FEDERAL COURT OF AUSTRALIA

Applicant MZKAO v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1484

MIGRATION – judicial review – protection visa – whether Tribunal failed to ask itself the right question – whether findings of Tribunal were unreasonable – whether country information relied on by Tribunal was outdated.

Migration Act 1958 (Cth)

Plaintiff S157/2002 v Commonwealth of Australia (2003) 195 ALR 24 referred to

Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 applied

SAAT v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 345 applied

Minister for Immigration and Multicultural and Indigenous Affairs v Kord [2002] FCAFC 77, (2002) 125 FCR 68 applied

Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611 applied

Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 [2003] HCA 30, (2003) 198 ALR 59 referred to

Minister for Immigration and Multicultural Affairs v Anthonypillai [2001] FCA 274, (2001) 106 FCR 426 applied

Kioa v West (1985) 159 CLR 550 referred to

Selavadurai v Minister for Immigration and Ethnic Affairs and Another (1994) 34 ALD 347 followed

APPLICANT MZKAO v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

V 520 OF 2003

MARSHALL J

12 DECEMBER 2003

MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	V 520 OF 2003
ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA	

BETWEEN:	APPLICANT MZKAO Appellant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS Respondent
JUDGE:	MARSHALL J
DATE OF ORDER:	12 DECEMBER 2003
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent's costs of the appeal.

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

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	V 520 OF 2003
ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA	

BETWEEN:	APPLICANT MZKAO Appellant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS Respondent

JUDGE:	MARSHALL J
DATE:	12 DECEMBER 2003
PLACE:	MELBOURNE

REASONS FOR JUDGMENT

1 This is an appeal from a judgment of Federal Magistrate McInnis given on 23 June 2003. The learned Federal Magistrate dismissed the appellant's application for review made pursuant to s 39B of the *Judiciary Act 1903* (Cth) in respect of a decision of the Refugee Review Tribunal ("the Tribunal") affirming a decision of a delegate of the respondent to refuse the appellant a protection visa.

2 Pursuant to s 25(1A) of the *Federal Court of Australia Act 1976* (Cth), the Chief Justice determined on 4 August 2003 that this appeal should be heard by a single judge of the Federal Court.

3 It should be noted at the outset that there is clearly an error in the notice of appeal in this matter. The notice of appeal refers to a decision of the Chief Federal Magistrate (and not McInnis FM) and to the appellant's return to Sri Lanka, when the appellant is of Indian nationality. The respondent submitted in written contentions that the appellant ought to file an amended notice of appeal that accurately sets out the grounds of appeal relied upon. However, in an attempt to be practical, and rather than putting the parties to further time and expense, I have treated the appellant's submissions as setting out his grounds of appeal for the purposes of this appeal.

4 The issues for determination in the appeal are:

- whether the Federal Magistrate erred in holding that there was no jurisdictional error in the Tribunal's finding that the appellant did not face a real chance of persecution in employment in India by reason of his race;

- whether the Federal Magistrate erred in holding that there was no jurisdictional error in the Tribunal's finding that the appellant did not face a real chance of persecution by reason of his religion; and

- whether the Federal Magistrate erred in failing to find a jurisdictional error in the Tribunal giving weight to the appellant's voluntary return to India on three occasions as indicating an absence of a strong subjective fear for his well-being in India.

Relevant Facts

5 The appellant, who is a citizen of India, is a 36 year old Roman Catholic, of Anglo-Indian ethnicity. He was born and grew up in Madras. He undertook tertiary education in India and worked there between 1983 and 1997 in accountancy and other administrative occupations.

6 The appellant first visited Australia between March and June 1994 on a tourist visa. He returned to Australia two years later, in July 1997, on a student visa. He has been living in Australia since, except for two return trips to India to visit his mother (three trips altogether). He last returned to Australia on 18 January 2000. On 13 March 2001, he lodged an application for a protection visa with the Department of Immigration and Multicultural Affairs (as it then was) under the *Migration Act 1958* (Cth) ("the Act"). In his application, the appellant claimed that:

- As an Anglo-Indian of British descent, he is discriminated against by other Indian communities, has no equal opportunity, has limited educational opportunities and no real job prospects or access to other facilities in India;

- As a result of this, he holds different political opinions to the Indian government and has a well-founded fear that if he is returned to India he will be persecuted;

- After working and studying in Australia, he is more adapted to the lifestyle here and believes that Australia offers him educational and job opportunities that India cannot.

7 On 18 May 2001, a delegate of the respondent refused to grant a protection visa. In his reasons for decision the delegate stated:

'I find that the harm or mistreatment feared by the applicant is not of sufficient gravity as to constitute persecution.

Therefore, I find that there is no need to consider whether there is a Convention ground or whether there is a real chance of persecution on a Convention ground and that the applicant's fear of persecution is well founded.'

Review by the Tribunal

8 On 12 June 2001, the appellant applied to the Tribunal for review of the delegate's decision. In his submissions to the Tribunal, the appellant, by himself and through his migration agent, also made some claims additional to those set out in his initial application, including that:

- He is also discriminated against because he has a strong Roman Catholic faith;

- He did not know that he could apply for a protection visa until four years after his arrival in Australia;

- He has returned to India a number of times but the situation has not improved;

- He has always wanted to leave India and live in an English speaking country.

9 However, the appellant did not provide any details as to the nature of the persecution he faces in India for reasons of his race or religion, except to note that Anglo-Indians are told they do not belong in India, that he is disadvantaged because he does not speak any of the official languages of India except English, and that he is always required to address Indian people in a deferential way.

10 The Tribunal affirmed the delegate's decision on 4 October 2002. However, in contrast to the delegate, the Tribunal identified the Convention grounds of race and religion before proceeding to the finding that the harm the appellant feared in relation to these two grounds was not of sufficient gravity to amount to persecution.

Review by the Federal Magistrates Court

11 The appellant then sought judicial review of the Tribunal's decision in the Federal Magistrates Court on 15 November 2002. The application for review contained three grounds of review. First, that the Tribunal failed to conduct the review according to the requirements of procedural fairness, in that it determined that the appellant had not made any claim of persecution in relation to religion, when such a claim had in fact been made. Second, that the Tribunal erred in considering whether racial discrimination against the appellant in India as a member of a minority ethnic group amounts to persecution. Third, that the Tribunal failed to conduct the review in accordance with the rules of natural justice, in that it was clear to the Tribunal that the appellant was not properly represented. This last ground does not appear to have been pursued at the hearing before the Federal Magistrate.

12 The Federal Magistrate dismissed the appeal on 23 June 2002 (*MZKAO v Minister for Immigration* [2003] FMCA 284). In his reasons, his Honour correctly noted that the consequence of the High Court's decision in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24 was that, despite s 474 of the Act, a court reviewing a decision of the Tribunal is entitled to consider whether or not the Tribunal made a jurisdictional error. If a jurisdictional error is found, the Tribunal can be directed to remake the impugned decision according to law, through writs of certiorari and mandamus.

13 However, after reviewing the Tribunal's reasons, the Federal Magistrate held (at 31):

'In this application having considered all the material being placed before this court I am unable to conclude that there is any proper basis upon which the court can find jurisdictional error. In my view, the RRT has indeed considered all relevant matters, it has relied upon relevant information and the conclusions reached by the RRT are conclusions reasonably open to it. I can see no other basis upon which the decision of the RRT in this case can be challenged. I cannot find on the material before me any material which would justify reaching a conclusion that there has been a lack of good faith or indeed that the RRT has otherwise attracted the attention of the court arising out of the proviso that is often referred to as the Hickman proviso. In my view, the decision sought to be reviewed is a decision which does not attract on any basis the intervention of this court.'

Grounds of Appeal

Issue 1 - Persecution by reason of race

14 The Tribunal accepted that the appellant is an Anglo-Indian Christian of Indian nationality and that he held some political opinions that were different to those held by the Indian Government. But it held that there was no material before it to indicate that the appellant faced consequences amounting to persecution.

15 The Tribunal noted that the UN *Handbook on Procedures and Criteria for Determining Refugee Status* 1992 states:

'Differences in the treatment of various groups do indeed exist to a greater or less extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn a livelihood, his right to practice his religion, or his access to normally available educational facilities.'

16 The Tribunal also acknowledged that 'denial of access to employment, to the professions and to education… may constitute persecution if imposed for a convention reason': see *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 431. However, it held that the appellant did not face a real chance of persecution, in employment or otherwise, by reason of his race. In making this finding, the Tribunal placed weight on the fact that the appellant had completed a tertiary education in India and that he had been able to gain regular remunerative employment in the private sector over a period of 14 years, including in a job where he held at least some degree of seniority. It also placed weight on the fact that the United States Department of State *Country Reports on Human Rights Practices* 2001, made no reference to any problems faced by Anglo-Indians because of their race.

17 The appellant alleged that there is a jurisdictional error in this finding, because paid employment per se has been equated with access to employment and an absence of persecution. The appellant claimed that the Tribunal ignored the extent to which his career and salary prospects are limited because of his race and thereby identified the wrong issue or asked itself the wrong question. It was submitted that the Tribunal should have found that the appellant would be denied access to the professions, although it was conceded that there was no claim of that sort made by the appellant to the Tribunal and that there was no evidence upon which such a claim could be based. However, it was submitted that the Tribunal should have made enquiries about these matters. That submission is rejected. There was no onus on the Tribunal to advance a case for the appellant, which was not apparent from the claims he advanced before it.

18 The appellant further submitted that the Tribunal's finding that he did not face a real chance of persecution by reason of his race was inconsistent with the country information and thereby glaringly improbable, so unreasonable that no reasonable person could have reached it, and plainly unjust.

19 The Tribunal did not ignore the potential impact of the appellant's race on his employment prospects. Its findings of fact are largely consistent with the country information. They are not improbable or unreasonable. The Tribunal considered the issue of persecution on the grounds of race, but found no country information suggesting that Anglo-Indians were subject to such

persecution. The appellant did not provide the Tribunal with any material contradicting the country information that it relied upon.

20 Together with the country information, the Tribunal was entitled to take into account the appellant's educational and employment history in India, as well as the appellant's claims of discrimination amounting to persecution. The weighing of all these relevant considerations in determining whether the discrimination claimed by the appellant was serious enough to constitute persecution was a matter of fact and degree for the Tribunal to determine (see *SAAT v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 345 at [12]).

21 As the Tribunal noted under s 91R(1) of the Act, persecution must involve 'serious harm' and 'systematic and discriminatory conduct': see *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 388 and *Minister for Immigration and Multicultural and Indigenous Affairs v Kord* [2002] FCAFC 77 at [15]-[30], (2002) 125 FCR 68 at 72-79. Section 91R(2)(f) of the Act specifies that an instance of 'serious harm' may be a 'denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist'. In light of this definition, I consider that it was open to the Tribunal, on the evidence before it, to find that any employment difficulties faced by the appellant in India did not amount to 'serious harm' or persecution. No unfairness or other jurisdictional error is demonstrated in respect of the Tribunal's finding that the appellant does not face a real chance of persecution by reason of his race. The first ground of appeal must therefore fail.

Issue 2 - Persecution by reason of religion

22 The Tribunal found that the appellant had not made any claim of persecution on the basis of his religion. As noted by the Federal Magistrate this was clearly wrong (at 28). The appellant's migration agent stated in his letter to the Tribunal of 5 June 2001 that the appellant's strong Roman Catholic faith was in part the cause of the discrimination the appellant claimed to be subject to by other Indian communities.

23 However, despite the Tribunal's view that the appellant had made no claim of persecution on the basis of his religion, the Tribunal proceeded to a thorough consideration of the issue. It cited extensive extracts from the United States Department of State *Country Reports on Human Rights Practices* 2001 and a number of DFAT reports issued between 1998 and 2001 discussing freedom of religion, religious tensions and the position of Christians in India. After considering these reports it concluded:

'Aforementioned information indicates there have been occasional attacks on some prominent Christians, in particular, apparently by Hindu fundamentalists. Some church buildings away from the applicant's home State were destroyed in violent attacks, apparently in late 1999 or early 2000. Some church leaders attributed the attacks against Christians to political motives arising out of the tendency of Christian teachers to develop political awareness among adherents, usually drawn from the lower castes in Indian society in remote, rural areas. In a quite recent investigation

the Minorities Commission found no evidence of any increase in communal tensions and has promoted dialogue in order to increase tolerance between Christians and Hindus. The Bharatiya Janata Party (BJP) prime minister has also made public statements following isolated outbreaks of communal violence in an endeavour to ease communal and religious tensions and to affirm the rule of law.

In assessing the applicant's claims based on his Christianity and weighing aforementioned country information the Tribunal finds that he does not face a real chance of persecution for any Convention reason.'

24 In the appeal before the Federal Magistrate, the appellant placed reliance on the Tribunal's statement that the appellant had not made any claim of persecution in relation to religion to argue that the Tribunal had failed to take into account the appellant's religion as a basis for his perceived fear of persecution. As His Honour held, that argument was clearly untenable given that the Tribunal actually addressed the issue. The Federal Magistrate further concluded that the Tribunal had considered the issue of religious persecution in "an entirely appropriate manner having regard to relevant and recent country information".

25 On the appeal to this Court, the appellant submitted that the Tribunal and Federal Magistrate fell into jurisdictional error for two reasons:

- First, the appellant contended that the bulk of the country information considered by the Tribunal clearly indicated that the appellant would face a very real chance of persecution because of his religion. Therefore the findings of the Tribunal as affirmed by the Federal Magistrate were glaringly improbable, unreasonable and plainly unjust.

- Second, the appellant submitted that the country information relied upon, which was a year old and sometimes older, was out of date. The appellant claimed that this resulted in a failure of the Tribunal to assess whether the appellant was a person to whom Australia had protection obligations 'upon the facts as they exist **when the decision is made**'. The appellant argued that this amounted to a jurisdictional error both because the Tribunal failed to observe limitations on its decision making power and because the decision was not a *bona fide* attempt to exercise the power.

26 In relation to the first issue, it is true that the country information referred to a significant number of incidents of violence against Christians, including attacks on Christian churches and schools, Christian missionaries, aid workers and prominent Christian leaders.

27 However, the country information also included statements such as the following:

'The Constitution [of India] provides for freedom of religion, and the Government generally respects this right in practice…

The Government has taken steps to promote interfaith understanding…

An official inquiry by the National Commission for Minorities into the roughly 400 attacks on Christians between December 1998 and December 2000, found only random acts of unconnected violence, not a pattern of religiously motivated hate crimes…

Speaking in Parliament in August 2000 on the series of church bombings in 2000, Home Minister L.K Advani stated that "the Center, in consultation with the affected states, will take stern action against those found guilty of instigating attacks against Christians."'

28 The country information was thus not entirely consistent in describing the situation of Christians in India. The Tribunal was entitled, in making a finding of fact as to the existence of a real chance of persecution by reason of the appellant's religion, to weigh up the information on violence against Christians in India and the information disclosing a certain level of freedom of religion and state protection in India with the appellant's circumstances, that is a practising Roman Catholic, but one who does not claim to be a missionary, aid worker or religious leader. As with the assessment of the existence of persecution by reason of race, the weighing of all these relevant considerations is a matter of fact and degree for the Tribunal to determine (see *SAAT* at [12]).

29 The Tribunal's decision cannot be said to be glaringly improbable, unreasonable or plainly unjust so as to amount to a jurisdictional error. The conclusion the Tribunal reached was open to it on the evidence – it was supported by probative material and logical grounds (see *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 657; see also *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30, (2003) 198 ALR 59).

30 In relation to the appellant's argument that the country information used was out of date, in my view the Federal Magistrate was correct in holding that information generated up to and including 2001 was clearly recent enough so as not to be considered to be irrelevant or outdated when the Tribunal made its decision in October 2002. The Tribunal is under no duty to make inquiries or to search out further country information (see *Minister for Immigration and Multicultural Affairs v Anthonypillai* [2001] FCA 274 at [86], (2001) 106 FCR 426 at 445) and if the appellant was not satisfied with the country information on which the Tribunal intended to rely, it was open to him to put further information before the Tribunal (see *Kioa v West* (1985) 159 CLR 550 at 587). He did not do so.

31 Given that I do not consider that the material relied on was relevantly out of date, it is not necessary to consider whether a situation in which a Tribunal relied on outdated material would amount to jurisdictional error.

32 In light of the above, I have formed the view that no jurisdictional error is demonstrated in respect of the Tribunal's finding that the appellant does not

face a real chance of persecution by reason of his religion. The second ground of appeal must therefore also fail.

Issue 3 - The appellant's voluntary return Visits to India

33 In finding that the appellant did not face a real chance of persecution in India, on the grounds of race or religion, or have a well-founded fear of such persecution as required by Article 1A(2) of the Refugees Convention, the Tribunal also placed weight on the appellant's voluntary return to India on three occasions, two of which were to visit his mother.

34 The appellant contended that the use by the Tribunal of his return visits to India, as evidence of an absence of a strong subjective fear for his well being results in a conclusion that is glaringly improbable, plainly unjust and so unreasonable that no reasonable person could have reached it.

35 This point can be dealt with shortly. It is clear that the appellant's voluntary return to India on three occasions is relevant to assessing whether and to what extent the appellant fears persecution or 'serious harm' in India. The fact that the appellant was prepared to return there more than once strongly suggests that the fear he held, if any, was either not a fear of immediate harm or not a fear of treatment that would amount to 'serious harm'.

36 The appellant's return visits to India can be viewed in the same light as the failure to apply promptly for a protection visa upon arrival in Australia, discussed by Heerey J in *Selavadurai v Minister for Immigration and Ethnic Affairs and Another* (1994) 34 ALD 347 at 349:

'(v) The applicant complained of the Tribunal's taking into account the fact that the applicant did not lodge his application for refugee status until some 20 months after he had arrived in Australia and just prior to the expiration of his visa. In my opinion, this was a legitimate factual argument and an obvious one to take into account in assessing the genuineness, or at least the depth of the applicant's alleged fear of persecution.'

37 I can therefore see no merit in the claim that the conclusion the Tribunal reached was glaringly improbable, plainly unjust or unreasonable.

Conclusion

38 In my view, the Federal Magistrate did not err in failing to find jurisdictional error in the Tribunal's decision. The appeal must therefore be dismissed with costs.

I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Marshall.

Associate:

Dated: 12 December 2003

Counsel for the Appellant:	Mr Rowan Hamilton
Solicitor for the Appellant:	Di Mauro Solicitors
Counsel for the Respondent:	Ms Heather Riley
Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	12 December 2003
Date of Judgment:	12 December 2003