FEDERAL COURT OF AUSTRALIA

SZHBX v Minister for Immigration & Citizenship [2007] FCA 1169

SZHBX, SZHBY AND SZHBZ v MINISTER FOR IMMIGRATION & CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL
NSD 716 OF 2007

EDMONDS J
7 AUGUST 2007
SYDNEY

NO QUESTION OF PRINCIPLE

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 716 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZHBX** **First Appellant**
	SZHBY **Second Appellant**
	SZHBZ **Third Appellant**
AND:	**MINISTER FOR IMMIGRATION & CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**EDMONDS J**
DATE OF ORDER:	**7 AUGUST 2007**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellants pay the first respondent's costs.

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

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	SZHBY **Second Appellant**
	SZHBZ **Third Appellant**
AND:	**MINISTER FOR IMMIGRATION & CITIZENSHIP** **First Respondent**
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JUDGE:	**EDMONDS J**
DATE:	**7 AUGUST 2007**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

INTRODUCTION

1 This is an appeal from the Federal Magistrates Court (Barnes FM) dismissing an application for judicial review of a decision of the second respondent ('the Tribunal') affirming a decision of a delegate of the first respondent ('the Minister') not to grant the appellants protection visas.

BACKGROUND

2 The first appellant, together with his wife and daughter, are citizens of Bangladesh. They arrived in Australia on 19 February 2005. On 3 March 2005, they lodged an application for protection visas (class XA) with the Department of Immigration and Multicultural

Affairs. On 30 March 2005 a delegate of the Minister refused to grant them protection visas. On 19 April 2005, the appellants applied for a review of that decision to the Tribunal.

THE APPELLANT'S CLAIMS AND THE TRIBUNAL'S FINDINGS AND CONCLUSIONS

3 Only the first appellant made claims under the Convention. His wife and daughter relied on their membership of his family.

4 The first appellant's claims before the Tribunal are set out in some detail in [2] – [10] of the reasons for judgment of her Honour below and the Tribunal's findings and conclusion are set out at [11] – [30] of those reasons. Shortly stated, the first appellant sought a protection visa on the ground that he had a well-founded fear of persecution by reason of his Buddhist religion. While accepting the first appellant was a Buddhist, the Tribunal did not accept that he had a high profile, or that he faced serious harm. The Tribunal was not satisfied that his business was targeted by Muslim businessmen because he was a Buddhist. The Tribunal found that he had embellished his claims and was not a credible witness. Further, it was reasonable for him to relocate within Bangladesh.

IN THE FEDERAL MAGISTRATES COURT

5 The grounds set out in the further amended application filed in the Federal Magistrates Court on 7 February 2007 claimed that the Tribunal:

(1) made a jurisdictional error by failing to deal with an integer of the first appellant's claim, namely, whether Buddhists suffered persecution by application of the enemy property law;

(2) constructively failed to exercise jurisdiction by failing to consider whether the fear that the first appellant's wife and daughter may be kidnapped as part of an extortion attempt could amount to Convention-based persecution;

(3) failed to deal with an integer of the first appellant's claim, namely, that he suffered persecution by reason of being a businessman and a Buddhist;

(4) mis-applied the test of relocation; and

(5) failed to consider whether the extortion claim may, in the context of the particular social group and the political environment, have the characteristics of individual targeting motivated by Convention reasons.

6 Her Honour below held that the Tribunal did not fall into jurisdictional error, for the following reasons:

(i) the Tribunal did not have a general duty to make inquiries either under the *Migration Act 1958* (Cth) ('the Act') or on the basis of procedural fairness, or a common law duty with regard to the question whether Buddhists were persecuted by reason of the enemy property law (ground 1) (at [51]).

(ii) the Tribunal did not err in the manner in which it considered whether the essential and significant reason for extortion of the first appellant was Convention related (ground 2) (at [61] – [65]).

(iii) the Tribunal did not fail to consider an integer of the first appellant's claim, namely, whether he was a member of a particular social group of Buddhist businessmen, because this claim was not raised squarely on the material before the Tribunal (grounds 3 and 5) (at [89]).

(iv) the Tribunal did not mis-apply the test of relocation by considering it in the context of its other findings (ground 4) (at [96]).

GROUNDS OF APPEAL

7 The single ground set out in the notice of appeal is that her Honour erred in failing to hold that the Tribunal erred by failing to deal with the first appellant on the basis that he belonged to a particular social group such as Buddhist businessmen because the Minister's delegate dealt with the claim on that basis and it was not obvious on the known material having regard to the issues arising that the Tribunal would not deal with the claim on the same basis.

MINISTER'S SUBMISSIONS

8 The ground of appeal appears at first glance to relate to grounds 2, 3 and 5 in the further amended application. Her Honour rejected the first appellant's claim that the Tribunal failed to consider as an integer of his claim that he was a member of the particular social

group of Buddhist businessmen in Bangladesh, because on the evidence he simply had not made such a claim. His claim was that he was a prominent Buddhist and that he was targeted because he was a prominent Buddhist who had been an activist and assisted other members of the Buddhist community in Chittagong.

9 Her Honour correctly inferred that the Tribunal considered, but rejected, the possibility that the first appellant was claiming persecution on the ground of his membership of the particular social group of Buddhist businessmen. The Tribunal took care to understand and properly characterise the first appellant's case before it. Her Honour correctly construed the Tribunal's reasons as including a finding that the first appellant did not claim he suffered persecution by reason of his membership of a particular social group of Buddhist businessmen (cf. *Dranichnikov v Minister for Immigration & Multicultural Affairs* (2003) 197 ALR 389 at [60] – [64]; *SZEEX v Minister for Immigration & Multicultural Affairs* [2005] FMCA 359 at [12] – [14], [28] – [33]). This conclusion of her Honour should be given due weight (*Minister for Immigration, Local Government & Ethnic Affairs v Hamsher* (1992) 35 FCR 359 at 368 – 369; *Rajaratnam v Minister for Immigration & Multicultural Affairs* (2000) 62 ALD 73 at [12] – [15] per Moore J in dissent).

10 In any event, the ground in the notice of appeal differs from grounds 2, 3 or 5 of the further amended application. The ground of appeal does not claim that her Honour erred in her construction of the application before the Tribunal and that a claim to be a member of a particular social group did arise squarely on the material before the Tribunal. Rather, it is a claim that the Tribunal had a duty to disclose to the first appellant as an issue that it did not propose to construe his claim in the same way that the delegate did.

11 The particulars to the ground of appeal indicate that it is a claim of breach of s 425 of the Act, which requires the Tribunal to 'invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review', based on the High Court's decision in *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 81 ALJR 515. Particular (g) to the ground of appeal summarises the preceding particulars by alleging that the Tribunal did not undertake a review of the delegate's decision as contemplated by s 415 of the Act. While s 415 refers to

the power of the Tribunal on review, the first respondent understands the first appellant to intend particular (g) to refer to s 425 of the Act.

12 In the Minister's submission, this ground should be rejected because it:

(a) rests upon a misconception as to the holding in *SZBEL;* and

(b) does not, on the evidence as to the basis on which the delegate made his decision, involve any non-compliance with s 425.

Principle in *SZBEL*

13 *SZBEL* is authority that s 425 does not confine the Tribunal to the issues which the delegate considered dispositive, but does require the Tribunal to disclose to the applicant additional issues it identifies which were not considered by the delegate to be dispositive and were not argued by the applicant:

> *'The Tribunal is not confined to whatever may have been the issues that the delegate considered. The issues that arise in relation to the decision are to be identified by the Tribunal. But if the Tribunal takes no step identify some issue other than those that the delegate considered dispositive, and does not tell the applicant what that other issue is, the applicant is entitled to assume that the issues the delegate considered dispositive are 'the issues arising in relation to the decision under review'. That is why the point at which to begin the identification of issues arising in relation to the decision under review will usually be the reasons given for that decision. And unless some other additional issues are identified by the Tribunal (as they may be), it would ordinarily follow that, on review by the Tribunal, the issues arising in relation to the decision under review would be those which the original decision-maker identified as determinative against the applicant.'* ((2006) 81 ALJR 515 at [35]).

14 Section 425, as construed in *SZBEL,* requires the Tribunal to disclose to an applicant additional issues which were not live issues in the delegate's decision or otherwise made known to the applicant as being in issue. If the Tribunal proposes to make an adverse finding on a matter where the delegate accepted or found no deficiency in the applicant's claims and the applicant has not otherwise been notified that the matter is in issue, the Tribunal should disclose to the applicant that it has a concern about the matter ((2006) 81 ALJR 515 at [36]). It is an entirely different matter to say that the Tribunal is bound to treat the applicant's case before the Tribunal as identical to the case the applicant presented to the delegate. Following

the delegate's decision an applicant may present additional evidence, and/or elaborate upon or change the Convention ground claimed. The Tribunal has a duty to consider the claim as it is presented to it on the basis of all the available evidence. The Tribunal does not have a duty to inform an applicant that because the evidence on which he or she now relies is different from the evidence before the delegate, the Tribunal may make different factual findings. Nor does the Tribunal have a duty under s 425 to inform an applicant that because the claims are now framed on the basis of a different Convention ground it will be required to consider whether the evidence supports the new claim.

15 However, ordinarily in the course of a hearing the Tribunal seeks to clarify with an applicant what Convention ground is claimed. That lies at the core of the purpose of the hearing.

16 In SZBEL the Tribunal member asked the appellant questions which elicited from him the same description of events that he had given in his statutory declaration. The Tribunal member did not challenge any of what the appellant said and did not ask him to amplify any aspects of the account, yet found that his evidence was 'implausible' ((2006) 81 ALJR 515 at [3]). The Tribunal affirmed the delegate's decision on the basis of new issues, namely that the appellant's account of how the ship's captain came to know of his interest in Christianity, and his account of the captain's reaction to that knowledge, were implausible. Because the delegate 'had not based his decision on either of these aspects of the matter' ((2006) 81 ALJR 515 at [43]) and 'nothing in the delegate's reasons for decision indicated that these aspects of [the appellant's] account were in issue' ((2006) 81 ALJR 515 at [43]), s 425 required the Tribunal to tell the appellant that these matters were issues in relation to the application for review ((2006) 81 ALJR 515 at [43]).

17 In *SZBEL* the High Court made observations as to how a Tribunal may indicate to an applicant at the hearing that a matter is in issue. There is no necessity for the Tribunal member to put to the applicant that he or she is lying, or may be thought to be embellishing the account of certain events. However where the Tribunal considers specific aspects of the account to be important but open to doubt, the Tribunal 'must at least ask the applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted' ((2006) 81 ALJR 515 at [47]), without giving the applicant a 'running

commentary upon what it thinks about the evidence that is given' ((2006) 81 ALJR 515 at [48]).

18 In the present case the Tribunal was not confined to the issues which were identified by the delegate. Putting to one side for the moment what issues were considered by the delegate, did the Tribunal affirm the decision by deciding adversely to the first appellant an issue which had not been notified to him? The answer to that question must be in the negative. As found by her Honour below, the Tribunal questioned the first appellant about whether he experienced discrimination because he was a Buddhist and his business was forced to close. The first appellant's answers were that he suffered persecution because of his religious profile as a leader of the Buddhist community. He did not claim that the social group of Buddhist businessmen were selectively discriminated against by extortionists because they were Buddhists and businessmen. The reason he was targeted was because of his religious profile.

19 The way in which the Tribunal member identified the issue was in accordance with observations made by the High Court in *SZBEL*. It was sufficient for the Tribunal to ask the first appellant to expand upon his account and explain the nature of the Convention ground on which he relied. Contrary to the allegation made in particular (a) of the notice of appeal, the Tribunal did identify the issue of possible factual circumstances which might raise a claim based on a particular social group. However the first appellant's answers confirmed for the Tribunal that his claim was persecution on the ground of religion, not on the ground of membership of a particular social group. Whether the first appellant was persecuted as a member of a particular social group was an issue which the first appellant did not squarely raise before the Tribunal. There was no necessity for the Tribunal to pursue it further or deal with it in its reasons. The first appellant gave evidence that he was the subject of extortion because of his religious profile. Then he agreed it was the price of doing business in Bangladesh. It was open to the Tribunal to find that the extortion did not occur because of his profile as a Buddhist and that it was non-Convention related criminal behaviour.

Basis for delegate's decision

20 As a step in the claim that the Tribunal failed to comply with s 425 of the Act, particular (e) in the notice of appeal claims that the first appellant was entitled to assume that

the issues the delegate considered dispositive were those which arose in relation to the decision under review. The first appellant complains in particular (f) that the Tribunal did not notify him that his claim to belong to a particular social group was a live issue.

21 There are two confusions in this. First, the Tribunal did not reject a claim made by the first appellant to be a member of a particular social group. The Tribunal did not deal with such a claim in its reasons because it did not understand the first appellant as ever having made such a claim. The Tribunal plainly took this approach because of the answers the first appellant gave at the hearing. Even assuming for the sake of argument that the first appellant had previously made such a claim, it is erroneous to assume that an applicant's claims must remain the same before the Tribunal as they were before the delegate and that the Tribunal is required to consider the same claims. As set out in [13] above, *SZBEL* provides no authority to support that proposition. If an applicant makes a claim based on one Convention ground before the delegate, then changes the nature of his claim before the Tribunal, the Tribunal is required to deal with the claim as it is now articulated by the applicant.

22 Second, in any event the first appellant made no claim before the delegate that he was a member of a particular social group, nor did the delegate deal with his application on the basis that he claimed this Convention ground. The first appellant's claim that the Tribunal took him by surprise in rejecting or failing to deal with the Convention ground of membership of a particular social group when the delegate had done so, lacks a factual foundation. The delegate's decision contains no reference to a claim to belong to a particular social group.

23 In the submission of the Minister the error claimed in the notice of appeal is not established.

24 Although the notice of appeal states that the first appellant seeks to appeal from the whole of the decision of Barnes FM, no error is claimed in relation to her Honour's conclusion with regard to the relocation issue, which was ground 4 below. Her Honour held that there was no error in the Tribunal's conclusion that it was reasonable for the first appellant to relocate within Bangladesh and that there was effective state protection. Even if the single ground stated in the notice of appeal were established, the Tribunal's decision would stand on the basis of its finding that it was reasonable for the first appellant to relocate

(*VBAP of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 965 at [25]).

25 Accordingly, the Minister submits that the appeal should be dismissed with costs.

CONCLUSION

26 I agree with the Minister's submissions in [13] – [25] above and, accordingly, the appeal must be dismissed with costs.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Edmonds.

Associate:

Dated: 7 August 2007

Solicitor for the Appellants:	The appellants appeared in person
Counsel for the First Respondent:	Ms M Allars
Solicitor for the First Respondent:	DLA Phillips Fox
Date of Hearing:	31 July 2007
Date of Judgment:	7 August 2007