FEDERAL COURT OF AUSTRALIA

MZYBX v Minister for Immigration & Citizenship [2009] FCA 685

Migration Act 1958 (Cth), ss 5(1), 36, 36(2), 91R, 91R(2), 91R(2)(d), 424A

Convention relating to the Status of Refugees done at Geneva on 28 July 1951
Protocol relating to the Status of Refugees done at New York on 31 January 1967

MZYBX v Minister for Immigration & Citizenship & Anor [2009] FMCA 195 affirmed

MZYBX v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
VID 141 of 2009

GRAY J
26 MAY 2009
MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 141 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **MZYBX**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **GRAY J**
DATE OF ORDER: **26 MAY 2009**
WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. The Refugee Review Tribunal be added as the second respondent to the appeal, and the title to the proceeding be amended accordingly.
2. The appeal be dismissed.
3. The appellant pay the first respondent's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 141 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **MZYBX**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **GRAY J**
DATE: **26 MAY 2009**
PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

1 This appeal is from a judgment of the Federal Magistrates Court of Australia, delivered on 10 February 2009, and published as *MZYBX v Minister for Immigration & Citizenship & Anor* [2009] FMCA 195. The learned federal magistrate dismissed an application by the appellant for review of a decision of the Refugee Review Tribunal ("the Tribunal"). The Tribunal affirmed a decision of a delegate of the first respondent, the Minister for Immigration and Citizenship ("the Minister"), refusing to grant to the appellant a protection visa.

2 The appellant is a citizen of Malaysia who came to Australia with a legitimate visa on 21 November 2007. He applied for a protection visa on 3 January 2008. On 29 February 2008, the Minister's delegate refused to grant a protection visa. The appellant applied to the Tribunal for review of that decision. He attended at a hearing before the Tribunal on 16 May 2008 where he gave evidence and made submissions with the assistance of an interpreter in the Tamil and English languages. The Tribunal's decision was signed on 11 July 2008 and handed down or sent to the appellant on 4 August 2008.

3 By s 36 of the *Migration Act 1958* (Cth) ("the Migration Act"), there is a class of visas to be known as protection visas. The relevant criterion for a protection visa is that the person applying for it be a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. The terms "Refugees Convention" and "Refugees Protocol" are defined in s 5(1) of the Migration Act to mean respectively the *Convention relating to the Status of Refugees done at Geneva on 28 July 1951* and the *Protocol relating to the Status of Refugees done at New York on 31 January 1967*. It is convenient to call those two documents, taken together, the Convention. For present purposes, it is sufficient to note that, pursuant to the Convention, Australia has protection obligations to a person who:

> *owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country*

4 The appellant claimed to have a well-founded fear of persecution if he should return to Malaysia for reasons of his race, his religion and his political opinion. As a Tamil he was brought up in the Hindu religion. Some years ago, he intended to marry a Muslim woman and began the process of conversion to Islam for that purpose. The woman's family eventually put a stop to the marriage. The appellant reverted to his Hindu religion, and married a Hindu woman. Nonetheless, he said that Muslims still claim him as a Muslim and seek to persuade him to follow the Muslim faith. In addition, the appellant claimed to have a history of activism for the rights of Hindus in Malaysia, including activity with an organisation calling itself Hindraf. He said that he was at a demonstration on 30 October 2007, at which a crowd attempted to prevent the demolition of a Hindu shrine, and that he was beaten by police and detained overnight. He said that he was also threatened that he would be imprisoned if he was caught being involved in an illegal demonstration again. The appellant also claimed to have been an active member of a political party referred to as the DAP.

5

In its reasons for decision the Tribunal expressed some doubts about the credibility of the appellant, but gave him the benefit of those doubts and accepted his claims as he stated them. It did not accept, however, that anything that had happened to the appellant, or would happen to him in the future in Malaysia, was sufficiently serious to amount to persecution as defined in s 91R of the Migration Act.

6 The Tribunal found that the appellant and his wife had been able to continue to work and to operate their business, despite the fact that on one or more occasions the appellant had been kept talking in the street by Muslims and thereby prevented from going about his work. The Tribunal found that the appellant had not been prevented from practising his Hindu religion, and is still regarded by the Malaysian authorities as a Hindu. The Tribunal accepted that, in Malaysia, there is entrenched discrimination against Hindus. It found that, despite this discrimination, the appellant had been able to hold a series of jobs, to purchase property in Malaysia, and to have a transport subcontracting business which his wife has continued to operate while he is in Australia.

7 The Tribunal said that the treatment of the appellant in consequence of the demonstration on 30 October 2007 was appropriate and adapted to a legitimate object of the Malaysian government in maintaining law and order. There was nothing else that prevented the appellant from engaging in any activities of the DAP, or in the sort of Hindraf activities he had been involved in apart from the demonstration. The Tribunal found that there was nothing to suggest that the Malaysian authorities had any ongoing adverse interest in the appellant. It found that the appellant's stated intention not to engage in further Hindraf demonstrations was a matter of his own choice, resulting from his desire to avoid discrimination, and was not to avoid persecution.

8 In its conclusion, the Tribunal found that there was not a real chance that, in the reasonably foreseeable future, the appellant would experience serious harm capable of amounting to persecution, if he should return to Malaysia, whether for the Convention reasons of his race, his religion, his political opinion, or for any other reason.

9 In his application to the Federal Magistrates Court, the appellant relied on six grounds expressed in the application. The learned federal magistrate also identified four other possible grounds expressed within the appellant's written contentions in that court. Her

Honour dealt with all of those grounds and submissions, and concluded that the appellant could not succeed on any of them.

10 The appellant's original notice of appeal, filed in this Court, contained the statement that the written reasons of the federal magistrate were not at that time available to the appellant, and that he reserved his right to amend his notice of appeal once he had a copy of the reasons for the dismissal of his application. It was not open to the appellant to reserve any right to amend, but it was open to him to seek leave to amend. He filed an amended notice of appeal on 22 May 2009, after the Minister had filed an outline of written submissions. In neither the original notice of appeal nor the amended notice of appeal is the Refugee Review Tribunal named as a party to the appeal. Because the appellant seeks orders against the Tribunal, it will be necessary for an order to be made that the Tribunal be added as the second respondent and that the title to the proceeding be amended accordingly. Leave was granted to amend the notice of appeal. The counsel for the Minister did not take objection to the grant of leave.

11 The amended notice of appeal expresses five grounds of appeal which engage with the conclusions of the federal magistrate on some of the grounds on which the appellant relied in the Federal Magistrates Court. The appellant did not comply with the direction to file written submissions in this Court. He appeared in person and made oral submissions with the assistance of an interpreter, interpreting from the Tamil language to the English language and from the English language to the Tamil language. The appellant's oral submissions did not engage with the grounds of his appeal, or with the necessity to demonstrate jurisdictional error on the part of the Tribunal. This is not surprising, as the concept of jurisdictional error is difficult to understand. The appellant attempted to persuade me that elements of his evidence to the Tribunal justified findings of fact in his favour that would have entitled him to the grant of a protection visa. I endeavoured to explain to him that the finding of facts is a function reserved to the Tribunal and that neither the Federal Magistrates Court nor this Court could change those findings of fact. I rejected the appellant's attempt to provide me with further documentary material which he said supported his claim. Unless the appellant could show that the Tribunal had failed to perform its statutory function or had not followed the correct process, he could not have succeeded in the Federal Magistrates Court and cannot succeed in this Court.

12 With this in mind, it is appropriate to turn to the reasons for judgment of the federal magistrate, to the manner in which her Honour dealt with the grounds of the appellant's application to that court, and to the question whether it is possible to detect any error in the manner in which those grounds were dealt with.

13 The first ground related to the question of denial of economic opportunity to the appellant. This topic is also raised in the first ground of appeal. The appellant contended, and still wishes to contend, that he was prevented from continuing with his transport business, was therefore deprived of his livelihood and his capacity to subsist, and that the Tribunal was in error in holding that this did not constitute serious harm amounting to persecution. As the federal magistrate pointed out at [4] of her reasons for judgment, the Tribunal did not accept that the appellant's capacity to subsist had been threatened, or that he was denied economic opportunity. The Tribunal's finding of fact that the appellant was able to continue to operate his business was fatal to his claim in this respect.

14 The second ground before the federal magistrate, also the second ground of appeal, concerns the finding that the appellant has not succumbed to pressure to change his religion. The federal magistrate said at [7] that the appellant was seeking to challenge findings of fact made by the Tribunal in relying on this ground. Her Honour held correctly that she could not review such findings of fact. In addition, at [9], her Honour pointed out that the appellant's own evidence did not support his claim that he was prevented from practising his religion. In his second ground of appeal, the appellant argued that it was jurisdictional error to argue that successful resistance to religious conversion in the past would continue in the future. He contended that he was prevented from practising his religion and that the Tribunal failed to explore the harm that befell him as a result. This ground of appeal discloses no jurisdictional error. Even if the Tribunal's finding that the appellant had not succumbed to pressure to change his religion, or its finding that he was not prevented from practising his religion, were incorrect, there is nothing that the Court could do to correct such a finding. There was, in fact, ample evidence before the Tribunal to support those findings. Having made those findings, the Tribunal was not bound to explore the harm that might befall the appellant on the assumption that its findings were wrong.

15 The third ground before the Federal Magistrates Court, also reflected in the third ground of appeal, concerned the question whether the discrimination that the Tribunal acknowledged occurred against Hindus in Malaysia amounted to persecution. At [12], the federal magistrate said:

> *The question whether harm amounts merely to discrimination or whether it amounts to persecution is a matter of fact and degree. That is a question for the Tribunal to determine, unless the Tribunal has misdirected itself as to what might constitute serious harm. I consider that the view taken by the Tribunal in this case was reasonably open to it. This ground is not made out.*

The third ground of appeal involved a contention that the Tribunal misdirected itself in relation to what might constitute serious harm. In the light of the Tribunal's findings concerning the appellant's employment history, property ownership, and business activity, it is not surprising that the Tribunal found that any discrimination against the appellant as a Hindu, or as a Tamil, in Malaysia did not amount to serious harm, and therefore did not amount to persecution.

16 The fourth ground of the application to the court below was that the Tribunal had not assessed the appellant's claim of persecution for the reason of his race. At [14], the federal magistrate pointed out that the Tribunal found specifically that the appellant had not been persecuted in the past and would not face persecution in the future for reasons of his race. At [15] her Honour also pointed out that the Tribunal had found that the appellant had not been persecuted in the past and there was not a real chance that he would be persecuted in the future for the reason of his race. At [16] her Honour said that the appellant did not rely on any specific matters concerning his race, as opposed to relying on his religion. Both in the context of conditions in Malaysia, and in the context of the appellant's own claims, the federal magistrate did not consider that the Tribunal had made a jurisdictional error.

17 Ground 5 in the Federal Magistrates Court involved a challenge to the Tribunal's conclusion about the appellant's choice not to be involved in Hindraf activities in the future. At [19], the federal magistrate said that the Tribunal had found that the appellant acknowledged giving up Hindraf activities to avoid problems with the Muslims, but also that the Tribunal found that the appellant's problems with the Muslims did not amount to persecution. Her Honour said:

> *Accordingly, even if the actions of the Muslims were supported or condoned by the government, their actions did not amount to persecution to which the authorities turned a blind eye or which otherwise had an official quality. That is because the actions of the Muslims did not amount to persecution.*

Her Honour took the view that ground 5 was not made out.

18 The fourth ground of appeal does not engage specifically with either ground 4 or ground 5 in the court below. The fourth ground of appeal alleges that the Tribunal misinterpreted s 36(2) of the Migration Act and the Convention, when concluding that the problems the appellant had due to his participation in Hindraf activities and the problems he faced from Muslims did not amount to persecution. In effect, this ground raises again the Tribunal's conclusion that there was no real chance that the appellant would suffer serious harm amounting to persecution if he should return to Malaysia. The Tribunal was correct in applying s 91R of the Migration Act which, in effect, requires that there be "serious harm" before a finding of persecution can be made. Section 91R(2) contains various specific examples of serious harm. The appellant, in his submissions, had fastened on para (d), "significant economic hardship that threatens the person's capacity to subsist". As has been pointed out earlier, the Tribunal found against the appellant on this issue. It found that his capacity to subsist had not been threatened, and would not be threatened. There was no jurisdictional error involved in the finding of the Tribunal to that effect.

19 In the sixth ground of his application to the court below, the appellant asserted that the Tribunal had made an issue about his credibility, and alleged that the Tribunal ought to have given him notice under s 424A of the Migration Act in relation to findings concerning his credibility. This ground is reflected in the fifth ground of appeal in this Court. At [22], the federal magistrate drew attention to the fact that the Tribunal had expressly given the appellant the benefit of the doubt in relation to his claims, and did not rely on an adverse view of the appellant's credibility. There was no reason to suppose that any issue relating to the appellant's credibility was ever considered by the Tribunal to be the reason, or a part of the reason, for affirming the decision under review. In any event, the Tribunal's doubts as to credibility did not constitute information within the meaning of s 424A of the Migration Act. Accordingly, her Honour concluded that there was no breach of s 424A in this case. There is no doubt that her Honour was correct in this view. One of the major tasks of the Tribunal is to judge the credit of an applicant before it. Its view of an applicant's credit may be

significant in its determination of the case, but any view about credit reached at the end of the case does not constitute information within the meaning of s 424A. As the federal magistrate pointed out at [23], the Tribunal did raise in the course of the hearing issues of the appellant's credit and did invite him to respond, either orally or in writing, or to have the hearing adjourned to enable him to respond if he wished. Her Honour was unable to discern any basis on which the appellant could argue denial of procedural fairness in relation to the credibility issue.

20 As I have said, there were four further matters that the federal magistrate discussed in her reasons for judgment. Those matters have not been the subject of grounds of appeal expressed in the amended notice of appeal. The first of the additional matters concerned again denial of procedural fairness in relation to the credibility issue. The second of them involved the appellant seeking to challenge the finding of fact that the Tribunal made concerning possible disadvantage to the appellant in dealing with the appellant's estate after his death. The Tribunal correctly pointed out that something that might happen after a person's death cannot amount to persecution of that person. The appellant had also attempted to challenge other findings or conclusions of fact made by the Tribunal. The challenges included the contention that not being able to pursue a preferred way of earning a livelihood, such as by becoming a dairy farmer, would amount to persecution. The federal magistrate pointed out correctly that it was necessary for the Tribunal to find serious harm before it could find persecution. In relation to a challenge to the Tribunal's finding that the pressure on the appellant did not interfere with his practice of Hinduism, her Honour pointed out that the Tribunal stated that the appellant gave no example of how his practice of Hinduism had been compromised.

21 The third additional matter involved the question of the appellant's treatment at, and as a result of, the demonstration of 30 October 2007. As the federal magistrate pointed out at [32], the Tribunal accepted that this treatment may have amounted to persecution, subject to considering whether the law that was applied to the appellant was a law of general application, and whether it was applied in discriminatory fashion. At [33]-[34], her Honour also referred to the Tribunal's finding that the appellant indicated that he did not intend to participate in Hindraf activities in the future, and the Tribunal's conclusion that the appellant

had modified his behaviour to avoid discriminatory actions, rather than to avoid persecution. Her Honour concluded correctly that the Tribunal's conclusions were open on the evidence.

22 The final contention in the court below also involved the question of the appellant's choice to avoid further participation in Hindraf activities. As her Honour said at [37], it was "not to the point that other Hindus may suffer persecution for reasons specific to them." The Tribunal was required to assess the actual case the appellant put, rather than a theoretical case that another applicant might put. As her Honour said, even if the Tribunal made findings contrary to independent information about the treatment of Hindus in Malaysia, the weight to be given to that independent information was a matter for the Tribunal. Her Honour was correct to take the view that the contention involved no jurisdictional error.

23 In order to succeed in this appeal it was necessary for the appellant to demonstrate error on the part of the Federal Magistrates Court. He could only do that by demonstrating that the federal magistrate ought to have found jurisdictional error on the part of the Tribunal. The appellant has failed to demonstrate either jurisdictional error on the part of the Tribunal, or error on the part of the federal magistrate. I have read carefully the reasons for decision of the Tribunal, and the reasons for judgment of the federal magistrate. I am not able to identify any jurisdictional error in the former, or any error in the latter. It will therefore be necessary to dismiss the appeal.

24 Counsel for the Minister has sought an order that the appellant pay the Minister's costs of the appeal. Such an order is normal, following the principle that costs follow the event. The appellant has made no submission in response to the submission on behalf of the Minister concerning costs. Accordingly, the appellant will be ordered to pay the Minister's costs of the appeal.

25 The Court orders that:

1. The Refugee Review Tribunal be added as the second respondent to the appeal, and the title to the proceeding be amended accordingly.
2. The appeal be dismissed.
3. The appellant pay the first respondent's costs of the appeal.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gray.

Associate:

Dated: 23 June 2009

Counsel for the appellant:	The appellant appeared in person
Counsel for the respondents:	Ms Sharon Burchell
Solicitor for the respondents:	Australian Government Solicitor
Date of hearing:	26 May 2009
Date of judgment:	26 May 2009