

FEDERAL MAGISTRATES COURT OF AUSTRALIA

MZXBP v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 77

MIGRATION – Failure of Refugee Review Tribunal to deal with critical and discrete claim – failure went to jurisdiction – Tribunal’s decision set aside.

Migration Act 1958

NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No.2) [2004] FCAFC 263

M51 of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 887

M55 v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 131

VUAV v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 1271

SZEFN v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 78

Minister for Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

NADR v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 167

Applicant:	MZXBP
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	MLG 1048 of 2005
Judgment of:	O’Dwyer FM
Hearing date:	13 April 2006
Delivered at:	Melbourne
Delivered on:	2 February 2007

REPRESENTATION

Counsel for the Applicant: Mr Gilbert

Solicitors for the Applicant: Victoria Legal Aid

Counsel for the Respondent: Ms Costello

Solicitors for the Respondent: Phillips Fox

ORDERS

- (1) The name of the first respondent be amended to read, “Minister for Immigration and Citizenship”.
- (2) The decision of the Refugee Review Tribunal made on 12 July 2005 be set aside.
- (3) The matter be remitted to the Tribunal for determination according to law.
- (4) The first respondent pay the applicant’s costs.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

MLG 1048 of 2005

MZXBP
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. By an amended application filed on 3 February 2006, the applicant seeks to review a decision of the Refugee Review Tribunal (the Tribunal) made on 12 July 2005, which affirmed an earlier determination by the first respondent's delegate to refuse the applicant a protection visa.
2. The applicant claims that the Tribunal's decision was affected by jurisdictional error and set out four grounds giving particulars of that jurisdictional error. In written contentions of fact and law and also at the hearing, the applicant abandoned one of those grounds; that being the ground alleging a breach by the Tribunal of its obligations under s.425 of the *Migration Act 1958* (the Act). The three other grounds can be summarised as follows:
 - a) that the process embodied in s.424A of the Act was engaged, but the Tribunal failed to comply with that process in that the reason,

or part of the reason, for the Tribunal's decision was based upon information contained in the applicant's original application for a protection visa but which was not adopted or republished for the purposes of the application for review to the Tribunal;

- b) that there were a number of factual errors made by the Tribunal, which were said to go to jurisdiction; and
- c) that there was a failure by the Tribunal to deal with a discrete aspect of the applicant's claims which amounted to jurisdictional error.

Background

- 3. The applicant claims to be a citizen of Sri Lanka. He arrived in Australia on 27 May 2004. On 9 July 2004, he lodged an application for a protection (class XA) visa with the first respondent, which was accompanied by a supporting statutory declaration.
- 4. His application for the visa was refused on 10 December 2004 by a delegate of the first respondent.
- 5. On 11 February 2005, the applicant applied to the Tribunal for review of the delegate's decision.
- 6. Relevantly, in a submission dated 9 May 2005, the applicant's then migration advisors provided to the Tribunal a statutory declaration signed by the applicant. In that statutory declaration, the applicant stated:
 - 1. *I am making this statement in order to support my claims already on record, in relation to persecution that I will face if I return to Sri Lanka. My previous claims remain true and relevant to my current claims as a refugee.*
- 7. A hearing took place before the Tribunal on 12 July 2005 at which the applicant gave oral evidence.
- 8. Under the heading "Findings and Reasons" the Tribunal did not accept:

- a) that the applicant was a Provisional Organiser for the United National Party (UNP);
 - b) that the applicant was seen as a political worker for the UNP;
 - c) that the applicant was a prominent UNP personality;
 - d) that the two incidents occurred where he claimed that he was assaulted and otherwise mistreated in September and November 2003;
 - e) that his mother received threatening telephone calls after he left Sri Lanka; and
 - f) that errors in translation accounted for discrepancies in his account as to the timing of two incidents relating to where he was employed at the time, the order of his employment, and whether he complained to police.
9. It is fair to say that the Tribunal found that his credit was in issue because of the inconsistencies between matters raised in his application for a protection visa and his inability to explain those inconsistencies at the hearing.

Failure to deal with the applicant's claim

10. Of the three grounds set out above, it was the Tribunal's failure to deal with a discrete and critical claim which, in my view, amounts to a jurisdictional error on the Tribunal's part justifying the remedy sought by the applicant.
11. The applicant contended that the Tribunal failed to consider a matter that was clearly raised on the material and by that failure had committed a jurisdictional error (see *NABE v Minister for Immigration & Multicultural & Indigenous Affairs* (No.2) [2004] FCAFC 263).
12. In that regard, the applicant contended that the Tribunal failed to deal with the applicant's claim that his friend was murdered in circumstances where the friend had a similar role and profile to the applicant within the UNP, and where that friend was associated with

him because he had helped the applicant after he was beaten by attackers on one occasion.

13. It was conceded by the applicant that in a recitation of the facts and circumstances under the heading “Claims and Evidence”, and indeed during the conduct of the hearing, the question of the applicant’s friend was raised. However, in the “Findings and Reasons” section of the decision the matter of the friend was not considered, nor a finding given in relation to this evidence.

14. The applicant contended that this was a significant failure on the part of the Tribunal and it was the one that was recognised in the matter of *M51 of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 887. In that case Ryan J said:

26. *The available inference from the Tribunal’s failure to make any finding on the applicant’s claims relating to the death of his colleagues is that, given its duty under s 430 to record its findings on all matters it considers material, it did not consider the alleged deaths material to the case before it: Yusuf per Gleeson CJ at 330-1 [5], and per Gaudron J at 338 [35]. In my view, a Tribunal informed by a proper understanding of the law could not have considered that such a claim, if true, was not material to the question it was required by the Act to address, being whether the applicant had a well-founded fear of persecution. I consider, therefore, that the failure to make a finding on this issue indicates that the Tribunal did not ask itself the right question and thereby fell into legal error.*

15. The applicant contended that the claim in relation to his friend was not simply a piece of evidence. The circumstances of his friend went to support the central theme of the applicant’s claim; namely, that people in his position within the UNP were at risk. The applicant contended that it also went to the applicant’s case directly, because the friend had helped him on one occasion following an attack on the applicant. At the Tribunal hearing, the applicant had supported his claim by evidence; namely the photographs of the funeral of his friend, and the recent news item in the *Divania* dated 8 May 2005, which reported the killing of an organiser.

16. The applicant contended that his own position fell squarely within the four corners of *M51*. It is fair to say that the facts and circumstances in *M51* and the case before me are very similar. Further, notwithstanding the fact that the Tribunal canvassed in the evidence section of its reasons for decision the issue of the friend and the circumstances of his death, it did not see fit to consider those matters of such material significance as to make findings of fact.
17. The first respondent in reply to this contention argued that it is an attack on the fact finding processes of the Tribunal rather than an argument going to jurisdiction. In the alternative, the first respondent argued that any non-consideration of this particular evidence is not a failure to consider a separate and distinct claim and therefore no jurisdictional error has been committed.
18. In my view, it is evident that the applicant, in putting his case to the Tribunal, required the Tribunal to put substantial weight on the facts and circumstances of his friend's death. This was in the context of the applicant putting his case that he was at risk of persecution because someone with his low profile within the UNP, such as his friend, was persecuted and suffered the ultimate price for his political belief. That person not only had a similar political profile as the applicant, but was also someone with whom the applicant was associated.
19. In my view, it was a material and significant aspect of the applicant's case that his profile and his involvement with the UNP was similar to that of his deceased friend. It was important and material for the Tribunal to evaluate the significance of his friend and the circumstances of his friend's death in the context of the case as put by the applicant for a protection visa.
20. It is not simply enough to refer to the friend in the "Claims and Evidence" section of the decision and not in the "Findings and Reasons" section where I consider that it was encumbered upon the Tribunal to make an appropriate finding.
21. The factual circumstances of *M51* are very similar to the case before me. I am bound by *M51* and having regard to the competing contentions, I am of the view that there has been a failure by the

Tribunal to consider a critical and discrete claim by the applicant, which goes to jurisdiction.

The other two grounds

22. In respect of the remaining two grounds, because of my finding above, I need not consider them. Suffice to say, I was not persuaded of the merits of either.
23. In respect of the contention centred on the s.424A process, I am satisfied that the applicant specifically adopted the information contained in his protection visa application for use in his application for review by the Tribunal. The applicant's contention about whether information contained in responses to standardised questions in the visa application form was not adopted, as opposed to additional information contained in further material filed with the pro forma application, was in my view unsustainable and denied the reality of the situation (see *M55 v The Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA131, *VUAV v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1271, and *SZEFN v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 78).
24. In respect of the contention that the Tribunal had made errors of fact that went to jurisdiction, I simply say that there were no such errors of fact obvious from the decision. They are not, in my view, errors that amount to a misunderstanding or misconception of the facts that led to a failure to consider a claim (See *NABE, Minister for Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 and *NADR v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 167).

Conclusion

25. Whilst I am not persuaded that the ground based upon an alleged failure to comply with s.424A of the Act or the other ground that there were material errors of fact that went to jurisdiction have been made out, I am satisfied that the Tribunal failed to consider a material claim clearly raised before it in its findings and reasons.

26. The decision of the Tribunal should be set aside and the matter remitted to Tribunal for determination according to law.

I certify that the preceding twenty-six (26) paragraphs are a true copy of the reasons for judgment of O'Dwyer FM

Associate: Marlene Dixon

Date: 1 February 2007