

FEDERAL COURT OF AUSTRALIA

SZOYL v Minister for Immigration and Citizenship [2011] FCA 914

Citation: SZOYL v Minister for Immigration and Citizenship [2011] FCA 914

Appeal from: SZOYL & SZOYM v Minister for Immigration & Anor [2011] FMCA 236

Parties: **SZOYL and SZOYM v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL**

File number: NSD 627 of 2011

Judge: **BROMBERG J**

Date of judgment: 11 August 2011

Legislation: *Migration Act 1958* (Cth) s 474

Cases cited: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225
Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 197 ALR 389
NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) (2004] 144 FCR 1
NAVK v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 124
NAVK v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1695
Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476
SDAQ v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 199 ALR 265
SZOYL & SZOYM v Minister for Immigration & Anor [2011] FMCA 236

Date of hearing: 9 August 2011

Place: Sydney

Division: GENERAL DIVISION

Category: No Catchwords

Number of paragraphs: 24

Counsel for the Appellants: The Appellants appeared in person

Counsel for the First Respondent: Ms B Nolan

Solicitor for the First Respondent: DLA Piper

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

NSD 627 of 2011

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: SZOYL
 First Appellant**

**SZOYM
 Second Appellant**

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

**REFUGEE REVIEW TRIBUNAL
 Second Respondent**

JUDGE: BROMBERG J

DATE OF ORDER: 11 AUGUST 2011

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellants pay the first respondent's costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011

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

NSD 627 of 2011

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: SZOYL
 First Appellant**

**SZOYM
Second Appellant**

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

**REFUGEE REVIEW TRIBUNAL
Second Respondent**

JUDGE: BROMBERG J

DATE: 11 AUGUST 2011

PLACE: SYDNEY

REASONS FOR JUDGMENT

INTRODUCTION

1 This is an appeal from a judgment of a Federal Magistrate (*SZOYL & SZOYM v Minister for Immigration & Anor* [2011] FMCA 236) in which the learned Federal Magistrate dismissed the appellants' application for judicial review. The Federal Magistrate reviewed a decision of the Refugee Review Tribunal ("the Tribunal") which affirmed a decision of a delegate of the first respondent ("the Minister") not to grant the first appellant a protection visa and thereby refusing the second appellant's claim as a family member.

2 The task of the Federal Magistrates Court in dealing with the judicial review proceedings brought by the appellants was to determine whether the Tribunal's decision was affected by jurisdictional error: s 474 of the *Migration Act 1958* (Cth) ("the Migration Act"); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

3 The task of this Court in relation to the appeal brought by the appellants is to determine whether the judgment of the Federal Magistrate is affected by appealable error.

4 In essence, the appeal raises one question: Did the Tribunal constructively fail to exercise its jurisdiction by failing to address the first appellant's claim of a fear of persecution by reference to her membership of a particular social group?

5 The Federal Magistrate determined that there was no such constructive failure and, for the reasons that follow, I am satisfied that no error has been demonstrated and that the appeal should be dismissed.

LEGAL PRINCIPLES

What is a social group?

6 It is a necessary part of the definition of a refugee under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together "the Convention") that there is a well-founded fear of persecution 'for reasons of race, religion, nationality, membership of a particular social group or political opinion'.

7 The attributes of a social group were considered in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225. Such a group will possess some particular characteristic or characteristics that distinguish it and its members from society at large: Brennan CJ at 234. The group must also be identifiable as a social unit with an "internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals" that unites them as a group and distinguishes them from society as a whole: McHugh J at 264. McHugh J continued at 266:

It follows that, once a reasonably large group of individuals is perceived in a society as linked or unified by some common characteristic, attribute, activity, belief, interest or goal which itself does not constitute persecution and which is known in but not shared by the society as a whole, there is no textual, historical or policy reason for denying these individuals the right to be classified as "a particular social group" for Convention purposes.

When must the Tribunal consider a social group claim?

8 In *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 Gummow and Callinan JJ at [26] outlined the steps required by the Tribunal in identifying a social group in a claim for refugee status:

At the outset it should be pointed out that the task of the Tribunal involves a number of steps. First the Tribunal needs to determine whether the group or class to which an applicant claims to belong is capable of constituting a social group for the purposes of the Convention. That determination in part at least involves a question of law. If that question is answered affirmatively, the next question, one of fact, is whether the applicant is a member of that class. There then follow the questions whether the applicant has a fear, whether the fear is well founded, and if it is, whether it is for a Convention reason.

9 If a claim is made of a well-founded fear of persecution by reference to an applicant's alleged membership of a particular social group then the Tribunal is bound to deal with that claim. Failure to deal with such a claim amounts to a failure to accord procedural fairness and a constructive failure to exercise jurisdiction and constitutes jurisdictional error: *Dranichnikov* at [24] (Gummow and Callinan JJ, Hayne J agreeing at [95]); *NAVK v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 124 at [29] (Nicholson and Edmonds JJ with whom Conti J agreed at [41]); *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [55] and [63] (Black CJ, French and Selway JJ).

10 An express claim need not be made of membership to a particular social group if the unarticulated claim is "squarely" raised or apparent on the material available to the Tribunal: *NABE* (Black CJ French & Selway JJ) at [58]; *SDAQ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 265 (Cooper J) at [19]. The claim must "arise sufficiently from the material as to require a reasonably competent Tribunal in the circumstances to appreciate its existence": *NAVK v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1695 at [15] (Allsop J).

11 However, an unarticulated claim that is raised on the evidence will not depend for its exposure on constructive or creative activity by the Tribunal: *NABE* (Black CJ French & Selway JJ) at [58]. The Tribunal is not required to consider a claim that is not expressly made or does not arise clearly on the materials before it: *NABE* at [61] (Black CJ, French and Selway JJ); *NAVK* at [15] (Allsop J).

12 Ultimately, the statutorily prescribed task of the Tribunal is "to assess the claims by reference to all the material, not to undertake an independent analytical exercise of the material for the discovery of potential claims which might be made, but which have not been,

and then subjecting them to further analysis to assess their legitimacy”: *NAVK* at [15] (Allsop J).

REVIEW BEFORE THE FEDERAL MAGISTRATES COURT

13 By way of amended application filed on 17 March 2011, the appellants made an application to the Federal Magistrates Court for review of the Tribunal’s decision with the following stated grounds of review:

Ground 1

The Tribunal committed jurisdictional error when it failed to properly identify, assess and address the applicants’ particular social group, being a former member of the nursing fraternity who resigned from the Fiji civil service, and who upon return will be persecuted and discriminated by the Fijian military regime. Instead, the Tribunal simply assessed the Applicant’s situation and return to Fiji as an economic hardship. The Tribunal has been procedurally unfair and made decision turned on unidentified social group ((CB 203) at [52]) instead of clearly identifying the social group and dealing with the relevant social group[s] the applicants were advancing (and ought to have provided the applicants proper opportunity to deal with that group).

Particulars

The [first] applicant is a former registered nurse who resigned from Fiji civil service because of opposition to the Fijian military regime. The current Fijian military regime has policies in place to discriminate and pressure returning residents who have claimed asylum abroad. The RRT decision turns on, inter alia, RRT not being satisfied on basis of being “a member of a particular social group” (CB 203 [52]) instead of dealing with a group being identified by the applicants (and first applicant in particular) instead of some perceived group or general population.

Ground 2

The Tribunal committed jurisdictional error when it failed to consider the applicants as female members of the family opposed to the Fijian military regime and who were particularly vulnerable.

Particulars

The first applicant is a female and opponent of the Fijian military regime and vulnerable to harm.

Ground 3

Not pressed

14 The social group identified by the appellants before the Federal Magistrate was defined as having the following attributes:

- indigenous Fijians;

- former government employees;
- holding views opposed to the governance by the unelected military government of Fiji;
- former government employees with a readiness to express opposition/opinions including imputed political opinion;
- a person previously taken into the military camp;
- female members of the group;
- members of Fiji Democracy and Freedom Movement (“FDFM”); and
- willingness to participate in FDFM meeting/activities.

15 The Federal Magistrate concluded that a claim based on the particular social group propounded by the appellants did not arise from the material before the Tribunal. The Federal Magistrate was of the view that the appellants had sought to construct a social group from characteristics common only to the first appellant. The Magistrate was of the view that the identification of the social group was artificial and self-serving and further that there was no evidence in any of the material before the Tribunal that the social group, as propounded by the appellants, existed in Fiji at the relevant time.

16 In essence, the Federal Magistrate rejected the appellants’ application for judicial review on the basis that there had been no constructive failure by the Tribunal to exercise its jurisdiction by failing to consider a claim made by the appellant on the basis of a particular social group as asserted. The judge determined that the circumstances presented to the Tribunal did not give rise for the need for any such consideration.

THE APPEAL TO THIS COURT

17 On 12 May 2011 the appellants appealed the decision of the Federal Magistrate with the following stated grounds of appeal:

GROUND OF APPEAL

1. His Honour erred when His Honour held that the Appellants had not advanced a social group

Particulars

The particulars in the grounds below is relied.

2. His Honour should have found that the Tribunal erred when the Tribunal failed to address the social group in accordance with the applicants claim. The Tribunal erred in its consideration of the social group. His Honour should have found that the Tribunal did not properly assess the social group.

Particulars

His Honour erred stating that such group did not arise; and His Honour should have found that the steps formulated in *Dranichnikov* [2003] HCA 26 were relevant in the matter.

3. His Honour erred in failing to address the social group in accordance with the well defined interpretation and failed address the proper social group and erred in failing to take into account all of the evidence before the Tribunal: *SZOYL v MIAC* [2011] FMCA 236 at [49] – [51]. The entirety of the evidence ought to have been taken from all the sources of evidence: *NAVK v MIMIA* [2004] FCA 1695 at [15] and therefore requires consideration of unarticulated social group which was tolerably clear from the material.

Particulars

His Honour erred stating that such group did not arise.

18 When the appeal was called on for hearing on 8 August 2011 the appellants did not appear. No request had been provided to the Court for a Fijian interpreter and it was confirmed that correspondence from both the Court and the respondents had been sent to the appellants advising of the date of the appeal. During a short adjournment, the appellants were contacted by the respondent’s solicitors via telephone and the appellants advised that they had forgotten the date. I determined to relist the matter so that the appellants could appear, which they did. When the hearing resumed, the appellants did not make any submissions of any substance to support their stated grounds of appeal.

19 The appellants’ grounds of appeal to this Court are somewhat confusing. They seem to be raising three matters. The first is that the Federal Magistrate should have identified the particular social group propounded by the appellants and have determined that it was capable of constituting a social group. Secondly, that the Magistrate should have found error in the Tribunal’s failure to identify a claim made by the appellant on the basis of membership of that social group. Thirdly, that the Tribunal failed to address that claim.

20 The Federal Magistrate’s finding that the particular social group advanced in submissions before him was not capable of constituting a social group, was only necessary to the disposition of the judicial review proceedings before him if the Federal Magistrate had

been satisfied that a claim based on that social group had been made to the Tribunal by the first appellant.

21 What was more germane to the disposition of the application before the Federal Magistrate was the question of whether the Tribunal should have considered a claim by the first appellant based upon her membership of the social group propounded before the Federal Magistrate. In my view, the answer to that question is that the Tribunal was under no obligation to consider any such claim. No such claim was expressly made. No such claim was squarely raised or apparent on the material available to the Tribunal. Whilst the attributes relied upon as the indicia for the social group were in the material before the Tribunal, they were recognisable as attributes of the first appellant only and not as indicia for a particular group. The material did not suggest the existence of a group of people with the particular attributes relied upon and distinguishable from Fijian society at large. That being the case, the Tribunal was under no obligation to consider such a claim.

22 As the Tribunal was under no obligation to address such a claim, the Federal Magistrate did not err in failing to identify a constructive failure by the Tribunal to exercise its jurisdiction by failing to identify and consider a claim made by the first appellant based on her membership of the social group.

23 These conclusions dispose of the second and third matters which are raised on the appeal. I need not deal with the first matter (whether the asserted social group was capable of forming a social group) as the finding made by the Federal Magistrate was unnecessary to the disposition of the judicial review proceedings before him.

DISPOSITION

24 As I have found no appealable error, the appeal must be dismissed. The appellants' should pay the costs of the Minister, including of the hearing on 8 August 2011 when the appellants failed to attend.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg.

Associate:

Dated: 11 August 2011