FEDERAL COURT OF AUSTRALIA

SZVSO v Minister for Immigration and Border Protection [2016] FCA 1040

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| Appeal from: | *SZVSO v Minister for Immigration & Anor* [2016] FCCA 1092 |
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| File number: |  |
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| Judge: | **GLEESON J** |
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| Date of judgment: | 1 September 2016 |
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| Catchwords: | **MIGRATION** – appeal from a decision of Federal Circuit Court of Australia – no error identified in the decision – appeal dismissed  |
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| Cases cited: | *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; (2013) 212 FCR 99 *Minister for Immigration and Border Protection v SZSRS* [2014] FCAFC 16; (2014) 309 ALR 67  |
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| Date of hearing: | 9 August 2016 |
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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: | 27 |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Counsel for the Respondent: | Ms N Blake |
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| Solicitor for the Respondent: | Clayton Utz |

ORDERS

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|  | NSD 786 of 2016 |
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| BETWEEN: | SZVSOAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONRespondent |

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| JUDGE: | GLEESON J |
| DATE OF ORDER: | 1 September 2016 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent’s costs.

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

REASONS FOR JUDGMENT

GLEESON J:

1. This is an appeal from a decision of a judge of the Federal Circuit Court of Australia (“FCCA”), made on 13 May 2016, dismissing the appellant’s application to the FCCA: *SZVSO v Minister for Immigration & Anor* [2016] FCCA 1092.
2. By his application to the FCCA, filed 25 November 2014, the appellant sought judicial review of a decision of the Refugee Review Tribunal (“Tribunal”) made on 28 October 2014, affirming the decision of a delegate of the respondent (“Minister’s delegate”), made on 3 March 2014, not to grant him a Protection (Class XA) visa.
3. The single ground of appeal is: “The leaned [sic] Judge made error of fact and law to dismiss the appeal.”
4. The appellant did not file written submissions in support of his appeal. He appeared at the hearing of the appeal with the assistance of an Urdu interpreter.

# Background

1. The appellant is a male citizen of Pakistan born on 7 July 1970. He was granted a subclass 456 visa on 7 October 2010 and arrived in Australia on that visa on 2 December 2010.
2. The appellant applied for a Protection (Class XA) visa on 20 June 2013.
3. The appellant claimed to fear harm on the basis of his religion, being Shiah Muslim, and because of his wealth and status as a member of a rich landowning family that had an Imambargah (a Shiah prayer hall) on its land.
4. The appellant claimed to be a member of a wealthy and high profile Shi’ite family in Pakistan that had extensive landholdings and farmed cattle in Rawalpindi. The appellant became a director of the family business, he and his family had a high profile in the local area, and prayer meetings were held at the Imambargah on their property. In that context, the appellant made the following further claims:
5. On 3 January 2012, the appellant, on the way to visit his uncle, was harassed by three people with masks on their faces. He was told to close his Imambargah and to stop taking Shiah prayers because “they hate Fiqa Jafferia” (Shi’ite prayer). The appellant was threatened. He reported the incident to the police who told him that they would investigate and take the necessary action but no further action was taken.
6. On 6 January 2012, a Majalis (or congregation) was arranged in the Imambargah. There was no incident at the Majalis as the police were present but the appellant’s family received calls from an unknown person telling them that they should not hold such an event in the future as “they will take revenge”. The police were informed but they did not respond. The appellant contacted various people to discuss the problem but continued to receive threatening phone calls. His family did not feel safe so, for their own protection, they hired security guards.
7. On 26 February 2012, the appellant’s brother was kidnapped by “10 to 12 persons”. The appellant received a telephone call from someone who was “clearly a Pathan” who warned him not to tell the police. The family were told that his brother would be released if they stopped holding Majalis and Shiah prayers and paid a ransom. The ransom was paid and his brother was released.
8. On 12 May 2012, the appellant received a further call from the kidnappers and the appellant was told that they wanted to meet him.
9. In September 2012, the appellant attended one of the family’s farms when unknown persons fired shots at one of his security guards. He could not identify the attackers but felt the attack was religiously motivated as he had received a call a day earlier in which he was told to change his religion or he would be killed. He received a further anonymous phone call threatening his life and thereafter the appellant left Pakistan because he feared for his life.
10. On 24 November 2012, a Majalis was organised at the residence of one of his close relatives. An unknown assailant attacked the event (“blasted there”) and some of his friends were martyred, although his family escaped the incident.
11. The appellant returned to Pakistan even though his life was in danger. He was told by his family not to return. On his return, in January 2013, the appellant received further threats from kidnappers and “owing to these obnoxious calls” he returned to Australia.

## Tribunal’s findings

1. The Tribunal accepted that the appellant was someone of the Shiah faith who came from Rawalpindi and that he was a relatively wealthy farmer and landowner. The Tribunal also accepted that a series of atrocities had been committed against the Shiah community in Pakistan. However, the Tribunal did not accept the claims that the appellant made about what had happened to him in Pakistan, concluding that “the problematic nature of the evidence is due to the fact that [the appellant] has manufactured his claims to fear harm in Pakistan”. The Tribunal identified a number of difficulties with the appellant’s evidence:
2. There were inconsistencies in information provided by the appellant to the Tribunal and to the Minister’s delegate. The inconsistencies suggested that the appellant was manufacturing his evidence. The appellant was unable to specify many of the dates of the incidents on which he relied. For example:
	1. at the Tribunal hearing, the appellant could not identify the date on which his brother had been kidnapped even though he had given a specific date in his statement to the Department of Immigration and Border Protection (“Department”).
	2. in his statement to the Department, the appellant said that he paid 30,000 rupees for his brother’s release but he told the Tribunal that the figure was 5 million rupees.
3. The appellant’s evidence about the Pakistani police was implausible. The appellant claimed that he reported a number of incidents to the police. Although the Tribunal accepted that the police in Pakistan had some serious problems, it considered it unlikely that they would not do anything if the appellant’s brother was kidnapped contrary to the appellant’s statements to the Tribunal.
4. The appellant failed to raise some claims in his June 2013 statement to the Department, which he later raised in his interview with the Minister’s delegate and the hearing before the Tribunal. In particular, the statement to the Department did not refer to the alleged incident in September 2012 which the appellant claimed had resulted in his security guard being shot and injured. Nor did the statement refer to an incident in which the appellant’s brother was allegedly shot in May 2013. The Tribunal did not accept the appellant’s explanation for failing to provide details of these significant incidents in his statement to the Department.
5. The appellant’s immigration history was inconsistent with a fear of persecution. The appellant had visited Australia and New Zealand for business and work purposes between 2010 and 2013 yet had returned to Pakistan in June 2012 and January 2013. The Tribunal considered that the appellant’s delay in lodging the protection visa application between January and June 2013, in circumstances where the appellant claimed to have fled Pakistan after staying for only four to five days, was also inconsistent with his claims to fear harm. The Tribunal considered that the appellant, after travelling to Australia on temporary business visas since 2010, had sought a more permanent means of staying in Australia and had fabricated claims in an attempt to remain in Australian on a permanent basis.
6. The Tribunal considered country information about the treatment of those of the Shiah faith in Pakistan and specifically in Rawalpindi. That country information supported the finding that the situation for Shiahs in Pakistan remained precarious, however, the targeting of Shiahs in Islamabad and Rawalpindi had been relatively low level compared with some other parts of Pakistan. There was a relatively low number of incidents or targeting of Shiahs in Rawalpindi/Islamabad, although the Tribunal accepted the appellant’s evidence in relation to an attack on an Imambargah in Rawalpindi which the appellant claimed was one of the worst that Pakistan has experienced. On the available information, the Tribunal was not satisfied that there was a real chance that the appellant would be harmed in Pakistan, now or in the reasonably foreseeable future. Nor was the Tribunal satisfied that the appellant is at
“heightened risk” due to his family’s wealth or the operation of an Imambargah.

## Proceeding before the FCCA

1. On 25 November 2014, the appellant filed an application in the FCCA for judicial review of the Tribunal’s decision. The stated grounds of the application were:

1. The Tribunal erred in finding that there was a relatively low number of incidents on [sic] targeting of Shias in Rawalpindi/Islamabad.

2. The Tribunal erred in finding that there was no “real risk” of significant harm if the applicant were to go back to Pakistan.

1. With respect to the first ground, the FCCA judge concluded that there was nothing in the material to indicate that the Tribunal’s conclusion as to the frequency of incidents targeting Shiahs in Rawalpindi/Islamabad was not open on the material before it, including the available country information to which the Tribunal referred. Insofar as she disagreed with the conclusions of the Tribunal, the FCCA judge concluded that the appellant was seeking impermissible merits review.
2. With respect to the second ground, the FCCA judge rejected the appellant’s contention that the Tribunal had erred in failing “to reconcile the conflicting expert evidence”. The appellant did not make clear what was intended by the ground. It was open to the Tribunal to accept the information in the relevant report from the Department of Foreign Affairs and Trade. The Tribunal considered the security situation for Shiahs in Rawalpindi generally and for the appellant specifically, both in terms of the Refugees’ Convention criterion and the complementary protection criterion. The FCCA judge concluded that no error was demonstrated under this ground.
3. The FCCA judge separately gave further consideration to whether the appellant’s claim to fear harm as a member of a wealthy and prominent family could be separated from his claim about his and his family’s religion. Her Honour was satisfied that the Tribunal had not failed to deal with any integer of the appellant’s claim, noting in particular the Tribunal’s finding that it was not satisfied that the appellant was at heightened risk due to his family’s wealth or the operation of the Imambargah.
4. The FCCA judge also considered an issue raised by the appellant at the hearing regarding the Tribunal’s decision not to adjourn a second hearing that it had scheduled for 13 October 2014, following an earlier hearing attended by the appellant on 11 September 2014. At the 11 September 2014 hearing, the appellant had advised the Tribunal that his representative was unwell and he was given a further month, “but no longer”, to obtain another representative. The Tribunal advised the appellant to obtain a new representative as soon as possible.
5. On 19 September 2014 the appellant was sent an invitation to attend the new hearing, scheduled for 13 October 2014. On 9 October 2014 the appellant advised an officer of the Tribunal that he had recently appointed a new representative, and the newly appointed representative requested that the hearing be postponed for 30 days. The Tribunal refused this request for a further adjournment. The appellant attended the 13 October 2014 hearing, and advised the Tribunal that his representative was unable to attend but that he wished to proceed with the hearing. He also stated that he may need another month to obtain additional documents. The Tribunal allowed the appellant an additional two weeks only to provide submissions and any additional documents. At [77], the FCCA judge concluded:

The Tribunal’s approach to the adjournment application (and the time for provision of further documents) was one that was within its “*decisional freedom*” in the sense considered by French CJ in [*Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332] at [28] and is not such as to amount to the unreasonable exercise of its discretion in such a way as to found a jurisdictional error (see Gageler J in *Li* at [24]). The Tribunal did not come to a conclusion that was so unreasonable that no reasonable decision-maker could have come to it. There was an “*intelligible justification*” given in its reasons for its refusal to grant a further adjournment (see [*Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; (2014) 231 FCR 437]at [47]). It cannot be said that its decision was arbitrary or capricious or lacking in common sense or indicative of a lack of procedural fairness (also see *Singh* at [43]-[52]).

1. A further issue raised by the appellant at the FCCA hearing concerned whether the Tribunal had considered documents given by the appellant to his first representative. The documents were said to comprise medical reports and police reports and “first information reports”. Based upon an affidavit of Ms Laura Jacobs, at [81], the FCCA judge concluded that no such documents had been provided to the Department or the Tribunal. The appellant had been told by the Tribunal at the 11 September 2014 hearing that no documents had been provided, and he responded by saying that he could contact the office of his representative to obtain the documents or he could obtain the documents from Pakistan. When no documents were provided by the time of the 13 October 2014 hearing, the appellant was allowed a further two weeks to obtain the documents.
2. The FCCA judge noted that some photographs were located on the Departmental file. Her Honour concluded, at [82], that, insofar as there was any suggestion that the Tribunal erred in failing to mention the photographs, this was not indicative of jurisdictional error. The Tribunal was not obliged to refer to every item of evidence and it could not be said that this was critical in the sense considered in *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; (2013) 212 FCR 99 and *Minister for Immigration and Border Protection v SZSRS* [2014] FCAFC 16; (2014) 309 ALR 67*.*

# Submissions on the appeal

1. At the hearing of the appeal, the appellant complained that he did not have a lawyer and was not given enough time to engage a lawyer because he had been in a detention centre for the nine or ten months (during which time he was also hospitalised) prior to the second or third week of June 2016. The appellant also referred to a medical certificate dated 2 August 2016 and an Echocardiography report dated 17 December 2015.
2. I took the appellant’s complaint to be, in substance, an application for an adjournment. The adjournment was opposed. After hearing detailed submissions from both parties, I declined to adjourn the hearing of the appeal for reasons that were recorded on the transcript.

## Appellant’s submissions

1. On the substantive appeal, the appellant complained that the Tribunal gave him two weeks to produce documents in support of his claims, but the documents were with his former representative who was fighting for his life as a result of a brain tumour.
2. The appellant requested time to produce documentary evidence to this Court which, he said, he was unable to obtain earlier as a result of having been in immigration detention.
3. The appellant also made submissions about documents which, he said, would demonstrate how many members of his family had been killed in Pakistan as well as the death of a family member of his lawyer. The appellant submitted that his real case has not yet been presented.

## Minister’s submissions

1. On the Minister’s behalf, Ms Blake submitted that the decision of the FCCA judge was correct for the reasons her Honour gave.
2. Ms Blake also observed that it was not clear precisely what documents the appellant sought to obtain. She argued that the Tribunal gave the appellant a significant opportunity to produce any additional documents which he had informed the Tribunal could be obtained from Pakistan. Ms Blake noted that there is no record of any request for further time after the Tribunal allowed the appellant two weeks to provide more documents following the 13 October 2013 hearing.

# Consideration

1. I am not satisfied that there was any error in the decision of the FCCA. The appellant did not identify any error and I have not identified any error.
2. As I explained to the appellant at the hearing, the function of this Court on the appeal is to consider the legality of the decision of the FCCA judge. There would be no point in permitting the appellant further time to gather evidence in support of his claims for protection because it would not be relevant to the legality of the FCCA judge’s decision.
3. The appeal must therefore be dismissed with costs.

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| I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson. |

Associate:

Dated: 1 September 2016