

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZIQN & ANOR v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 1376

MIGRATION – Visa – protection visa – Refugee Review Tribunal – application for review of decision of Refugee Review Tribunal affirming decision not to grant protection visa – applicants are citizens of Philippines claiming fear of persecution after her husband was murdered by rebels – certiorari and mandamus.

Judiciary Act 1903 (Cth), s.39B
Migration Act 1958 (Cth), ss.91R, 91X, 417, 474

SZEWB & Ors v Minister for Immigration & Anor [2005] FMCA 1145 referred to.

SZIQM v Minister for Immigration & Anor [2007] FMCA 1372 referred to.

First Applicant:	SZIQN
Second Applicant:	SZLGR
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	SYG 1043 of 2006
Judgment of:	Scarlett FM
Hearing date:	16 February 2007
Date of last submission:	16 February 2007
Delivered at:	Sydney
Delivered on:	3 August 2007

REPRESENTATION

Counsel for the Applicant: Mr Young

Solicitors for the Applicant: D J Hegarty Consultants Pty Ltd

Counsel for the Respondent: Mr Lloyd

Solicitors for the Respondent: Clayton Utz

ORDERS

- (1) The title of the First Respondent is changed to Minister for Immigration & Citizenship.
- (2) That there be an order in the nature of certiorari quashing the decision of the Second Respondent made on 17 February 2006 and handed down on 9 March 2006.
- (3) That there be an order in the nature of mandamus returning the application of the Applicants to the Second Respondent to be determined according to law.
- (4) The First Respondent is to pay the Applicants' costs fixed in the sum of \$4,500.00.

CORRIGENDUM

1. Pursuant to order made by Federal Magistrate Lloyd-Jones on 3 May 2006, the Applicant in the proceedings shall be joined by another party. The Second Applicant shall be known as "SZLGR".

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 1043 of 2006

SZIQN

First Applicant

SZLGR

Second Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP

First Respondent

REFUGEE REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application for review of a decision of the Refugee Review Tribunal. The decision was signed on 17th February 2006 and handed down on 9th March 2006. There were five Applicants for review of the delegate's decision in the proceedings before the Refugee Review Tribunal although there is only one Applicant for judicial review of that decision. The Applicants before the Tribunal were a widowed mother and her four children. The decision of the Tribunal was to affirm the decision not to grant protection visas to the First and Fifth-named Applicants. The Tribunal found that it did not have jurisdiction with respect to the Second, Third and Fourth-named Applicants. Only the first-named Applicant in the Tribunal proceedings was originally an Applicant in this Court.

2. The Applicants commenced proceedings for judicial review by filing an application and an affidavit in support on 6th April 2006. In that application the Applicant seeks the following orders:
 - i) The decision of the Second Respondent made on 17 February 2006 and handed down on 9 March 2006 be quashed.
 - ii) An order in the nature of mandamus requiring the Second Respondent to review, according to law, the decision of a delegate of the First Respondent to refuse a protection visa to the Applicant.
 - iii) The First Respondent to pay the Applicant's costs.
3. The First Respondent, now known as the Minister for Immigration & Citizenship, has filed a Response opposing the application. As a matter of formality I will make an order changing the title of the First Respondent to Minister for Immigration & Citizenship.

Background

4. The background to this matter is that the Applicant is a citizen of the Philippines. She arrived in Australia with her four children on 29th October 2003. On 28th November 2003 the Applicant and her four children lodged applications for Protection (Class XA) visas with what was then called the Department of Immigration & Multicultural & Indigenous Affairs. On 31st December 2003 a delegate of the Minister refused the applications for protection visas and on 27th January 2004 the Applicants applied to the Refugee Review Tribunal for review of that decision.
5. On 20th May 2004 the Tribunal, presumably differently constituted, affirmed the delegate's decision not to grant protection visas. The Applicants then sought judicial review of that decision from the Federal Magistrates Court. On 4th August 2005, in proceedings *SZEWB & Ors v Minister for Immigration & Anor* [2005] FMCA 1145, Smith FM ordered that, inter alia, a writ of certiorari should issue quashing the Tribunal decision and that a writ of mandamus should issue directed to the Second Respondent, requiring the Second Respondent

to determine according to law the application for review of the decision of the delegate of the First Respondent dated 31st December 2003.

6. The matter was then remitted to the Tribunal. The Tribunal wrote to the Applicant's migration agent on 16th September 2005 inviting the Applicants to attend a hearing scheduled for 18th October 2005. The Tribunal wrote to the Applicant in these proceedings separately on 20th September 2005, again inviting her and the other Applicants to attend a hearing.
7. The Applicant's migration agent forwarded to the Tribunal a copy of a confidential psychologist's report relating to the Applicant prepared by Saime Dilek on 18th February 2005. The migration agent also forwarded a report from a social worker at Sydney Children's Hospital and a letter from the Applicant to the Registrar of the Tribunal dated 7th November 2005. The letter told the Tribunal that three of the children had left Australia to join their biological mother on 7th November. Although the children had lived with the Applicant, after her husband's death she was required to give up their custody because of the insistence of the children's biological mother. The letter asked the Tribunal to remove the names of the children from the Applicants.
8. The Applicant's then solicitor forwarded a Response to Hearing Invitation to the Tribunal indicating that the First Applicant wished to attend a hearing and would require an interpreter in the Tagalog language. The Response also indicated that Ms Dilek, the psychologist, was required as a witness and that she would give evidence about the Applicant's mental and psychological condition consequent upon the Applicant's husband's assassination in the Philippines.
9. The Applicant then appears to have changed migration agent and solicitors, and the current solicitors wrote to the Tribunal on 16th November 2005 making a submission and referring to the decision of Smith FM setting aside the earlier decision. The migration agent also provided a copy of some newspaper reports relating to violence in the Philippines and a statutory declaration from the Applicant to which she had annexed a copy of a fax which appears to have been faxed from the Philippines on 12th November 2005 from a lady indicating that her husband, whose name I will not disclose as the lady is the

Applicant's sister-in-law and disclosure of her name may tend to identify the Applicant in breach of s.91X of the Migration Act.

10. The sister-in-law in her fax told the Applicant that her husband was ambushed and killed by unidentified men at 6:30pm on 11th November 2005. There was also attached a newspaper report referring to the murder of the policeman by three armed men who had six gunshots in his body and head. There are also other newspaper reports filed and a copy of the decision of Smith FM in *SZEWB (supra)*. The Applicant also provided her Philippines passport to the Tribunal for photocopying, and a copy of that record appears in the Court Book.
11. The Applicant's migration agent wrote to the Tribunal on 12th December 2005 enclosing a faxed copy of an autopsy report dated 28th February 1980 relating to the brother of the Applicant's late husband. The letter advised the Tribunal that the brother was also murdered by rebels as stated in evidence by the Applicant at the earlier hearing.
12. The Applicant attended the Tribunal hearing and gave evidence on 21st November and 14th December 2005. The Tribunal also took account of the Applicant's oral evidence to the Tribunal previously constituted on 7th April 2004. A copy of the Tribunal's decision record can be found in the Court Book at pages 277 through to 307 inclusive.
13. The Tribunal set out the Applicant's claims in her primary application and noted that the Applicant was a female national of the Philippines, aged 32 at the time of the decision, who married her late husband in June 2000 who was an independent councillor allied to the municipality mayor of the area in which they lived. There were four children, although only the youngest child was her biological child, and the Tribunal noted that he was the only one who remained in Australia at the time of the hearing. The Tribunal noted that the Applicant arrived in Australia on a Philippines passport issued in Manila on 13th August 2003 and travelled to Australia five days after obtaining a visa accompanied by the children.
14. The Applicant's claim was that on 12th February 2003, the Applicant was with her husband and son when 30 armed men approached the house. Five people threatened them while others ransacked the house. The Applicant's sister-in-law who lived next door called the police but

no-one came. The men took the Applicant, the Applicant's husband and the Applicant's son to a house two blocks away and executed the Applicant's husband in front of her. After the execution one of them shouted, "We will kill all the (name deleted¹) family."

15. The Applicant stated that the New People's Army later wrote threatening letters to her so she knew that they were the killers of her husband. She believed that they wanted her husband to use his council and other connections to obtain arms for them but he refused. She later stated to the Tribunal that they may also have killed him because he had planned to run for mayor in the next election. The Applicant claimed that she feared the New People's Army because they wanted to pressure her family to help their cause. They had cells all over the Philippines and could follow her anywhere.
16. The Tribunal referred to various items of documentary evidence provided by the Applicant. The Tribunal referred to the pre-hearing submission from the Applicant's migration agent and referred to the decision of the Federal Magistrates Court. The Tribunal also set out a summary of the Applicant's oral evidence to the Tribunal. At page 290 of the Court Book the Tribunal noted that it alerted the Applicant that it would need to determine whether she faced a real chance of persecution if she returned to the Philippines and if so, whether the essential and significant reason would be one of the five reasons set out in the Convention and that the identity of the husband's assailants could therefore be important.
17. The Tribunal told the Applicant that there were contradictory indications as to the perpetrators but the Applicant responded that they were really one and the same operating under different names. The Tribunal referred to Independent country information about the New People's Army and noted that the Applicant said at page 291 of the Court Book that four members of her husband's family had been killed: her father-in-law and brother-in-law 12 years earlier, her husband and, most recently, another brother-in-law, the policeman to whom I have previously referred.

¹ Name deleted to comply with *Migration Act 1958* (Cth) s.91X

18. The Applicant told the Tribunal that at her husband's funeral and on later occasions the governor of the area had spoken to the Applicant about becoming involved in politics herself and that she did have an increasing role and profile in politics. The Tribunal noted the Applicant's comments the police were corrupt and could not guarantee her safety and she had received no advice of a breakthrough in the investigations of the husband's death.
19. The Applicant's migration adviser invited the Tribunal to accept the genuineness and well-foundedness of the Applicant's fears and that they could be based on her political opinion as well as membership of a particular social group, being the particular family. The migration agent suggested that there was a real chance that the rebels had come to know of the Applicant's increasing political profile as reflected in the two threatening letters she had received personally. She had not wanted to leave the Philippines but had been driven to do so because of being kept under surveillance and implicitly a harbinger of future harm.
20. The migration agent stressed the distinction between the New People's Army and other organisations might not be realistic in the Applicant's eyes but the repeated death threats showed that the Applicant had a political profile which put her at risk of harm from the rebels.
21. The Tribunal noted that it would need to address two particular areas of concern arising from the evidence of the Applicant and the Applicant's niece, who was also an applicant for a protection visa. The Applicant's niece is also an applicant for review of a decision of the Refugee Review Tribunal in proceedings *SZIQM v Minister for Immigration & Anor* [2007] FMCA 1372.
22. The Tribunal referred to Independent country information at pages 294 and 295 of the Court Book about the New People's Army, which is the military wing of the Communist Party of the Philippines.

The Tribunal's Findings and Reasons

23. The Tribunal's findings and reasons are set out at pages 295 through to 307 of the Court Book. The Tribunal accepted that the Applicants were Philippines by nationality and noted the production of the Applicant's passport. The Tribunal assessed the First Applicant's claims, namely,

the Applicant in these proceedings, against the Philippines. The Tribunal noted that essentially it was the Applicant's claim that she feared persecution from extremist rebels who killed her husband for reasons of his political opinion and possibly his membership of his family and that following his death the rebels had made a series of threats to the Applicant and her family in letters and in threatening conduct. The Tribunal noted that the Applicant claimed she was being targeted for her political opinion imputed from the activities of her deceased husband and because of her membership of a particular social group, the family.

24. At the second hearing, the Applicant claimed to fear persecution from the same people on the basis of her actual political opinion because she had been approached to run for local politics in her husband's place. She feared that the rebel groups would target her if she returned to the Philippines and that she would be at risk both psychologically and physically anywhere in the country and that the police in the Philippines were unable to protect her from harm. The Tribunal said:

The Tribunal accepts, on the basis of the Applicant's oral and documentary evidence, that the Applicant's husband was killed by a group of armed men. It accepts that this experience was traumatic for the Applicant and, based on the psychological report, that it has had a detrimental affect on her. The Tribunal accepts that this is exacerbated by the Applicant's concerns for her children, particularly the fifth-named Applicant, an infant who was present at the time of the killing.²

25. The Tribunal took the view that the exact identity of the perpetrators of the murder was not clear and accepted the adviser's comments that it would not be reasonable to expect the Applicant to know who the killers were in the circumstances that the police appeared to have been unable to identify the perpetrators. The Tribunal considered the motivation for the murder and accepted that the husband had a political profile as head of the association of barangay captains and as an independent councillor. The Tribunal also accepted as relevant that the Applicant's husband had planned to run for the office of mayor.

² See Court Book at page 297

26. The Tribunal noted that Independent information had indicated that insurgents target the holders of public office who are perceived as legitimate and priority targets because they represent the authority of the Philippine state and its agents. The Tribunal noted that the circumstances of the Applicant's husband's killing suggested that the rebels also targeted him with a view to obtaining weapons, which indicated multiple motives. The Tribunal went on to say, however:

However, the totality of the material before the Tribunal leaves it satisfied that the essential and significant reason for the murder was the husband's political opinion, actual and imputed.

Relevant to an assessment of the Applicant's claims is whether: (a) the husband's murder also revealed that he was also targeted for reason of his membership of a (putative) particular social group, the (name deleted) family, and/or (b) whether subsequent events indicate that the Applicant is at risk for reason of imputation to her of his political opinion, including as a member of the (name deleted) family.

For the reasons stated below, regardless of whether the (name deleted) family forms a particular social group for the purposes of the Convention, the Tribunal is not satisfied that the husband was in fact killed 'for reasons of' his membership of the (name deleted) family, or that subsequent events show the Applicant to face a real chance of persecution for reason of her family membership, political opinion or any other reason.³

27. The Tribunal went on to set out that reason and referred to the murder of Sergeant (name deleted) in November 2005, being the Applicant's brother-in-law and neighbour, and the Tribunal said:

Based on these circumstances, the Tribunal accepts that (name deleted's) murder was by the same people who killed the Applicant's husband, for the same reasons. The newspaper articles submitted to the Tribunal each focus on (named deleted's) role as a police officer, suggesting that he, like the Applicant's husband, was killed for reason of his office and the political values that represented, and perhaps his duties as a policeman, as well as other reasons such as the opportunity to seize arms and equipment. There is no mention in the press reports submitted of a (name deleted) family link.⁴

³ See Court Book at page 298

⁴ See Court Book at page 299

28. The Tribunal went on to refer to an alleged statement by one of the Applicant's husband's killers: "We will kill all members of the (name deleted) family." The Tribunal found that the material before it indicated that politically prominent males, including but not necessarily confined to the (name deleted) family, may be at risk of being targeted, but the mere fact of that family membership did not establish a well-founded fear of persecution. The Tribunal was not satisfied that the Applicant as a member of that family was or is at risk of persecution for that reason. The Tribunal went on to note:

The Applicant nonetheless referred to a number of subsequent developments - most notably the two threatening letters (in June 2003 and in October 2003), as well as a series of alleged threats, such as telephone calls and menacing 'surveillance' by unknown persons - to assert that she became increasingly aware that she and her family were at risk of persecution. She contends that these actions represented a continuation of the rebel's actions against the husband. In other words, they were the same people, with the same purpose.

For the following reasons, the Tribunal does not accept that the subsequent developments demonstrate that the Applicant was at risk for any reasons directly linked with her husband's death - whether for the (now rejected) reason of her membership of his family, or for any imputed political opinion arising from her marriage to him or her witnessing of the murder.

The Tribunal gives the Applicant the benefit of the doubt, and accepts that she received the two letters containing extortion demands. The Tribunal is not satisfied, however, that the letters are either (a) connected with the motivations for her husband's murder, or (b) connected with each other for the reasons stated below.⁵

29. The Tribunal considered the letters that the Applicant received but noted that they appeared to be extortion demands and was therefore not satisfied that the letters had any link with the circumstances of the brutal murder of the Applicant's husband but arose out of the consequences of public knowledge that the Applicant as his widow had control over the husband's assets, such as a rice belt.

⁵ See Court Book at page 300

30. The Tribunal found that the Applicant's arrangement of a passport for her children and herself in mid-2003 reinforced the Tribunal's finding that the Applicant did not fear persecution at that time and took the view that the passports were obtained as part of an orderly plan to leave the country rather than an intention to seek safety, although that did not preclude their subsequent use for that purpose. In summary, the Tribunal said this:

In sum, the Tribunal accepts that her husband was executed in front of her in February 2003, for political reasons. It accepts that the Applicant has suffered psychological harm as a result of this incident. However, it is not satisfied that the Applicant has suffered any subsequent persecution following this act, or that such harm as has occurred was for the same or related reasons as her husband's murder.⁶

31. The Tribunal found that the letters that the Applicants received did not represent credible threats to the Applicant and her family given a lack of follow-up, taking into account the Applicant's reaction to the letter in June 2003 and her failure at any time whilst in the Philippines to contact the police. The Tribunal was not satisfied that the Applicant genuinely considered the letters to be credible threats.
32. The Tribunal concluded that the Applicant did not have a well-founded fear of prospective persecution for Convention reasons anywhere in the Philippines. The Tribunal acknowledged that the Applicant, as well as her child, had experienced a traumatic incident with psychological effects and appreciated that the Applicant had sought a new life in Australia for herself and her children and her niece, to remove them from the immediate environs where the murder occurred and to offer them a better future.
33. The Tribunal noted the Applicant's evident discomfort at the prospect of her return to the Philippines, not least because it could cause her unpleasant memories. The Tribunal went on to note that the Applicant's claims suggested that the Applicant wished the Tribunal to consider the humanitarian aspects of her application but found that the Tribunal's role was limited to determining whether the Applicant satisfied the criteria for the grant of a protection visa and that a consideration of her

⁶ See Court Book at page 303

circumstances on other grounds was a matter solely within the Minister's discretion.

34. The Tribunal affirmed the decision not to grant protection visas to the Applicant and her child, the fifth-named Applicant in those proceedings.

Application for Judicial Review

35. The Applicant seeks judicial review of the Tribunal's decision. In the application the Applicant sets out 10 grounds:

- i) The Refugee Review Tribunal (RRT) made jurisdictional error by treating a statement by the killers of the Applicant's husband that they would kill all members of her family, as not being an accurate reflection of their motivation, where there was no evidence for this finding.
- ii) The RRT made jurisdictional error by treating threats by the killers of the Applicant's husband as being of no account because the Applicant and her son had not been harmed.
- iii) The RRT made jurisdictional error by rejecting the Applicant's claim to fear persecution as a member of the (name deleted) family as necessarily failing because her husband was murdered because of his political profile.
- iv) The RRT failed to adopt the real chance test in assessing evidence of threats to the Applicant.
- v) The RRT failed to consider whether fear of harm as a consequence of a Convention-related murder could amount to a well-founded fear of execution even if the perpetrators of the threats were not themselves acting from political motivation.
- vi) The RRT made jurisdictional error by treating as irrelevant the Applicant's claim that she had lost faith in the police.

- vii) The RRT limited its consideration of State protection to whether the State would deny the Applicant protection on a selective and discriminatory basis for Convention reasons.
- viii) The RRT failed to consider whether the murder of the Applicant's brother-in-law, a policeman, in November 2005 was such as to give the Applicant a well-founded fear of persecution for reasons of her membership of her family.
- ix) The RRT exercised its jurisdiction in a manner which was so unreasonable that no reasonable person could have so exercised the power.
- x) The RRT engaged in inappropriate speculation as to what a person who genuinely feared serious harm would do in a particular situation when there was no basis for such speculation and the speculation was inconsistent with the role of the Tribunal in determining whether the Applicant was a person to whom Australia had protection obligations under the Refugees' Convention.

36. Counsel for the Applicant, Mr Young, prepared a written outline of submissions which was filed at Court on 14th February 2007. He noted that the Tribunal accepted that the killers of the Applicant's husband were members of an insurgent group, most probably the New People's Army, and stated that the Applicant's brother-in-law and neighbour, a policeman, was later killed by the same group. He submitted that the pivotal RRT finding was at page 303, that it was not satisfied that the Applicant had suffered persecution following the murder or that any harm which had occurred to her was related to her husband's murder. He went on to submit that the Convention and s.91R(1)(c) of the Migration Act include threats as being within the Convention and the statutory modification of it.

37. There was a finding by the RRT that consequent on the murder of her husband, the Applicant had received threats. He noted that the Respondent submitted that the Tribunal had found there was no connection between later threats to the Applicant and the husband's murder. Counsel for the Applicant submitted that this was not strictly correct. The Tribunal found that it was not satisfied that the threats

were connected with the motivation for her husband's murder and the circumstances of it, but the Tribunal did find, however, that it arose out of the consequences of the murder. That being the case, the Tribunal was bound to consider whether the original political reason was the essential and significant reason for the persecution. The Tribunal did not find that the Applicant did not fear the threats after her husband's murder. Rather, it found that the Applicant did not fear serious harm from the rebels. The Tribunal stated that the failure to advise the police "casts doubt" on whether she had a subjective fear of harm. The Tribunal did not accept her reasons for not contacting the police but it made no finding that she did not have a subjective fear of harm.

38. Once the Tribunal had accepted that threats were later made to the Applicant as a consequence of the murder of the Applicant's husband, the Tribunal was bound to consider whether the Convention reason was the essential and significant reason for those threats and whether the Applicant had a well-founded fear of persecution as a result. The RRT did neither.
39. Counsel for the Applicant disputed the Respondent's submission that the Tribunal expressly took into account the death of the brother-in-law of the Applicant in November 2005. Certainly the Tribunal accepted the Applicant's claim but it did not consider the evidence as to whether the Applicant, who had left the Philippines in 2003, would have a well-founded fear of persecution if forced at the time of the hearing to return to the Philippines given those circumstances.
40. Even if the Tribunal did not accept that the brother-in-law had not been killed because of the family link, the murder of two family members for reasons of political opinion raises the issue of a well-founded fear of persecution by reason of that family link. A fear based on two murders can be well-founded even if the two events do not affirmatively establish a link. The question of whether the motivation for two murders of the same family members are because of the family link does not necessarily give rise to the same answer as whether another member of the same family would have a well-founded fear of harm because of the family connection.

41. Counsel for the First Respondent Minister, Mr Lloyd, in a written outline of submissions filed on 12th February 2007 addressed the Applicant's 10 grounds of review in order.
42. As to the first ground that there was no evidence to support the Tribunal's conclusion that the statement by one of the killers of the Applicant's husband about his motive was not an accurate reflection of his motivation, he submitted that the statement was to the effect that they would kill all members of the Applicant's family. The Tribunal did not accept that this was accurate having regard to the fact that they had had the opportunity to kill more but have not done so. For example, they could have killed the Applicant and her son at the same time but did not do so. This was a finding of fact for the Tribunal and not an error outside of the Tribunal's jurisdiction.
43. As to the second ground alleging that the Tribunal made a jurisdictional error because it treated the statement of one of the killers as of no account because the Applicant and her son had not been killed, this was a finding of fact for the Tribunal and no jurisdictional error is identified.
44. As to the third ground that the Tribunal made a jurisdictional error by treating the Applicant's family group claim as necessarily failing because her husband had been killed for political reasons, he submitted that the Tribunal did not treat the Applicant's claim as necessarily failing. It was just not satisfied that she faced harm by reason of her family membership, a finding of fact open on the evidence. He went on to submit, rather unkindly, that calling something a jurisdictional error does not make it one.
45. As to the Applicant's fourth ground that the Tribunal failed to adopt the real chance test in evaluating the threats to the Applicant, Mr Lloyd submitted that the Tribunal correctly stated the law pertaining to that test at the beginning of its reasons on page 280 of the Court Book. It also applied that test in its findings and reasons. That the Applicant disagrees with the Tribunal's view does not reveal that the wrong test was applied, it amounts to no more than an invitation to the Court to undertake merits review which is outside the jurisdiction of the Court.

46. Referring to the Applicant's fifth ground that the Tribunal failed to consider whether fear of harm as a consequence of Convention-related murder could amount to a well-founded fear of execution even if the perpetrators of the threats were not themselves acting from a political motivation, Mr Lloyd submitted that the Tribunal found that the applicant did not have a genuine fear from the threats received after her husband's murder and that in any event there was no connection between them and her husband's murder.
47. Turning to the sixth ground, that the Tribunal made a jurisdictional error by treating as irrelevant the Applicant's claim that she had lost faith in the police, the Tribunal found that the Applicant did not face a real chance of persecution for a Convention reason, making it unnecessary to consider whether the Applicant could access police protection. In any event, the Tribunal went on to find that the Applicant could do so. The Applicant's lack of faith in the police was not sufficient to make her a refugee and no jurisdictional error was disclosed.
48. As to the seventh ground that the Tribunal limited its consideration of police protection to whether the police would deny her protection, Mr Lloyd submitted that that was all that could be relevant on the Tribunal's findings and no jurisdictional error was disclosed.
49. Turning to the eighth ground, that the Tribunal failed to consider the death of the Applicant's brother-in-law in November 2005 was such as to give her a well-founded fear of persecution by reason of her family membership, Mr Lloyd submitted that this was expressly taken into account by the Tribunal in its analysis.
50. As to the ninth ground that the Tribunal made a decision that was beyond power because it was an unreasonable exercise of the power conferred, Mr Lloyd submitted that even if this ground could constitute jurisdictional error, the Tribunal's decision was clearly reasoned and could not be said to be unreasonable in any relevant sense. He submitted that this was another invitation to merits review.
51. Turning to the tenth and final ground that the Tribunal engaged in inappropriate speculation about what a person who genuinely feared persecution would do in a particular situation, he submitted that this

was something that fell clearly within the Tribunal's jurisdiction to decide. It was precisely the job of the Tribunal in assessing claims of protection visa applicants. I have commented previously in other cases, including the decision in *SZIQM(supra)*, that it is not the task of a Court on judicial review to undertake merits review. It is not the task of the Court to make its own assessment of the facts and it is irrelevant if another person or Tribunal on looking at the same facts could form a different view or arrive at a different factual conclusion.

52. It is clear, however, that even if the Applicant is not able to succeed in showing jurisdictional error, the Applicant would appear to have a very strong humanitarian claim which may, if necessary, be put to the Minister for Immigration & Citizenship under s.417 of the Migration Act. This is a claim by a woman that she and her infant son were present when her husband was murdered by insurgents for what has been found by the Tribunal to be a political reason. The Applicant has provided evidence in the form of a psychologist's report indicating that she has suffered significantly as a result of what must clearly be a most traumatic event and has suffered not only on her own behalf, but because of the fact that her child was present at the time. It would be difficult to see how a person could not have a subjective fear in the circumstances, even though this Court is not a judge of the facts and it may well be that if necessary this is a matter which could be considered by the Minister under the provisions of s.417 of the Migration Act.
53. However, the task of this Court is to ascertain whether or not jurisdictional error had been made out. The Applicant claimed that she had received threats as a consequence of the murder of her husband. The Applicant's husband had been murdered for a Convention reason. The Tribunal accepted that the Applicant's husband had a political profile, and the Tribunal at page 298 of the Court Book pronounced itself satisfied that the essential and significant reason for the Applicant's husband's murder was the husband's political opinion, actual and imputed. The Applicant subsequently received threats but the Tribunal found it was not satisfied that the threats were connected with the motivation for the husband's murder and the circumstances of it. The Tribunal, however, did find that the threats arose out of the consequences of the murder.

54. I am of the view that counsel for the Applicant is correct in submitting that the Tribunal was bound to consider whether the original political reason was the essential and significant reason for the persecution. Once the Tribunal had accepted that threats were made to the Applicant as a consequence of the murder of her husband, the Tribunal was bound to consider whether the Convention reason was the essential and significant reason for those threats.
55. In my view, the Applicant is correct in submitting that the Tribunal did not do so. It also follows that once the Tribunal had accepted threats were made to the Applicant as a consequence of the murder of her husband, the Tribunal was bound to consider whether the Applicant had a well-founded fear of persecution as a result of those threats. The Tribunal did not do this either. In my view, this is a jurisdictional error. The fact that the Tribunal took neither step is in my view an indication that the Tribunal fell into jurisdictional error. As the Tribunal fell into jurisdictional error, the decision is not therefore a privative clause decision as defined by s.474 of the Migration Act. It follows that the Applicant's application must succeed and I am satisfied that orders in the nature of certiorari and mandamus should issue and that an order for costs should be made.
56. The Applicant was legally represented by counsel and by a solicitor in these proceedings and Mr Young of counsel has indicated that costs in the sum \$4,500.00 would be appropriate. I note that the Applicant's legal advisers acted in respect of the Applicant in *SZIQM* which was heard at the same time and that is a reason for making some discount in what would otherwise be the scale fee. I am satisfied that \$4,500.00 is an appropriate amount for costs.

I certify that the preceding fifty-six (56) paragraphs are a true copy of the reasons for judgment of Scarlett FM

Associate: V .Lee

Date: 14 August 2007