FEDERAL COURT OF AUSTRALIA

SZLQD v Minister for Immigration and Citizenship [2008] FCA 739

MIGRATION – protection visa - leave to appeal application from judgment of Federal Magistrates Court – whether decision attended by sufficient doubt to warrant reconsideration – whether substantial injustice would result if leave to appeal were refused, supposing the decision to be wrong – whether Refugee Review Tribunal failed to accord procedural fairness in accordance with s 424AA of the *Migration Act 1958* (Cth) – whether s 424AA operated at time of review application
Held: application dismissed

Federal Magistrates Court Rules 2001 (Cth) rr 44.12(1)(a) and 44.12(2)
Migration Act 1958 (Cth) ss 424A, 424A(3) and 424AA
Migration Amendment (Review Provisions) Act 2007 (Cth) ss 2 and 33(b)

SZLQD v Minister for Immigration and Citizenship [2008] FMCA 190, cited
Décor Corporation Pty Ltd v Dart Industries Inc (1991) 33 FCR 397, applied
Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437, referred to
SZLTC v Minister for Immigration and Citizenship [2008] FMCA 384, referred to

SZLQD v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL

NSD 285 OF 2008

MARSHALL J
22 MAY 2008
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 285 OF 2008**

BETWEEN:	**SZLQD** **Applicant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**MARSHALL J**
DATE OF ORDER:	**22 MAY 2008**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. Leave to appeal is refused.

2. The applicant pay the first respondent's costs of the application, fixed at $1,880.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 285 OF 2008**

BETWEEN:	**SZLQD** **Applicant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**MARSHALL J**
DATE:	**22 MAY 2008**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 The applicant seeks leave to appeal from an interlocutory judgment of Federal Magistrate Smith dismissing the applicant's application for judicial review of a decision by the second respondent Refugee Review Tribunal not to grant him a protection visa: see *SZLQD v Minister for Immigration and Citizenship* [2008] FMCA 190. The Tribunal had earlier affirmed the first respondent Minister's decision to refuse the grant of a protection visa. Leave to appeal is required from this Court because the Federal Magistrate dismissed the application on the ground that it does not raise an arguable case for the relief claimed pursuant to r 44.12(1)(a) of the *Federal Magistrates Court Rules 2001* (Cth). Such a procedure is interlocutory in nature: see r 44.12(2) of the *Rules*.

2 The applicant is a citizen of India who arrived in Australia on 27 March 2007. He claims to be an active member of the Bharatiya Janta Party in Kerala State. He claims a well founded fear of persecution due to his support for the BJP. He claims that because of his political views, imputed or otherwise, he has suffered arrest, attacks and mistreatment.

3 The applicant applied for a protection visa on 10 April 2007. A delegate of the first respondent Minister rejected that application. The delegate noted that the applicant was free

to relocate to another part of India where the applicant's localised problems would not continue.

4 The applicant sought merits review of the Minister's decision by the Tribunal. The applicant was invited to give oral evidence and present arguments to the Tribunal and did so with the assistance of an interpreter. The Tribunal considered the applicant's claims, questioned him about them and considered independent country information. After considering the evidence it concluded that it was:

> *…not satisfied that the applicant has been attacked, arrested and mistreated as claimed because the Tribunal has found that he was not involved with the BJP as claimed, and his evidence about the attacks and arrests was vague and unconvincing.*
>
> The Tribunal affirmed the decision not to grant the applicant a protection visa.

5 The applicant sought judicial review of that decision in the Federal Magistrates Court. The applicant's amended application in that court relied on several grounds of review. The learned Federal Magistrate considered all the grounds and concluded that none of them was made out by the applicant and that they did not raise an arguable case for the relief claimed. The application was dismissed.

6 The applicant now seeks leave to appeal from the judgment of the court below. The draft notice of appeal seeks orders that:

- the judgment of Federal Magistrate Smith dated 12 February 2008 be set aside; and
- the matter be remitted to the Tribunal to determine according to law.

7 Grounds one and two of the draft notice of appeal are drafted in the broadest terms and have not been particularised by the applicant. Ground one states:

> *The single Judge of the Federal Magistrates Court in his Honours judgment delivered on the 12 February 2008 failed to find error of law, jurisdictional error, procedural fairness and relief under section 39B of the judiciary Act 1903.*

Assuming that the ground should read that the Magistrates "erred" when his Honour "failed to find error of law…", without further submission on why that is so, the ground does not

suggest that the judgment is attended with sufficient doubt to warrant it being reconsidered on appeal or that a substantial injustice would result if leave were refused, supposing it to be wrong: see *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398.

8 The second ground of appeal is similarly vague and broadly stated. It states that:

> *The learned Federal Magistrate has dismissed the case without considering the legal and factual errors contained in the decision of the Refugee Review Tribunal.*

That is not the case. The Federal Magistrate considered all the grounds for review contained in the applicant's amended application. This proposed ground lacks merit.

9 The third ground states:

> *Federal Magistrate Smith made a legal, factual and jurisdictional error in not applying the principles laid down by the full court of* [sic] *Federal Court in* Randhawa v The Minister for Immigration, Local Government and Ethnic Affairs *(1994) 52 FCR 437.*

That judgment stands for the principle that, if relocation within a country of origin is an issue for consideration by a decision maker, and the applicant has a well founded fear of persecution in relation to the part of the country from which he or she had fled, the decision maker must consider whether it is reasonable in all the circumstances for that person to relocate elsewhere.

10 On this issue below, the Federal Magistrate held at [9] of his Honour's reasons for judgment that:

> *I could find no basis in the present decision of the Tribunal for arguing error by the Tribunal by reference to s 91R,* ***or to the principles in relation to relocation****. In fact, the present Tribunal's decision did not turn upon those principles.* (emphasis added)

11 The court below did not specifically address *Randhawa* in its reasons and there is no evidence that it was raised in submissions by the applicant. In any case, that judgment can be distinguished from the current matter because the Tribunal found that the applicant did not have a well founded fear of persecution. Therefore, the issue of relocation did not arise before the Tribunal.

12 On 20 May 2008, one day after the filing of the first respondent's written submissions in the application for leave to appeal, the appellant's solicitors filed a notice of appearance. Those solicitors also filed brief written submissions. The submissions do not address any grounds raised in the proposed notice of appeal. Instead they refer to that ground of the application raised in the court below which alleged a denial of procedural fairness by reference to s 424A of the *Migration Act 1958* (Cth). The submissions contend that the Tribunal denied the applicant procedural fairness by failing to give him the particulars of country information relied on in coming to its decision. Recognising that s 424A(3) provides a complete answer to that submission, the written submissions rely on s 424AA. They allege that it is arguable that the Tribunal failed to carry out the procedure required by s 424AA.

Section 424AA, provides:

> *If an applicant is appearing before the Tribunal because of an invitation under section 425:*
>
> *(a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and*
>
> *(b) if the Tribunal does so—the Tribunal must:*
>
> *(i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and*
>
> *(ii) orally invite the applicant to comment on or respond to the information; and*
>
> *(iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and*
>
> *(iv) if the applicant seeks additional time to comment on or respond to the information—adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.*

That section places no obligation on the Tribunal but enables it, if it so chooses, to orally give to an applicant any information which the Tribunal considers would be part of the reason for affirming the decision under review. It does not compel the Tribunal to orally give an applicant any particulars of country information which it intends to rely on. So much is apparent from that part of the explanatory memorandum accompanying the bill which introduced s 424AA where the following was said:

> *New section 424AA provides a new discretion for the RRT to orally give information and invite an applicant to comment on or respond to the information at the time that the applicant is appearing before the RRT in response to an invitation issued under section 425. This will complement the RRT's existing obligation under section 424A, in that, if the RRT does not*

> *orally give information and seek comments or a response from an applicant under section 424AA, it must do so in writing, under section 424A. The corollary is that if the RRT does give clear particulars of the information and seek comments or a response from an applicant under section 424AA, it is not required to give the particulars under section 424A.*

13 In any event, s 424AA only applies to applications for review lodged after 29 June 2007. This is the effect of ss 2 and 33(b) of the *Migration Amendment (Review Provisions) Act 2007* (Cth), which commenced on 29 June 2007. The applicant lodged his application for review on 25 June 2007. Section 424AA did not apply to his review. In this regard see *SZLTC v Minister for Immigration and Citizenship* [2008] FMCA 384 at [15] per Driver FM.

14 This new argument was not raised before the court below and is not mentioned in the proposed notice of appeal. As the applicant was previously unrepresented, the Court was prepared to allow the issue to be raised as the matter was the subject of submissions served on the Minister earlier in the week. In any event, it is a submission which has no merit. It does not disclose an arguable case for review of the Tribunal's decision or any arguable appeal point in the proposed appeal.

15 The applicant has not demonstrated that the decision below is attended with sufficient doubt to warrant its reconsideration on appeal, or that a substantial injustice would result if leave to appeal were refused.

16 The applicant's application for leave to appeal is dismissed, with costs.

I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Marshall.

Associate:

Dated: 22 May 2008

Counsel for the Appellant:	Mr R Turner
Solicitor for the Appellant:	Turner Coulson Immigration Lawyers
Counsel for the First Respondent:	Ms S Kantaria
Solicitor for the First Respondent:	Clayton Utz
Date of Hearing:	22 May 2008
Date of Judgment:	22 May 2008