FEDERAL COURT OF AUSTRALIA

SZENJ v Minister for Immigration and Citizenship [2007] FCA 734

Migration Act 1958 (Cth)

Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd [2006] 231 ALR 663 followed

Kumar v Minister for Immigration and Multicultural and Indigenous Affairs (No. 2) [2004] FCA 18 cited

Re Refugee Review Tribunal; Ex Parte H [2001] 179 ALR 425 cited

Syan v Refugee Review Tribunal (1995) 61 FCR 284 cited

SZENJ v MINISTER FOR IMMIGRATION AND CITIZENSHIP & REFUGEE REVIEW TRIBUNAL

NSD 413 OF 2007

DOWNES J

18 MAY 2007

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NSD 413 OF 2007

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGE:	DOWNES J
DATE OF ORDER:	18 MAY 2007
WHERE MADE:	SYDNEY

THE COURT ORDERS:

1. Appeal dismissed with costs.

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 413 OF 2007

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGE:	DOWNES J
DATE:	18 MAY 2007
PLACE:	SYDNEY

REASONS FOR JUDGMENT

1 The appellant is from India. He is aged 30 years. He arrived in Australia in January 2004. He applied for a protection visa, claiming a well-founded fear of persecution within the Refugees Convention on the ground of his Sikh religion and his membership of the political party Akali Dal. His application was refused on 16 February 2004. There have been two decisions of the Refugee Review Tribunal affirming the decision to refuse a protection visa. The first decision was made on 18 August 2004. The appellant appealed to the Federal Magistrates Court and the Federal Court of Australia. On 13 March 2006 the matter was remitted by consent to the Tribunal for reconsideration. The second Tribunal decision was made on 12

July 2006. The appellant again appealed to the Federal Magistrates Court. His application was dismissed on 26 February 2007. He appeals to this court against that decision.

2 The *Migration Act 1958* (Cth) commits the ultimate determination of the facts in refugee cases to the Refugee Review Tribunal. That Tribunal considers the matter afresh and on its merits. It is not a court. It substitutes its decision for that of the Minister, which is usually made through his delegate. The Parliament, representing the people, has thus created two tiers of decision-making during which an applicant for a protection visa has an opportunity to put forward a case on the facts.

3 The rights of persons claiming to be refugees in Australia do not, however, stop there. For practical purposes there is a review of the decision of the Refugee Review Tribunal in the Federal Magistrates Court with an appeal to this court. The appeal is, however, confined to an error of law usually amounting to jurisdictional error.

4 Behind every application for a protection visa lies a factual basis. The factual basis in the present case is that the appellant claimed to fear persecution from the Indian authorities and members of the India Congress Party because of his Sikh religion and political opinion. He claimed that in 1994 there were several incidents where he was threatened and attacked by members of the terrorist Khalistan Movement. When he complained to police they asserted that he was a terrorist. He was forced to leave his family home. He does not claim he was persecuted between 1996 and 2002. However, when the Congress Party gained power in 2002, he claims that he and his family were targeted as supporters of the Akali Dal Party. He claims that he was harassed by police and interrogated for extended periods. He claims that he was in Botswana from 2002 until he came to Australia.

5 The Refugee Review Tribunal, constituted by Mr S Norman, was not satisfied that the appellant had a real chance of persecution, either from terrorist groups, from being a Sikh or from his support, or his father's alleged support, of the Akali Dal Party. The Tribunal did not dismiss the fact that the appellant may have been detained on two or three occasions by local police in 2002. However, it stated that even if this evidence was accepted, it was not satisfied that the appellant would continue to be of adverse interest if he relocated within India. This was because it was not satisfied that he would "express [his political or other convictions] in any way that would give rise to more than a remote chance he would come to the adverse attention of any person or group (or the State) in India". Further, it was satisfied that it was reasonable to expect the appellant to safely relocate within India.

6 The reality of this case is that the appellant has lost it on the facts. However, the only appeal relates to the law. Accordingly, any appeal must address the law and not the facts, except in a small class of cases where errors of law relate to the facts. This raises problems for the many appellants who are in a similar position to the present appellant. However, if there is a

relevant error of law an appeal will be successful. Accordingly, I now turn to that question.

7 The grounds of appeal relied on in the present case fall into two broad categories. The first relates to the way in which the appeal proceeded before the Federal Magistrate. The second relates to the substance of the decision of the Refugee Review Tribunal.

8 One of the claims in the first category is that the Federal Magistrate who heard the case did so in a way which demonstrated actual bias or reasonably apprehended bias. In *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd* (2006) 231 ALR 663, the High Court of Australia dealt with a claim, which had been upheld by the Full Federal Court of Australia, that a judge of that court had conducted himself in a way which would give rise to a reasonable apprehension of bias. In the course of giving their judgment in the appeal, Crennan and Kirby JJ, with whom Gummow ACJ agreed on the point, stated at [117]: "An intermediate appellant court dealing with allegations of apprehended bias, coupled with other discrete grounds of appeal must deal with the issue of bias first". Accordingly, I must deal first with the bias claims made on behalf of the appellant. I note, however, that it is the second group of claims which address the question of whether the decision of the Refugee Review Tribunal is tainted with appealable error. Were I to uphold the claim of bias (see *Concrete* at [117]), it would seem that the proper course would be for me to send the matter back for reconsideration by the Federal Magistrates Court rather than to deal with the substantive issue relating to the validity of the decision of the Refugee Review Tribunal.

9 I propose to say at the outset that I think that the claim of bias, whether actual or apprehended, is entirely without foundation. I have read large parts of the transcript which has been put before me and I have, in particular, read all the parts of the transcript that were specifically referred to by the appellant's solicitor and to the parts of the transcript that are reproduced in the appellant's written submissions. I had played to me a substantial section of the recording of the hearing and had the opportunity to listen to that while I read through the recorded parts as they appeared in the written transcript. My first impression of my reading of the transcript and of listening to the recording of the hearing was that the proceeding took place in a way which is entirely normal and acceptable and in a way which occurs in courts in Australia every day of the week.

10 I particularly thought that in the way she addressed the appellant's solicitor, the learned Federal Magistrate proceeded with moderation. I did not notice her at any stage to raise her voice in any way that was untoward. The appellant has urged upon me that from time to time she interrupted. All I can say about that is that if interruptions by judges of counsel can give rise to a claim of apprehended bias, then there would be very many such claims that could be made. I noticed, although the appellant's solicitor did not refer to it, that there were occasions when he interrupted the Federal Magistrate.

11 I do not propose to leave this matter simply with my initial observations because the appellant put carefully considered and prepared submissions to me relating to the detail of the claim and the basis on which it was made out and I propose to address those matters. The primary matter which was raised by the appellant – and it is a matter which in some circumstances could give rise to some elements of complaint – was that, without any application having been made on the part of the respondent Minister, the Federal Magistrate referred to the prospect of her imposing a costs order personally upon the appellant's solicitor.

12 I accept that such orders should be made only in the rarest of circumstances where serious lapses of proper conduct have occurred for such an order to be justified. Like Mansfield J in *Kumar v Minister for Immigration and Multicultural and Indigenous Affairs (No. 2)* [2004] FCA 18, I am conscious of the fact (and think it is quite a significant matter) that the moment a personal costs order is made against a lawyer, a problem of conflict immediately arises between the lawyer and his client. Such conflicts do not assist the administration of justice. It therefore seems to me that it is not generally appropriate, except in a serious case and even then only when an application is made by a party, that consideration should be given to the imposing of a personal costs order. I am not, of course, saying that it is not open to the court to impose a personal costs order of its own motion. However, the Federal Magistrate did not proceed in this case to impose any personal costs order and so no consequence arises in that regard. It seems to me, having read carefully the material and having listened to the recording, that in the way in which the Federal Magistrate dealt with the matter, even if she might have desisted from raising the matter unless an application had been made, her conduct fell a very long way short of anything that could amount to actual or apprehended bias.

13 The appellant did raise some other matters specifically on the issue of bias. I have given consideration to all of those matters and again I think that they have no substance. One particular matter was the fact that, apparently, the Federal Magistrate had read the first of the decisions of the Refugee Review Tribunal, rather than the second decision of the Refugee Review Tribunal, prior to the hearing and understood that that first decision was the decision under review. I have read the parts of the transcript relating to that matter and it seems to me that, again, it does not give rise to any claim of bias.

14 Submissions were put to me as to the precise test which applies in a case of bias. The appellant contended for a passage in the decision of the High Court of Australia in *Re Refugee Review Tribunal; Ex Parte H* [2001] 179 ALR 425 at page 434 as the appropriate test. That test is "whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question to be decided". The conclusions I have arrived at apply if that is the correct test. However, whatever the correct test is, I still arrive at the same conclusions.

15 Another issue raised before me was whether the question of bias could be raised in this appeal, it having not been raised before the Federal

Magistrate. In the light of my decision on the substance of the matter, I do not need to deal with this question.

16 The actual issues relating to bias are framed in grounds in the amended notice of appeal which are reproduced in the appellant's written submissions. Lest it should be thought by my summary approach to the issues that I have not considered the detail of those matters, I will now refer to the particular grounds, which are as follows:

1. The decision of the Federal Magistrate should be set aside as there was a reasonable apprehension of bias on the part of the Federal Magistrate in the way her Honour conducted the hearing.

2. The decision of the Federal Magistrate should be set aside as her Honour was biased against the Applicant's solicitor advocate.

17 The bias claims formed part only of grounds associated with the conduct of the hearing. There were two further grounds related to procedural fairness. They were as follows:

3. The decision of the Federal Magistrate should be set aside as her Honour denied procedural fairness to the Applicant's solicitor advocate.

4. The decision of the Federal Magistrate should be set aside as there was a reasonable apprehension of serious negligence on the part of the Federal Magistrate in the way her Honour failed to prepare herself to conduct the hearing that might have caused a reasonable lay observer to conclude that the solicitor advocate's client that is the Appellant (a) might not get justice and/or (b) might not have his case properly dealt with by the Magistrate. Further, this also caused apprehension on the part of the Appellant's solicitor advocate that her Honour was not familiar with the case and thus did not fully grasp the issues and therefore the Appellant's case was not properly inquired into.

18 Although ground 4 is described in terms of serious negligence, when he was putting submissions to me, the appellant's solicitor said that this ground should be really understood as a further ground of denial of procedural fairness. For much the same reason as I have found that there is no basis for a claim of bias, it seems to me that both of these grounds should fail.

19 Ground 4 particularly raises the issue of the Federal Magistrate having read the wrong decision of the Refugee Review Tribunal. I note,

however, that her Honour specifically said to the parties that they should proceed on this basis, by which she must have been understood to have been saying that they should address her on the basis that at the time of the hearing she was not familiar with the terms of the reasons of the Refugee Review Tribunal. I also note that her Honour reserved her decision so that she had ample opportunity to read the reasons before giving judgment.

20 It is not, to my mind, any basis for a breach of procedural fairness to say that a judge has not read or fully understood the case to be put prior to coming on the bench. Indeed, my career at the bar extends back far enough to remember a time when that was usually the moment when judicial officers first learnt about a case that was before them.

21 It follows from the above that the four grounds relating to the conduct of the trial must fail.

22 I turn now to four grounds relating to the decision of the Refugee Review Tribunal. As my introductory remarks foreshadowed, it seems to me that this is a case in which, although the applicant had the opportunity to put a case on the facts a number of times to different bodies, namely the departmental delegate and to two differently constituted Refugee Review Tribunals, the reality is that he failed on these occasions to make out his case. I frankly think that the present grounds of appeal are really an attempt to cavil with the decisions of the Refugee Review Tribunal on the facts. If that is the case, then it is not surprising if they are unsuccessful. Nevertheless, I will address the particular claims that are made.

23 Ground 5 is as follows:

5. The learned Federal Magistrate erred by failing to find that the Tribunal made jurisdictional error as it failed to consider whether the applicant was persecuted in the past in order to decide whether he will be persecuted in the future.

24 This ground and other grounds require one to begin by looking at a paragraph in the decision of the Refugee Review Tribunal which is not easy to understand. The relevant part of the paragraph, for present purposes, is as follows:

He claimed that some six months later (ie in or around August/September 2002), and prior to his departure from India in or around December 2002, he had been detailed on two or three occasions (once overnight), by the local police who wished to question him. The applicant explained that on those occasions he had been 'accused' of supporting terrorist activities in the Punjab. When I put to him that country information that I had seen indicated, that for all intents and purposes terrorist groups no longer operated in the Punjab, the applicant agreed this was correct but claimed the accusations that were made against him were false and were put at the instigation of the Congress Party (who at the time controlled the State Government). Thus, I understand the accusation made against the applicant was

apparently designed to harass him while he was in the Punjab (which I accept is plausible), and was not otherwise supported by 'adequate' evidence of the applicant's involvement of that which he was accused. That said, the applicant was only accused at this time (ie late 2002) and there is no indication that he was subsequently falsely charge and or convicted of any offence.

25 The question is what finding, if any, did the Refugee Review Tribunal make relating to the claim of the appellant that he had been detained on two or three occasions, once overnight, by the local police, who wished to question him? Part of the problem arises from the fact that, further on, the Refugee Review Tribunal refers to the suggestion that an accusation was made, apparently designed to harass the appellant, and that this was plausible.

26 I do not think that one could conclude from the relevant passage that the Refugee Review Tribunal upheld the claim relating to the detention; but neither did it reject the claim. Accordingly, if it had an obligation to consider this claim and form a firm conclusion, there is a basis for an argument along the lines argued by the appellant. However, the reason why the Tribunal did not firmly resolve this issue is that it proceeded on another basis. It proceeded on a basis which accepted that the claim was true without actually so finding and looked at the consequences. There are two relevant passages in the reasons for decision. The Tribunal said:

Be that as it may, even if I accept the applicant may come to the adverse attention of eg the Congress Party or local Indian authorities in the Punjab (presumably at the instigation of the Congress Party), nothing the applicant has thus far claimed satisfied me that he would continue to be of adverse interest to the Congress Party or the Indian authorities should he relocate within India.

The Tribunal also said:

That said, and notwithstanding his claims to the contrary, even if I accept the applicant had come to the adverse attention of the Congress Party and or the local Indian Authorities in the Punjab, I am satisfied the applicant could safely relocate within India.

27 I do not suggest that where a tribunal such as the Refugee Review Tribunal omits to consider a relevant consideration, considers an irrelevant consideration or otherwise fails to carry out its obligation according to law, that, subject to s 474 of the Migration Act (the privative clause), a court on judicial review would not correct the error. However, that is not to say that it is an appropriate way to deal with decisions of tribunals such as the Refugee Review Tribunal to analyse, in the minutest way, the reasoning process with a view to seeking to identify some error in the reasoning process. The judgments of courts are hardly ever analysed in such a way.

28 In the present case, what the Refugee Review Tribunal said was that the appellant might have been detained on two or three occasions, but even if the appellant was detained on those two or three occasions, a fact which the Tribunal for the purpose of its consideration was prepared to assume, it did not consider that there was a relevant well-founded fear. The reason for so considering was largely associated with the Refugee Review Tribunal's views relating to relocation. It is well-established that an answer to a claim for refugee status can be found in a circumstance in which an applicant can relocate and it is reasonable to expect the applicant to do so.

29 The crux of the argument put on behalf of the appellant is that before the second step was taken there should have been a positive determination on the first question as to whether there was detention or not. I do not agree that that is a necessary prerequisite to a consideration of relocation. In many cases it may be desirable for decision-makers to address the first question to conclusion, but I do not think that failure to do so gives rise to any relevantly appealable error. In coming to this conclusion I appear to be supported by the decision of this Court in *Syan v Refugee Review Tribunal* (1995) 61 FCR 284 and particularly some observations made by Beazley J at 288 and 290-291. It follows that the fifth ground of appeal cannot succeed.

30 The sixth ground of appeal is associated with the seventh and eighth grounds of appeal and I will set them out together:

6. The learned Federal Magistrate erred by failing to find that the Tribunal made jurisdictional error as it failed to ask two important questions in making a finding critical to its ultimate lack of satisfaction.

7. The learned Federal Magistrate erred by failing to find that in making a finding that the Tribunal may not accept that he would be even interested in legitimately expressing his political opinion in a manner that would bring him to the adverse attention of anyone should he return to India the Tribunal failed to ask an important question and thus made a jurisdictional error.

8. The learned Federal Magistrate erred by failing to find that in making the finding "I may not accept his alleged convictions were sufficiently strong such that their disregard may constitute persecution for him" the Tribunal made jurisdictional error as it: (a) failed to take relevant matters into consideration and; (b) took irrelevant matters into consideration.

31 So far as grounds 6 and 7 are concerned, they really depend upon an argument that the Tribunal did not address sufficiently what might be the process of reasoning flowing from findings relating to detention for two or three days and findings relating to the comparative level of political motivation of the

appellant and his family. I must say I think these are classic examples of attempting to revisit the facts.

32 The decision of the Tribunal, which I have read more than once, is coherent and sufficiently complete in its reasoning. It is no attack on the reasons to say that another person on another occasion might have asked another question. The point is that Mr Norman was the person constituting the Tribunal to determine the appellant's claim, he addressed the matters which arose in a logical and satisfactory fashion, and he came to a conclusion. He might have considered the two matters now raised but his conclusion is not undermined by his having failed to do so. Accordingly, ground 6 and 7 must fail. Ground 8 is slightly different and concentrates more on the level of political motivation of the appellant. However, for the reasons I have already given, it does not seem to me that it can succeed.

33 It follows that neither the claims relating to the way the hearing was conducted, nor the claims relating to the decision of the Refugee Review Tribunal, have been made out and the only result is that the appeal must be dismissed and will be dismissed with costs.

I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Downes

Associate:

Dated: 23 May 2007

Solicitor for the Appellant:	Silva Solicitors
Counsel for the First Respondent:	J Gleeson
Solicitor for the First Respondent:	Australian Government Solicitor
Date of Hearing:	18 May 2007
Date of Judgment:	18 May 2007