

FEDERAL COURT OF AUSTRALIA

Minister for Immigration & Citizenship v SZJGY [2008] FCAFC 87

MIGRATION – review of decision of Federal Magistrates Court – whether Federal Magistrate erred in finding that the Refugee Review Tribunal made a jurisdictional error by failing to accord the Respondent procedural fairness – applicability of *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 – whether Refugee Review Tribunal’s statements and questions during the hearing sufficiently indicated to the first respondent that everything he said in support of his application was in issue

Migration Act 1958 (Cth) s 425

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152 distinguished

**MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZJGY AND REFUGEE
REVIEW TRIBUNAL
NSD 193 OF 2008**

**STONE, JACOBSON AND EDMONDS JJ
30 MAY 2008
SYDNEY**

CATCHWORDS

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

NSD 193 OF 2008

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: MINISTER FOR IMMIGRATION AND CITIZENSHIP
Appellant**

**AND: SZJGY
First Respondent**

**REFUGEE REVIEW TRIBUNAL
Second Respondent**

JUDGES: STONE, JACOBSON AND EDMONDS JJ

DATE OF ORDER: 30 MAY 2008

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Orders 2 and 3 made by the Federal Magistrate on 25 January 2008 be set aside and in lieu thereof the application to the Federal Magistrates Court be dismissed.
3. The first respondent pay the appellant's costs of the appeal and of the proceedings below.

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

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Appellant**

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Second Respondent**

JUDGES: STONE, JACOBSON AND EDMONDS JJ

DATE: 30 MAY 2008

PLACE: SYDNEY

REASONS FOR JUDGMENT

THE COURT:

1 The first respondent (Respondent) claims to be a citizen of the People's Republic of China who left that country in 2005. He claimed to have a well-founded fear of persecution on political grounds arising from sustained harassment and persecution by the Public Security Bureau, in particular, the Chinese traffic police. According to the Respondent this arose from his refusal to engage in corrupt conduct by bribing police in connection with his trucking business. The Refugee Review Tribunal found that the Respondent had not given a truthful account of his experiences during the period prior to his departure from China.

2 The question that arises in this appeal is whether the Federal Magistrate erred in finding that the Tribunal made a jurisdictional error by failing to accord the Respondent procedural fairness as required by s 425 of the *Migration Act 1958* (Cth). The essential issue is whether this case falls within the principles stated by the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152.

3 It is important to understand how the elements of the Respondent's account of his experience are related. In brief, his account is as follows. Because he would not pay bribes

to the traffic police he was subjected to frequent fines and continuous interference with his trucking business which made it very difficult for him to operate the business. His continued opposition to the police conduct resulted in him being imprisoned for one month from July to August 2004. While in prison he was beaten and tortured in an attempt to force him to sign a confession. Eventually he signed a false confession prepared by the police in which he admitted that he had attempted to hinder the police in the execution of their duty and was fined RMB 10,000.

4 He claimed that the sustained mistreatment by the police led him to attempt to involve other truck drivers in his protests against the police corruption. He wrote petitions to relevant authorities and contacted newspapers, television and radio stations. He was threatened by the police with the result that he was unable to operate the business “smoothly and normally”. Eventually he was forced to sell his business in order to repay his debts.

5 The Tribunal’s account indicates that at the hearing the discussion between the Tribunal and the Respondent focused on the police attempts to obtain bribes and their response when the Respondent refused to cooperate. The Tribunal’s difficulty in accepting the Respondent’s account of these incidents would seem to explain why it did not press the Respondent about his derivative claims of imprisonment and political activism.

6 The Federal Magistrate ordered that the Tribunal’s decision be quashed. He did so on the basis described in [38]-[39] of his reasons:

In my view, the Tribunal failed to accord procedural fairness to the applicant pursuant to s 425 of the [*Migration Act*] because, firstly, its references at the hearing to inconsistencies in a limited range of the applicant’s evidence, and its concern about the implausibility of one very narrow aspect of his claims, does not, in my view, constitute the Tribunal identifying credibility as an issue with the applicant’s claims in the circumstances of this case.

Secondly, it is not, in my view, sufficient to raise some inconsistencies across a narrow and specific band of the applicant’s claims while the dispositive issue is the total rejection of all of the applicant’s claims because of credibility concerns.

7 The Federal Magistrate’s conclusion relied on the views expressed by the High Court in *SZBEL*. The appellant in *SZBEL* claimed that he feared persecution in Iran on the basis of his conversion to Christianity. The High Court held that his description of the events preceding his jumping ship in Australia contained three elements of importance. These are

set out in [10]-[12] of the High Court's reasons for judgment, and relate to three unconnected events that gave rise to the appellant's claim of fear of persecution. Only one of those elements was directly dealt with by the delegate in his reason for rejection of the claim. In its review of the delegate's decision, the Tribunal did not identify the other two elements as important issues, nor did it challenge the appellant's account of them. Because the three elements of the claim were entirely unrelated, the appellant simply could not have known based on the delegate's reasons that two of the elements were in issue. Accordingly, the fact that the Tribunal failed to give the appellant "a sufficient opportunity to give evidence, or make submissions, about what turned out to be two of the three determinative issues arising in relation to the decision" (see *SZBEL* at [44]) was held to constitute a breach of the requirement of procedural fairness.

8 In order to review the Federal Magistrate's application of *SZBEL* it is necessary to consider the following findings of the delegate in this case:

I consider that there is a credibility issue of whether or not the applicant is from China. I draw an adverse conclusion from the fact that certified copies of the Taiwanese travel document, that he claims to have travelled on, show departure from Taipei and not from China on October 20 2005, arriving in Australia on October 21, 2005. He has made no claims of persecution against Taiwan and as such I find that he does not have a well-founded fear of persecution if he were to return to Tawan [sic].

Even if the applicant is actually from the PRC, I consider that his claims do not constitute a well-founded fear [of persecution] from the Chinese authorities. I do not find it credible that the applicant was able to leave China through border controls without attracting scrutiny from the security authorities.

9 The Federal Magistrate was of the view that the delegate's decision record did not put the Respondent on notice that an issue arose as to the credibility of his entire account of his experiences in China. He said at [27]:

In any event, what is clear is that whatever the delegate can be said to have considered in the circumstances, it cannot be said that the applicant could have properly understood that his credibility, and most certainly the credibility of his claims, as they related to anything other than his nationality and method of departure from China, would be seen as lacking in credibility.

10 His Honour then turned to the question of what the Tribunal's account of the hearing revealed in respect of the various inadequacies of the Respondent's account. His Honour

criticised the Tribunal for focusing on only some elements of the Respondent's account and commented, at [34]-[35]:

Applicants often give contradictory evidence before a Tribunal. Tribunals have often found that certain explanations appear implausible. This does not necessarily mean that a Tribunal will then automatically proceed to reject all of an applicant's claims. It is, as the High Court said in *SZBEL* at [47], that:

“... there may well be cases, perhaps many cases, where either the delegate's decision, or the Tribunal's statements or questions during a hearing, sufficiently indicate to an applicant that everything he or she says in support of the application is in issue.”

In my view, however, that did not occur at the hearing before the Tribunal. The Tribunal plainly found that all of the applicant's claims were rejected. But at the hearing raised only, at best, a very limited number of inconsistencies in his evidence, and only one possibly implausible aspect of his claims. It was insufficient, in my view, to then equate this with the comprehensive rejection on credibility grounds, of all the applicant's claims.

11 While we agree with his Honour's comment about contradictory evidence in relation to one claim not leading **inevitably** to a rejection of all of an applicant's claims, we do not accept his Honour's conclusion in relation to the Respondent's claims. In our view, this case is an example of the situation to which the High Court referred in the comment from *SZBEL* quoted by his Honour. The general principle relied on by his Honour is applicable where elements of an applicant's claim provide independent bases for the claims made, as was the case in *SZBEL*. However where, as here, an applicant gives a chronological account of his experiences and the later elements of the account are a function of earlier events, the credibility of the later events must depend on whether or not the Tribunal accepts the earlier account. According to the Respondent his initial refusal to pay fines led to his harassment by the police and to his imprisonment. His continued refusal led to the disruption of his trucking business which led him to engage in political opposition to the police corruption. This led to further threats and harassment and eventually to him fleeing China. It is this chain of experiences on which his claim to have a well-founded fear of persecution is based.

12 The Tribunal's refusal to accept his account of the initial elements in this chain of causation is a sufficient reason not to explore later elements.

13 For these reasons the appeal must be upheld with costs and the orders of the Federal Magistrate set aside.

I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Stone, Jacobson and Edmonds.

Associate:

Dated: 30 May 2008

Counsel for the Appellant: Mr D. Godwin

Solicitor for the Appellant: DLA Phillips Fox

Counsel for the First Respondent: Mr D. Burwood

The Second Respondent did not appear.

Date of Hearing: 27 May 2008

Date of Judgment: 30 May 2008

