FEDERAL MAGISTRATES COURT OF AUSTRALIA

MZXLY & ORS v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 418*

MIGRATION – Tribunal finding that applicant faced a real risk of harm if returned to India but could access state protection – jurisdictional error established – matter remitted to the tribunal.

MZWTX v Minister for Immigration [2006] FMCA 297
VAT v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 255
M93 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FMCA 252
NAHI v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 10
SZCPK v Minister Immigration and Multicultural Affairs [2006] FCA 1657
SHKB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 545
Applicant S100 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1364
Minister for Immigration and Multicultural Affairs v Respondent S152/2003 (2004) 205 ALR 487

Applicants:	MZXLY, MZXLZ & MZXMA
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	MLG 1136 of 2006
Judgment of:	Burchardt FM
Hearing date:	27 February 2007
Date of last submission:	27 February 2007
Delivered at:	Melbourne
Delivered on:	19 April 2007

REPRESENTATION

Counsel for the Applicant:	Ms N Karapanagiotidis (pro bono)
Counsel for the Respondent:	Mr W Mosley
Solicitors for the Respondent:	Australian Government Solicitor

ORDERS

(1) That a writ of certiorari issue directed to the Second Respondent, quashing the decision of the Second Respondent dated 7 August 2006.

(2) That a writ of mandamus issue directed to the Second Respondent, requiring the Second Respondent to determine according to law the application for review.

(3) That the First Respondent pay the Applicant's costs.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 1136 of 2006

MZXLY, MZXLZ & MZXMA
Applicants

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The relevant facts and chronology in this matter are set out in the contentions of fact and law of each of the parties and are not controversial.

2. The Applicants are citizens of India and are husband and wife and their 24-year-old son. They are of Muslim religion. They arrived in Australia on 17 December 2001 on visitor visas.

3. On 25 January 2002 the Applicants applied for protection visas (CB 9-48). Only the husband made application on the basis of specific claims of persecution for reasons of his religion, imputed political opinion and membership of a particular social group. I shall refer to the husband, for convenience, hereafter as the Applicant.

4. On 4 June 2002 a delegate of the Minister determined that the Applicant was not a person to whom Australia had protection obligations and refused the application.

5. On 28 June 2002 the Applicants applied for review of the delegate's decision to the Refugee Review Tribunal ("the Tribunal") pursuant to the provisions of the *Migration Act 1958* ("the Act"). The application included a submission repeating the claims in the application to the delegate. The Tribunal affirmed the delegate's decision on 21 August 2003. The Applicant sought judicial review of that decision and on 22 March 2005, Connolly FM set aside the Tribunal's decision and remitted the matter to the Tribunal.

6. The reconstituted Tribunal conducted a hearing on 24 July 2006 and subsequently affirmed the delegate's decision by its decision dated 7 August 2006 handed down on 16 August 2006.

7. On 11 September 2006 the Applicant made application to this Court seeking review of the Tribunal's decision. A further amended application is dated 9 January 2007.

8. The Applicant's claims are set out in paragraphs 9 and 10 of the Applicant's contentions of fact and law. They are summarised in paragraph 10 of the Respondent's contentions of fact and law as follows:

> "*In short summary, the applicant claimed to have a well-founded fear of persecution in India due to his Muslim faith. The applicant claimed to fear persecution from members of Shiv Sena. Shiv Sena is a Hindu nationalist political party. The applicant claimed members of Shiv Sena targeted Muslim people because Shiv Sena followers are Hindu.*"

9. The Tribunal accepted the Applicant's claims that he suffered harm in the past from Shiv Sena and such harm amounted to serious harm for the purposes of the Convention. It accepted that the harm was for a Convention related reason being his religion. It accepted that if the Applicant returned to India now or in the reasonably foreseeable future there was a real chance of similar harm occurring.

10. The Tribunal further found however that if the Applicant returned to India now or in the reasonably foreseeable future he would be able to access effective state protection from the harm that he feared from non-state actors, being members of Shiv Sena. The factual finding of effective state protection was dispositive of the Applicant's claims.

Accordingly, the Tribunal found there was not a real chance of Convention related persecution and accordingly he was not a person to whom Australia owed protection obligations.

11. Counsel for the Applicants commenced her submission by conceding that the husband is the primary claimant and that the claims of the Applicant wife and child must stand or fall according to the disposition of the husband's claims.

12. Counsel submitted that this was the third Tribunal hearing and that no adverse credit findings had ever been against the Applicant. She submitted, correctly in my opinion, that the Applicant had been believed.

13. She canvassed the facts and laid emphasis on the fact that following the first report made by the Applicant to the police about harassment and extortion by Shiv Sena members, there was more harassment leading to the Applicant being hospitalised. He thereafter withdrew his complaint.

14. There was then further harassment of the Applicant including a kidnapping threat against his daughter.

15. The police, following a shooting incident where a customer of the Applicant was shot, arrested the alleged perpetrators and their files were before the Court when the Applicant fled the country.

16. It was submitted by Counsel for the Applicant that the Tribunal had looked only at whether the assailants were arrested and charged that had not inquired further.

17. The country information relied upon by the Tribunal was fully set out it was submitted at CB 147 to 148 and no other country information was out before the Tribunal.

18. The first matter raised by the Applicant was the decision in *MZWTX v Minister for Immigration* [2006] FMCA 297 ("*MZWTX*"). I will return to that argument later.

19. The second matter raised by Counsel for the Applicant is the issue of effective protection. It was submitted that the Tribunal narrowed the

test to simply whether or not there had been arrest and prosecution of those who had sought to harm the Applicant. The Applicant's Counsel submitted that the Tribunal should have considered what reasonable protection meant but failed to do so because it had limited its inquiries in the manner described.

20. Counsel referred to the case of *VAT v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 255 at [16]. That paragraph has a helpful recitation by the Full Federal Court of what constitutes jurisdictional error and I repeat the paragraph seriatim.

> *"It is not disputed by the appellants that in order to find jurisdictional error this Court should rely on the description of what constitutes jurisdictional error as it appears in Plaintiff S 157/2002 v Commonwealth of Australia [2003] HCA 2; (2003) 211 CLR 476 and in particular on the statement in Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323 at [82] citing Craig v State of South Australia (1995) 184 CLR 163. That requires the appellants to establish that the Tribunal fell into error of law by identifying a wrong issue, asking itself a wrong question, ignoring relevant material, relying on irrelevant material or, at least in some circumstances, making an erroneous finding or reaching a mistaken conclusion. To this may be added denial of procedural fairness (authorities omitted)."*

21. Counsel also referred to *M93 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FMCA 252 ("*M93 of 2004*"). Counsel submitted that paragraphs [75]-[80] of the judgment the Federal Magistrates Court of Australia constituted by McInnis FM had concluded that the Tribunal in that instance fell into error because it had confined its inquiry in relation to state protection to the narrow issue of whether or not the state condoned or tolerated the relevant harm. Counsel submitted that the effect of that decision was the Tribunal in this instance should have considered whether or not the Government of India could provide a reasonably effective and impartial police force and justice system to protect the life of the Applicant.

22. As stated earlier Counsel for the Applicant also relied upon *MZWTX*. That was a matter addressed in Counsel's written contentions of fact and law. What was submitted here was that *MZWTX* was authority for

the proposition that the absence of a proper factual basis for concluding that the Applicant would have access to state protection at a level that would meet generally accepted international standards meant that the Tribunal had asked itself the wrong question. Counsel submitted that the fact that a state cannot be expected to guarantee safety or remove all risks of harm before it can be said that an unwillingness to seek protection can be justified does not provide the defining test of adequacy or effectiveness of state protection. Counsel submitted at paragraph 26 Applicant's contentions:

> *"In this case there simply wasn't sufficient material in the quoted country information to justify a finding that there was effective protection."*

23. Counsel for the First Respondent submitted that there were two basis advanced by the Applicant. The first was that there was insufficient material to enable a factual basis to be found and there was adequate state protection. Counsel referred to the Tribunal's express findings at CB 147 that the Applicant faces a real chance or harm from Shiv Sena if he returns to India in this regard.

24. Counsel for the Respondent submitted that the Tribunal relied on two matters to arrive at its decision. The first was country information. The second was the manner of the police response to the Applicant's complaints. On the occasion of the first complaint there was arrest, detention and charging of the alleged perpetrators before the Applicant withdrew the complaint. On the second occasion there was arrest, detention and charging of the alleged perpetrators, which were being pursued in Court when the Applicant left India.

25. Counsel referred to the case of *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10 at [12]-[13] in this regard. I do not find that extract particularly of assistance because it was based very much on its own facts, although I note that the Court observed at [13]:

> *"Both the choice and the assessment of the weight of such material were matters for the Tribunal. The Court cannot substitute its own view of the material, even if it had a different view from that reached by the Tribunal."*

26. It was expressly conceded by Counsel for the First Respondent that the issue of relocation was not raised before the Tribunal nor was the subject of any consideration by the Tribunal. That issue remains at large.

27. Other cases cited by Counsel for the First Respondent to support the proposition that it was for the Tribunal as the fact-finding body to come to its conclusions were *SZCPK v Minister Immigration and Multicultural Affairs* [2006] FCA 1657 and *SHKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 545. Those cases in my respectful view likewise turn essentially on their own facts.

28. In respect of the second matter relied upon by the Tribunal, namely the provision of effective protection, this being the second ground pressed by the Applicant, Counsel for the Respondents made similar submissions. He submitted that the matter had been weighed in the balance.

29. Counsel for the First Respondent referred to *Applicant S100 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1364. In that case Tamberlin J at [12]-[17] analysed what was required in that case in respect of protection of a citizen of India from harm by Naxalite groups. In essence what his Honour found was that the country information in that case was in his view sufficient to permit a reasonable inference that the Governmental authorities in India would if requested take measures to protect the Applicant from violence. His Honour also quoted at [13] an extract from the decision of the High Court in *Minister for Immigration and Multicultural Affairs v Respondent S152/2003* (2004) 205 ALR 487 at [26]-[27] as follows:

> *"No country can guarantee that its citizens will at all times, and in all circumstances, be safe from violence. Day by day, Australia courts deal with criminal cases involving violent attacks on person or property. Some of them may occur for reasons of racial or religious intolerance. The religious activities in which the first respondent engaged between May and December 1998 evidently aroused the anger of some other people. Their response was unlawful. The Ukrainian state was obliged to take reasonable measures to protect the lives and safety of its citizen, and those measures would include an*

appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system. None of the country information before the tribunal justified a conclusion that there was a failure on the part of Ukraine to conform to its obligations in that respect.

In fact, there was no evidence before the tribunal that the first respondent sought the protection of the Ukrainian authorities, either before he left the country or after he arrived in Australia. According to the account of events he gave to the tribunal, he made no formal complaint to the police, and when the police interviewed him after the first attack, he made no statement because he could not identify his attackers. The tribunal considered the response of the police on that occasion to be appropriate. It is hardly surprising that there was no evidence of the failure of Ukraine to provide a reasonably effective police and justice system. That was not the case that the first respondent was seeking to make. The country information available to the tribunal extended beyond the case that was put by the first respondent. Even so, it gave no cause to conclude that there was any failure of state protection in the sense of a failure to meet the standards of protection required by international standards, such as those considered by the European Court of Human Rights in Osman v United Kingdom."

30. In essence Counsel adopted the test that what is needed to be shown was a capacity on the part of the Government of India to provide to accepted international standards a police force and justice system sufficient to protect reasonably the Applicant and his family.

31. Counsel sought to distinguish *MZWTX* on the footing that there was no convention nexus in that case and no police action.

32. He also submitted that *M93 of 2004* was distinguishable on the facts.

33. In the ultimate, I have arrived at the conclusion that the Tribunal fell into error. The fact is that the Tribunal found (at CB 147) that:

> "*Given the past harm that he has suffered at the hands of Shiv Sena, given his well-known role in reporting their members to the police on two separate occasions and given the country information referred to above about the severity of attacks on Muslims by members of Shiv Sena, I accept the Applicant's claims that if he returned to India now or in the reasonably*

foreseeable future there is a real chance that he will suffer harm from members of Shiv Sena because of his religion as a Muslim."

34. The Tribunal then went on to consider whether the Indian authorities would be able to provide the Applicant with effective state protection from the harm he fears. Superficially, the findings it made in that regard are unobjectionable.

35. The findings however suffer from a major and, in my opinion, insurmountable difficulty. The fact is that the Applicant had already suffered the harm that led to the finding just referred to by the Tribunal notwithstanding his contacts with the police. The reality is that while there was no evidence that the Applicant had sought that the police provide him with protection, the finding that the state authorities would provide protection to an acceptable international standard flies wholly in the face of what has actually occurred.

36. In my opinion the Tribunal asked itself the wrong question and reached a mistaken conclusion. Once it had found that the Applicant did face a real chance of harm upon his return to India, it was no longer appropriate in my opinion for the Tribunal to consider whether the Applicant was likely to be protected by the Indian authorities. The evidence before the Tribunal, accepted by it, showed that the Applicant faced a real chance of harm notwithstanding the appropriate involvement of the Indian authorities.

37. In my opinion the Tribunal's decision is logically inconsistent and can not stand.

38. I note that both parties before me have agreed that the issue of relocation has not been determined by the Tribunal, notwithstanding that there is some reference to issues going to relocation in the Tribunal's reasons for judgment.

39. The Applicant should be granted the relief he seeks. The matter should be remitted to the Tribunal to be determined in the light of these reasons for decision.

40. There will be orders as sought by the Applicant, including an order that the First Respondent pay the Applicant's costs.

I certify that the preceding forty (40) paragraphs are a true copy of the reasons for judgment of Burchardt FM

Associate: Brooke Evans

Date: 19 April 2007