FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZLPJ & ANOR v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 928

MIGRATION – Application to review decision of Refugee Review Tribunal – no jurisdictional error – application dismissed.

Migration Act 1958 (Cth), ss.36, 424A, 427

Abebe v The Commonwealth of Australia (1999) 197 CLR 510
Applicant M164 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 16
Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88
Minister for Immigration and Multicultural and Indigenous Affairs v NAMW and Others (2004) 140 FCR 572
NAEA of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2003) FCA 341
NAHI v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 10
Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152
SZGME v Minister for Immigration and Citizenship [2008] FCAFC 91
VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 80 ALD 559
VJAF v Minister for Immigration and Multicultural and Indigenous Affairs (2005) FCAFC 178
V120/00A and Others v Minister for Immigration and Multicultural Affairs and Another (2002) 116 FCR 576
WAJW v Minister for Immigration and Multicultural and Indigenous Affairs (2004) FCAFC 330

Applicants:	SZLPJ & SZLPK
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL

File Number:	SYG 3429 of 2007
Judgment of:	Barnes FM
Hearing date:	2 July 2008
Delivered at:	Sydney
Delivered on:	2 July 2008

REPRESENTATION

Applicants:	In person
Counsel for the Respondent:	Mr JAC Potts
Solicitors for the Respondent:	Clayton Utz

ORDERS

(1) That the application be dismissed.

(2) That the applicants pay the costs of the first respondent fixed in the sum of $5,000.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3429 of 2007

SZLPJ & SZLPK
Applicants

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(Revised from transcript)

1. This is an application for review of a decision of the Refugee Review Tribunal handed down on 11 October 2007 affirming a decision of the delegate of the first respondent not to grant the applicants' protection visas.

2. The applicants, who are husband and wife and citizens of India, arrived in Australia in May 2007 and applied for protection visas. The applicant husband made claims to be a refugee. The applicant wife applied as a member of her husband's family unit.

3. The claims made in connection with the protection visa application are generally expressed, apparently on the basis that further information would be provided. The applicant husband claimed his family circumstances were very bad and because of some "*critical problems*" (which were not described) they could not live in India. He stated that

their visas would expire shortly and they did not have sufficient time to set out all their sufferings, but claimed that if they went back to India they would be killed by their enemies.

4. The application was refused by a delegate of the first respondent who found that the applicants did not provide any relevant facts to enable the delegate to be satisfied that there were any Convention grounds as the essential or significant reason for the harm feared.

5. The applicants sought review by the Tribunal. They submitted a statement to the Tribunal in support of their claims. In that statement both the applicant wife and the applicant husband made claims relating to an alleged fear of persecution in India. This statement, which was signed by both of the applicants, was said to be a detailed statement of claims they would have submitted to the Department if their applications had not been rejected before that time.

6. The applicant wife claimed to have been born in Kerala into an orthodox Hindu family. She detailed her involvement in Hinduism and that of her family. It was also claimed that the applicant husband was an ardent Hindu and that they supported the Barathiya Janatha Party, (BJP). It was claimed that other Muslim and Hindu groups supported the Communist Party which was destroying Hindu culture and that there were many criminal elements among the Communists and the Marxists who assaulted Hindus. The applicants claimed that "*we as Hindus came forward to fight against the Hindu cultural dissolution by the Communist Marxist regime in Kerala*".

7. The applicants claimed that they spent time at an Ashram and at Hindu temples and led a peaceful life until the Communist regime started to harass people involved in Hindu temple activities. The wife claimed that thugs and Communist criminals started to enter the temples wearing footwear, making the Hindu temple proceedings "*inauspicious*" and that in August 2006 these people had dragged a number of women, including the applicant wife, out of the temple by their hair, called them prostitutes and assaulted them. She claimed that they kicked her in the mouth, head and chest.

8. It was claimed that Hindu Saints from different temples and Ashrams took them to complain at the police station, but that they were not even

permitted to enter the police station and that the police took no steps to convict any perpetrators and nor did the Communist regime. The applicant wife claimed that thereafter her husband and other men whose families had been assaulted joined with the Hindu association to canvass against government officials and the authorities for not taking action.

9. The applicants claimed that in October 2006 when they were in the applicant husband's taxi five men forced themselves into the taxi and beat them. They claimed that they were separated from each other and the applicant wife was taken to the local police station where she was sexually harassed, raped and kept in a cell. She later saw these same people dressed as police officers working at the police station. She claimed that a number of other women were brought into the cell and that they were told they would be sent out of the country by ship to engage in prostitution overseas, that they were kept in another part of Kerala for nearly 15 days and thereafter taken by van to the local harbour where they were stopped by Customs officers who suspected foul play and called the police to release them. The applicant wife claimed that the Customs officers telephoned her brother who took her to Madras. He told her that her husband had been assaulted by criminals and suffered mental depression. The applicant husband was brought to Madras and treated for his injuries by a Tamal doctor. The applicants claimed that they were told by the applicant's wife's brother that two of the women who had been detained had complained to the police and had disappeared and that the police were searching for the other women kept captive and had sent goondas and criminals to other parts of India to find them and kill them.

10. The applicant wife claimed that around March 2007 her brother was arrested by the police and beaten severely, but bribed the police and fled from the country and that thereafter they left the country and came to Australia.

11. The applicant wife claimed that as a woman she could not live in Kerala any further and that the criminal Communist police officers would kill them if they found them in Kerala or any part of India if they feared they could put a case against the police.

12. The applicants also provided the Tribunal with two items of country information. They attended a Tribunal hearing. The only evidence before the Court of what occurred in that hearing is the Tribunal reasons for decision.

13. The Tribunal set out at some length the applicants' claims, the evidence before it in the written statement and the oral evidence given by each of the applicants at the Tribunal hearing. In its findings and reasons it found, for reasons it set out, that the applicants did not have a well-founded fear of persecution. It considered both the claims of the applicant husband and of the applicant wife in that respect.

14. The Tribunal identified a number of evidentiary matters of concern to it. It considered that cumulatively such concerns were legitimate matters to be taken into account in reaching adverse credibility findings and found that the applicants were not credible.

15. The Tribunal set out in some detail its concerns in relation to particular aspects of the evidence of each of the applicants. In particular in relation to the applicant wife it had regard to the fact that in the course of the hearing she had claimed that in June or July 2006 a number of intoxicated men came into the temple "*making hooliganism and orally abusing women*", including herself, but that she had not made such a claim in the written statement. The Tribunal indicated that it had put this matter to her. It was not persuaded or convinced by her explanation that she left this information out as there was no physical injury or abuse. Given the detailed and comprehensive nature of the applicants' written statement it considered this matter to be significant and that its absence in the statement suggested fabrication in the course of the hearing. This was said to raise doubts about the veracity of the applicants' claims and general credibility.

16. The Tribunal also considered inconsistencies between the statement and the oral evidence of the applicant wife about what happened when she attempted to report the August 2006 incident to the authorities and in relation to who complained and whether or not they were permitted to enter the police station. It also had regard to the fact that the applicant wife was unable to recall the date of the event complained of in October 2006 and found it difficult to accept that the applicants were ill-treated because the applicant wife had complained, finding her

explanation that this occurred as a result of political influence, which was common in Kerala, to be unconvincing. The Tribunal also had regard to a lack of detail in relation to the October 2006 incident and what occurred to the applicant wife thereafter and also found it implausible that if the police had been involved or connected with the arrangements to deport the applicant and other women they would not have made arrangements with Customs.

17. The Tribunal also had regard to the applicant wife's confusion in relation to her claims about the people who had raped her and whether they were connected with or were the police. It also found it difficult to understand that she had been raped for complaining about ill-treatment as she claimed.

18. The Tribunal then addressed specific concerns in relation to the applicant husband's evidence. It found that his claim that the Marxist party oppressed and ill-treated him and at one point wanted him to join the party lacked important details about when alleged incidents occurred and that this raised doubts about his claims and credibility. It also had regard to the fact that the claim that he had been punished by the Marxist Party had not been made in the comprehensive and detailed written statement provided to the Tribunal. It addressed the applicant husband's explanation for the absence of such statements which it did not find persuasive. The Tribunal found that raising a substantial new claim at the hearing raised doubts about the claims and the applicant's credibility generally.

19. The Tribunal was of the view that there was a lack of important details about when claimed problems had occurred. It also had regard to the fact that the applicant husband raised a new claim at the hearing in relation to having been detained. The Tribunal addressed the applicant husband's claim that when the statement was prepared he was depressed and incidents were not recorded, but was not persuaded by this explanation. It was not satisfied on the information before it that either of the applicants had suffered from any condition it needed to take into account in assessing the claims.

20. The Tribunal indicated that it appreciated that in "*isolation*" the individual "*evidentiary matters of concern may not be significant,*" but

was satisfied that when they were considered cumulatively they were "*legitimate matters to be taken into account*".

21. The Tribunal was, however, prepared to accept a number of aspects of the claims: that the applicants were of the Hindu faith and practiced their religion; that the wife regularly visited temples and contributed financially; that her father was a famous businessman who was well-known as a religious person; that she was involved in teaching local children about Hindu culture and as a volunteer nurse; and also that the applicant husband was an ardent Hindu with involvement in activities, including volunteer work. The Tribunal also accepted the wife's evidence that she had not been involved in any political activities but that at election time they supported the BJP. However, on the evidence as a whole, the Tribunal was not satisfied that the applicants had "*suffered any harm on the basis of their religion or support for the BJP*".

22. The Tribunal stated that given the adverse credibility findings and considering the evidence as a whole it was not satisfied about specific aspects of the claims which it set out. In particular, it rejected the past claims about instances of harm. The Tribunal also rejected aspects of the claims in relation to the future, finding that it was not satisfied that the applicants "*would suffer any of the claimed harm*".

23. Nonetheless the Tribunal went on to consider whether the applicants had a well-founded fear of any harm on the basis of their religion or support for the BJP. It accepted that they were supporters of the BJP in so far as they voted for the party at election time, but did not accept that the applicant husband had "*helped the BJP in any other way or that he did whatever he was asked to do, or that he had been ill-treated or punished by the Marxist Party, or that he had any problems when going to the temple, or that he was ever detained or ill-treated by the police*".

24. The Tribunal stated that it appreciated that "*an applicant need not prove past time in order establish future harm"*. It "*considered the generic reports provided by the applicants"* (clearly a reference to the country information reports provided by the applicants) and their general claims about "*inter-religious tensions*". It addressed independent country information about inter-religious tensions and the

situation of Hindus in Kerala and India and found that the religious profile of the applicants was not that of a group that could be harmed on the basis of their religion. On the evidence as a whole it was not satisfied there was "*a real chance that the applicants would be subjected to any ill-treatment amounting to persecution if they were to return to India, on the basis of any actual or imputed political activities/opinions*" (such as voting) or religion or any other Convention ground.

25. The Tribunal concluded on the basis of the available information and in consideration of the evidence as a whole it was "*satisfied that there is not a real chance the applicants would suffer serious harm as contemplated by the Act, or persecution as contemplated by the Convention in the reasonably foreseeable future if they were to return to India*". It was not satisfied that the applicants were persons to whom Australia had protection obligations under the Refugee's Convention and hence found that they did not satisfy the criteria in s.36(2)(a) for a protection visa. Nor did they satisfy the alternative criteria in s.36(2)(b) (which relates to members of the family unit). The Tribunal affirmed the decision of the delegate of the first respondent.

26. The applicants sought review by applicant filed in this Court on 5 November 2007. They rely on an amended application filed on 11 January 2008. They did not file written submissions. In oral submissions they took issue with whether the Tribunal considered the matter properly and gave weight to their claims and sought further time in order to present their case. Insofar as they sought an adjournment I considered that application, but refused it.

27. The general contention that the Tribunal did not consider the matter properly may be intended to suggest that the Tribunal did not consider integers of the applicants' claims. When given the opportunity to elaborate the applicants did not do so. Such a claim is repeated in ground one of the amended application which is that the Tribunal "*did not take into account certain relevant considerations or 'integers' central to the applicants claim*". This ground does not particularise any such failure. However it may be read with ground two which is "*The Tribunal thereby failed to carry out its review function and to exercise its jurisdiction*". There are two particulars to this ground. The

first particular is that "*The tribunal did not consider the applicants who had been under immense and intimidating pressure from Communist Party thugs and sexually harassed and raped her by the Kerala police, because of their religious activities and membership with BJP party*". The second is "*In relation to the above the Tribunal did not consider the applicant* [wife's] *claim that she would be sent out of the country by ship to engage in prostitution abroad"*.

28. This ground appears to refer to aspects of the claims made in the written statement and also before the Tribunal. The Tribunal set out at some length those claims. The Tribunal decision is the only account of what occurred in the Tribunal hearing.

29. In its findings and reasons it recognised that it needed to consider what had occurred in the past and also the possibility of a well-founded fear of future harm. It addressed each of the issues complained of in each particular.

30. It considered the claim that the applicants had been under "*immense and intimidating pressure from Communist Party thugs*". It addressed, but rejected the applicants' claims, that the applicant wife had been physically or verbally abused during incidents at temples on three occasions in 2006, that she and the husband were in their taxi and detained, beaten and mistreated by five men, and that she was taken to the local police station, sexually harassed and raped and ill-treated. It also rejected their claim that until they left India they feared that they could be found by the criminals or the thugs working for the Communist authorities, and the applicant wife's claim that, as a woman, she could not live in Kerala any longer, that the criminal Communist police officers would kill them if they found them in India, that the police feared that the applicants could put a case against them, that if another government came to power they could not return to India as the criminal police officers would kill them to get rid of any evidence against them in relation to their criminal activities, or that they would be killed by any enemies.

31. The Tribunal also considered the claims in relation to membership of the BJP Party, accepting the wife's evidence that she had not been involved in any political activities, but that at election time they supported the BJP. It rejected the claim that the applicant husband had

helped the BJP in any way other than voting for it. In other words, the Tribunal considered but rejected the applicants' past claims in this respect and also considered the possibility of a well-founded fear of future harm based on their religion and support of the BJP to the extent that it accepted that they supported the BJP by voting for it at election time. No jurisdictional error or failure to consider the aspects of the applicants' claims set out in the first particular to ground two is established.

32. The second particular is that "*the Tribunal did not consider the applicant* [wife's] *claim that she would be sent out of the country by ship to engage in prostitution abroad*". Again the Tribunal summarised the applicants' claims in this respect. In its findings and reasons it rejected the underlying claim of detention in October 2006 by five officers and ill-treatment. It also rejected the claim that the wife or other detainees were taken to the port as claimed but were noticed by Customs officers or, indeed, that her brother went to the port and sent them to Madras and the consequential claims that she made in that respect in relation to two women complaining and having disappeared and that they were sought by the police. It rejected the claims about the husband and others canvassing against government officials and the authorities for their inaction or against the government. Implicit in its rejection of these claims is a rejection of the claim that the wife would be sent out of the country by ship to engage in prostitution.

33. It has not been established that the Tribunal fell into jurisdictional error in the manner contended by this particular. The Tribunal also rejected the applicants' claim that it would not be safe for them to live in their hometown permanently or that it had become known that police officers had sent thugs and criminals to other parts of India to find them or kill them. It is not apparent on the material before the Court that the Tribunal failed to have regard to any other aspects of the applicants' claims in a manner constituting jurisdictional error. Rather, the Tribunal considered the substance of the applicants' claims, but because it did not believe much of their evidence, disbelieved critical aspects of what they claimed had occurred in the past. Nonetheless it went on to consider their claims of well-founded fear of future harm on the basis of those aspects of the evidence which the Tribunal accepted. Grounds one and two are not made out.

34. Ground three is that "*The Tribunal exceeded its jurisdictional* (sic) *or constructively failed to exercise jurisdiction or denied … procedural fairness in that the Tribunal failed to investigate … genuine claims with the requirement of Migration Act 1958"*.

35. While the Tribunal has the power under s.427(1)(d) of the *Migration Act 1958* (Cth) to make investigations, it is well-established that the Tribunal is under no general duty to make inquiries. This is not a case which comes within an exception to that general principle such as was considered by Wilcox J in *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155, as it cannot be said that it is obvious that there was material that was readily available which was centrally relevant to the decision to be made such that the Tribunal would be under an obligation to make some attempt to obtain such information. Nor is this a case in which inquiries might have been made about the authenticity of documents before the Tribunal such as was considered in *Applicant M164 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 16.

36. As Gummow and Hayne JJ stated in *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510 at [187]: "*It is for the applicant advance whatever evidence or argument she wishes to advance in support of her contention*". The Tribunal considered the applicants' claims but was not satisfied on all of the information before it that they had a well-founded fear of persecution in the necessary sense and met the criteria for the visa. Ground three is not made out.

37. Ground four is somewhat difficult to understand. It was not clarified by the applicants in oral submissions. It is: "*The Tribunal did not use the country information as specific however, the general information gathered by the Tribunal considered to weigh against my case in the final outcome. The Tribunal used the all information for matter of reasoning and evaluation of my case for protection visa*".

38. Despite the lack of clarity in the expression of this ground, counsel for the first respondent addressed a number of possible interpretations. However on none of those bases is jurisdictional error established.

39. Insofar as this ground takes issue with the manner in which the Tribunal used country information, the Tribunal referred to two items

of country information in its reasons for decision in considering the possibility that the applicants had a well-founded fear of future harm on the basis of their religion as Hindus or their political opinion (to the extent that it accepted that their political opinion involved voting for the BJP) or any other Convention ground. If the applicants' complaint relates to the fact that the Tribunal used country information rather than, for example, relying on their evidence, that does not establish jurisdictional error. As the Full Court of the Federal Court stated in *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10 at [11]: "*There can be no objection in principle to the Tribunal relying on `country information'. The weight that it gives to such information is a matter for the Tribunal itself, as part of its fact-finding function."* Their Honours also observed: "*It is not … a jurisdictional error, for the Tribunal to base a decision on `country information' that is not true. The question of the accuracy of the `country information' is one for the Tribunal, not for the Court*."

40. In any event, the Tribunal did not reject all the applicants' claims based simply on country information. Rather, having regard to its credibility findings and concerns in relation to various aspects of the applicants' claims and evidence, it was not satisfied that they had suffered or would suffer any of the claimed harm. No jurisdictional error is apparent in the manner in which the Tribunal used the country information to conclude that Hindus were not in a minority in Kerala or in the majority states of India, that the religious tensions and potential ill treatment in India related mostly to Muslims and Christians or that the religious profile of the applicants as Hindus was not that of a group that could be harmed on that basis.

41. If the applicants intended to suggest that the country information should have been put to them under s.424A, it is well-established that country information such as was used in this case is within the exception to the obligation in s.424A(1) within s.424A(3)(a) of the Migration Act (see *VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 80 ALD 559 and *Minister for Immigration and Multicultural and Indigenous Affairs v NAMW and Others* (2004) 140 FCR 572). There are a number of other authorities which have rejected attempts to challenge the correctness of these decisions (see *WAJW v Minister for Immigration and*

Multicultural and Indigenous Affairs (2004) FCAFC 330 and *VJAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) FCAFC 178).

42. Another possibility is that this ground is intended to take issue with the Tribunal's treatment of the two items of country information that the applicants provided to and contends that the Tribunal failed to have regard to that information. That is not made out. The Tribunal referred to the information provided and in its findings and reasons stated that it had had regard to the generic reports provided by the applicants and their general claims about inter-religious tensions. Indeed it accepted that there had been religious tensions in India. It was open to the Tribunal to have regard to the US Department of State Report on India of 2006 in relation to religious freedom in India. The weight to be given to particular items of country information is a matter for the Tribunal and no jurisdictional error is established in that respect. Ground four is not made out.

43. The next ground is numbered ground six. It is that the Tribunal "*member emphasised on some irrelevant questions at the hearing and ignored our religious background that put out life in danger. In doing so, the Tribunal member have ignored* (sic) *relevant material and made finding which is erroneous or mistaken*." There is no identification or particularisation of the complaints that the applicants make in relation to the Tribunal hearing. While it is difficult to identify what might be described as irrelevancies in the Tribunal account of what occurred in the Tribunal hearing, if the Tribunal did in fact ask an irrelevant question at the Tribunal hearing, that would not of itself establish jurisdictional error. Certainly there is nothing in the Tribunal account of the hearing to suggest a lack of procedural fairness or an apprehension of bias or actual bias if this is what is intended to be contended.

44. Insofar as this ground involves a contention that the Tribunal ignored the applicants' religious background, the Tribunal accepted that they were of the Hindu faith and that they practiced their religion and also their claims about the level of their involvement in their religion. It cannot be said that the Tribunal ignored relevant material in that respect. The Tribunal considered the possibility that the applicants had

a well-founded fear of persecution based on their religion and their claims about inter-religious tensions. It is also apparent from the Tribunal account of what occurred in the hearing that it raised the issue of religion during the hearing. The Tribunal recorded that it asked each applicant about his or her religion and about the practice of that religion and discussed country information about the situation of Hindus in India and in Kerala. No *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 issue is apparent in this respect. Ground six is not made out.

45. The next ground is numbered ground seven. It is that "*The Tribunal applied the wrong test*". The first particular is that: "*The Tribunal left out individual elements of the applicants' claims and tested whether they individually amounted to persecution rather than look at the claim as a whole to determine whether the claim so considered amounted to persecution*." This claim is not made out, given the manner in which the Tribunal dealt with the applicants' claims. It considered individual aspects of the claims, but also considered the claims cumulatively in not being satisfied that the applicants had suffered or would suffer any of the claimed harm and in not being satisfied on all the evidence before it that there was a real chance of persecution in the requisite sense for a Convention reason in the future. The Tribunal made findings of fact in relation to what it believed had happened and what it believed had not happened and looked at all of the claims in making those findings.

46. The second particular is a contention that the Tribunal required "*independent evidence of the fact before* [it] *would accept a claim being made by the applicants*." It is said that the Tribunal placed too "*high an onus of proof on the applicants"* and failed to give them the "*benefit of the doubt*". There is nothing in the material before the Court to justify an inference that the Tribunal required corroborative evidence in the manner contended. Indeed to the contrary is the fact that the Tribunal accepted on the applicants' own evidence on certain aspects of their claims, in particular in relation to their practice of religion. This ground is not made out.

47. The final ground is that: "*The Tribunal failed to ask a question that it was … legally required to ask"*, being "*Whether the Indian authorities*

provided a standard of protection comparable with international standards." However in the circumstances of this case given the basis for the Tribunal decision, this was not a question that was required to be answered as the Tribunal did not accept that the past harm complained of had occurred or that they had a well-founded fear of future harm amounting to persecution.

48. Counsel for the first respondent addressed the fact that the applicant wife initially made an application for protection visa not as someone with a claim to fear persecution in her own right, but simply as a member of her husband's family unit. The first respondent's written submissions canvas in some detail the possibility that because the Tribunal embarked on a consideration of her substantive claims to fear persecution that might in some way be erroneous based on authority in this Court which in turn seemed to be based on earlier Federal Court authority in *NAEA of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) FCA 341 and *V120/00A v Minister for Immigration and Multicultural Affairs* (2002) 116 FCR 576.

49. However in *SZGME v Minister for Immigration and Citizenship* [2008] FCAFC 91 the Full Court of the Federal Court considered the validity of certain protection visa applications, including a contention that an applicant had not made a valid application because she failed to submit a Part C or Part D with her protection visa application and in Part B indicated she did not have her own claims to be a refugee. By the time the matter went to the Tribunal she had provided a Part C form to the Tribunal (not the Department) making her own claims to be a refugee. Black CJ and Allsop J indicated at [73] that if there was a valid application for a protection visa by the applicant as a family unit member it had been refused by the delegate and review of the refusal sought. I note that this is what occurred in this case and that there is no suggestion there was not a valid application for protection visa by the applicant wife.

50. In *SZGME* Black CJ and Allsop J went on to observe that it was difficult to see why the applicant could not before the Tribunal "*change the basis for her claim to such a visa from being a member of a family unit to her own fears of persecution*" (at [73]). Their Honours saw no

basis to conclude that a further application had to be filed to permit consideration of a changed basis for consideration of a valid application for a protection visa (at [86] – [87]) and found that there was no "*reason why an applicant could not apply for a protection visa"* both on the basis of family membership and on the basis of their own claims to be a refugee (at [90]). On that basis their Honours concluded (at [93]) that when the applicant made clear to the Tribunal that she wished to have the delegate's decision reviewed "*on the basis that she had her own claims*" (as did the applicant wife in this case) the Tribunal had authority and an obligation to consider whether she "*met the criteria for the grant of a protection visa*."

51. On this basis the Tribunal did not err in considering the applicant's wife's own claims. The first respondent's written submissions canvassed the possibility that the Court might nonetheless follow the earlier authority of the Federal Court and in this Court as directly in point. However I note that even on that basis no error is established. At the conclusion of its reasons for decision the Tribunal found that neither applicant satisfied the alternative criteria in s.36(2)(b), that is as a member of the family unit. Having rejected the applicant husband's claims to refugee status, it therefore followed that the applicant wife could not succeed as a member of his family unit. Hence it is not strictly necessary for me to determine whether *SZGME* should be distinguished on the facts or the observations of Black CJ and Allsop J, regarded as obiter. As conceded by counsel for the first respondent the approach in *SZGME* should usually result in a more favourable treatment of an applicant's claims because both bases would be considered. In any event, I am not persuaded that the Tribunal has fallen into jurisdictional error in considering the wife's claims. Moreover, even if it had, it would be futile to send the matter back to the Tribunal for redetermination because any such error would not affect the applicant's husband's application and therefore the rejection of the applicant wife's claim as not satisfying the criterion in s.36(2)(b) of the Migration Act. Hence relief should be refused on that basis.

52. Another matter addressed in oral submissions by counsel for the first respondent was the Tribunal's treatment of the fact that another applicant to the Tribunal had made similar complaints to those made by the wife. The Tribunal indicated to the applicant wife in the hearing

that this could raise concerns about her own claims. If any obligation arose under s.425 such obligation was met (see *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 in relation to procedural fairness). However in its findings and reasons the Tribunal stated that it had not in any way used this issue adversely to the applicants. Hence, consistent with the approach taken by the High Court in *VEAL* and notwithstanding later authority in relation to the scope of s.424A, such a matter would not be information that would be the reason or part of the reason for affirming the decision under review within s.424A(1).

53. The other issue addressed in oral submissions was the possibility in light of the recent decision of the Full Court of the Federal Court in *SZKTI v Minister for Immigration and Citizenship* [2008] FCAFC 83 that the procedural requirements in s.424(3) had to be met in relation to obtaining information under s.424 because the Tribunal referred in the hearing to the fact that there was another matter before it where similar claims had been made. However, these circumstances are not such as to give rise to such an issue. The Tribunal stated that this was another matter which was before it. Hence this could not be said to be a situation in which "*in conducting the review*" the Tribunal obtained information from a person or other source. Indeed, on the Tribunal's account of what occurred in the hearing, the Tribunal was already in possession of this information.

54. As no jurisdictional error has been established, the application must be dismissed.

RECORDED : NOT TRANSCRIBED

55. The applicants have been unsuccessful. There is nothing to warrant a departure from the normal rule that the unsuccessful applicants should meet the costs of the first respondent. The amount sought is $5,000. This is appropriate in light of the nature of this and other similar matters.

I certify that the preceding fifty-five (55) paragraphs are a true copy of the reasons for judgment of Barnes FM

Associate:

Date: 22 July 2008