FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZLAN & ANOR v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 262

MIGRATION – Review of decision by Refugee Review Tribunal – whether Refugee Review Tribunal's decision affected by jurisdictional error – whether finding of no Convention nexus was a separate alternative finding – whether in using the words *"If the Tribunal is wrong about this"* the Refugee Review Tribunal was expressing doubt as to its findings – whether *Rajalingam* has any application where the Refugee Review Tribunal accepted facts asserted by the applicant but concluded harm had no Convention nexus.

Judiciary Act 1903 (Cth), s.39B
Migration Act 1958 (Cth), ss.5(1); 36(2); 36(3); 65(1); 91R; 91S; 474; pt.8 div.2

Minister for Immigration and Multicultural Affairs v Rajalingam [1999] FCR 719
Ram v Minister for Immigration and Ethnic Affairs and Another (1995) 57 FCR 565
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Minister for Immigration & Ethnic Affairs v Guo Wei Rong & Anor (1997) 191 CLR 559
Abebe v The Commonwealth [1999] HCA 14
VBAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 965 at [33]
SZCJH v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 1660
SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 2

First Applicant:	SZLAN
Second Applicant:	SZLAO
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL

File number:	SYG 2084 of 2007
Judgment of:	Emmett FM
Hearing dates:	7 February 2008 & 3 March 2008
Date of last submission:	3 March 2008
Delivered at:	Sydney
Delivered on:	7 March 2008

REPRESENTATION

Counsel for the applicant:	Mr D. Godwin
Counsel for the respondent:	Ms L. Clegg
Solicitors for the respondent:	Mr C. Thorpe, Clayton Utz

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2084 of 2007

SZLAN
First Applicant

SZLAO
Second Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application pursuant to s.39B of the *Judiciary Act 1903* (Cth) and Part 8 Division 2 of the *Migration Act 1958* (Cth) ("**the Act**") for judicial review of a decision of the Refugee Review Tribunal ("**the Tribunal**") dated 31 May 2007 and handed down on 12 June 2007.

2. The first named applicant claims to be from Nepal and was an importer and exporter of juices and other goods in Nepal ("**the Applicant**"). The second named applicant is the wife of the Applicant and relies on the claims of the Applicant ("**the Second Applicant**").

3. The applicants arrived in Australia on 19 November 2006 having departed legally from Tribhuban International Airport on passports

issued in their own names and a temporary business (Subclass 456) visa.

4. On 29 December 2006, the applicants lodged an application for protection (Class XA) visas with the Department of Immigration and Multicultural and Indigenous Affairs ("**the Department**") under the Act.

5. In their protection visa application, the Applicant claimed that he feared persecution by Maoist trade unions and creditors who were seeking to extort them in Nepal.

6. On 22 January 2007, a delegate of the First Respondent ("**the Delegate**") refused the Applicant's application for a protection visa on the basis that the Applicant is not a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol ("**the Convention**"). The Delegate cited the following reasons for this conclusion:

> "*The applicant claims to have arrived in Australia primarily for the purpose of settling his business affairs with an Australian juice company and is pursuing legal matters in relation to this through the Australian judicial system. These stated reasons for departing Nepal, in the absence of an expressed intention to depart so as to seek asylum, is not characteristic of someone with a strong subjective fear of persecution.*"

7. The Delegate also noted that, according to country information, the Applicant, should be able to avail himself of "*an acceptable level of state protection*" should he return to Nepal and be subject to further harassment.

8. On 14 February 2007, the applicants lodged an application for review of the Delegate's decision with the Tribunal. The applicants provided no further material in support of the review application. On 31 May 2007, the Tribunal affirmed the decision of the Delegate not to grant a protection visa.

9. On 5 July 2007, the applicants filed an application in this Court seeking judicial review of the Tribunal's decision.

Legislative framework

10. Section 65(1) of the Act authorises the decision-maker to grant a visa if satisfied that the prescribed criteria have been met. However, if the decision-maker is not so satisfied then the visa application is to be refused.

11. Section 36(2) of the Act relevantly provides that a criterion for a protection visa is that an applicant is a non-citizen in Australia to whom the Minister is satisfied that Australia has a protection obligation under the Refugees Convention as amended by the Refugees Protocol. Section 5(1) of the Act defines "Refugees Convention" and "Refugees Protocol" as meaning the 1951 Convention relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees.

12. Australia has protection obligations to a refugee on Australian territory.

13. Article 1A(2) of the Convention relevantly defines a refugee as a person who:

> *"owing to a 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; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."*

14. Section 91R and s.91S of the Act refer to persecution and membership of a particular social group when considering Article 1A(2) of the Convention.

The Tribunal decision

15. The background facts and decision of the Tribunal are accurately summarised in the written submissions prepared by counsel for the applicants as follows:

> *"2. The applicant's are husband and wife. Their case to the RRT was essentially that they were citizens of Nepal who conducted an import business which included the importation of P&N juices from Australia. In 2006 they unknowingly received and distributed some contaminated juice. A shop keeper complained*

to a Maoist trade union official who told their customers to pay the union and not the applicants. The Maoists allowed them to come to Australia to seek compensation from P&N. The P&N company have refused to adequately compensate them, they now fear further retribution from the Maoists if they return empty handed to Nepal.

3. The RRT accepted that the Maoists had sought money from the applicant in the way he claimed.

4. The RRT considered the applicants' claims firstly as being in respect of the political opinion imputed to them by the Maoists or the Government. The RRT found that the male applicant was not a Maoist and was not a political supporter of Maoists. It found that the Maoists simply were extorting money from the applicant and his political opinion (imputed or actual) was not a reason for the extortion.

5. The RRT then considered whether the harm the applicant feared was in respect of his membership of a particular social group. Three groups were identified- 'victim of Maoist atrocities …who did not have protection of the law and who were extorted by the Maoist element and who suffered loss and disadvantages" and "business people in Nepal" and "wealthy Nepalis". The RRT found that the essential and significant reason that the applicant fears harm from the Maoists was extortion or monetary gain and there was no policy of Maoists targeting business people other than as suitably wealthy individuals."

The proceeding before this Court

16. Counsel for the applicants confirmed that the Applicant relied on the grounds in the amended application filed on 24 October 2007 as follows:

"1. That the RRT applied the wrong test for determining whether the applicant's had a legally enforceable right to enter and reside in India for the purposes of s36(3) of the Act;

2. That the decision of the second respondent was affected by jurisdictional error:

(a) the Second Respondent failed to complete its jurisdictional task

Particulars

(i) When it assessed whether the applicants faced a real chance of persecution in Nepal the RRT failed to assess whether the applicants would face persecution from the Maoists as part of the Nepalese Government. Further, the RRT made a factual finding that the complicity of the Maoists would make it unlikely that the applicants would receive a fair trial or that the penalty would be proportionate to the crime. This finding was not addressed when the RRT assessed the chance of the applicants being persecuted as part of a particular social group when they returned to Nepal.

(ii) In the alternative to ground 1, The RRT did not make any finding, when considering whether s36(3) of the Act applied, as to whether the applicants had taken reasonable steps to avail themselves of a right to enter into and reside in India."

17. Counsel for the First Respondent submitted that the applicants could not succeed on any of the grounds because the Tribunal had affirmed the decision under review on three alternative bases:

    a) a finding that there was a lack of Convention nexus by reason of the fact that the Maoists were pursuing the applicant based solely on his wealth, and not his political opinion or membership of a particular social group: CB267.3 – 268.5; or

    b) a finding based largely on independent country information, that the applicant would be afforded effective state protection by the Nepalese authorities if he returned to Nepal: CB 268.6 269.3; or

    c) a finding that the applicant had a right to enter and reside in another country, namely India, by reference to the statutory mandate in s 36(3) of the Act, independent country information and the applicant's personal circumstances.

18. Counsel for the First Respondent submitted that each of these findings was an alternative and independent basis for the Tribunal's conclusion that Australia did not have protection obligations to the applicants, such that the decision is valid so long as one basis cannot be impeached.

19. Counsel for the applicants submitted that the Tribunal's finding in (a) above that there was no Convention nexus was a finding attenuating by sufficient doubt that it caused the Tribunal to consider the other issues in the event the Tribunal is wrong about its primary findings about the Applicant's claims.

20. Counsel for the applicants did not contend that the findings made by the Tribunal on the claims made by the Applicant that there was no Convention nexus were affected by error. Rather, counsel for the applicants submitted that the Tribunal's conclusions on that issue were sufficiently doubtful in the mind of the Tribunal that the Tribunal went on to consider what if it was wrong, in accordance with the principles in *Minister for Immigration and Multicultural Affairs v Rajalingam* [1999] FCR 719 (***"Rajalingam"***).

21. Counsel for the applicants submitted that in considering the other issues addressed by the Tribunal referred to in (b) and (c) above, the Tribunal committed jurisdictional error.

22. In relation to (b) above, counsel for the applicants submitted that whilst the Tribunal referred to independent country information that suggested that the Maoists were now a part of the stable democracy in Nepal, it made no conclusive findings about why, in those circumstances, the Applicant did not continue to have a well-founded fear of persecution of the Maoists for a Convention related reason.

23. In relation to (c) above, counsel for the applicants submitted the following:

    i) In relation to s.36(3) of the Act, it was not open to the Tribunal to conclude that the Applicant had a right of entry into India. To that end, counsel for the Applicant submitted that the Tribunal was obliged to be satisfied that the Applicant had a legally enforceable right to enter India and that the evidence did not support such a conclusion.

    ii) The Tribunal was obliged to make a finding as to whether or not the applicants had taken reasonable steps to avail themselves of a right to enter into and reside in India in accordance with s.36(3) of the Act and had failed to make any such finding.

Convention nexus

24. The findings made by the Tribunal in its decision in relation to the issue of Convention nexus are as follows:

*"**It has been stated that the applicant is not a politician and does not have any association with a political party. There were no claims that the applicant was a Maoist himself.** However, it may be construed that it was perceived by the Maoists that he had a political opinion opposed to theirs, that is, that he had an imputed political profile. The Tribunal finds that the applicant made donations to the Maoists. These 'donations' are in reality monies extorted from different parts of Nepali society, but particularly the business people in cities such as Kathmandu. The Tribunal **accepts** the evidence that this has been commonplace in Nepal, and the agent's evidence that 90% of businesses have been asked for donations by the Maoists. It is also **accepte**d that even the government seeks 'donations'. The Tribunal also **accept**s that the Maoists were sympathetic to the applicant in that they allowed him to leave Nepal, so he could recover funds to pay them money. The Tribunal finds that this gesture is not one provided to a person perceived to have a different political opinion, but simply to increase the chance that they will receive monies which they are attempting to extort from him.*

In this regard it may be construed that the applicant is a Maoist-supporter, having been a 'donor' over ten years. As a result, it may be suggested that the applicant fears harm by the Maoists because he has not continued to support them through the imposed payment of 15 lakhs, which he was unable to pay. However, the Tribunal finds that this penalty is contrived and its underlying purpose, or the motivation of the Maoists, is extortion. ***The Tribunal finds that the applicant is not a Maoist, nor a political supporter of the Maoists. Money and goods have simply been extorted from him****.*

*So, having regard to all the evidence, including the lack of any claims in this regard**, the Tribunal finds that any possible claims relating to the applicant's political opinion do not engage the provisions of the Convention.** The Tribunal finds that the Maoists are not targeting him for extortion for reasons of political opinion (actual or imputed). The Tribunal finds that the applicant does not have a well-founded fear of persecution for reason of his political opinion.*

It was submitted that 'the victim of the Maoist atrocities can be classified as a particular social group who did not have protection of the law and who were extorted by the Maoist element and who suffered losses and disadvantages.' Other possible particular social groups arising on the facts are 'business people in Nepal' and 'wealthy Nepalis.' ***Whilst the Tribunal accepts that the applicant has been extorted in the way***

he claims from the Maoists, it finds that the essential and significant reason for any harm the applicant fears from the Maoists is extortion or monetary gain. *The Tribunal finds that there is no policy of Maoists targeting business people other than as suitably wealthy victims. In this regard, the Tribunal accepts the Court's reasoning in Ram v MIEA (1995) 57 FCR 565, where the applicant claimed that he was being extorted on the basis that he was a member of a particular social group; namely, villagers who had gone abroad and returned with money, or other wealthy Sikhs. The Court rejected this contention. Justice Burchett stated (at p.569):*

> *"In the present case, quite apart from the difficulty of seeing wealthy Punjabis living in circumstances which make them vulnerable to extortion as a sufficient group, it is the greater difficulty of saying that the attacks feared by the appellant would be for reasons of his membership of that group which, it seems to me, he cannot overcome. Plainly, extortionists are not implementing a policy, they are simply extracting money from a suitable victim. Their forays are disinterestedly individual… [The appellant] does not fear persecution for reasons of membership of a particular social group, but extortion based on a perception of his personal wealth and aimed at him individually. (emphasis original)"*

Having regard to the above, ***the Tribunal finds that the applicant's claims in relation to membership of a particular social group do not engage the provisions of the Convention.***

Overall, the Tribunal is satisfied that those claimed to be seeking retribution against the applicant are not doing so as an aspect of a broader political campaign, or targeting him as a member of a particular social group, but for a non-Convention related reason. That reason is extortion, based on the applicant's wealth. ***The Tribunal finds that the applicant does not have a well-founded fear of persecution for reason of his political opinion or for reason of his membership of a particular social group."*** (emphasis added)

25. Following those findings the Tribunal commenced dealing with other issues referred to in (b) and (c) above prefaced by using the words "*If the Tribunal is wrong about this*". Counsel for the applicants submitted that the use of those words reflected the Tribunal's doubts about its findings and, thereby, it was compelled to consider "*what if it was*

wrong" about its findings in accordance with the principles in *Rajalingam*.

26. Counsel for the applicants submitted that the jurisprudence of *Rajalingam* had been in existence for sufficiently long that when the Tribunal used the words *"If the Tribunal is wrong about this"*, the Tribunal was plainly picking up the *"what if I am wrong?"* test referred to and considered in *Rajalingam*.

27. In *Rajalingam* Sackville J referred to the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 (*"**Wu Shan Liang**"*) and *Minister for Immigration & Ethnic Affairs v Guo Wei Rong & Anor* (1997) 191 CLR 559 (*"**Guo Wei Rong**"*) where the appellants factual assertions were not accepted. However, it is clear that the Tribunal must take into account the chance that an appellant was persecuted as alleged when determining when there is a well-founded fear of persecution (*Abebe v The Commonwealth* [1999] HCA 14 at [83]; *Rajalingam* at [239]; *Guo*).

28. In drawing together the relevant High Court authorities, Sackville J stated:

> *"It follows from the observations of the High Court in Wu Shan Liang and Guo that there are circumstances in which the RRT must take into account the possibility that alleged past events occurred even though it finds that those events probably did not occur. This result, perhaps surprising at first glance, comes about because the ultimate question before the RRT is whether it is satisfied that the applicant has a well-founded fear of future persecution, in the sense of having a "real substantial basis" for the fear. The RRT must not foreclose reasonable speculation about the chances of the hypothetical future event occurring."*

29. However, unlike in *Rajalingam*, in the case before this Court, a fair reading of the Tribunal's decision makes clear that the Tribunal accepted the factual claims made by the Applicant of past harm and the difficulties he had faced at the hands of criminals.

30. Counsel for the First Respondent submitted that the principles of *Rajalingam* related only to doubt about factual findings made not in accordance with the facts asserted by an applicant. In this case, the Tribunal accepted the Applicant's factual assertions, however, found

that they did not have a Convention nexus. The finding that the persecution feared by the Applicant is not Convention related is a question of law.

31. In the case before this Court, even if the same events were to occur again, the Tribunal has found that such events have no Convention nexus according to law.

32. In the circumstances, the principles in *Rajalingam* and the High Court authorities do not have application in the case before this Court.

33. Certainly, the Tribunal did not refer to *Rajalingam* in its use of the words *"If the Tribunal is wrong about this"*.

34. I accept the submissions of the First Respondent that the Tribunal was doing no more than intending to set out alternative bases for concluding that the Applicant did not have a well founded fear of persecution for a Convention related reason, albeit an unnecessary exercise.

35. As stated above in these Reasons, the Tribunal made findings of fact in accordance with the Applicant's claims. The Tribunal applied the correct law to the facts as it found them to be. The Tribunal found that any harm suffered was not for a Convention related reason and therefore was not satisfied that any harm suffered in the future if the Applicant was to return to Nepal or India would be for a Convention related reason. Those findings and conclusions were open to the Tribunal on the evidence and material before it and for which it provided reasons.

36. There was no error in the Tribunal's decision in respect of that issue.

37. The finding on Convention nexus is a separate finding and entirely independent from the issues identified at (b) and (c) above (see paragraph 17 in these Reasons). Moreover, the Applicant did not challenge these findings.

38. In the circumstances, it is not necessary for this Court to consider whether or not there was jurisdictional error in respect of the Tribunal's consideration of the other bases referred to in (b) and (c) above (*VBAP*

of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 965 at [33] and *SZCJH v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1660 at [23]; *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2 at [232]-[233]).

39. In the circumstances, it matters not whether there was error in the manner in which the Tribunal dealt with the matters raised in the grounds of the amended application before this Court.

40. The Tribunal's decision is a privative clause decision and therefore, pursuant to s.474 of the Act, this Court has no jurisdiction to interfere.

41. Accordingly, the proceeding before this Court is dismissed with costs.

I certify that the preceding forty-one (41) paragraphs are a true copy of the reasons for judgment of Emmett FM

Associate: S. Kwong

Date: 6 March 2008