FEDERAL COURT OF AUSTRALIA

SZAFW v Minister for Immigration & Multicultural & Indigenous Affairs

[2004] FCAFC 173

MIGRATION – application for protection visa – whether appellant put claim to the Tribunal – whether Tribunal failed to consider appellant's claim – whether failure to consider appellant's claim amounts to jurisdictional error

Judiciary Act 1903 (Cth) s 39B
Migration Act 1958 (Cth)

Convention Relating to the Status of Refugees 1951

Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 75 ALD 630 applied
Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 197 ALR 389 cited
Minister for Immigration and Multicultural Affairs v Respondents S152/2003 (2004) 205 ALR 487 cited
Nguyen v Minister for Immigration and Multicultural Affairs (1998) 88 FCR 206 cited
SZAFW v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FMCA 446 discussed

SZAFW v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
N 1715 OF 2003

WILCOX, STONE & JACOBSON JJ
6 JULY 2004
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N 1715 OF 2003**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZAFW** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGES:	**WILCOX, STONE & JACOBSON JJ**
DATE OF ORDER:	**6 JULY 2004**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed;
2. The orders of the Federal Magistrate be set aside;
3. The decision of the Refugee Review Tribunal be set aside and the matter remitted to the Tribunal for rehearing and redetermination; and
4. The respondent pay the appellant's costs of this appeal and of the application to the Federal Magistrates Court.

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

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DATE:	**6 JULY 2004**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

THE COURT

1 This is an appeal from a decision of a Federal Magistrate who, on 13 October 2003, dismissed an application by the appellant under s 39B of the *Judiciary Act 1903* (Cth) in relation to a decision of the Refugee Review Tribunal ('Tribunal') (*SZAFW v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FMCA 443). In that decision the Tribunal determined that the appellant was not entitled to a protection visa under the *Migration Act 1958* (Cth) ('the Act'). The appellant alleges that the Tribunal, when considering her application for a protection (class XA) visa, made jurisdictional errors by failing to exercise jurisdiction in relation to two allegations of the appellant and by misconstruing criteria in the Act and the *Convention Relating to the Status of Refugees 1951* ('Convention').

BACKGROUND

2 The appellant is a citizen of Sierra Leone of Fullah ethnicity and Muslim religion. She is a widow with eight others in her family unit: two daughters, one son, two stepsons, a stepdaughter, an adopted daughter and a step granddaughter. She came to Australia on 13 October 2000 as part of Sierra Leone's Paralympics entourage.

3 The circumstances which the appellant claims give rise to a well-founded fear of persecution for a Convention reason date back to January 1999. At that time her husband was the Fullah chief and an Imam at the Fullah mosque in Freetown. He had friends who were members of a rebel group, the Revolutionary United Front ('RUF') although he was not himself a member. These people would seek his advice as an Imam, thus causing him to be identified with the RUF. In January 1999 the RUF rebels took over Freetown for about five weeks. During that time eight members of the RUF forced the appellant and her husband to allow them to stay in their home by threatening them with death.

4 After the rebels were driven out of Freetown on 18 February 1999, the appellant's house was identified by the government troops as a 'rebel house'. The appellant's house was burnt down, her husband was killed and her youngest daughter abducted. The appellant's neighbours physically harassed her as a rebel member and attacked her son with a machete. The appellant and her family fled from Sierra Leone and, on 20 February 1999, entered Guinea where they stayed in a refugee camp for about six weeks, the appellant returning to Sierra Leone on two or three occasions to look for her daughter.

5 The appellant travelled between various places in Guinea until she returned to Sierra Leone permanently in December 1999, settling in Conakry Dee. On one occasion she was recognised by people at the markets as the wife of the former Imam and was physically attacked, but managed to escape without harm. In her application for a protection visa the appellant said that at this time she had to mask herself by wearing a veil so that she could avoid recognition. The appellant also referred to general harassment by her neighbours and other civilians because they regarded her as a rebel sympathiser.

6 The appellant also made reference to a Mr Hassan Barrie, whom she described as her nephew. Mr Barrie had been a Minister in the former junta and had been tried and sentenced to death by the government forces. He escaped when rebels attacked the prison where he was being held. Later he returned to Freetown and took up his former position as an electrical engineer. The appellant is concerned that she will be a target for retribution by the current Kabbah government because of her association with Mr Barrie.

THE TRIBUNAL'S DECISION

7 The Tribunal considered the appellant a credible witness, stating that 'the overall

impression the Tribunal gained [was] that the applicant's account of what happened to her was, to the best of her recollection, accurate.' In the absence of any indication to the contrary, this statement should be treated as indicating the Tribunal's acceptance of the appellant's evidence that she had been harassed by non-government people particularly, perhaps especially, by her neighbours. The Tribunal accepted that the appellant had suffered because of the pro-rebel opinions that had been imputed to her as a result of the association she and her husband had with the rebels and because of her association with her nephew who was charged with collaborating with the rebels.

8 Despite this, the Tribunal rejected the appellant's claim for refugee status because it found that the situation in Sierra Leone had been steadily improving over the past two years. It found that a reconciliation process had been underway for a considerable time and that former combatants of the RUF had been disarmed and re-integrated into normal society. The Tribunal commented that, apart from several incidents of verbal abuse and one minor physical attack, the appellant had not suffered harm in Sierra Leone since February 1999. She was able to reside in the country between December 1999 and October 2000 without experiencing harm and was able to travel to Australia under her own name, using her own passport, without any apparent difficulty.

9 The Tribunal found that the appellant's nephew was no longer of adverse interest to the government. The Tribunal noted that he was not executed, and, in fact, had returned to his profession as an engineer in 2000. The Tribunal also referred to evidence that the leader of the RUF, Johnny Paul Koroma, was at liberty and had been a candidate in the May 2002 presidential elections. The Tribunal reasoned that if Mr Koroma was not of interest to the Sierra Leone government the same would be true of the appellant's nephew and consequently the appellant would not be targeted by the Kabbah government because of her relationship with him.

10 The Tribunal concluded that should the appellant return to Freetown she would not now, nor in the reasonably foreseeable future, be at risk of persecution, therefore her fear of persecution was not well-founded. Because its conclusion was based on the change in circumstances in Sierra Leone, the Tribunal held that it was not necessary to consider the appellant's additional claim that her situation would be exacerbated by the lack of protection by a male family member.

APPEAL BEFORE THE FEDERAL MAGISTRATES COURT AND THIS COURT

11 The grounds of appeal put before this Court mirror the grounds put before the Federal Magistrate. Those submissions may be summarised as follows:

1. The Tribunal failed to consider all the contentions put by the appellant. Specifically, the appellant claimed that the Tribunal did not consider her claim to have a well-founded fear of persecution arising from:
    a. her husband's association with the rebels; and
    b. the fact that she is a woman without male protection.
2. The Tribunal incorrectly construed the criteria prescribed by the Act in relation to her ability to remain safely in Sierra Leone by implicitly dismissing her claim to have a well-founded fear of persecution on the basis that she could remain in hiding and under disguise or, in the alternative, by failing to take into account the appellant's claim that she could only remain in Sierra Leone in disguise.
3. The Tribunal erred in limiting its examination of the consequences of the appellant's relationship to Mr Barrie to the year 2002; the Tribunal did not consider the consequences of this relationship in the 'reasonably foreseeable future', as required by the Convention.

FAILURE TO CONSIDER THE APPELLANT'S CLAIMS

Appellant's Husband's Association with the Rebels

12 The learned Federal Magistrate outlined the appellant's claims at [6], [8]:

> *'The applicant claims that the Tribunal's decision discloses no reference to, or consideration of, the applicant's claim to fear persecution because of her husband's association with rebels … The applicant argues that in failing to consider whether the applicant was a member of a social group comprising family members or spouses of rebel advisers or spiritual leaders or persons perceived to be such, it failed to consider the most substantive aspect of the applicant's claim to have a well-founded fear of persecution. She argued that instead of considering her as the spouse of a person with rebel associates, who was actually killed for those connections in February 1999, it had only considered her as a person who for one isolated period was forced to accommodate rebels in her home. She argues that the Tribunal looked at the beating up she received in Conakry Dee as an isolated and not serious incident. Whereas she would argue that it was corroboration of her claim that she could be the subject of persecution because she had been the wife of a person who had been reputed to be associated with the rebels.'*

13 In oral submissions before this Court, Mr Braham denied that this submission was

'nitpicking' and directed the Court to the Tribunal's identification of the key elements of the appellant's claims before the Tribunal. Specifically the Tribunal stated:

> *'Your late husband was the Fullah chief in Freetown and was an Imam at the mosque. He had friends who were in the RUF and though he was not in the RUF himself, these people used to seek his advice.'*

14 According to Mr Braham it was the Tribunal's identification of this point as a 'key element' of the appellant's claim and its subsequent failure to deal with the claim that gives rise to a jurisdictional error. Mr Braham submitted that the Tribunal limited its consideration to whether the appellant might face persecution because of accommodating RUF rebels in her home for a five week period three years ago, and did not consider her husband's prior and longer association – an association which, Mr Braham contended, resulted in pro-RUF political opinions being attributed to the appellant. It was submitted by the appellant that this distinction is material as the Tribunal concluded that the appellant had no well-founded fear of persecution on the basis of imputed RUF opinion as her association with the rebels was 'sufficiently brief and sufficiently in the past as to no longer set her apart from the population at large'. The appellant submitted that this description of her association with the rebels was only apposite to describe the five week period in 1999 when the appellant housed the rebels, and that the Tribunal's conclusion may have been different had it taken into account the much longer period with which her husband had been associated with the rebels.

15 In both the Federal Magistrates Court and this Court, the respondent argued that the appellant did not initially claim that her association with her husband was something that accentuated the likelihood that she would be suspected of supporting the rebels. The respondent submits that, on the contrary, the appellant emphasised that the only conduct her husband was engaged in was giving advice to the rebels, some of whom were old friends. Thus, the respondent concluded, the appellant's references to her husband were made to demonstrate that even the briefest contact with the rebels could lead to harm. Rather than arguing that she was put at risk by her association with her husband, the appellant had invited the Tribunal to extrapolate from the difficulty that his remote connection with the rebels had caused him to her own circumstances. The respondent submitted that this submission misconstrues the appellant's initial application and is merely an attempt to circumvent the Tribunal's reasoning.

16 The Federal Magistrate accepted the respondent's submission stating at [10]:

> *'There is nothing in* [the appellant's] *submission* [to the Tribunal] *which suggests that her fear is based upon her being the widow of an imputed rebel sympathiser. … her fear does appear to be based upon rebel sympathies imputed to her. But perhaps this is a distinction without a difference. Her fear is of persecution by persons either in the government, or whom the government would not prosecute, who wish to avenge themselves upon the rebels and those persons associated with them. Does it matter whether she is associated with the rebels because of her husband or because of an opinion that is imputed to her directly? The fear is the same, the persecution would be the same.'*

17 If the respondent's submission is correct and the appellant did not claim that her association with her husband accentuated the risk of her being persecuted for an imputed political opinion then, as Kirby J expressed it in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 205 ALR 487 ('*S152*') at 520, at [123] this would be simply,

> *'another case where persons who failed before the tribunal on the merits, sought to re-canvass factual findings in an impermissible way and to argue their claim for judicial review in a matter significantly different from the argument advanced before the tribunal.'*

For reasons explained below, however, we do not accept this submission.

18 In her initial application for a protection visa, the appellant had written:

> *'Even if you are only seen with someone who is accused of being a rebel can* [sic] *get your life in to danger.*
> …
> *My husband was a tribal chief, he was accused of being the rebel sorcerer, just because people came to him for advice, as he was well verse* [sic] *in the Koran,* ***as such he was hated for that, and he was killed for that.'*** (emphasis added)

19 The Minister's delegate realised the appellant made a claim of connection with the rebels that extended beyond their short occupation of her house. In itemising the appellant's claims, the delegate stated:

> *'The applicant is a 44 year old woman of Fullah ethnicity and a Muslim. The applicant claims that her husband* [name omitted] *was the Fullah chief in Freetown and one of the Eman in the Fullah mosque and was sought after by many people for general and spiritual advice.* ***Her husband had many old friends who joined the rebels****. These people were often seen in the family's company.'* (emphasis added)

The delegate also recorded a claim by the appellant that, when she visited a market in Conakry Dee, she was 'identified by a group of women and accused of being the wife of a rebel'. She also claimed that 'the government forces knew who she was because her husband

had been well known and popular'.

20 Contrary to the submission of counsel for the respondent, the appellant had not merely invited the Tribunal to draw an analogy between what counsel called the husband's 'remote connection' with the rebels and her own connection arising out of the fact that eight rebels forcibly occupied her home for a five week period in early 1999. She had actively and repeatedly asserted an earlier, and longer-lasting, connection between her husband and the rebels which had given her the reputation of being the wife of a rebel and had led to her being physically attacked. The appellant was not simply presenting the facts and leaving it to the tribunal 'to search out, and find, any available basis which theoretically the Act provides for relief'; *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 per Kirby J at 405, at [78]. When questioned about her connection with the rebels, her persistent and repeated assertion was that her husband was involved with the rebels through his role as their friend and spiritual adviser and that she was a wife of someone connected to the rebels.

21 Nowhere did the Tribunal consider that part of the appellant's claim that was based on her husband's longer-standing relationship with the rebels. Although this would have been a matter for the Tribunal to determine, if it had addressed this claim, there is arguably a significant qualitative difference between an association with the rebels because of one's house having been temporarily taken over by them and an earlier long-lasting voluntary association. People who knew or believed that the rebels occupied the appellant's home by force would not necessarily have assumed that the appellant and her husband were rebel sympathisers. However, people who knew the appellant's husband had friends amongst the rebels and had advised them from time to time might readily have imputed sympathy for the rebels' cause to both the husband and the appellant. In our opinion, the Tribunal was obliged to address the question whether hostility, on the latter account, to the appellant, by ordinary people as distinct from government, had abated to the point that it no longer posed a real chance of persecution of the appellant by such people.

22 In the comments quoted at [16] above, the Federal Magistrate asked rhetorically, 'does it matter' whether the appellant's fear derives from her being the widow of an imputed rebel sympathiser or from rebel sympathies imputed directly to her. That is, would it be futile to remit the matter to the Tribunal even in light of the above failure on the part of the

Tribunal; *Nguyen v Minister for Immigration and Multicultural Affairs* (1998) 88 FCR 206 at 213-14. If the Tribunal only had to be satisfied that an adverse political opinion was imputed to her then the question might well be answered in the negative. But that is not sufficient; the Tribunal must be satisfied that the fear is 'well-founded'. In assessing the basis of the appellant's fear, the source of the persecution and the reasons why those responsible for it would impute an adverse political opinion to the appellant are highly relevant.

23 The Tribunal accepted that pro-RUF opinions had been imputed to the appellant. In assessing the appellant's situation, however, the Tribunal did not consider the extent to which, if at all, the appellant was at risk of persecution from non-government sources by virtue of having been married to a man who had been executed because he was regarded as a rebel sympathiser.

24 The Tribunal found the situation in Sierra Leone 'has been steadily improving over the past two years, to the extent that the civil war has now been over for some five months'. The Tribunal described the reconciliation process that had been put in place. These statements about improvements in the Sierra Leone situation were findings of fact. Similarly the Tribunal's findings referred to in [9] above are not vulnerable to attack in this Court. Accordingly, they must be accepted as providing a legally unimpeachable answer to the appellant's claims, provided they were applied by the Tribunal against the whole of those claims.

25 In our view, however, the Tribunal did not do this but confined the appellant's claim of non-government persecution to the consequences of the rebel's occupation of her house. This is evident from the following paragraph in the section of the Tribunal's reasons headed 'Findings and Reasons':

> *'In these circumstances, the Tribunal finds that the applicant would not be at risk of persecution* ***on the basis of her having been forced to accommodate RUF rebels more than three years ago****, should she return to Freetown, either now or in the reasonably foreseeable future. In these circumstances, it is not necessary to consider whether or not the applicant would be without the protection of a male family member, and, if so whether such lack of protection would exacerbate her situation.'* (emphasis added)

26 In the following paragraph, the Tribunal referred to the position in neighbouring Liberia and commented:

> *'Even if events in Liberia were to result in fighting in Sierra Leone, the Tribunal considers that the applicant's association with the RUF was sufficiently brief and sufficiently in the past as to no longer set her apart from the population at large and make her a target for action on the basis of her perceived political opinion.'*

The words 'sufficiently brief' appear to refer to the five week period in early 1999 during which the rebels occupied the appellant's house.

27 In *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 75 ALD 630 ('*WAEE*') the Full Court commented at 640-641, at [45]:

> *'If the tribunal fails to consider a contention that the applicant fears persecution for a particular reason which, if accepted, would justify concluding that the applicant has satisfied the relevant criterion, and if that contention is supported by probative material, the tribunal will have failed in the discharge of its duty, imposed by s 414, to conduct a review of the decision. This is a matter of substance, not a matter of the form of the tribunal's published reasons for decision.'*

28 The Full Court held, at 642, at [52], that such a failure amounted to jurisdictional error. Accordingly, we are of the opinion that the Tribunal fell into jurisdictional error in this case. That being so, the Federal Magistrate erred in dismissing the appellant's application for judicial review.

29 Having regard to that conclusion, it is unnecessary for us to deal with the other grounds of appeal. The appeal should be allowed. The decision of the Federal Magistrate should be set aside and, in lieu thereof, it should be ordered that the decision of the Tribunal be set aside and the appellant's application for review remitted to the Tribunal for rehearing and redetermination.

I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Wilcox, Stone and Jacobson.

Associate:

Dated: 6 July 2004

Counsel for the Appellant:	Mr P Braham
Solicitor for the Appellant:	Ms J Downie, Law Society of NSW
Counsel for the Respondent:	Mr R Beech-Jones
Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	27 February 2004
Date of Judgment:	6 July 2004