FEDERAL COURT OF AUSTRALIA

SZJTK v Minister for Immigration and Citizenship [2008] FCA 1712

CORRIGENDUM

SZJTK v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
NSD 1086 OF 2008

REEVES J
14 NOVEMBER 2008 (CORRIGENDUM 24 NOVEMBER 2008)
DARWIN

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1086 OF 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZJTK** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**REEVES J**
DATE OF ORDER:	**14 NOVEMBER 2008**
WHERE MADE:	**DARWIN**

CORRIGENDUM

1. On page 3 at paragraph 6, remove the ‘s’ from months to read ‘… a seven month vacation’.

2. On page 5 at paragraph 10, remove the extra ‘s’ to read ‘… under s 429A …’.

3. On page 7 at paragraph 18, remove the word ‘have’ and replace with ‘has’ to read ‘… because none of them has any merits’.

I certify that the preceding three (3) numbered paragraphs are a true copy of the corrigendum to the Reasons for Judgment of the Honourable Justice Reeves.

Associate:

Dated: 24 November 2008

FEDERAL COURT OF AUSTRALIA

SZJTK v Minister for Immigration and Citizenship [2008] FCA 1712

Migration Act 1958 (Cth)

Attorney-General of NSW v Quin (1990) 170 CLR 1
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Minister for Immigration and Ethnic Affairs v Eshetu (1999) 197 CLR 611
Minister for Immigration & Multicultural & Indigenous Affairs v Epeabaka (2001) 206 CLR 128
SZJYD v Minister for Immigration and Citizenship [2007] FCA 798
SZJYD v Minister for Immigration and Citizenship [2007] FMCA 452
SZLJA v Minister for Immigration and Citizenship & Anor [2007] FMCA 1695
Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507; [2001] HCA 17
Minister for Immigration & Multicultural Affairs v Yusuf (2001) 206 CLR 323; [2001] HCA 30
McDonald v Commissioner of Taxation (2000) ATC 4271 at [21] to [22] per Finn J
ACCC v World Netsafe [2002] FCA 526

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NSD 1086 OF 2008

REEVES J
14 NOVEMBER 2008
DARWIN

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1086 OF 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZJTK**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **REEVES J**
DATE OF ORDER: **14 NOVEMBER 2008**
WHERE MADE: **DARWIN**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1086 OF 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZJTK**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **REEVES J**
DATE: **14 NOVEMBER 2008**
PLACE: **DARWIN**

REASONS FOR JUDGMENT

INTRODUCTION

1 This is an appeal against the judgment of Federal Magistrate Barnes delivered on 25 June 2008, which dismissed an application for judicial review of a decision of the Refugee Review Tribunal ('the Tribunal'). The Tribunal's decision was handed down on 2 November 2006 and affirmed a decision of a delegate of the Minister for Immigration and Citizenship to refuse to grant a protection visa to the appellant. The appellant submits that both the Tribunal and the Federal Magistrate failed to recognise that the Tribunal breached s 425 of the *Migration Act* 1958 (Cth) ('the Act') when it conducted a hearing by videoconference, and that the Tribunal failed to properly consider the future harm faced by the appellant as a liberal Muslim in India, at the hands of radical Hindus.

FACTUAL SUMMARY

2 The appellant is a citizen of India who arrived in Australia on a tourist visa on 3 May 2006. The appellant lodged an application for a protection visa with the Department of Immigration and Citizenship on 2 June 2006. A delegate of the first respondent refused that

application on 21 June 2006 and the appellant applied to the Tribunal for a review of that decision on 17 July 2006.

3 The appellant lodged a statement with his protection visa application which sets out the basis of his claims to fear persecution in India because of his Muslim beliefs and associations. The appellant repeated those claims when he attended a hearing before the Tribunal on 29 August 2006. That hearing was conducted by videoconference between Sydney and Melbourne.

4 The appellant claimed that:

- He is a Muslim and had been an active member of his local Muslim community organisation 'Al-Ummah';
- His family employed Dalit people as agricultural workers and supported them by providing education to them which caused conflict with Hindu extremists, who eventually accused the appellant of being a terrorist and filed false charges against him;
- He was arrested and tortured and his parents were forced to pay a large amount of money to secure his release;
- His family's house was subsequently ransacked by a group of extremists. His parents were injured and forced to leave their village. He therefore left India in 1997 and worked in Saudi Arabia between 1997 and 2004, returning briefly in 2000 to marry, and again in 2002;
- He returned to India to live in 2004; however he claims extremists became aware of his return and in November 2004, two people beat him up. He was taken to the Local Police Station but no formal complaint was recorded. He moved to another part of India but was concerned that he may still be killed;
- He moved to Thailand until September 2005 when a riot occurred in his village;

- Because of the ongoing Hindu/Muslim violence in India, from which he says the Hindu police will not protect him, he came to seek protection in Australia and maintains that if he returns to India the police or Hindu extremists or other political adversaries would harass and seriously harm or kill him.

5 The Tribunal sent the appellant a letter under s 424A of the Act on 6 September 2006, asking him to comment on "inconsistencies in the [oral versus written] evidence about why [he] decided to leave India [which] raise doubts about [his] credibility"; and on his demonstrated "ability and willingness to return to India on a number of occasions since", which in itself could be seen to throw doubt on the genuineness of his membership of Al Ummah. The Tribunal received a detailed written response from the appellant on 29 September 2006. The Tribunal considered that response and affirmed the delegate's decision on 2 November 2006.

THE TRIBUNAL'S DECISION

6 The Tribunal did not accept the appellant's claims he was a member of Al-Ummah or any other Muslim organisation on the basis of unresolved inconsistencies in the various accounts he gave, particularly with regard to his alleged arrest and being falsely charged in 1997. In coming to this conclusion the Tribunal also had regard to the ease and regularity with which the appellant returned to his home town and stayed with his family, including for a seven months vacation. The Tribunal stated that this was "not credible against the background of problems and contentions" which he claimed. It also rejected the appellant's claim that the inconsistencies arose from difficulties he had with the interpreter at the Tribunal hearing.

7 The Tribunal therefore did not accept any of the appellant's related claims of persecution by Hindu extremists. The Tribunal concluded that the appellant did not genuinely hold a fear of persecution, that he had not been seriously harmed in the past and that there was nothing before it to indicate that he would face a real chance of serious harm should he return to India. The Tribunal therefore affirmed the delegate's decision.

THE FEDERAL MAGISTRATES DECISION

8 The appellant filed a further amended application for judicial review in the Federal Magistrates Court on 25 February 2008, which set out the following two grounds:

> 1. The Tribunal failed to provide the Applicant with the opportunity to appear before it, and thus failed to comply with the mandatory requirements of s 425(1).
>
> **Particulars**
>
> (i) Section 425 mandates an oral hearing at which both the Applicant and the Tribunal are physically present (giving the word "before" its natural English meaning, in the context, of "in front of") in the one place, in order that the Applicant may present their case.
>
> (ii) The Tribunal was not physically present at the hearing, because the Tribunal was in Melbourne, not in Sydney, and thus the Applicant did not "appear before" the Tribunal.
>
> 2. The Tribunal failed to consider an integer of the Applicant's claim, in failing to consider whether or not a liberal Muslim (regardless of their specific claims of affiliation or past persecution) in India was at risk of harm from radical Hindus, and not able to access effective protection.

9 At the hearing before the Federal Magistrate on 17 April 2008, the appellant added two further claims: that the interpretation offered at the Tribunal hearing was unsatisfactory; and that the Tribunal had failed to comply with s 430 of the Act. The appellant was given further time to substantiate his 'interpretation' claim but, as her Honour noted, the affidavit he subsequently filed did not assist and she found that claim was not made out. Her Honour also noted that any breach of s 430 would not involve jurisdictional error.

10 In relation to ground 1 above, the Federal Magistrate held that the Tribunal was entitled to arrange for the appellant to appear by closed circuit television or any other means

of communication under ss 429A of the Act and that section was an empowering provision which allowed the Tribunal, on its own motion, to arrange a hearing where the Tribunal and the appellant were physically separate; citing *SZJYD v Minister for Immigration and Citizenship* [2007] FMCA 452. The Federal Magistrate found nothing in the hearing transcript to demonstrate that the appellant had been confused during the hearing, or as a result of using the video link, or in some other way that he was prejudiced in presenting his case.

11 The Federal Magistrate found that it was apparent from a consideration of the Tribunal decision as a whole that the appellant's claims had all been addressed. The Federal Magistrate stated that while the Tribunal's findings were made at a high level of generality, it was clear that the Tribunal had understood and addressed - but then rejected - the appellant's claimed fear of harm from radical Hindus.

12 The Federal Magistrate found that the Tribunal made a positive finding that the appellant had not suffered any harm in the past on the basis of inconsistencies inherent in his claims. Her Honour found that there was nothing before the Tribunal to support the appellant's claim of a 'real chance' of persecution for a Convention-related reason in the future.

13 The Federal Magistrate accordingly dismissed the appellant's application for want of jurisdictional error.

THE PRESENT APPEAL

14 In the notice of appeal filed in this Court on 15 July 2008, the appellant raised the following single ground:

> 1. The Federal Magistrate in upholding the decision of the Refugee Review Tribunal in upholding the decision of the Department of Immigration in rejecting the applicant['s] application for a protection visa, even though he had clearly established that his ground of appeal [sic] within the definition of Refugee.

15 However, in the outline of written submissions he subsequently filed, the appellant purported to raise four further complaints, as follows (with numbers added to the last two paragraphs):

> (1) The honourable FM failed to consider the ground of the application such as error of law made by the Tribunal failed to provide the applicant with an opportunity to appear it, thus failed to comply with the mandatory requirements of section 425(1).
>
> Particular:
>
> (i) Section 425 mandates an oral hearing at which both the Applicant and the Tribunal are physically present in the one place, in order that the applicant may present their case.
>
> (ii) The Tribunal was not physically present at the hearing, because the Tribunal was in Melbourne, not in Sydney, and thus the applicant did not 'appear before' the Tribunal.
>
> (2) The Tribunal has failed to investigate applicant claims, specially the grounds of persecution in India. Therefore, the Tribunal's decision dated 11 October 2007 was effected by actual bias constituting judicial error.
>
> (3) Therefore the applicant submits that the Tribunal failed to analyse properly the "future harm" the applicant may face if he has to back to India.
>
> (4) Hence, due to this failure, the Tribunal had committed a serious jurisdictional error by failing to assess or carry out the 'real chance' test, before dismissing the applicant's claim.

16 While the complaint in paragraph (1) above is the same as that raised in ground 1 before the Federal Magistrate (see [8] above), the complaints in paragraphs (2) to (4) inclusive above were not raised before the Federal Magistrate. It follows that to raise them for the first time on this appeal the appellant requires leave.

17 At the hearing of the appeal before me on 7 November 2008, the appellant appeared in person, unrepresented, but assisted by an interpreter. Mr Shariff appeared for the first respondent.

18 Mr Shariff opposed leave being granted to the appellant to raise the complaints in paragraphs (2) to (4) above on the ground that it is not in the interests of justice to do so because none of them have any merits.

CONSIDERATION

19 On its face, the single ground of appeal contained in the notice of appeal before this Court clearly seeks to challenge the Tribunal's assessment and rejection of the appellant's claims to be a refugee. It therefore seeks to challenge the fact-finding role of the Tribunal on that issue. As has been said many times, it is not the function of this Court, on an appeal of this kind, to engage in a review of the Tribunal's fact-finding role: see *Attorney-General of NSW v Quin* (1990) 170 CLR 1 at 34 – 36, *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 and 291 – 292, *Minister for Immigration and Ethnic Affairs v Eshetu* (1999) 197 CLR 611 at [132] – [134] and *Minister for Immigration & Multicultural & Indigenous Affairs v Epeabaka* (2001) 206 CLR 128 at [64]. This ground of appeal therefore has no merit and must be rejected.

20 Since this is the sole ground of appeal raised in the notice of appeal before this Court that conclusion may be sufficient to dispose of this appeal. However, as noted above, the appellant appears to have attempted to raise four further matters by way of complaint in his outline of written submissions. Since the appellant is not legally represented and the first respondent did not object to this course, I will consider those matters as if they were grounds of appeal, noting however that three of them i.e. those in paragraphs (2) to (4), were not raised before the Federal Magistrate and therefore require leave to be raised for the first time on this appeal.

21 By paragraph (1) of his outline of written submissions, the appellant seeks to argue that s 425 of the Act requires that he be given the opportunity to appear in person at the hearing before the Tribunal and his appearance by video conference facility between Melbourne and Sydney did not meet that requirement. The appellant raised the same argument before the Federal Magistrate and her Honour rejected it relying upon the provisions of s 429A of the Act and the decisions of *SZJYD v Minister for Immigration and Citizenship* [2007] FMCA 452 at [30], on appeal [2007] FCA 798; and *SZLJA v Minister for*

Immigration and Citizenship & Anor [2007] FMCA 1695 at [2] (see [31] to [35] of her reasons).

22 I do not consider her Honour made any error in reaching that conclusion. Section 425(1) of the Act provides:

> The Tribunal must 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.

23 As is apparent from its terms, this section requires the Tribunal to give an applicant an opportunity to appear before it, to give evidence and to present arguments. However, it does not require that the opportunity to appear before the Tribunal must be an apperance "in person". In this day and age, it is quite common for courts and tribunals to have people appearing before them using modern technology such as video conference facilities. Most of the concerns of decades past about the use of such technology have disappeared: see *McDonald v Commissioner of Taxation* (2000) ATC 4271 at [21] to [22] per Finn J.

24 Indeed, s 429A of the Act expressly allows for appearances before the Tribunal to be conducted using such technology. It provides:

> For the purposes of the review of a decision, the Tribunal may allow the appearance by the applicant before the Tribunal, or the giving of evidence by the applicant or any other person, to be by:
>
> (a) telephone; or
> (b) closed-circuit television; or
> (c) any other means of communication.

25 As the Federal Magistrate observed, this is an enabling provision. It clearly gives the Tribunal a discretion to allow an applicant's appearance (for the purposes of a review hearing under s 425 of the Act) to be undertaken by telephone, closed-circuit television (which is probably not the same as a video conference facility), or any other means of communication (which clearly would include a video conference facility).

26 In exercising that discretion, the Tribunal would generally need to consider whether an appearance using such technology gave the applicant concerned a fair opportunity to give his or her evidence and to present arguments to it. The Tribunal may also need to consider other factors, such as whether its questioning of the applicant concerned is likely to be

conducted fairly and effectively using such technology; whether it would be able to properly make any necessary assessment of the applicant's credibility; whether it may need to put a large quantity of documents to the applicant; and what delays and costs may be caused if the appearance were not to be conducted in that way. These, and other factors, have been considered in relation to the use of video conference facilities in courts and tribunals, in a number of cases in this, and other courts, over the past two decades. The most recent decision on this issue, and one that conveniently reviews many of the earlier authorities, is *ACCC v World Netsafe* [2002] FCA 526 at [4] to [8] per Spender J.

27 In this case, there is no evidence that the appellant expressed any opposition to appearing before the Tribunal by video conference facility, or that the Tribunal had any concerns that allowing the appellant to appear by means of that technology presented any difficulty. The issue first appears to have been raised by the appellant in his further amended application for review before the Federal Magistrates Court – it does not appear in the earlier two versions of that application. Notwithstanding its late emergence as an issue, her Honour considered the transcript of the Tribunal hearing and concluded that there was nothing in it to demonstrate that the appellant had been confused, disadvantaged or prejudiced in any way by the use of the video conference facility to conduct the hearing. Having read it myself, I respectfully agree.

28 For these reasons, I consider that the argument raised in paragraph (1) of the appellant's outline of written submissions has no merit and must therefore be rejected.

29 In paragraph (2) of the appellant's outline of written submissions, he makes the bald allegation that the Tribunal's decision was "effected (sic) by actual bias". This is a serious allegation. It is not particularised and no evidence has been adduced to support it. It follows that it has not been distinctly made or clearly proved as required by authority: see *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; [2001] HCA 17 at [69] per Gleeson CJ and Gummow J and [127] per Kirby J. It follows that this complaint has no merits and I refuse the appellant leave to raise it for the first time on this appeal.

30 In paragraphs (3) and (4) of his outline of written submissions, the appellant alleges that the Tribunal "failed to analysis properly" the future harm the appellant may face if he were to return to India and it failed to assess or apply the 'real chance' test to his claims. The

appellant made similar claims in relation to another issue before the Federal Magistrate i.e. the failure to consider an integer of his claim, namely whether or not he was a liberal Muslim and therefore faced the risk of harm from radical Hindus. After referring to the High Court decision in *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30 at [91] about the level of generality at which a Tribunal may determine an issue, her Honour rejected this claim on the basis that while, the Tribunal's ultimate findings were made at a very high level of generality, it was clear that it had properly understood and addressed the appellant's claims to fear harm in this regard.

31 In reaching this conclusion her Honour appears to have been referring to the penultimate paragraph of the 'Findings and Reasons' section of the Tribunal's Decision Record as follows:

> The Tribunal finds the applicant has not been seriously harmed in the past. The Tribunal finds there is nothing before the Tribunal to support the claim that should the applicant return to India he would face a real chance of serious harm in the reasonably foreseeable future on account of his religion, political opinion (actual or imputed) or other Convention ground by Hindu groups or the authorities.

32 It is apparent from the Tribunal's Decision Record that prior to reaching this conclusion, the Tribunal assessed the various claims made by the appellant and his evidence in support of them and set out its reasons for rejecting them. It follows, in my view, that the Federal Magistrate was correct in concluding the Tribunal did make an assessment of the question whether the appellant had a 'real chance' of suffering future harm if he were to return to India and rejected that claim. While the appellant may be dissatisfied with this conclusion, the Tribunal's conclusions on these issues are not matters that are open to review on an appeal of this kind: see the authorities set out at [19] above.

33 For these reasons, I do not consider the matters raised by paragraphs (3) and (4) of the appellant's outline of written submissions have any merit and insofar as he is attempting to raise them for the first time on this appeal, I refuse leave for him to do so.

CONCLUSION

34 For these reasons, this appeal must be dismissed. I will hear the parties on the question of costs.

I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Reeves.

Associate:

Dated: 14 November 2008

Appellant:	In person
Counsel for the First Respondent:	Mr Y Shariff
Solicitor for the First Respondent:	Clayton Utz
Date of Hearing:	7 November 2008
Date of Judgment:	14 November 2008