FEDERAL COURT OF AUSTRALIA

SZCME v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 932

MIGRATION - appeal from Federal Magistrates Court - where application for review dismissed - where Tribunal failed to comply with s 424A of the *Migration Act 1958* (Cth) - whether Tribunal's decision was entirely independent of the failure to comply with s 424A

Federal Court of Australia Act 1976 (Cth) s 25(1AA)

Migration Act 1958 (Cth) s 424A

Minister for Immigration and Multicultural Affairs v Al Shamry (2001) 110 FCR 27 Cited

Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437 Cited

Refugee Review Tribunal ex parte *Aala* (2000) 204 CLR 82 Cited

SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 215 ALR 162 Cited

SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 2 Considered

SZCME v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS AND REFUGEE REVIEW TRIBUNAL

NSD 244 OF 2006

KIEFEL J

25 JULY 2006

BRISBANE (HEARD IN SYDNEY)

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NSD 244 OF 2006

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	SZCME APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS FIRST RESPONDENT REFUGEE REVIEW TRIBUNAL SECOND RESPONDENT

JUDGE:	KIEFEL J
DATE OF ORDER:	25 JULY 2006
WHERE MADE:	BRISBANE (HEARD IN SYDNEY)

THE COURT ORDERS THAT:

1. The appeal is allowed.

2. The orders of the Federal Magistrate dated 25 January 2006 are set aside.

3. The decision of the Refugee Review Tribunal made on 24 November 2003 are set aside.

4. The matter is remitted to the Tribunal to be determined according to law.

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

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NSD 244 OF 2006

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	SZCME
	APPELLANT

AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS FIRST RESPONDENT REFUGEE REVIEW TRIBUNAL SECOND RESPONDENT

JUDGE:	KIEFEL J
DATE:	25 JULY 2006
PLACE:	BRISBANE (HEARD IN SYDNEY)

REASONS FOR JUDGMENT

1 The appellant is an Indian Tamil and a Muslim. His claim for a protection visa under the *Migration Act 1958* (Cth) was refused by the Minister's delegate and that decision was affirmed by the Refugee Review Tribunal on 24 November 2003. An application for review of that decision was dismissed by a Federal Magistrate. The appellant appeals from that decision. The appellate jurisdiction of the Court is exercised by a single judge: pursuant to s 25(1AA) *Federal Court of Australia Act 1976* (Cth).

2 The appellant entered Australia on 28 November 2002 on a visitor's visa. In his statement accompanying his application for a protection visa the appellant claimed that he was a member of the Tamil Nadu Muslim Munnetra Kazhagam party ('TMMK') which advocates the rights of Muslims in India. He was involved in the arrangement of a rally for the party on 6 December 1999 but was warned by a prominent Hindu leader not to carry it out. There was a suggestion, or he believed, that he might be killed and he did not proceed further with the arrangements. The police however came to his house on 1 December 1999 and arrested him and other members of the TMMK. He was detained without charge or hearing until 8 December 1999 and was treated badly and beaten by the police. He said that the police were pro-Hindu. The appellant said that he organised another rally for 6 December 2001 and this time ignored advice not to proceed. The police arrested him on 30 November 2001.

3 The appellant then joined the Dravida Munnetra Kazhagam party ('DMK') as a means of protection, but it lost the 2001 election. There were

major clashes throughout Tamil Nadu between the two parties. Members of the ruling party came to his parent's house looking for him and he left the village, fearing for his life, and went to Chennai. He left Chennai for Delhi where he remained for four months for security reasons and then went to Mumbai where he remained for three months. After nearly a year he went home to his village, having read that the situation had calmed down.

4 The appellant said in his statement that when he returned to his village he conducted a public protest meeting against a law which had recently been passed and which denied people the right to convert to another religion. The police arrested him, but released him without charge. He later learned that the police had passed on his views to the Chief Minister of the ruling party and that there was going to be a '*big problem*.' He became scared and left his village. Subsequently he learned that a warrant for his arrest had been issued and his family told him that not only were Hindu extremists after him, but now the police and the ruling party were also against him. The government would have no difficulty in tracing him anywhere in India and killing him, he said. The appellant arranged to travel to Australia.

5 In the hearing before the Tribunal, the appellant was asked why he had visited Germany in 1999, to which he responded that he was having some problems and he was looking for peace. He did not apply for refugee status there because the climate was too cold. The Tribunal then records asking him whether he had been charged with any criminal offences in India and brought before a court. He said he had not. The Tribunal asked him whether he had been arrested in India and he said, in effect, that they were looking to arrest him when he left India. The Tribunal then asked *'so you have never been arrested'* and he said *"No"*. The appellant told the Tribunal that from 2000 until 2001, he travelled frequently on business between his village and Chennai, about 250 kilometres away. He said that he went there to collect the money from the coconut business which he and his father ran and that the business was not doing as well as it had before. When asked whether the lack of success of the business was the reason he left India and he said that it was one of the reasons, the other being '*political problems*'. When asked to explain this, on three occasions, he said that he had been '*hassled*' by Hindus because he was the leader of the TMMK. He had been arrested on 1 December 2001 and held until 8 December 2001. At this point the Tribunal reminded the appellant that he had earlier told the Tribunal that he had never been arrested. He said "*it wasn't in those years*". The Tribunal reminded him that when he had been asked had he *ever* been arrested and he had replied '*no*'. He then said '*I forgot about it'.*

6 The Tribunal asked the appellant why he could not re-locate to Chennai, if he had problems in his village. He said "*they*" would find him there as it was only 250 kilometres from his home. The Tribunal then asked the appellant when he went to Delhi for four months and he could not recall and put it generally in the time just before he came to Australia. When asked why he could not return there, he did not answer the question directly. He said that he went to Bombay (Mumbai) for three months because his business was *'going down'* and he tried, unsuccessfully, to establish a new business

there. He also went there to keep away from political troubles, because his name *'is noted'* and he would have problems if he returned home. He said that he did not have any problems leaving India but that '*they*' searched for him after he left.

7 The Tribunal found that the appellant had not suffered persecution in India because of either his political opinions or his religion and did not have a well-founded fear of persecution in the reasonably foreseeable future. The Tribunal did not believe that he was ever jailed for his political activities or for any other reason. In this regard it listed features of his evidence, including inconsistencies. He had not repeated his claim to have been arrested and been beaten and starved in 1999, and he had said that rally was cancelled. At the hearing he claimed he had *never* been arrested and left India to avoid it and later changed his story to say he had been once arrested. The Tribunal did not accept his explanation of forgetfulness. The Tribunal considered that if the appellant had been experiencing political or religious problems in India he would have sought refugee status in Germany. The Tribunal did not find his explanation for not seeking refuge there satisfactory. The Tribunal inferred that the sole reason the appellant came to Australia was the failure of his business. The Tribunal went on:

'I am also satisfied that if the Applicant had held a well-founded fear of persecution in India for a Convention-related reason, he could have re-located, and could now re-locate, to any of the places (such as Chennai, Bombay or Delhi) where he had previously resided (albeit temporarily) and conducted his business.'

8 In his amended application to the Federal Magistrates Court, which as his Honour noted was largely incomprehensible, the appellant appears to allege that the Tribunal failed to take account of a relevant consideration, namely the chance of him being arrested or persecuted if he returned to India on account of his being part of a Muslim minority in India and his political opinion. His Honour held that the Tribunal correctly identified the appellant's claims and addressed them. His Honour rejected the appellant's other ground that the Tribunal's reasoning was not rational or logical. The written submission made to his Honour addressed only the merits of the case his Honour considered. In oral submissions the appellant sought to explain his inconsistent evidence about his arrests and maintained his claim that a reason why he came to Australia was the problems he had had because of his political views. His Honour however considered those points to address only the merits of the Tribunal's assessment and did not establish jurisdictional error.

9 The appellant's notice of appeal does not contain grounds directed to his Honour's reasons. He alleges that the Tribunal failed to accord him natural justice, that it identified the wrong issue and failed to act according to law. No particulars were provided of these grounds. The grounds notified were not pressed on the hearing of the appeal, rather the appellant relied upon written submissions in which he sought to identify errors in the Tribunal's decision. In relation to his inconsistent evidence he contended that the Tribunal misinterpreted his version or asked him a question which confused him. He said that the Tribunal asked

him if he had been charged with any *criminal* offences and he had not. He implies that he understood the question about being arrested to also relate to criminal offences. His point is that he was arrested for political reasons. The other submission put by the appellant was that the Tribunal should not have made the finding about relocation. He submitted that the Tribunal did not understand the reality of the situation in India.

10 Counsel for the Minister most properly drew to my attention the decisions in *Minister for Immigration and Multicultural Affairs v Al Shamry* (2001) 110 FCR 27 and *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2 and *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162 concerning the requirements of s 424A of the *Migration Act 1958* (Cth). I should add that both the Tribunal's and his Honour's decisions were given before the decisions in *SZEEU* and *SAAP*.

11 Section 424A provides in relevant part:

'(1) Subject to subsection (3), the Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and

(c) invite the applicant to comment on it.

(2) The information and invitation must be given to the applicant:

(a) except where paragraph (b) applies – by one of the methods specified in section 441A; or

(b) if the applicant is in immigration detention – by a method prescribed for the purposes of giving documents to such a person.

(3) This section does not apply to information:

(a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or

(b) that the applicant gave for the purpose of the application; or

(c) that is non-disclosable information.'

12 In *Al Shamry*, the Tribunal used statements made by the respondent during an interview at an airport on his arrival in Australia to impugn his credibility. It was held that the information did not come within the exemption of subs (3)(b). Consistency of approach to the word '*applicant*' required that '*the application*' for which purpose the information was given meant the application for review by the Tribunal (at [17]). It followed that it was required to provide him with the statements he had earlier given and invite his comments upon it, and the statements must be in writing. The effect of s 424A(2) is that the information and the invitation must be given by a prescribed method involving the provision of a document.

13 The decision in *Al Shamry* was followed in *SZEEU*. By this time the High Court, in *SAAP,* had held that a failure to comply with s 424A constituted jurisdictional error on the part of the Tribunal, because of its mandatory language. The matter of compliance could not be assessed by reference to notions of procedural fairness.

14 The Minister concedes that the requirements of s 424A have not been met in the present case and points to the Tribunal's findings that the appellant had not been a leading member of the TMMK and the DMK or that he had had political problems in India, which were based, in part, upon inconsistencies between what the appellant had said in his application and what he had told the Tribunal. Of greater importance to the Tribunal's ultimate findings concerning the appellant's credit-worthiness was the evidence concerning whether the appellant had been arrested. The Tribunal's consideration of this issue commences with the observation that the appellant had claimed it earlier but had not repeated it in his evidence before it.

15 Counsel for the Minister did not suggest that the Tribunal's view of the appellant's credit could be disassociated from its findings relevant to the question whether he had a well founded fear of persecution for a Convention reason. The Minister relies only upon the finding that the appellant could relocate to other places in India: see *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437, 440, 442. It is submitted that it can stand as an alternative, and independent, basis for the Tribunal's decision.

16 In *SZEEU*, Allsop J observed that relief may be withheld by an appellate court where there is a basis, otherwise unimpeached, upon which the Tribunal's decision was reached which was unaffected by the failure to comply with the statutory procedure (at [232]). Such an approach would not be inconsistent with *SAAP* nor with the views expressed in *Refugee Review Tribunal* ex parte *Aala* (2000) 204 CLR 82 (at [57] - [62]). His Honour considered the basis for the Tribunal's decision must however be seen to be *'entirely independent'* of the failure to follow s 424A (at [233]).

17 Counsel for the Minister submitted that the Tribunal's finding about relocation did not rely upon any of the evidence relevant to the appellant's fear

of persecution and was unaffected by any failure, on the part of the Tribunal, to canvas previous statements with the appellant. The correctness of these submissions depends upon whether the Tribunal drew upon the view it took of the appellants credibility, which had been formed largely by reference to the inconsistencies in his evidence.

18 In the finding quoted above, the Tribunal takes as its premise the appellant having a well-founded fear of persecution in India for a Convention reason. It may therefore be taken to accept, for the purposes of the relocation enquiry, that he feared harm from the ruling political party, perhaps through the medium of the police. It says nothing however about the Tribunal's attitude towards any fear the appellant may have had about them pursuing him to other parts of the country. It may also be inferred that the Tribunal considered that the reason the appellant could live in the places it mentioned was that he had lived there before. The Tribunal had asked the appellant why he could not live in Chennai. His answer was that he could be found there. The Tribunal may well have thought this unlikely because he had not been sought out before. The Tribunal did not ask about relocation to Mumbai or Delhi, but the appellant had volunteered that he believed that he could be found anywhere. Again, the Tribunal may have thought it unlikely that any persecutors would seek him out because they had not done so before. Moreover, with respect to Mumbai, he had said that he went there to stay away from political trouble. This may been seen as inconsistent with a belief that he would be sought out. However, the Tribunal may also have rejected his alleged fears because it did not accept his evidence as credible. Its approach to this aspect of his evidence is not apparent. No objective reason, unrelated to credit, is given for the conclusion reached. It is not possible therefore to say that the Tribunal's finding is in no way connected to the use made of the inconsistencies in his evidence, including those arising from his earlier statements.

19 Given the approach which appears to be dictated by previous Full Courts, I am obliged to accept the Minister's concession concerning the requirements of s 424A. I am unable to conclude that the Tribunal's decision concerning relocation was entirely independent of what arose from the failure to follow s 424A. No basis for a refusal to allow the appeal is shown. There will be orders that the appeal be allowed; that the orders of the Federal Magistrate dated 25 January 2006 be set aside; the decision of the Refugee Review Tribunal made 24 November 2003 be set aside; and that the matter be remitted to the Tribunal to be determined according to law.

I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kiefel.

Associate:

Dated: 25 July 2006

For the Appellant:	In Person
Counsel for the Respondent:	Mr G R Kennett
Solicitor for the Respondent:	Clayton Utz Lawyers
Date of Hearing:	12 May 2006
Date of Judgment:	25 July 2006