

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZQEP v MINISTER FOR IMMIGRATION & ANOR [2011] FMCA 548

MIGRATION – Review of decision by Refugee Review Tribunal – whether Refugee Review Tribunal’s decision affected by jurisdictional error – whether Refugee Review Tribunal considered the Applicant’s claims cumulatively.

Judiciary Act 1903 (Cth), s.39B

Migration Act 1958 (Cth), ss.5(1); 36(2); 65(1); 65(1)(b); 91R; 474; pt.8 div.2

SZGUW v Minister for Immigration and Citizenship [2008] FCA 91

Applicant: SZQEP

First Respondent: MINISTER FOR IMMIGRATION & CITIZENSHIP

Second Respondent: REFUGEE REVIEW TRIBUNAL

File Number: SYG 827 of 2011

Judgment of: Emmett FM

Hearing date: 18 July 2011

Date of Last Submission: 18 July 2011

Delivered at: Sydney

Delivered on: 18 July 2011

REPRESENTATION

Solicitors for the Applicant: Mr Farid Varess (Fragomen)

Counsel for the Respondent: Mr Tim Reilly

Solicitors for the Respondent: Ms Michelle Stone (DLA Piper)

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY**

SYG 827 of 2011

SZQEP
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

**EX TEMPORE
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 March 2011 and handed down on 31 March 2011.
2. The applicant claims to be a citizen of Sri Lanka and a Jaffna Tamil from Manipay Northern Jaffna Peninsula who has been living in Colombo for the last 15 years (“**the Applicant**”).
3. The issue is whether the Tribunal considered the Applicant’s claims commutatively in affirming the decision under review. This issue is considered below in the context of considering whether the Tribunal’s decision is affected by jurisdictional error.

4. Prior to considering the proceeding before this Court, these Reasons provide the relevant procedural background, a summary of the legislative framework, a summary of the Applicant's protection visa application claims and the decision of the delegate of the First Respondent ("**the Delegate**") and a summary of the Tribunal's review and decision.

Background

5. The Applicant arrived in Australia on 13 June 2010 having departed legally from Sri Lanka on a passport issued in her own name and a 679 family sponsored visitor visa.
6. On 14 October 2010, the Applicant lodged an application for a Protection (Class XA) visa with the Department of Immigration and Citizenship ("**the Department**") under the Act.
7. On 9 November 2010, the Delegate refused the Applicant's application for a protection visa.
8. On 22 November 2010, the Applicant lodged an application for review of the Delegate's decision by the Refugee Review Tribunal.
9. On 31 March 2011, the Tribunal affirmed the decision of the Delegate not to grant a protection visa.
10. On 29 April 2011, the Applicant filed an application in this Court seeking judicial review of the Tribunal's decision.

Legislative framework

11. 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 s.65(1)(b) mandates that the visa application is to be refused.
12. 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 (“**the Convention**”).

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, 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 of the Act expands on the notion of persecution and serious harm when considering Article 1A(2) of the Convention.

The Applicant’s application for a protection visa

15. The Applicant provided a statement in support of her protection visa application in which she claimed that:
- a) She is a Jaffna Tamil by ethnicity.
 - b) In 1983, her house was shell-attacked and her leg injured during altercations between the Sri Lankan security force and Tamils.
 - c) She is married and her husband is presently residing in Colombo in Sri Lanka.
 - d) In 1987, fighting erupted between Indian Peace Keeping Force (“**IPKF**”) and the Liberation Tigers of Tamil Eelam (“**LTTE**”) in Sri Lanka.
 - e) In 1988, an LTTE member entered her house to escape from the IPKF. The IPKF suspected her whole family of being supporters of the LTTE. The IPKF soldiers mistreated and beat her. The IPKF soldiers took her brothers to a camp and detained them for one week.

- f) In 1991, Sri Lankan security forces attacked the Applicant's village and again her house was damaged.
- g) During the 1990s, the Applicant's brothers fled Sri Lanka because of their involvement with the LTTE. One of her brothers assisted the LTTE with food parcels and another helped injured LTTE soldiers through his work at a hospital. Also during this period, the police visited her husband's shop and questioned him several times. In addition, the majority of the people where her and her husband lived, suspected them of having connections with the LTTE.
- h) Sri Lankan authorities suspected that young Tamil males and females from Jaffna were supporters of the LTTE movement. She was checked and detained on the road side on several occasions, and the police came to inspect her home many times.
- i) In 1993, the Applicant and her husband moved to Colombo because the Sinhalese suspected the Applicant and her family may have connections with the LTTE.
- j) In February 2010, she was threatened by her brother's wife as a result of her involvement in a dispute relating to her brother's marriage. Her brother's wife had connections to a group which was known to be responsible for abducting, killing and extorting money from Tamil people, and she threatened to inform that group that the Applicant was a supporter of the LTTE and to have the Applicant killed by members of that group.
- k) She became very worried and organised for another of her brothers, who lived in Sydney, to make arrangements to sponsor her to come to Australia.
- l) She learnt that on 19 June 2010 a group of armed men had entered her house in Sri Lanka and questioned her husband of her whereabouts. They warned her husband not to tell her or the police about the incident. The Applicant claimed that this incident occurred because of her involvement in arranging the unhappy marriage of her brother and her sister in law's family's involvement with the EPDP (a paramilitary group working with

the Sri Lankan government forces) and the sister in law's threat to tell the EPDP of the Applicant's brothers' support of the LTTE.

The Delegate's decision

16. On 28 October 2010, the Applicant attended an interview with the Delegate.
17. On 9 November 2010, 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 Convention.

The Tribunal's review and decision

18. On 19 November 2010, the Applicant lodged an application for review of the Delegate's decision by the Tribunal.
19. On 22 December 2010, the Tribunal wrote to the Applicant informing her that the Tribunal had considered the material before it but was unable to make a favourable decision on that material alone. The letter invited the Applicant to attend a hearing on 18 February 2011 to give oral evidence and present arguments.
20. On 31 January 2011, the Applicant wrote to the Tribunal providing further information about her case. The Applicant referred to her feared harm if she was to return to Sri Lanka from the EPDP. The Applicant claimed that her sister-in-law's family was connected with the EPDP and that her sister-in-law's marriage with the Applicant's brother had ended unhappily. The Applicant claimed that her brother was involved in assisting the Tamil's Rehabilitation Organisation ("TRO") in shipping goods to the LTTE to the Vanni region in Sri Lanka. The Applicant claimed that the sister-in-law's uncle was connected with the EPDP and that the sister-in-law and her uncle would inform the EPDP of the Applicant's brothers' support of the LTTE and the Applicant's association. The Applicant claimed that the Sri Lankan government was condoning attacks by the EPDP against persons associated or suspected of being associated with the LTTE.
21. On 18 February 2011, the Applicant attended the Tribunal hearing and gave evidence.

22. On 19 February 2011, the Applicant wrote to the Tribunal confirming that the armed people whom she alleged came to her house in Colombo after she had left for Australia were from the EPDP and that she continued to fear harm because she is a Tamil ethnic if she was to return to Sri Lanka.
23. On 8 March 2011, the Tribunal wrote to the Applicant identifying information that may form part of the reason for affirming the decision under review, explaining its relevance and inviting the Applicant to comment upon it (“**the s.424A Letter**”). The s.424A Letter gave the Applicant information provided by her brother in support of her visitor’s visa application which stated that the Applicant’s husband’s business was thriving in Colombo and that the Applicant has not had any problems in Colombo and would not seek to apply for a protection visa in Australia. The s.424A Letter informed the Applicant that this information was relevant because it may cause the Tribunal to find that the Applicant and her husband had continued to reside in Colombo throughout the war in relative peace even though her brothers had left Sri Lanka in 1998. The letter stated that such a finding may mean that the Tribunal would not be satisfied that there is a real chance that the Applicant would face persecution if she was to return to Sri Lanka because of her brothers.
24. On 21 March 2011, the Tribunal received the Applicant’s response to the s.424A Letter. The Applicant’s response referred again to her claim of a fear of harm from the EPDP because of her sister-in-law’s family connections with the EPDP and her sister-in-law’s wish to seek revenge against the Applicant because of her involvement in the marriage of her brother by using the sister-in-law’s uncle’s involvement with the EPDP.
25. The Tribunal noted that it had before it the Department’s file, the Delegate’s decision record and other materials available to it from a range of sources.
26. The Tribunal set out in full the Applicant’s claims in support of her protection visa application and the Applicant’s further claims set out in her letter dated 31 January 2011.

27. The Tribunal explored the Applicant's claims with her at a hearing and put to her various concerns it had about those claims and noted the Applicant's responses.
28. The Tribunal also took evidence from the Applicant's brother who confirmed the Applicant's claims of a fear of harm from the EPDP by reason of the sister-in-law's family connection with the EPDP and her wish to take revenge on the Applicant and her family for the breakdown of her marriage to one of the Applicant's brothers. In particular, the Tribunal noted that it put to the Applicant's brother the information provided by him in support of her tourist visa application that the Applicant did not have any major problems in Sri Lanka and noted the Applicant's brother's responses.
29. The Tribunal expressed its concern both to the Applicant and her brother that her claims of fear of harm by the EPDP, even if accepted, may not be Convention related.
30. Following the Tribunal hearing, the Tribunal noted the two further letters it received, dated 31 January 2011 and 19 February 2011, further expanding on the Applicant's claims.
31. In its decision record, the Tribunal set out in full the text of its s.424A Letter dated 8 March 2011 and the Applicant's response dated 18 March 2011.
32. The Tribunal found the Applicant's claims made in support of her protection visa application to be "*vague and difficult to believe*". The Tribunal found the Applicant's response to its concerns about the information in the Applicant's tourist visa application that she had lived in Colombo for 15 years without problems, to be evasive and lacking in detail.
33. The Tribunal found that the Applicant's evidence and material and that of her brother suggested that the Applicant did not have any problems with the LTTE whilst living in Colombo even at the height of the war.
34. The Tribunal considered the Applicant's subsequent claim of a fear of harm because of the conduct of the sister-in-law and the sister-in-law's family involvement with the EPDP and that a group of armed men had entered her house on 19 June 2010 looking for her and her husband.

The Tribunal expressed concerns about the timing of these claims. In particular, the Applicant's claim that her brother had been involved with the TRO in shipping goods to the LTTE in Sri Lanka, and the omission by the applicant in her protection visa application of these further claims. The Tribunal noted that these claims were only made after the Department had rejected her case. The Tribunal was concerned that these claims were "*the only tangible and remotely current accusations that the applicant suggested (the sister in law) could provide to Sri Lankan authorities.*" The Tribunal found that such conduct would presumably be utmost in the Applicant's mind and included in her protection visa application if true. The Tribunal found the information provided at the Tribunal stage to be "*not convincing*". The Tribunal did not accept the Applicant's explanation that she had forgotten.

35. Ultimately, the Tribunal rejected the Applicant's claims that the sister-in-law had told her uncle or the EPDP that the Applicant's brother was involved with the LTTE or involved in assisting the TRO to ship goods to the LTTE in Sri Lanka, or that the Applicant is LTTE.
36. The Tribunal noted the Applicant's brother's claim that the Applicant's fear of persecution was made out because all her brothers had left Sri Lanka. However, the Tribunal was not persuaded on the basis that the Applicant had continued to reside in Colombo with her husband in relative peace throughout the war even though her brothers had departed Sri Lanka in 1998. For that reason, the Tribunal was not satisfied that there was a real chance that the Applicant would face persecution because of her brothers if she were to return to Sri Lanka.
37. The Tribunal also noted the Applicant's claim of a fear of persecution in Sri Lanka because of her Tamil ethnicity. However, the Tribunal found that, other than an incident in November 2010 involving a Tamil male missing from Colombo, all other material provided by the Applicant referred to incidents occurring outside Colombo. The Tribunal found that it was appropriate to consider the Applicant's situation on the basis that she would return to Colombo where she had lived for over 15 years.
38. Given that the Applicant and her husband had continued to live in Colombo in relative peace throughout the war, and that the war has

been over since May 2009, there was not a real chance that the Applicant would face persecution in the reasonably foreseeable future simply because she is a Tamil.

39. Accordingly, the Tribunal affirmed the decision under review.

The proceeding before this Court

40. The Applicant was represented before this Court by her solicitor, Mr Varess.

41. Mr Varess confirmed that the Applicant relied on Ground 1 only in the application filed on 29 April 2011. Mr Varess confirmed that the Applicant withdrew Ground 2 of the application. Ground 1 is as follows:

“1. The Tribunal fell into jurisdictional error by failing to consider the applicant’s claims cumulatively.

Particulars

a. The applicant presented a series of individual claims.

b. The applicant also claimed that “all these matters taken together will lead to [her] being mistreated for reasons of race and imputed political opinion”.

c. By failing to consider the applicant’s claims cumulatively, the Tribunal fell into jurisdictional error. ”

Ground 1

42. Mr Varess contended that the Applicant had made 5 claims which the Tribunal had considered individually, despite the Applicant’s request that it have regard to all her claims and had failed to consider the Applicant’s claims cumulatively.

43. **The first claim** contended for by Mr Varess, was that the Applicant claimed that pressure was put on her by Tamil groups when she was a school girl to join the Tamil movement. She refused. The Applicant completed her schooling in 1981. Mr Varess conceded that the Applicant did not make a claim identifying from whom she feared

persecution as a result of any pressure and that this claim was not further articulated by the Applicant in support of her protection visa application as substantiating a fear of persecution for a Convention related reason.

44. In the circumstances, I do not accept that the assertion by the Applicant of pressure as a school girl to join Tamil groups is anything other than historical background that does not articulate a claim of fear of persecution for a Convention related reason.
45. **The second claim** related to the Applicant's assertions of past harm in Jaffna. Mr Varess identified that harm as the shelling attack in 1983, the incident in 1988 where the IPKF suspected her family of hiding a LTTE soldier and the incident in 1991 when her village was attacked causing her to move 2 years later to Colombo. These incidents are referred to above in the summary of the Tribunal's decision.
46. A fair reading of the Tribunal's decision record makes clear that the Tribunal determined to consider the Applicant's claims on the basis that she would return to Colombo where she had lived for over 15 years. Mr Varess conceded that there was no claim made by the Applicant of any desire to live anywhere in Sri Lanka other than in Colombo, and certainly not to Jaffna where these incidents had occurred.
47. In the circumstances, I accept the submission of counsel for the First Respondent, Mr Reilly, that these early incidents were further historical background and did not form part of the Applicant's claim to fear harm in Sri Lanka in 2011. Otherwise, the Tribunal found that the Applicant and her husband had lived in relative peace in Colombo for 15 years before coming to Australia and that the basis of the events referred to by the Applicant which led to the civil war in Sri Lanka had been over since May 2009. Those findings were open to the Tribunal on the evidence and material before it and for the reasons it gave. Mr Varess agreed that the Tribunal's findings as stated were open to it on the evidence and material before it.
48. **The third claim** related to the Applicant's claim of a fear of harm as a Tamil ethnic. However, as referred to above, the Tribunal found that the material provided by the Applicant in support of that claim, again, related to events outside Colombo, other than that relating to a Tamil

male civilian missing in Colombo in November 2010. In rejecting the Applicant's fear of persecution for that reason, the Tribunal noted that it was appropriate to consider the Applicant's claims on the basis that she would return to Colombo where she had lived for over 15 years in relative peace.

49. Again, as stated above, these findings were open to the Tribunal on the evidence and materials before it and for the reason it gave.
50. **The fourth claim** related to the Applicant's fear of a future harm because the Applicant's brothers had fled Sri Lanka in 1998 because of their involvement with the LTTE. Again, for the same reasons as above, the Tribunal found that the Applicant had lived in Colombo in relative peace for the last 15 years even though her brothers departed Sri Lanka in 1998. The Tribunal was not satisfied that there was a real chance that the Applicant would face persecution if she were to return to Sri Lanka because her brothers had fled Sri Lanka in 1998.
51. Again, those findings were open to the Tribunal on the evidence and material before it and for the reasons it gave, and the Applicant does not contend otherwise.
52. **The fifth claim** relates to the Applicant's claim of a fear of future harm in Sri Lanka because of the threats of her sister-in-law that the sister-in-law's family involvement with the EPDP would enable the sister in law to seek revenge upon the Applicant and her brothers by informing the EPDP of the Applicant's brothers' LTTE connections and their involvement in assisting the TRO in shipping goods to the LTTE in Sri Lanka.
53. However, as stated above, those claims were rejected by the Tribunal by reason of the Applicant's late inclusion of further details of those claims and the unsatisfactory nature of her explanations for the lateness of those allegations.
54. The solicitor for the Applicant submitted that the Tribunal had not rejected the claims. Rather, Mr Varess submitted that the Tribunal had found that the claims were not Convention related. I do not accept Mr Varess's submissions. A fair reading of the Tribunal's decision record makes clear that the Tribunal rejected all claims made by the Applicant

of a fear of persecution from the EPDP, including that they had come looking for the Applicant subsequent to the departure to Australia. Mr Varess submitted that the claim of invasion of the Applicant's home in Colombo after her leaving was because of her involvement in the unsuccessful marriage of her brother and sister and law and did not relate to the claim of a fear of harm from EPDP. However, such a submission cannot be maintained. The Applicant's letter, dated 19 February 2011 clearly states that the people who she claimed came to her house were from the EPDP.

55. In the circumstances, **claims 1, 2 and 5** made by the Applicant are not relevant to the issue before the Tribunal of whether the Applicant has a well founded fear of persecution for a Convention related reason in Colombo and whether there is a real chance if the Applicant returns to Sri Lanka now or in the reasonably foreseeable future, that she will be persecuted for a Convention reason.
56. **Claims 4 and 5**, as identified by Mr Varess, involve the Applicant's claims of a dangerous life in Colombo, as evidenced by her material, and her fear of harm in Colombo from Sri Lankan security forces because of her brothers' connection with the LTTE and the fleeing of her brothers from Sri Lanka in 1998. Mr Varess submitted that the Tribunal did not consider these claims cumulatively as it was required to do. The reasons for the Tribunal's rejection of each of those claims was because of its finding that the Applicant and her husband had resided in Colombo in relative peace for 15 years throughout the war and that the war was now over.
57. Following the Tribunal's consideration of those 2 claims and its findings referred to above, the Tribunal stated that "*for the reasons given above*", the Tribunal affirmed the decision under review. Mr Varess submitted that it was not clear simply by the use of the words by the Tribunal "*for the reasons given above*" that the Tribunal had in fact considered the claims cumulatively. I am not persuaded by that submission. In particular, I note that Mr Varess submitted that the Applicant's request in her letter dated 18 March 2011, that her claim should be considered "*for the above reason*" was an invitation to the Tribunal to consider her claims cumulatively. When I put the inconsistency of the Applicant's position as to the meaning of the

words “*for the reasons given above*”, Mr Varess submitted that that the Applicant’s claims were made by an unrepresented person whereas the Tribunal was embarking on a statutory duty. I do not regard that reasoning as sufficient to establish that the Tribunal had failed to comply with its statutory duty, including its duty to consider the Applicant’s claims cumulatively.

58. Mr Varess referred the Court to *SZG UW v Minister for Immigration and Citizenship* [2008] FCA 91 at [67] where Jacobson J stated that:

“It is true that “overall, based on the evidence” the Tribunal was satisfied that the appellant’s fear was not well-founded. But the difficulty with this statement is that it appears after the Tribunal had considered each step in the claim in isolation and without considering the impact of state involvement in the conduct”.

59. However the facts in *SZG UW* were quite different to those in the case before this Court. In *SZG UW*, the Tribunal had found that the appellant had suffered past harm amounting to persecution for a Convention related reason and had failed to consider the full impact of the harm taken in its context. In the case before this Court, the Tribunal made no such finding at any time that any past harm that the Applicant may have suffered was persecution for a Convention related reason.
60. The Tribunal rejected the Applicant’s claims of a fear of harm arising from allegedly recent events relating to the Applicant’s sister in law on the basis of its rejection of the existence of those alleged events. Otherwise, the Tribunal was not satisfied that any fear of harm the Applicant may have was because her brothers had fled Sri Lanka in 1998 or for her Tamil ethnicity. As stated above, those findings were open to the Tribunal.
61. I do not accept that a fair reading of the Tribunal’s decision record makes clear that the Tribunal failed to consider the Applicant’s claims cumulatively simply because it did not use that language.
62. Accordingly, the Ground of the application is not made out.

Conclusion

63. A fair reading of the Tribunal's decision record makes clear that the Tribunal understood the claims being made by the Applicant; explored those claims with the Applicant at a hearing as well as with her brother; and, had regard to all material provided in support. The Tribunal put to the Applicant and her brother matters of concern it had about their evidence and noted their responses. The Tribunal largely accepted the country information before it provided by the Applicant. The Tribunal made findings based on the evidence and material before it. Those findings of fact were open to the Tribunal on the evidence and material before it and for the reasons it gave. A fair reading of the Tribunal's decision record makes clear that the Tribunal reached conclusions based on the findings made by it and to which it applied the correct law.
64. In the circumstances, the Tribunal complied with its obligations under the statutory regime in the making of its decision, including the conduct of its review.
65. The Tribunal's decision is not affected by jurisdictional error and is therefore a privative clause decision. Accordingly, pursuant to s.474 of the Act, this Court has no jurisdiction to interfere.
66. The proceeding before this Court should be dismissed with costs.

I certify that the preceding sixty-six (66) paragraphs are a true copy of the reasons for judgment of Emmett FM

Date: 18 July 2011