FEDERAL COURT OF AUSTRALIA

SZBQJ v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 143

IMMIGRATION – refugees – appeal from decision of Refugee Review Tribunal – application on behalf of minor by her next friend for protection visa – application refused – membership of a particular social group – one child policy of Peoples Republic of China –finding of fact by Refugee Review Tribunal that financial burden incurred by parents of unregistered children did not amount to persecution – application of *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293

Migration Act 1958 (Cth), ss 36, 91R

Convention on the Rights of the Child. 20 November 1989. 1577 UNTS 3 (entered into force 2 September 1990)

Singh v Commonwealth of Australia (2004) 209 ALR 355 cited

Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 applied

Appellant A (1997) 190 CLR 225 cited

Minister for Immigration and Multicultural Affairs v Ibrahim (2000) 204 CLR 1 cited

J Hathaway, *Law of Refugee Status*, Butterworths, Canada, 1991

SZBQJ V MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

NSD 1456 OF 2004

TAMBERLIN J

SYDNEY

28 FEBRUARY 2005

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NSD 1456 OF 2004

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT

BETWEEN:	SZBQJ APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGE:	TAMBERLIN J
DATE OF ORDER:	28 FEBRUARY 2005
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal is dismissed.

2. The appellant is to pay the respondent's costs.

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

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JUDGE:	TAMBERLIN J
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PLACE:	SYDNEY

REASONS FOR JUDGMENT

1 This is an appeal brought on behalf of the appellant child by her mother acting as next friend from a decision of a Federal Magistrate Raphael given on 23 September 2004. Federal Magistrate Raphael found that the Refugee Review Tribunal ("the Tribunal") had not fallen into jurisdictional error

in finding that any harassment or discrimination which might be suffered by the appellant upon her return to China did not constitute “persecution” within the meaning of the Convention definition or s 91R of the *Migration Act 1958* (Cth) (“the Act”).

2 The appellant claims that she has a well-founded fear of persecution in China as she is a member of a particular social group of “black” children which is comprised of children born in breach of China’s One Family Planning Policy. It is claimed that she would be unable to obtain household registration, would not receive adequate health care and that her parents would be unable to pay the fine to allow her to get household registration. The appellant also claimed that in order to avoid some of this disadvantageous treatment, her parents would be required to repay to the Government any child allowance that they received for five years for her brother, which had apparently been paid due to her father’s employment as a government worker, and that the allowance would be stopped.

3 The appellant child and her parents are citizens of China. The appellant child was born in Australia on 27 September 2002. On 13 August 2003, her parents lodged in her name an application for a Protection Visa with the Department of Immigration and Multicultural and Indigenous Affairs (“the Department”). On 21 August 2003, a Ministerial delegate made the decision to refuse to grant the appellant a Protection Visa. On 22 August 2003, the appellant sought review of this decision by the Tribunal. The Tribunal affirmed the decision of the delegate not to grant the appellant a protection visa on 25 September 2003. An appeal was then taken to the Federal Magistrates’ Court on 10 October 2003. On 3 March 2004, an amended application was filed on behalf of the appellant. The only grounds ultimately pressed before Federal Magistrate Raphael were as follows. First, that the Tribunal had failed to act in accordance with the substantial justice and merits of the case and did not act consistently with the Convention on the Rights of the Child (“the Convention”) as to the prohibition that the child should not be separated from his or her parents against his will. Second, that the Tribunal had failed to apply the law as to refugee status of members of particular social groups who have a well-founded fear of being persecuted, including children born in contravention of China’s one child policy. Finally, that the Tribunal had failed to act in accordance with natural justice.

4 The learned Magistrate gave judgment in respect of the above three grounds on 31 May 2004, but then adjourned the proceedings pending the High Court’s decision in *Singh v Commonwealth of Australia* (2004) 209 ALR 355. That decision was handed down on 9 September 2004. The matter was listed for hearing before his Honour 14 days later. On that day, his Honour made orders dismissing the application with costs.

5 An appeal was taken to this Court on 7 October 2004. The ground on which the appeal was argued was that the cumulative disadvantages of being an unregistered child and in breach of the one child policy were sufficiently great as to amount to persecution. Reliance, in particular, was placed on the imposition of a financial burden on the parents of unregistered children such

as denying unregistered children free access to social services; imposition of a fine on parents, the requirement of a payment for education and health services and exclusion from public sector employment.

reasoning of the tribunal

6 The Tribunal considered that the Family Planning Regulations of China (“the Regulations”) were not discriminatory but were applied equally to all Chinese citizens and were directed at a legitimate purpose, namely, to slow the growth of the Chinese population. The Tribunal noted that the effect of the Regulations was to impose a financial burden on the parents of unregistered children when officially registering those children and to deny unregistered children free access to social services where those services were available. The Tribunal was not satisfied that the imposition of a fine on parents for breach of the Regulations was discriminatory or persecutory in relation to unregistered children as a particular social group. It was also not satisfied that the level of financial imposition that resulted from breach of the Regulations was so onerous as to threaten the appellant’s parents’ capacity to subsist or to amount to a denial of access to basic services such that the appellant’s capacity to subsist was threatened. In any event, the Tribunal member considered that if the fine remained unpaid, the appellant would not thereby be denied access to basic services and she relied on information referred to in her decision which indicated that basic services were available to anyone who paid for the services. The financial burden for registration so as to obtain access to benefits was seen as a social compensation fee imposed on parents who have children in excess of the number of children permitted by the Regulations, presumably because of the additional cost incurred by the government as a consequence of providing support for another child.

7 The Tribunal member did not accept that it was beyond the capacity of the appellant’s parents to pay the fine. She did, however, note that they would be starting from a position of existing debt, as the funds that had enabled them to finance an international trip and a stay in Australia had been exhausted and the property on the security of which they had raised funds was probably no longer available to them.

8 The Tribunal Member did not accept that the parents were bereft of any sources of income from which to save the funds necessary to pay the fine. On balance, she was not satisfied that the fine imposed on the parents would be so significant, or the economic hardship so severe, that it would threaten the family’s capacity to subsist. She noted that some of the independent information indicated that in cases of severe financial hardship parents might be exempt from paying the social compensation fee. She accepted information that unregistered children were not precluded from accessing education and health services by reason of their lack of registration but merely that their parents must pay for the services, as many others in China do regardless of their registration status. This was seen to be a significant financial imposition but not so serious as to amount to persecution. As to the appellant’s exclusion in the future from public sector employment, the Tribunal considered that this did threaten her capacity to subsist.

9 The Tribunal member accepted the independent information that to the extent that there was any distinction between officially registered and “black” children, such a distinction was unlikely to extend to the appellant’s adulthood and was very unlikely to affect her access to employment in adulthood in the non-government sector or in rural areas. In any event, the Tribunal member expressed some doubt as to whether there was any distinction between officially registered and “black” children. She accepted the information that there was no social stigma attached to “black” children. For these reasons, the Tribunal concluded that there was no risk of harm serious enough to amount to persecution within the meaning of the Convention and s 91R of the Act.

decision below

10 His Honour set out and considered the reasoning of the Tribunal and the submissions made in par [13] of the judgment, concluding that the finding that there was no harassment sufficient to amount to persecution was a finding of fact for the Tribunal alone and was an arguable conclusion. His Honour was satisfied that there was independent country information that would have enabled the Tribunal to reach its decision but, even if the finding of fact was wrong, it was not a jurisdictional error. Accordingly, the application for review was dismissed.

Reasoning on appeal

11 Counsel for the appellant refers to s 91R(2) of the Act which refers to instances of **serious harm** for the purpose of considering whether there has been persecution within the meaning of the Convention. Among these instances are economic hardship that threatens the person’s capacity to subsist, denial of access to basic services where the denial threatens the person’s capacity to subsist and denial of the capacity to earn a livelihood of any kind where the denial threatens the capacity to subsist. The emphasis is on “subsistence”, which denotes the ability to continue to exist or remain in being.

12 As James Hathaway points out in the *Law of Refugee Status* (1991) at 102 when considering the content of the notion of persecution, the Convention left the expression of “persecution” undefined because it was realised that it was not possible to enumerate in advance all the forms of maltreatment which might legitimately entitle persons to benefit from the protection of a foreign state. He notes that refugee status was premised on the risk of serious harm but not necessarily on the possibility of consequences of life or death proportions. There is sufficient cause for international concern in circumstances where there are serious social and economic consequences: see also the observations of McHugh J in *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1 at [61]-[65].

13 There is no challenge in this appeal to the factual findings of the Tribunal. Indeed, the appellant relies on the factual findings made. The error is said to reside in the use that the Tribunal made of the factual findings, having regard to the statutory and Convention criteria as explained in the authorities. An analogy, it is said, can be drawn with circumstances in Australia if the parents of second children were required to pay a fine and denied access to Social Security payments, made ineligible for enrolment in public schools, denied medical care benefits and denied the possibility of public sector employment. It is said that these circumstances would be regarded as persecution.

14 The errors alleged against the Tribunal's reasoning are said to be that the Tribunal focused on the position of the appellant's parents and what they might do to avoid the effect of persecution rather than on the real issue, namely, the position of the child. It is said that the Tribunal erred in denying that the appellant was a member of a particular social group. I do not accept on a fair reading of the decision that this was the gravamen of the decision, which was, in my view, whether there was a real chance of persecution. A further error is said to be that the Tribunal sought to justify the disadvantages on the basis that they were directed to a legitimate purpose. I do not consider this submission has been made good because, in my view, the decision was based on the conclusion reached by the Tribunal as to the nature and extent of the disadvantages and not on the legitimacy or otherwise of the purpose.

15 In addition, the appellant relies on the reasoning of the High Court in the recent judgments delivered in *Chen Shi Hai v Minister for Immigration and Multicultural and Indigenous Affairs* (2000) 201 CLR 293 *(Chen Shi Hai)* and it is said that the Tribunal disregarded the guidance provided by the High Court in that decision. Particular reference is made to the following observations by Gleeson CJ, Gaudron, Gummow and Hayne JJ:

"(29) **Ordinarily**, **denial** of access to food, shelter, medical treatment and, in the case of children, **denial** of an opportunity to obtain an education involve such a significant departure from the standards of the civilized world as to constitute persecution. And this is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective.

(73) In a discriminatory way, such children are **denied** many of the **basic needs** of children. This is done although they are personally innocent of any wrongdoing. They suffer. Their suffering is on the other side of the coin of the laws and programmes addressed to their parents.

(74) The persecution is designed to punish the parents for their infractions of the law and to discourage potential parents from breaking that law. But it is done by discriminating against innocent children who are popularly described as 'black children'. This is done for what may be conceived of as the higher state purpose of population control. But **it is persecution nevertheless**…

…

(79) What may possibly be viewed as acceptable enforcement of laws and programmes of general application in the case of the parents may nonetheless be persecution in the case of the child. Persecution occasioning such a fear attracts the Convention definition and rights under Australian law." (Emphasis added)

16 In relation to the argument that the decision focused on the parents and not the child, I do not consider that any error has been demonstrated in relation to this matter. Clearly the courses of action open to the appellant's parents in order to minimise the detriment to the child and the possibility of avoiding persecution are circumstances that are relevant to the position of the child if returned. The ability of parents to avoid the effect of persecution of their children is a relevant and important matter to take into account. In any event, I do not consider that the Tribunal decision turned on this point.

17 In *Chen Shi Hai* at [19], the Court made it clear that laws or policies which target or apply only to a particular section of the population cannot properly be described as laws or policies of general application, especially where they target or impact adversely upon a particular class or social group such as "black children", as distinct from children generally. In the present case, I do not consider that the Tribunal has fallen into error in respect of the description of the relevant social group.

18 The Court in *Chen Shi Hai* also noted at [25] that the question whether a law or policy is imposed for a Convention reason cannot be segregated from the question whether the conduct amounts to persecution. To some extent, the reason for discriminatory conduct may be considered relevant. In examining the question of "persecution" in *Chen Shi Hai*, the Court referred at [28] to the principles laid down by McHugh J in *Appellant A* (1997) 190 CLR 225, especially at 258-259, where his Honour noted that whether differential treatment of a person of a particular race, nationality, or political persuasion, or who is a member of a particular social group constitutes persecution ultimately depends on whether the treatment is appropriate and adjusted to achieving some legitimate object of the country. It is a matter of proportion. In the principal judgment in *Chen Shi Hai*,it is said at [29] that whether differential treatment of groups is appropriate to achieving a "legitimate" government objective depends on the treatment involved and, ultimately, on the question whether the treatment offends the basic standards of civil societies which seek to meet the needs of common humanity.

19 In *Chen Shi Hai*,the Tribunal found as a central and critical fact that, if returned to China, the appellant in that case was likely to face discrimination which constituted persecution on the basis that the appellant would be denied access to food, education, and health care beyond a very basic level and, having regard to his parents' financial position, when the benefits of subsidised education were withdrawn, the appellant would be unable to have an education in any real sense. It was on this basic foundation of fact as found by the Tribunal that the High Court considered it was open to the Tribunal in

that case to find that the treatment the appellant was likely to receive, if returned to China, amounted to persecution. That finding was not challenged before the High Court.

20 In the present case, the position is quite different. Here, the Tribunal found that the discrimination would **not** as a matter of fact and degree amount to persecution. The RRT made no finding that, having regard to the financial position of the appellant's parents, if the benefit of subsidised education were withdrawn, the appellant would be unable to have any education at all.

21 The factual findings as to the persecutory effect of the policy and law as evaluated in their impact on the appellant cannot be transposed from *Chen Shi Hai* and applied to the present case as a binding determination on the facts. The decision of the High Court does not, and could not, lead to such a result. The legal principles adopted by the High Court must be applied but the factual conclusions are for the Tribunal alone. The evidence in each case must be separately and independently evaluated. It is obvious that the impact and circumstances surrounding the application of a national policy may impact differently on different persons so that in one instance the impact may constitute persecution but in other cases the impact may not be so substantial as to amount to Convention persecution. In its reasons for decision in the present case, the Tribunal specifically adverted to the High Court decision in *Chen Shi Hai.*

22 A further significant distinction between the circumstances in *Chen Shi Hai* and the present case is that in *Chen Shi Hai* the Tribunal concluded that because of the lack of enmity or malignity on the part of Chinese authorities the treatment that the appellant was likely to receive in China did not amount to "persecution" for the reason that the appellant was a member of the social group known as "black children". The essential error in the Tribunal's decision was the reliance by the Tribunal on the lack of enmity or malignity as a central consideration of importance. The High Court considered that this could not alter the fact that the disadvantages the child was likely to receive if returned to China were for the reason that he was a "black child".

23 The detriments to the child in the present case largely arise from the poverty of the parents and are not for a Convention reason. There was a great deal of evidence before the Tribunal in the independent material which is capable of supporting the conclusions reached. The Tribunal's conclusion was legitimately and properly open to it. While it is true that different conclusions could be reached by different minds on these issues, in substance, they are matters of fact as to whether the extent of harassment is sufficient in total to constitute persecution. This is a matter for the Tribunal.

24 For these reasons, I conclude that there has been no reviewable error demonstrated in the decision of the Tribunal. Nor has any error of principle or law been established in respect of the Magistrate's decision under appeal. Accordingly, the appeal is dismissed with costs.

I certify that the preceding twenty four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tamberlin.

Associate:

Dated: 28 February 2005

Counsel for the Appellant:	M McAuley
Counsel for the Respondent:	GT Johnson
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	8 December 2004
Date of Judgment:	28 February 2005