FEDERAL COURT OF AUSTRALIA

SZUEP v Minister for Immigration and Border Protection [2017] FCAFC 94

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| Appeal from: | *SZUEP & Anor v Minister for Immigration & Anor* [2016] FCCA 434 |
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| File number: |  |
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| Judges: | **PERRAM, ROBERTSON AND WIGNEY JJ** |
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| Date of judgment: | 13 June 2017 |
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| Catchwords: | **MIGRATION –** appeal from Federal Circuit Court of Australia – whether that Court erred in dismissing an application for judicial review of the decision of the Refugee Review Tribunal affirming the decision of the delegate of the Minister not to grant the appellants Protection (Class XA) visas – whether apprehended or actual bias on the part of the judge of the Federal Circuit Court – whether jurisdictional error on the part of the Tribunal – whether the Tribunal failed to consider a critical issue it was required to consider in order to complete its review – whether, in dealing with whether relocation was reasonable, the Tribunal failed to consider unique circumstances of the applicant |
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| Legislation: | *Migration Act 1958* (Cth) |
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| Cases cited: | *AXQ15 v Minister for Immigration and Border Protection* [2016] FCAFC 73  *CDD15 v Minister for Immigration and Border Protection* [2017] FCAFC 65  *Concrete Pty Limited v Parramatta Design and Developments Pty Ltd* [2006] HCA 55; 229 CLR 577  *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337  *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416  *Johnson v Johnson* [2000] HCA 48; 201 CLR 488  *Michael Wilson & Partners Ltd v Nicholls* [2011] HCA 48; 244 CLR 427  *Minister for Immigration and Border Protection v Singh* [2016] FCAFC 183; 244 FCR 305  *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507  *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14; 210 CLR 1  *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10  *Re JRL; ex parte CJL* [1986] HCA 39; 161 CLR 342  *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40; 233 CLR 18  *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152 |
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| Date of hearing: | 23 August 2016 |
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| Date of last submissions: | 7 June 2017 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 43 |
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| Counsel for the Appellants: | Mr A Silva with Mr N Silva |
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| Solicitor for the Appellants: | Silva Solicitors |
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| Counsel for the First Respondent: | Mr DA Hughes |
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| Solicitor for the First Respondent: | Clayton Utz |
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| Counsel for the Second Respondent: | The Second Respondent submitted save as to costs |

ORDERS

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|  | | NSD 396 of 2016 |
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| BETWEEN: | SZUEP  First Appellant  SZUEQ  Second Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGES: | PERRAM, ROBERTSON AND WIGNEY JJ |
| DATE OF ORDER: | 13 June 2017 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellants pay the first respondent’s costs, as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. This is an appeal from the judgment and orders of a judge of the Federal Circuit Court of Australia (the **primary judge**) given and made on 2 March 2016.
2. The primary judge dismissed an amended application for judicial review of the decision of the then Refugee Review Tribunal (the **Tribunal**), made on 17 March 2014, affirming the decision not to grant the appellants Protection (Class XA) visas.
3. As found by the Tribunal, the first appellant was born in the Eastern Cape and later moved to Johannesburg for study and work. She was in an abusive marriage with her first husband. She left her first husband in 2011 and hid with relatives near Johannesburg. Her husband attacked her in the street in August 2011 and she made a report to the police. He attempted to take their daughter on a number of occasions. The first appellant and the second appellant were in some kind of relationship prior to coming to Australia. They were attacked by a group of men sent by the former husband in May 2012: the second appellant was badly assaulted and the first appellant was raped in front of her daughter. They applied for visas immediately after this event and left shortly thereafter for Australia.
4. There are three issues in the appeal, raised by the supplementary notice of appeal dated 3 April 2016. (The Court was notified on 7 June 2017 that the appellants did not wish to seek to amend their notice of appeal to raise any issue concerning the issue of a certificate placing limits on what could be disclosed to the appellants during the course of the review: see *Minister for Immigration and Border Protection v Singh* [2016] FCAFC 183; 244 FCR 305).
5. The first issue, ground 1, is whether the decision of the primary judge should be set aside “because his Honour was biased or his Honour caused apprehension of bias”.
6. The second issue, ground 2, is whether the primary judge erred by not holding that the Tribunal “made jurisdictional error since it failed to consider a critical issue it was required [to] consider in order to complete its review”. This was put as a case where an applicant was harmed for a non-Convention reason but the State denies protection for a Convention reason, the second of the principles in *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14; 210 CLR 1.
7. The third issue is whether the primary judge erred by not holding that “the Tribunal made jurisdictional error in that in dealing with whether relocation is reasonable it failed to consider unique circumstances of the applicant with regards to (a) her daughter (b) denial of state protection already experienced”.

#### Ground 1

1. We consider first the issue of bias or apprehended bias: see *Concrete Pty Limited v Parramatta Design and Developments Pty Ltd* [2006] HCA 55; 229 CLR 577 at [2], [117] and [172].
2. In our opinion, this ground fails, substantially for the reasons we gave in *CDD15 v Minister for Immigration and Border Protection* [2017] FCAFC 65 at [79] and following, in which the same claims were made in respect of a hearing before the same judge at which the same advocate appeared for the applicants.
3. In the present case, we have read the transcript of the hearing before the primary judge on 2 March 2016. We see nothing in the conduct of that hearing that would give rise to a claim of actual bias. Indeed it is difficult to see why a claim of actual bias is necessary or appropriate in circumstances where the legislation does not exclude a ground of reasonable apprehension of bias. The test for actual bias is much higher than the test for apprehended bias, as explained in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337 at [6]. It was submitted on behalf of the appellants that the state of mind of the primary judge was hostile to the appellants, manifested in the way his Honour conducted the hearing and made the decision. We see no basis for such a submission. It was also submitted that the primary judge had prejudged the case but again we see no basis for that submission. The transcript shows that the conduct of the hearing stands firmly against it.
4. As made clear in *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507 at [127], findings of actual bias are subject to a stringent standard of proof: the accusation of actual bias must be “firmly established”. In the present case no substantial evidence has been proffered. We agree with the submission on behalf of the Minister that the allegation should not have been made.
5. As to the claim of apprehended bias, first we give our reasons for rejecting the tender of paragraphs 6 to 22 of an affidavit affirmed by the first appellant on 28 April 2016.The paragraphs concern what the first appellant thought about the strength of her case and about the proceedings before the primary judge. We rejected the material as irrelevant. It is irrelevant because a claim of apprehended bias is to be judged by reference to the apprehension of the fair-minded informed lay observer. The litigant is not that person. The test is an objective one: see *Johnson v Johnson* [2000] HCA 48; 201 CLR 488 at [12], as approved in *Michael Wilson & Partners Ltd v Nicholls* [2011] HCA 48; 244 CLR 427 at [32]. The fair-minded informed lay observer is not to be confused with the litigant or party: *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416 at [2].
6. As to the claim itself, the appellants submitted: “The suggested source of bias is his Honour’s negative attitude towards refugee applicants.” Three matters were listed as having taken place because of that attitude: his Honour (i) challenged the appellants’ advocate but supported the Minister’s counsel; (ii) took over the role of the Minister’s counsel by advocating for the Minister; and (iii) decided the case without properly considering submissions and evidence.
7. In our opinion, a reading of the transcript shows that (i) and (ii) above are unsustainable: the primary judge did not impermissibly challenge the appellants’ advocate and did not support the Minister’s counsel or take over the role of the Minister’s counsel. Neither did he advocate for the Minister. Also, the appellants’ submission is inconsistent with what was said in *AXQ15 v Minister for Immigration and Border Protection* [2016] FCAFC 73 at [32]:

There is no doubt that the primary judge was probing both parties to address the matters of concern to his Honour, and in so doing revealing the way in which key issues and arguments were being received and interpreted by him. Speaking generally, a judge may properly conduct a hearing in this way, having regard to contemporary case management principles. In this context, exchanges between the bench and one party at the bar table may at times appear somewhat one-sided to an opposing party; and upon reflecting on an adverse ex tempore judgment as in this case, the losing party may be tempted to attribute the loss to the primary judge having a closed mind. This is, however, simply not enough. As was noted in Johnson v Johnson [2000] HCA 48; 201 CLR 488 at 493 [13] per Gleeson CJ, Gaudron, McHugh and Gummow and Hayne JJ:

… At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. … Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them.

1. As to (iii) above, the appellants have not established that the primary judge “decided [the case] without properly considering submissions and evidence”. A reading of the transcript and of the reasons of the primary judge does not establish that his Honour had a closed mind. It is to be recalled that what must be shown is that a fair-minded lay observer might reasonably apprehend that the judicial officer might not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party: *Re JRL; ex parte CJL* [1986] HCA 39; 161 CLR 342 at 352 per Mason J.
2. This is not to say that there was no error in the decision of the primary judge, and we now turn to that matter.

#### Ground 2

1. The appellants submitted that the Tribunal failed to consider whether factual findings it made about the appellants’ claims regarding the action of the police when they sought protection disclosed any Convention reason for the harm. The appellants said the error of the Tribunal lay in applying the second of the principles stated in *Khawar*, that is, where an applicant is harmed for a non-Convention reason the State denies protection for a Convention reason.
2. The appellants said the findings the subject of this complaint were to be found at [88] of the reasons of the Tribunal as follows:

The Tribunal accepts that certain police officers may decline to get involved in family matters, a situation which may be exacerbated when the new partner is a foreigner, and that this was what happened when the primary applicant approached the police.

1. The appellants submitted that the Tribunal was required to consider whether they were denied State protection because of (i) membership of the first appellant in a particular social group and/or (ii) the nationality of the second appellant (being Nigerian) or race (Ibo).
2. The appellants also submitted that the Tribunal had decided the State protection issue overall “arbitrarily without proper consideration of the country information as well as the appellants’ personal circumstances.” This, it was submitted, lent support to the second limb of the appellants’ argument that the Tribunal did not consider the appellants’ circumstances which were a necessary consideration in the overall consideration of the availability of State protection.
3. The Minister submitted that the Tribunal found that the harm feared arose from the former husband’s personal hostility to the appellants and not from any Convention reason. The Tribunal then considered whether the State might deny protection for a Convention reason. The Tribunal was not satisfied that there was any risk of this. It was that finding, and in particular the reasoning at [88], which was attacked in the appellants’ submissions. The Minister submitted the relevant test to be satisfied was identified by Gleeson CJ in *Khawar* at [26] as follows:

As her case is argued, and as a matter of principle, it would not be sufficient for Ms Khawar to show maladministration, incompetence, or ineptitude, by the local police. That would not convert personally motivated domestic violence into persecution on one of the grounds set out in Art 1A(2). But if she could show state tolerance or condonation of domestic violence, and systematic discriminatory implementation of the law, then it would not be an answer to her case to say that such a state of affairs resulted from entrenched cultural attitudes. An Australian court or tribunal would need to be well-informed about the relevant facts and circumstances, including cultural conditions, before reaching a conclusion that what occurs in another country amounts to persecution by reason of the attitude of the authorities to the behaviour of private individuals; but if, after due care, such a conclusion is reached, then there is no reason for hesitating to give effect to it.

1. The Minister submitted that the Tribunal was not satisfied that there was evidence of selective and discriminatory withholding of State protection indicative of State toleration or condonation of the violence, sufficient to give rise to a Convention nexus.
2. In our opinion, one way in which the matter was argued before the primary judge was that the finding of the Tribunal in this respect was not open. It is also put that the Tribunal did not consider the issue of whether the appellants were denied State protection: see [19] above.
3. The Tribunal accepted, at [85], that there was a real chance that the former husband of the first appellant will seriously harm her (physical harm) if she returns to Johannesburg. The Tribunal then went on to consider whether or not the relevant Convention nexus was made out. It referred to *Khawar* at [26] and at [84]-[87] of that judgment. The Tribunal accepted that women may constitute a particular social group in some circumstances and the first appellant may be a member of that group. However, at [87], the Tribunal did not accept that the essential and significant reason the first appellant would be harmed if she returned to South Africa was the membership of that particular social group. Nor did the Tribunal accept that the essential and significant reason the first appellant would be harmed was membership of other particular social groups. The Tribunal found that the first appellant would suffer harm for reasons of her relationship with her former husband, that is, her former husband’s hostility towards her and her new relationship, and not because she was the member of any particular social group.
4. The Tribunal then considered, at [88], the country sources relating to violence against women in South Africa and noted that violence against women is prevalent in South Africa. It found that while there had been a climate of impunity, the South African government had taken steps to improve implementation of the laws protecting women and to reduce violence against women. It referred to the Domestic Violence Act and said there had been some problems with implementation, perhaps due to the lack of resources and training and failure of police to take women seriously. Having accepted that certain police officers may decline to get involved in family matters, exacerbated when the new partner is a foreigner, and that this was what happened when the first appellant approached the police, the Tribunal did not accept that this was official policy nor that the policy of withholding assistance for those reasons would be tolerated or condoned by the government. It found that the country information did not suggest that the government tolerated or condoned violence against women or, importantly, that there was systematic and discriminatory withholding of protection for a Convention reason. The Tribunal accepted there was some police abuses but did not accept that this meant that there was a selective and discriminatory withholding of state protection.
5. The Tribunal made comparable findings in relation to the second appellant’s claims that he feared harm in the future.
6. There is not a great deal of country information in the Appeal Book. It is primarily found at Attachment B to the Statement of Decision and Reasons of the Tribunal. Having read it, the claim that it was not open to the Tribunal to find as it did, particularly at [88], in relation to that information fails. To say that some of the matters on which the Tribunal made findings were “taken out of context” shows no more than that the appellants disagree with the evaluation of the country information made by the Tribunal. However, subject to principles of legal unreasonableness, the weight to be given to country information is a matter for the Tribunal: *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10 at [11]. Similarly, to submit that the country information report was negative misunderstands the nature of the question for the Tribunal. The Tribunal was not concerned with the position of women in South Africa generally but with the narrower question of, for example, State tolerance or condonation of domestic violence and systematic discriminatory implementation of the law.
7. The balance of this ground also fails in light of the reasoning of the Tribunal. Because the Tribunal found that the relevant test as explained in *Khawar* was not satisfied, it was not a jurisdictional error on the part of the Tribunal not to go on to consider the issues for which the appellants contend, that is, whether they were denied State protection because of (i) membership of the first appellant in a particular social group and/or (ii) the nationality of the second appellant (being Nigerian) or race (Ibo). These issues did not arise because the Tribunal did not accept that what occurred at the hands of the police was official policy nor that the policy of withholding assistance in family matters, potentially exacerbated when the new partner is a foreigner, would be tolerated or condoned by the government.
8. In our opinion, ground 2 fails.

#### Ground 3

1. At [91] and following, the Tribunal considered the claims against the complementary protection criteria. It was in this context that the Tribunal considered the issue of relocation.
2. At [97], the Tribunal said it was satisfied that it would be reasonable for the appellants to relocate to an area of the country where there would not be a real risk that they would suffer significant harm.
3. As to the first appellant, the Tribunal did not accept that there was a real risk of her former husband causing her harm in another region: he lived in Johannesburg, where he came from and has a job there. The Tribunal referred to where the former husband had looked for the first appellant in the past and the extensive distances between the main urban centres in South Africa. When the first appellant lived for a short time close to Johannesburg she was safe, the Tribunal said. Some time had now passed and if the first appellant was in a different city, the Tribunal was satisfied there would be no appreciable risk of harm. The chance of the former husband using connections to find her was remote given that he no longer worked for the police and has a job selling cars. The Tribunal did not accept that the former husband would have influence over police in other parts of South Africa. The Tribunal found that it would be reasonable for the first appellant to relocate as she has skills and work experience which would be transferable; she has experience in living in urban and rural areas and relocating; and she has relatives living in the Cape and in Durban. She would also have the support of the second appellant.
4. As to the second appellant, the Tribunal found that he also has work skills and experience and it will be reasonable for him to relocate as he could also rely on the first appellant’s family support, language skills and familiarity with other parts of the country. The second appellant had lived in South Africa for a long time and would also be familiar with the challenges of relocation.
5. The country sources did not suggest that there were any impediments to moving around the country to different regions.
6. The first appellant’s daughter was living with her mother in Johannesburg so could continue to do so or could move to be with her mother in a different region.
7. The appellants submitted that the Tribunal failed to consider unique circumstances of the first appellant with regard to (a) her daughter and (b) denial of state protection already experienced.
8. The appellants submitted that in making the finding that the first appellant’s former husband would not be able to locate her, the Tribunal failed to consider the fact that the presence of the daughter of the first appellant and her former husband would allow the former husband to track down the appellants. Information about the daughter was before the Tribunal. It was submitted that the appellants did not have the opportunity to put to the Tribunal the issue of the presence of the daughter on the ability of the former husband to locate the first appellant. The appellants submitted that the Tribunal breached the principles in *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40; 233 CLR 18 that whether relocation is practicable must depend upon the particular circumstances of the applicant. The appellants also submitted that the Tribunal failed to put to them the issue of the presence of the daughter on the ability of the husband to locate the first appellant, and referred to *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152 at [29] and [49].
9. The Minister submitted that the Tribunal set out the correct test and applied it at [96]. The Tribunal noted that the daughter was living with the first appellant’s mother in Johannesburg and found, at [97], that she could continue to do so or could move to be with her mother in a different region. The argument that the former husband of the first appellant would be able to find the appellants if the daughter was with them was not an argument put to the Tribunal but was first made to the primary judge. It also contradicted the evidence actually given. The Tribunal discussed the issue of relocation within South Africa with the first appellant. She did not mention the daughter as an impediment against relocation. The Minister also submitted that the first appellant gave oral evidence that the daughter is almost 16 years old; the former husband had made no arrangements to see the daughter since May 2012; that the former husband and the daughter have no contact as the daughter is afraid of him; and that the first appellant did not bring the daughter with her when leaving South Africa as “I knew very well that [the former husband] would not do anything to her”. As to the criticism of the primary judge for not dealing with the *SZBEL* point, the Minister submitted no such ground was identified in the amended application before the Court below, nor was it clear how it connected with the present ground 3.
10. In our opinion, it is clear that the issue of relocation was put by the Tribunal to the first appellant. It is also clear that the first appellant did not then refer to her daughter as being a reason why it was not reasonable, in the sense of practicable, for her, the first appellant, to relocate. In those circumstances we are not persuaded that there was any denial of procedural fairness in this respect. The *SZBEL* point fails. It is therefore immaterial that the primary judge did not refer to the point, although it appears that it was raised before him in [38] of the then applicants’ written submission and orally.
11. As to the substance of the point, since it was not put to the Tribunal, the Tribunal made no error in that respect and it is speculation on the part of the appellants to submit that “through her connection he can locate her mother”, if she returns to South Africa. We reject the submission that the Tribunal did not consider the circumstances particular to the first appellant.
12. The appellants also submitted that the Tribunal dealt with the first appellant’s circumstances in a flawed manner. Seven matters were enumerated. They consist of the Tribunal’s evaluation of the particular circumstances of the first appellant. They do not establish “that the Tribunal had not properly considered the serious harm already encountered and the denial of state protection already experienced.”
13. As to point (b), see [36] above, since the Tribunal found that there had been no denial of State protection, the point is difficult to follow. In any event, in considering the question of relocation the Tribunal had found that there was a real risk that the first appellant may suffer physical and possibly sexual abuse from her former husband. The Tribunal said the former husband had displayed violent and ruthless behaviour on many occasions in the past, and may continue to do so if the first appellant returned. This was the context in which the Tribunal considered relocation. The point remains elusive. In our opinion, it has no substance.

## Conclusion and orders

1. In our opinion, the appeal should be dismissed. There should be an order that the appellants pay the Minister’s costs, as agreed or taxed.

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| I certify that the preceding forty-three (43) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Perram, Robertson and Wigney. |

Associate:

Dated: 13 June 2017