

FEDERAL COURT OF AUSTRALIA

SZCVC v Minister for Immigration & Multicultural Affairs [2006] FCA 1535

MIGRATION – appeal from federal magistrate – refusal to grant protection visa – where appellant a citizen of Nepal – whether a well-founded fear of persecution exists – whether mere demands would satisfy the definition of “serious harm” pursuant to s 91R of the *Migration Act 1958* (Cth) – whether federal magistrate erred in finding that the Refugee Review Tribunal was not obliged to consider relocation where it was held there was no well-founded fear of persecution

Migration Act 1958 (Cth) s 91R

SZCVC v Minister for Immigration, Multicultural and Indigenous Affairs [2006] FMCA 701 affirmed

**SZCVC v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS
AND REFUGEE REVIEW TRIBUNAL**

NSD 1031 OF 2006

DOWSETT J

21 NOVEMBER 2006

BRISBANE VIA VIDEO-LINK TO SYDNEY (HEARD IN SYDNEY)

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD 1031 OF 2006

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: SZCVC
 Appellant**

**AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
 AFFAIRS
 First Respondent**

**REFUGEE REVIEW TRIBUNAL
Second Respondent**

JUDGE: DOWSETT J

DATE OF ORDER: 21 NOVEMBER 2006

**WHERE MADE: BRISBANE VIA VIDEO-LINK TO SYDNEY
 (HEARD IN SYDNEY)**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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JUDGE: DOWSETT J

DATE: 21 NOVEMBER 2006

**PLACE: BRISBANE VIA VIDEO-LINK TO SYDNEY
(HEARD IN SYDNEY)**

REASONS FOR JUDGMENT

BACKGROUND

1 This is an appeal from a decision of a federal magistrate declining an application for review of a decision of the second respondent (the “Tribunal”). By that decision the Tribunal declined to grant to the appellant a protection visa pursuant to the *Migration Act 1958* (Cth) (the “Act”). The history of the matter and a brief outline of the facts appear at [1]-[3] of the magistrate’s reasons as follows:

- ‘1. *The applicant is a citizen of Nepal. He arrived in Australia on 16 March 2003. On 30 April 2003 he lodged an application for a Protection (Class XA) Visa with the Department of Immigration and Multicultural and Indigenous Affairs. On 20 June 2003 a delegate of the Minister refused to grant a protection visa and on 9 July 2003 the applicant applied for review of that decision. The applicant attended a hearing before the Tribunal on 5 November 2003. On 29 January 2004 the Tribunal affirmed the decision not to grant a protection visa and handed down that decision on 19 February 2004.*
2. *The applicant’s claim to have a well-founded fear of persecution for the Convention reason of political opinion arose out of his imputed*

claimed association with the Communist Party of Nepal (CPN) (Maoist). The applicant stated that whilst he had joined the Communist Party of Nepal (United Marxist Leninist) he was approached by friends in the period from 1996 to 1998 who tried to recruit him to the Maoist cause. He said that they came to his village about twice each month and sought food and shelter which he gave them. In 1998 the applicant left his village and went to a town called Pokhara, although he returned to his village from time to time. He said that the Maoists continued to come to his home village and harass his family and also came to him in Pokhara. He claimed that a neighbour had informed upon him to the police as being a Maoist and as a result he was troubled both by the Maoist insurgents and by the police.

3. *The applicant told the Tribunal that he did not himself ever become a Maoist although he did go to a few cultural programmes organised by them. He told the Tribunal that he was a Buddhist and that he did not approve of the use of violence. The applicant was a Buddhist monk, and for the last two years that he was in Pokhara he wore the habit of a Buddhist monk, which he said, lessened any interference by the Maoists. Although adopting the dress of Buddhist monk, the applicant worked in a shop that he owned selling what I take to be Buddhists ephemera.'*

2 In the appellant's original application for a protection visa he claimed to have been a member of the Communist Party of Nepal (Maoist) ("NCA (Maoist)") and that:

'I was compelled to leave Nepal to save my life. I was harassed by police and Army. Also, MAOIST threatened me not to leave them.'

3 He also said that:

'The Police and Army will kill me.

Maoists will also persecute me for leaving Nepal without having their approval.'

4 He said that he had been forced to join the Maoists, that he feared that the ceasefire then in effect would not last and that there would be revenge killings and massacres. He feared that he would be labelled a Maoist terrorist and that the Nepalese authorities would not protect him. He indicated that he would submit a more detailed statement but did not do so. The Minister's delegate concluded that the applicant did not face a real chance of Convention-based persecution if returned to Nepal, and that his fear of persecution on return

was therefore not well-founded.

5 The appellant applied to the Refugee Review Tribunal (the “Tribunal”) for review of the delegate’s decision, again saying that he would *‘submit or explain my fear in due course’*. As I understand it no written statement was forthcoming. However the appellant attended a hearing in the Tribunal and outlined his concerns. Perhaps unfortunately, no transcript of his evidence has been provided, the proceedings before the magistrate apparently being conducted upon the basis that his evidence was sufficiently clearly set out in the Tribunal’s reasons. It seems that the appellant asserted that he feared persecution by the Maoists and by the authorities in Nepal, in both cases because of his political opinions. The Tribunal found against him on both bases. It also found that he could, in any event, avoid persecution by the Maoists by relocating to a large city in Nepal.

6 In his application to the magistrate for review of the Tribunal’s decision, the appellant challenged the Tribunal’s finding that he had no well-founded fear of persecution from either the police or the Maoists and its finding as to relocation. The magistrate found against him in connection with his claimed fears of persecution from both sources. However he found that the Tribunal had fallen into jurisdictional error in connection with the issue of relocation. Nonetheless, the magistrate concluded that in the absence of a finding that the appellant had a well-founded fear of persecution for a Convention reason, the Tribunal need not have addressed that issue. The error was therefore irrelevant.

7 On appeal to this Court the parties accepted that the magistrate had correctly identified jurisdictional error in connection with the issue of relocation. However the appellant accepted (in argument, although not in his written submissions) that the error would only be relevant if there were a finding of a well-founded fear of persecution. The appellant did not seek to demonstrate error in connection with the magistrate’s finding that he had no well-founded fear of persecution at the hands of the Nepalese authorities. Thus the only issue with which I must deal is fear of persecution at the hands of the Maoists. If the appellant succeeds on that issue, then the magistrate’s finding of jurisdictional error in connection with relocation would dictate that the Tribunal’s decision be set aside.

THE APPELLANT'S CLAIMS

8 The appellant initially claimed that he had lived in West Nepal for the whole of his life. He subsequently said that although his family continued to live at that location, he has, since 1998, spent most of his time in Pokhara where he conducts a business. He originally joined the Communist Party of Nepal (United Marxist Leninist), but some of his friends joined the NCP (Maoist) and then “pressured” him to join them. As a Buddhist he was opposed to the violent methods employed by the Maoists and so refused to join. His friends continued to ‘harass’ him to join them. Maoists came from the jungle areas to his home in the village, demanding food and shelter. He said that a neighbour informed the authorities that he was assisting the Maoists. As a result the security forces came to his home and questioned him. The Maoists continued to visit, demanding food and expressing concern about what he may have told the authorities. At some stage the authorities threatened to treat him as a Maoist and therefore a terrorist.

9 During 1996, 1997 and 1998 his friends continued to try to recruit him. They came to his village about twice each month, seeking food and shelter. It is not clear whether these were the same visits as those referred to in the preceding paragraph. It seems likely that they were. After he moved to Pokhara in 1998 he returned to the village quite frequently. The Maoists continued to come to his family home and to “harass” his family. In Pokhara he initially had fewer problems, but after the police learned that he was there, they and the Maoists commenced to visit him. Counsel for the appellant said that his understanding was that this implied that the Maoists had been informed by the police of his presence. About two years prior to the Tribunal hearing (November 2003) he commenced to wear the dress of a Buddhist monk to avoid adverse attention. He had trained as a monk and was selling “Buddha Arts”. On a few occasions the Maoists demanded that he deliver parcels for them and again pressured him to join them. He did not become a Maoist, but on three or four occasions he attended cultural programmes organized by the Maoists. He said that he was forced to attend. In the months immediately prior to his leaving Nepal to come to Australia, he was living in both Pokhara and his village and dressing as a monk. As a consequence he was not harassed as much as he had previously been.

10 He was questioned at some length about the attitude of the authorities towards him and, in particular, as to why they had not detained him. He replied that, perhaps, they did not

believe that they had enough evidence against him. The Tribunal asked him why, if that were the case, the situation would now be different if he returned to Nepal. He insisted that the situation was now worse and, *'that both the police and the Maoists would continue to come, and he could be shot by either of them ...'*. This passage is of particular importance for reasons which will appear at a later stage. At some stage the Tribunal asked him why, given that his problems were localized in his village and in Pokhara, he could not relocate to a safe area within Nepal, such as Kathmandu. The appellant said that such a course used to be possible but now that he is a business man, questions would be asked, and the Maoists would locate him.

THE TRIBUNAL'S DECISION

11 The Tribunal referred to country information which indicated that the Maoists were waging an insurrection, using torture, killing, bombing, extortion and intimidation against civilians and public officials. In January 2003 there had been a ceasefire, accompanied by cautious optimism for a negotiated settlement. However, by the end of August 2003, the peace process and the ceasefire had collapsed, and there had been an immediate acceleration in violence.

12 In its findings the Tribunal observed:

'The applicant claims that he faces persecution by the authorities in Nepal because of his actual or perceived involvement with the Communist Party of Nepal (Maoist). In addition he fears that the Maoists could also harm or kill him, and he claims that the authorities will be unable to protect him.'

13 After referring to a number of inconsistencies in the appellant's claims, the Tribunal concluded:

'Having considered all the evidence before me, and for the reasons that follow, I am not satisfied that the applicant has a well-founded fear of being persecuted by the authorities in Nepal because he is seen as being a Maoist or a supporter of the Maoists. Nor am I satisfied that he has a well-founded fear of persecution from the Maoists themselves.'

14 Despite its doubts about the appellant's evidence, the Tribunal accepted his account of his personal, educational and employment background. It also accepted that as a devout Buddhist, he was opposed to the violence used by the Maoists and, as a result, had refused to

join the party, despite repeated efforts to recruit him. It also accepted that some of his friends had become Maoists, and that they had “pressured” him to join. It accepted that on some occasions, Maoists had come to his family home in the village, demanding food, shelter and donations. That claim was consistent with independent information available to the Tribunal. The Tribunal considered it unlikely that they had come to the village as frequently as twice each month over a period of years but was prepared to ‘give the applicant the benefit of the doubt’ and accept that for a period, their visits were as claimed. It accepted that the appellant had been forced to attend Maoist cultural programmes on three or four occasions.

15 The Tribunal then continued:

‘On the applicant’s own evidence he initially had fewer problems with the Maoists after he moved to Pokhara in 1998, and although he claimed that their visits later increased, his final evidence was to the effect that when he dressed as a monk he was able to avoid the serious adverse attention of the Maoists (and the authorities) although they still pressured him.

The applicant had not before stated that he was a trained monk, but I accept his evidence in this regard and I note that in the passport on which he travelled to Australia his occupation is stated as “monk” and the picture in the passport evidences that he dressed as a monk. I accept the applicant’s evidence that, parallel with being a businessman selling “Buddha Art” he was in fact a monk and I accept his assertion that in the few years before he came to Australia that fact offered him a great deal of protection.

On the applicant’s own evidence at hearing he was never a Maoist, and I therefore do not accept his assertion in his application to the effect that as a result of that membership and his leaving Nepal without their permission the Maoists would persecute him if he returned to Nepal. At hearing the applicant maintained the claim that if he returns to Nepal the Maoists would continue to visit his home and make demands, and that they might shoot him (see page 9 above). I accept that the Maoists might visit his home in the village or Pokhara and make demands, but I do not accept that such problems in themselves amount to persecution and I do not accept his assertion that the Maoists might shoot him. I find this claim to be fanciful and not supported by the applicant’s own evidence to the effect that, despite their visits and attempts to recruit him over many years, the Maoists did not do him any other harm.’

16 The reference to ‘page 9’ in the above extract is of some relevance. It is there that the Tribunal recorded the appellant’s assertion that either the police or the Maoists might shoot him. The Tribunal’s rejection of his claim that he feared being shot by the Maoists related to that claim.

THE MAGISTRATE'S DECISION

17 Before the magistrate the appellant asserted that the Tribunal had not considered the possibility that he had a well-founded fear of some lesser harm (ie than shooting) at the hands of the Maoists. Of this submission the magistrate said at [9]:

'The Tribunal must deal with the case that is put to it and not some other case that might be more favourable to the applicant. The case that was put was that certain activities had occurred which the Tribunal accepted and then there was a submission, not based upon any evidence, that if the applicant returned to Nepal the Maoists would act in a particular way, which did not seem to follow from the evidence previously given. In these circumstances I am quite satisfied that the Tribunal in making its decision about the substance of the applicant's alleged persecution did not fall into jurisdictional error.'

THIS APPEAL

18 The appellant appeals against that conclusion. His submissions tacitly pose three questions, namely:

- What was the ambit of his claimed fear of persecution?
- Did the Tribunal understand the full ambit of that claim?
- Did the Tribunal deal with all aspects of that claim?

19 I will consider each question in turn.

Ambit of the appellant's claim

20 I have already summarized the evidence as it is recorded in the Tribunal's reasons. The appellant's case seems to have been quite narrow and lacking in detail. In proceedings before the magistrate, he did not tender the transcript of proceedings in the Tribunal as he would have had to do in order to demonstrate that aspects of his case had not been considered by the Tribunal. At a very late stage in the course of the hearing in this Court, the appellant sought to tender the transcript, largely as a result of observations which I had made in the course of argument. However I ruled against the application, given that the matter had proceeded so far, apparently on the basis that the Tribunal had accurately summarized the appellant's claims. I have previously noted that his claims before the Tribunal differed

substantially from those set out in his original application. At pp 6 and 7 of the reasons the Tribunal recorded, concerning his original application, that:

'The applicant's claims to refugee status as outlined in his application for a protection visa are briefly stated and to the effect that he left Nepal because he was persecuted by the police and the army for being a member of the Communist Party of Nepal (CPN) (Maoist). In addition he claims that the Maoists will persecute him for leaving Nepal without their permission.

He claims that he has been a supporter of communism since his early days at school. Initially he was a member of the Community Party of Nepal (Unified Marxist Leninists) CPN (UML), but later he was forced to join the Marxists. He had a successful business in Nepal and would not have given all that up if his life had not been at risk.'

21 This summary appears accurately to reflect information contained in the original application. It is curious in two respects, given the subsequent conduct of the matter. Firstly, it indicates that the appellant's reason for leaving Nepal was fear of persecution by the authorities, not fear of persecution by the Maoists. Fear of persecution from that source, in the event of his return to Nepal, appears to have been based upon the fact that he had left Nepal without their permission. The second curiosity is that he claimed to have been a member of CPN (Maoist) but subsequently indicated that he had never joined that party. These two anomalies may well have been fatal to the credibility of his subsequent claim to fear persecution at the hands of the Maoists based upon their previous conduct towards him. However the Tribunal gave him the benefit of the doubt with regard to these matters.

22 The appellant's reasons for fearing persecution from the Maoists seem to have been associated with their visits to him and his family, "demands" for material support and attempts to recruit him. At no stage did he suggest that threats were made in order to induce his cooperation or otherwise. Although he used the words 'harass' and 'pressure', there was no elaboration upon their meaning in this context. His evidence concerning such visits in Pokhara suggests that the Maoists' demands at that time were for delivery of documents and that he join them. Again there is no evidence of any threats. This visiting regime apparently commenced in his village in 1996 and continued, there and in Pokhara, until he left for Australia early in 2003. He was also out of Nepal for other periods during 2002-2003.

The Tribunal's understanding of his claim

23 The Tribunal understood that he feared harm or death at the hands of the Maoists. It also seems to have understood that he attributed his fears to the visiting regime. Indeed, that was the whole point of his case. He made one specific claim to fear “shooting” when the Maoists “came”, presumably a reference to anticipated future visits.

The Tribunal's treatment of his claims

24 The Tribunal treated as fanciful his claim to fear being shot. Given the circumstances in which it arose, that treatment was reasonable. The Tribunal clearly understood that the appellant apprehended a resumption of the visiting regime and accompanying demands in the event that he returned to Nepal. However it was aware that over the many years during which past visits had occurred, there had been no violence or even, on the appellant's evidence, threats of violence. The Tribunal said:

‘I accept that the Maoists might visit his home in the village or Pokhara and make demands, but I do not accept that such problems in themselves amount to persecution’

25 The appellant submits that the Tribunal failed to consider whether violence might attend future visits, particularly if he were unable or unwilling to give further support. It may be possible to infer from the appellant's account that the Maoists' demands for sustenance and support were framed in language, or set in a context, which might suggest that a failure to co-operate would be met with violence. However the fact is that he did not allege any previous threats or menacing conduct or any apprehension of possible violence. He did not suggest that others had, to his knowledge or understanding, suffered violence as punishment for non-co-operation. He did not suggest that meeting the Maoists' demands had caused, or would cause economic hardship.

26 The requirement, in order to establish refugee status, is that the appellant have a well founded fear of persecution for a Convention reason, in this case, political opinion. Assuming that demands for material support and that he join the Maoists are capable of being attributable to the appellant's political opinion, it is nonetheless difficult to see how such conduct can be described as persecution. “Persecution” is defined in s 91R of the *Migration Act 1958* (Cth) (the “Migration Act”) as follows:

- (1) *For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that article unless:*
- (a) *that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and*
 - (b) *the persecution involved serious harm to the person; and*
 - (c) *the persecution involved systematic and discriminatory conduct.*
- (2) *Without limiting what is serious harm for the purposes of paragraph (1)(b) the following are instances of **serious harm** for the purposes of that paragraph:*
- (a) *a threat to the person's life or liberty;*
 - (b) *significant physical harassment of the person;*
 - (c) *significant physical ill-treatment of the person;*
 - (d) *significant economic hardship that threatens the person's capacity to subsist;*
 - (e) *denial of access to basic services, where the denial threatens the person's capacity to subsist;*
 - (f) *denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.*
- ...'

27 Mere demands would not usually satisfy any aspect of the definition of “serious harm”. Subsection 91R(2) is not an exhaustive definition, but it accurately reflects the common meaning of the words “serious harm”. Demands, particularly by friends, would normally amount to persecution only if tangible and credible threats were offered as the alternative to co-operation. There is no evidence of such threats in this case. It was for the appellant to explain his reasons for fearing persecution. The Tribunal’s rejection of such fears as being without foundation reflected the appellant’s case which was based upon a history of demands without actual violence or threats. If the Tribunal’s reasons for rejecting the appellant’s claims were somewhat terse, they reflected the terse nature of those claims. There was nothing more upon which to focus. The Tribunal’s view that the appellant had no well-founded fear of persecution was open to it. No jurisdictional error is demonstrated in that regard.

RELOCATION

28 In the appellant’s outline of submissions, he submits that the magistrate erred in holding that the Tribunal was not obliged to consider relocation, given its finding that there was no well-founded fear of persecution. In oral submissions counsel for the appellant seemed to concede that the magistrate was correct in this view. In any event, I consider that he was correct. The issues involved in relocation can only be finally resolved after the relevant fear has been established. It may sometimes be desirable that findings of fact be made in connection with relocation even where there has been no finding of a well-founded fear, but failure to do so will not constitute operative jurisdictional error. I need not say any more about this matter.

ORDERS

29 The appeal will be dismissed. I will hear submissions as to costs.

I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett.

Associate:

Dated: 21 November 2006

Counsel for the Appellant:	Mr J R Young
Solicitor for the Appellant:	Simon Diab & Associates
Counsel for the Respondents:	Ms M Allans
Solicitor for the Respondents:	Blake Dawson Waldron
Date of Hearing:	6 November 2006
Date of Judgment:	21 November 2006

