

# FEDERAL COURT OF AUSTRALIA

SZLGS v Minister for Immigration and Citizenship [2008] FCA 893

Migration Act 1958 (Cth)

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

## **SZLGS v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL**

NSD 440 OF 2008

REEVES J

17 JUNE 2008

DARWIN

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

NSD 440 of 2008

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	SZLGS Appellant
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AND:	MINISTER FOR IMMIGRATION AND CITIZENSHIP First Respondent  REFUGEE REVIEW TRIBUNAL Second Respondent
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<u>JUDGE:</u>	REEVES J
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DATE OF ORDER:	17 JUNE 2008
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WHERE MADE:	DARWIN
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THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent's costs fixed in the sum of \$2,300.00.

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 440 OF 2008

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	SZLGS
	Appellant
AND:	MINISTER FOR IMMIGRATION AND CITIZENSHIP
	First Respondent
	REFUGEE REVIEW TRIBUNAL
	Second Respondent
JUDGE:	REEVES J
DATE:	17 JUNE 2008
PLACE:	DARWIN

## REASONS FOR JUDGMENT

# INTRODUCTION

1 This is an appeal against a judgment of Federal Magistrate Nicholls delivered on 13 May 2008, which dismissed an application for judicial review of a decision of the Refugee Review Tribunal ('the Tribunal'). The Tribunal's

decision was delivered on 14 August 2007. It affirmed a decision of a delegate of the first respondent to refuse to grant a protection visa to the appellant.

## BACKGROUND – SUMMARY OF FACTS

2 The appellant is a citizen of India. He was born on 7 June 1984 at Pulavanchi Village in the Thanjore District of the Tamil Nadu State of India. He arrived in Australia on 1 March 2007 and on 12 March 2007 he lodged an application for a protection visa. That application was refused by a delegate of the first respondent on 21 March 2007. On 12 April 2007, the appellant applied to the Tribunal for a review of that decision.

3 The appellant attended a hearing and gave evidence before the Tribunal on 2 July 2007. Upon the Tribunal affirming the decision of the delegate, the appellant lodged an application for review in the Federal Magistrates Court on 5 September 2007. He amended that application on 2 January 2008.

4 The appellant filed a statutory declaration in support of his visa application which set out his claims for protection. In summary, the appellant claimed that his father was a disaffected farmer who protested the low level of returns he received from the landlord of the family farm. As a result, he was arrested and jailed on fake charges, and beaten while he was in jail. He claimed that his father then became a member of the Communist Party of India and that on his release from jail he organised protests by other farmers against the landlords. He was subsequently blamed for the murder of some landlords and went into hiding. The appellant claimed that his mother and brother were taken to the Madukkur Police Station and beaten and tortured by the police in an attempt to locate his father. As a consequence his mother was hospitalised and later died and his brother escaped to another part of India.

5 According to the appellant, in June 2006 another landlord was murdered and the police thought his father was involved. As a consequence the appellant was taken into custody and beaten to force him to tell the police where his father was hiding. He was released without charge when his uncle and a lawyer came to the police station. However, he was re-arrested at his home at midnight three weeks later and sentenced to jail for one year on what he described as fake charges. With the help of his uncle and his lawyer the appellant was released on bail with a reporting condition in September 2006. He states that he then joined the Communist Party of India. He claimed that one day when he was reporting at the police station, a police officer (who was a friend of his uncle's) told him that the police intended to kill him to lure his father out of hiding. The appellant claimed that his uncle obtained a visa so that he could come to Australia to avoid him being killed.

# THE TRIBUNAL'S DECISION

6 At his hearing before the Tribunal, in support of his application, the appellant submitted a number of documents including: a death certificate relating to his mother's death, a document entitled 'Warrant of Arrest (Non-Bailable)', a copy of a 'Summons to an Accused Person' and a copy of a document entitled 'Fist Information Report'. Subsequent to the hearing, he also submitted a document that purported to be a court order dated 16 September 2006.

7 The Tribunal had concerns about the credibility of the appellant's claims relating to his arrest, detention and release in 2006, principally because they were at odds with the contents of some of the documents he had produced to the Tribunal. However, the Tribunal ultimately decided to give the appellant 'the benefit of the doubt and accept[ed] that he was arrested in June 2006, mistreated, released after a day, rearrested some three weeks later, detained for approximately and [sic] month and released on conditional bail'. The Tribunal also accepted that the appellant, following his release, had to report to the police on a weekly basis and that during one of these attendances he had heard of a threat to kill him with the intention of forcing his father to surrender to the authorities.

8 However, based upon the appellant's evidence at the hearing, the Tribunal concluded that the police were searching for his father because they suspected he was involved in a serious criminal offence, namely multiple murder, and that they had arrested the appellant to try to lure his father out of hiding and to force him to surrender to the police. The Tribunal also concluded that his arrest and detention in 2006 and any harm he thereby suffered was not due to any political opinions imputed to him, but rather was part of the attempt to trap his father.

9 The Tribunal considered whether the essential reason for the appellant's harm and any fear of harm was his membership of a particular social group, namely his family. On this aspect the Tribunal concluded that the appellant's fears of persecution arose: 'from being a relative of a person targeted by the police because of the latter's suspected involvement in serious criminal activity. Accordingly pursuant to s91S [of the *Migration Act* 1958 (Cth) ('the Act'), which requires the Tribunal to disregard any fear of persecution held by, or persecution of, his father which is not Convention-related] the Tribunal disregard[ed] the applicant's father's persecution or fear of persecution from the authorities.' The Tribunal therefore found that the appellant could not have a well-founded fear of persecution by membership of his family group.

10 Finally, the Tribunal considered whether the appellant might suffer harm if he were to return to India because of his membership of the Communist Party of India ('CPI' ML) Peoples War Group ('PWG'), even though the appellant had not expressly made this claim. In fact, at the hearing the appellant told the Tribunal that he had not actually become a member of

the CPI (ML); rather he had associated with some members of that organisation. In any event, the Tribunal ruled this out as a possible Convention reason because it found that the CPI (ML) PWG was a proscribed terrorist organisation under Tamil Nadu's *Criminal Law (Amendment) Act* and any punishment or harm he suffered would therefore be by reason of him breaching a general law against violent criminal and terrorist activities. Accordingly, the Tribunal found the appellant was not a refugee and affirmed the delegate's decision not to grant the appellant a protection visa.

## THE FEDERAL MAGISTRATE'S DECISION

11 In his Amended Application before the Federal Magistrates Court, the appellant alleged seven grounds for review summarised as follows:

- (1) a failure to afford the appellant procedural fairness by failing to comply with s424A of the Act which required the Tribunal to give the appellant particulars of the independent country information that was adverse to his case;
- (2) a failure to consider the appellant's evidence and genuine claims;
- (3) a failure to properly consider whether the appellant would suffer serious harm if he were to relocate within India under s91R(2)(a) of the Act;
- (4) a misuse of country information and a failure to 'have a fresh look' and to consider Amnesty International country information;
- (5) jurisdictional error in not taking into account relevant considerations or 'integers' central to the appellant's claims;
- (6) a failure to carry out a proper review and a failure to take into account the appellant's claim that he was intimidated, falsely accused and threatened by the Tamil Nadu police; and
- (7) a failure to consider and apply the Convention definition of 'Refugee', and the meaning of 'future harm'.

12 The Federal Magistrate set out his own summary of the Amended Application before him and proceeded to consider each ground in turn. In the process, his Honour dealt with ground (4) as if it raises two separate allegations: one of misuse of country information and the other of bias or bad faith. Further, his Honour has dealt with grounds (2) and (5) together under ground (2) and does not seem to have addressed ground (6) as a separate ground, although it raises the same issues as grounds (2) and (5). Finally, his Honour addressed a matter not raised in the application, namely whether the Tribunal had erred in its approach to s 91S of the Act

13 His Honour found that the Tribunal had complied with the procedural fairness obligations required by the Act. Noting the effect of s 424A(1), his Honour found that the Tribunal's decision turned on evidence submitted by the appellant himself and on country information; and both were subject to the exception in s 424A(3) of the Act.

14 His Honour found that any plain reading of the Tribunal's decision revealed that it did not overlook any aspect of the claims put forward by the appellant, or any integers central to the appellant's claims, such that the Tribunal had committed jurisdictional error. He concluded therefore that since the Tribunal's findings were open to it on the evidence before it, the appellant's complaint that 'even though he gave 'adequate evidence' the Tribunal found against him', was characteristic of a request for impermissible merits review.

15 In relation to the issues of relocation raised in ground (3), his Honour found that the Tribunal had not made any findings and there was no requirement that it should make any, given its broad findings that the appellant's fear of future harm was not Convention-related. He also found that the Tribunal had correctly applied the test of 'serious harm' in s 91R(1) of the Act and that 'its finding that none of the claims which it accepted had a Convention nexus meant that it was not required to go any further in its consideration'.

16 In relation to the use of country information (see ground (4) above), his Honour noted that the use of such information and the weight to be accorded to it was a factual matter and strictly for the Tribunal.

17 His Honour could find no evidence to support any allegation of bias or bad faith on the part of the Tribunal – an allegation his Honour assumed was being raised in ground (4) above.

18 Nor could his Honour find any failure to properly apply the test of whether the appellant was a 'Refugee' in terms of the Convention (ground 7 above). His Honour concluded that the Tribunal's findings were plainly open to it on the material before it.

19 In relation to s 91S of the Act, his Honour observed that in the circumstances it was necessary for the Tribunal to focus on the reason that the appellant's father was targeted, as distinct from the appellant's father's reasons for acting in the way that he did, which attracted the claimed persecution. Thus the question for the Tribunal was whether the fear of the persecution was for a reason other than a Convention-related reason. After considering the Tribunals' approach to this issue and the evidence before it, his Honour was satisfied that the Tribunal had pointed to evidence which clearly suggested that the appellant's father was wanted by police for a non-Convention reason and had therefore applied s 91S of the Act correctly.

20 The appellant's application was accordingly dismissed by his Honour on the basis that it failed to demonstrate any jurisdictional error on the part of the Tribunal.

## GROUND OF THE PRESENT APPEAL

21 The Notice of Appeal filed in this Court on 2 April 2008 asserts that the Federal Magistrate failed to:

- (a) find error of law, jurisdictional error, procedural fairness and relief under s39B of the Judiciary Act 1903;
- (b) consider 'legal and factual errors' in the Tribunal's decision; and
- (c) apply the principles in *Randhawa v MILGEA* (1994) 52 FCR 437 ('*Randhawa*');

and that the Tribunal had failed to record its decision, in accordance with s 430 of the Act. The gist of the particulars provided for this ground are that the Tribunal did not record in its reasons the material facts supporting its findings that any persecution the appellant had suffered was not for a Convention-related reason.

## THE CONTENTIONS

22 At the hearing of this appeal the appellant appeared in person and was unrepresented. He was assisted by an interpreter. Mr Knackstredt appeared for the first respondent.

23 Beyond complaining briefly that the Federal Magistrate's decision was unfair, the appellant made no submissions. Mr Knackstredt relied upon the written submissions he had earlier filed. They can be summarised as follows:

- (a) Grounds (1) and (2) are not particularised and in the absence of any particulars are not indicative of jurisdictional error.
- (b) Ground (3) was not raised in hearings below and is not particularised. However, because of the findings the Tribunal made that the appellant's fears of harm were not for Convention-related reasons, there was no occasion for the Tribunal to consider the reasonableness of relocation and therefore no occasion for the Federal Magistrate to consider the *Randhawa* decision.
- (c) Insofar as ground (4) is partially particularised, the Tribunal made findings on most of the matters raised by the appellant and it is not required to make a finding on every matter, particularly any matter that is subsumed in its findings that the harm suffered by the Tribunal was not for Convention-related reasons. The Tribunal gave



reasons for each of the findings it made, alternatively insofar as it failed to give reasons for a particular, a failure to comply with s 430 of the Act does not amount to jurisdictional error.

(d) No jurisdictional error has been demonstrated and in those circumstances the Tribunal's decision is a privative clause decision under s 474 of the Act i.e. not reviewable by the Federal Magistrates Court, nor this Court.

## CONSIDERATION

24 In my opinion, none of the grounds of appeal before this Court exposes any error in the decision of the Federal Magistrate. Grounds (1) and (2) are not particularised and without particulars of the various errors alleged to exist in his Honour's decision, these grounds are indiscernible. However, given that the appellant is unrepresented and given that these two grounds have alleged errors in his Honour's decision in a general sense, I have considered his Honour's decision and the reasons he has given for dismissing each of the grounds of review before him and I have been unable to detect any error in those reasons, let alone an error that could amount to a jurisdictional error.

25 In relation to ground (3), although it is far from clear what the appellant means by this ground, because the appellant has referred to the *Randhawa* decision (a decision which deals with relocation) and because the appellant raised relocation as an issue in ground (6) of his application for review before the Federal Magistrate, it is at least implicit that these two grounds are dealing with the same issue. I therefore do not agree with counsel for the first respondent's submissions that this ground was not raised before the Federal Magistrate.

26 However, I agree with the balance of the Minister's submissions on this ground, that because of the findings it had made that the appellant's fears of harm were not for Convention-related reasons, there was no requirement for the Tribunal to consider the reasonableness of the appellant relocating within India in order to avoid harm/fear of harm. The Federal Magistrate did not detect any error in the Tribunal's decision on these issues. In my respectful opinion the Federal Magistrate was correct in these conclusions for the reasons he gave. Therefore there was no occasion for the Federal Magistrate to consider the *Randhawa* decision.

27 Finally, in relation to ground (4), although counsel for the first respondent has not raised this aspect in his submissions, from my reading of the materials before the Federal Magistrate, the appellant does not appear to have raised any breach of s 430 below and, not surprisingly, his Honour does not appear to have turned his mind to the application of that section anywhere in his reasons for decision. It is apparent that the Federal Magistrate could not have committed appellable error in relation to a matter he was not asked to deal with and therefore did not deal with. It need not be said that an appeal to

this Court from a decision of a Federal Magistrate is directed to correcting error on the part of the Federal Magistrate. It follows that this ground must be rejected.

## ORDERS

28 For these reasons I order that this appeal be dismissed.

29 In the event that the appeal was dismissed the Minister's counsel sought a fixed order for costs in the sum of \$2300 on the basis of an affidavit that had been filed in accordance with the relevant Practice Note. Since the first respondent has been successful in this appeal, I consider costs should follow the event and I therefore order that the appellant pay the first respondent's costs fixed at \$2300.

I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Reeves.

Associate:

Dated: 17 June 2008

Counsel for the Appellant:	In person
Counsel for the First Respondent:	Mr Knackstredt
Solicitor for the Second Respondent:	Clayton Utz
Date of Hearing:	5 June 2008

Date of Judgment:

17 June 2008