FEDERAL COURT OF AUSTRALIA

SZJDW v Minister for Immigration and Citizenship [2007] FCA 1121

SZJDW AND SZJDX v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL

No NSD 737 of 2007

FINN J

1 AUGUST 2007

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NSD 737 OF 2007

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	SZJDW First Appellant SZJDX Second Appellant

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

JUDGE:	FINN J
DATE OF ORDER:	1 AUGUST 2007
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

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

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JUDGE:	FINN J
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PLACE:	SYDNEY

REASONS FOR JUDGMENT

1 This is an appeal from a decision of a Federal Magistrate dismissing an application for judicial review of a decision of the Refugee Review Tribunal which refused the grant of Protection (Class XA) visas to the applicants who are husband and wife. Only the wife made substantive claims so, as a matter of convenience, I will refer to the couple collectively as the appellant.

2 It is important in this matter to note that the application was first dealt with at a "show cause" hearing under R 44.12 of the *Federal Magistrates Court Rules*. There were three issues before his Honour at that hearing, two being grounds contained in the application itself, the third, arising from written submissions that had previously been filed. The Federal Magistrate determined at that hearing that only two issues merited a final hearing and he

made show cause orders accordingly against the respondent Minister in respect of those issues. They were:

(a) whether the Tribunal erred in finding that the claimed particular social group of "Hindu-Muslim couple who eloped" is extrinsically identified by the shared fear of persecution; and

(b) whether the Tribunal erred in considering past harm suffered as private in nature rather than as the actions of rogue officials.

3 The first of these related to the issue raised in submissions; the latter, to one of the two grounds of the application. Seemingly the other ground of the application was dismissed summarily under R 44.12, though no order to that effect is before me. That ground was not in issue – and could not have been put in issue by the applicant – at the final hearing giving rise to the judgment under appeal: see R 44.12(1)(b) and 13(2).

4 I refer to this procedural matter for this reason. The appellant's grounds of appeal to this Court set out as Ground 1 the substance of the ground not dealt with by the Federal Magistrate, it being alleged that the Federal Magistrate erred in law in dismissing the application without considering that ground. No application for leave to appeal has been made in relation to the dismissal of that part of the application: cf R 44.12(2). The appellant's written submissions, nonetheless, address the substance of the ground. I will deal with this matter as if an application for leave had been made.

BACKGROUND

5 The appellant, an Indian national, claimed to have a well-founded fear of persecution for, at least (see below), reasons of religion. Put in short form the essence of her claims were that:

(a) her mother, a Hindu, married a Muslim; this gave rise to fights between her mother and her husband's family; and the couple separated when the appellant was seven;

(b) the appellant was raised as a Hindu; she started seeing a Muslim; her uncles arranged a marriage with a Hindu; she was beaten by her uncles when they discovered her relationship with a Muslim with whom she then eloped; and they married in April 2005;

(c) her family was said to have considered itself shamed and dishonoured by this; she heard that they intended forcibly to separate the couple and take her back, so they kept changing their location;

(d) "On 28 September at about 06 p.m. there arrived my Uncles at that place (Chanderpur) with two other Policemen. My uncles got caught of my husband by the hair and started hitting him and also they slapped me and they tried to drag both of

us into the Van they came in and both of started shouting and crying loudly and many neighbours gathered and they were shouting at them and after warning us they left. Before they left they said 'if you don't came back we will not let you live."

6 The Tribunal's findings, insofar as presently relevant, were that (i) the appellant suffered serious harm; (ii) it was essentially for reasons of religion, i.e. it was Convention related; (iii) there was no particular social group of "Hindu-Muslim couple who eloped" or for that matter of "Hindu-Muslim couples"; (iv) that serious harm was suffered at the hands of her uncles and the two police officers; (v) the harm was private in nature; (vi) the two police officers involved in the beating of the appellant and her husband were acting as friends of the uncles and not in their official role or capacity; (vii) the social and political status of her uncles were not such that she would be denied adequate State protection; and (viii) she would be able to obtain State protection that would accord with international standards, for any private harm feared.

7 The visa application was refused.

THE FEDERAL MAGISTRATE'S DECISION

8 Of the two issues the subject of the show cause order, his Honour clearly and properly had misgivings about the Tribunal's finding that "Hindu-Muslim couple who eloped" was not capable of constituting a "particular social group" for the purposes of the Convention. He observed:

"Whether the postulated social group of 'Hindu Muslim couple who eloped' is extrinsically (sic) identified by a shared fear of persecution [the Tribunal held the group was 'intrinsically' so identified] is a debatable proposition. It is arguable that such a social group may be recognised in India independently of any fear of persecution. Essentially, however, it is for the Tribunal to determine whether it accepts that a postulated particular social group exists. An error of fact by the Tribunal in coming to a conclusion on that question would not establish a jurisdictional error unless the fact were a jurisdictional fact."

9 There is in my view a very real question as to whether the Tribunal correctly understood and correctly applied the principles stated in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 at [36] as it purported to do: see *SBWC v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 1104. No consideration appears to have been given either to societal perceptions in India or to "legal, social, cultural and religious norms prevalent in [Indian] society": cf *Applicant S* at [50]. This, though, is not a matter I need explore for reasons I give below.

10 In submissions to this Court, the appellants contend that "at no stage the Appellants advance a 'Social Group' argument before the Tribunal. The main contention of the Appellants argument was because of 'religion' they succumbed to harm". Whether or not the appellant has disavowed any challenge to the Tribunal's particular social group conclusion (notwithstanding it was one of the "show cause" issues) as she appeared to do at the present hearing, any error that the Tribunal may have made in this regard was, I consider, inoperative because of the conclusion it arrived at on the issues of religion and of State protection in any event.

11 The Tribunal, as I have indicated, was satisfied that the appellant suffered serious harm for reasons of religion. That finding in context would seem to be one that related to the appellant's inter-faith marriage. As such it seems indistinguishable from a finding of persecution by reason of being a Hindu-Muslim couple, i.e. in each instance the cause of any persecution is religious and is related to the parties being in an inter-faith marriage. In this sense the appellant attributes her harm to "religion". For this reason, the learned Federal Magistrate was probably correct in concluding that a claim to be a member of a particular social group comprised of Hindu and Muslim couples "would probably have added nothing to the claim based on religion. However, I would note in passing that the Tribunal accepted that: "Independent country information provided indicates that couples from different religions can be ill-treated in India."

12 Though it was satisfied that the appellant had suffered serious harm for a Convention reason, the Tribunal nonetheless concluded that the harm itself was not occasioned by State action and was not officially tolerated. In so concluding the Tribunal was satisfied that police officers involved in the beating incident were acting as friends of the appellant's uncles rather than in any official capacity and, as it is sometimes put, they acted as rogue State officials: cf *SZDWR v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 149 FCR 550 at [14]-[20].

13 The Tribunal then went on to consider whether the appellant would have access to effective State protection and concluded that she would.

14 The two presently relevant bases upon which the appellant alleged before the Tribunal that she would not receive such protection related, first, to the social status and influence of her uncles and, secondly, to her inter-faith marriage. As to the former, as I have indicated, the Tribunal was not satisfied that the status and political influence of her uncles was such as to affect the provision of State protection. As to the latter, i.e. the inter-faith marriage, the Tribunal indicated its appreciation that there were human rights issues in India but relying upon general country information it accepted that the Constitution provided for freedom of religion, that the government generally respected this right in practice and that the system of policing and the legal system was such as to satisfy the Tribunal that the appellant and her husband would be able to obtain State protection that would accord with international standards. It went on to say:

"In reaching this conclusion the Tribunal has given regard to the generic reports provided as well as the advisor's submissions that there have been many reports of corruption of the judiciary, that corruption is prevalent in India, that when it comes to intermarriages the situation is different, as the report he had provided indicates and that the police are not prepared to offer protection in inter-faith marriages. However, whilst it is plausible there are such problems, the Tribunal is of the opinion that without knowing the specifics, it would be erroneous to conclude that on the basis of that material, without more, that the couple would not receive adequate state protection."

15 I would have to say that I find this paragraph somewhat difficult to interpret. Consistent with the manner in which courts are enjoined to approach the reasons of Tribunals, I incline to the view that the Tribunal was concluding that it did not consider the evidence before it of the withholding of police protection in inter-faith marriages was of a sufficient character to dispel its state of satisfaction that adequate State protection would be available to the appellant and her husband. I make this observation conscious, as I noted above, that the Tribunal had already accepted that couples from different religions had been ill treated in India. I am constrained to say in the circumstances that the Tribunal's conclusion was one that was open to it.

16 In its appeal submissions the appellant strongly challenges the Tribunal's conclusion but the basis of her challenge relates to the classification of the police officers who assaulted her and her husband, as rogue State officials. She contests this classification because, in her view, they were "Peace officers". While it may be regrettable that on occasions public officials "act outside the law", it cannot for that reason be said that the State as of course is responsible for, or is to be taken as tolerating or condoning, such an illegal behaviour. The appellant's submission is simply based on an incorrect understanding of what are the applicable legal principles in this country. The finding of effective State protection in the circumstances was one open to the Tribunal on the material before it. Accordingly this ground of appeal must fail.

17 As to the ground of the application not dealt with by the Magistrate in the show cause proceedings, but which the appellant has sought to raise in this Court, its focus was on whether the Tribunal properly evaluated the extent of the threat made to the appellant by her uncles for the purposes of s 91R(2)(a) of the *Migration Act*. In its reasons the Tribunal indicated that it was satisfied that the uncles did not want to kill the husband, though the paragraph in its reasons in which it deal with the beating of the appellant and her husband is marked by less than clear and unambiguous expression. I am nonetheless satisfied that the Tribunal did properly address the question of the prospects of future serious harm - hence its conclusion about whether or not the threat made by the uncles was intended to be carried out. In consequence, because I do not consider that there was a legal error in the Tribunal's reasons, this ground has insufficient prospects to warrant the grant of leave which accordingly I refuse to grant: on the usual principles applied on

grant applications see *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397.

18 I will order that the appeal be dismissed with costs.

I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finn.

Associate:

Dated: 1 August 2007

The Appellant appeared in person.

Counsel for the Respondent:	Mr J Smith
Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	31 July 2007
Date of Judgment:	1 August 2007