FEDERAL COURT OF AUSTRALIA

SZFRG v Minister for Immigration and Border Protection [2017] FCA 189

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| Appeal from: | *SZFRG and Ors v Minister for Immigration & Anor* [2006] FMCA 1165  |
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| File number(s): |  |
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| Judge(s): | **PERRY J** |
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| Date of judgment: | 3 March 2017 |
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| Catchwords: | **MIGRATION** – application of *Migration Act* s 48A - whether appellants entitled to lodge a further visa protection claim where first claim was decided before enactment of complementary protection regime – whether the Department of Immigration and Border Protection is obliged to advise non-citizens of legislative amendments that may adversely affect their rights – appeal dismissed  |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth), s 24*Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth)*Migration Act 1958* (Cth), ss 36, 48A*Migration Amendment (Complementary Protection) Act* *2011* (Cth)*Migration Amendment Act 2014* (Cth)*Migration Legislation Amendment Act (No 1) 2014* (Cth) |
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| Cases cited: | *AZABF v Minister for Immigration and Border Protection* [2015] FCAFC 174*Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123*SZFRG and Ors v Minister for Immigration & Anor* [2006] FMCA 1165*SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71 |
|  |  |
| Date of hearing: | 17 February 2017 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 24 |
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| Counsel for the Appellants: | The first and second appellants appeared in person |
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| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

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|  | NSD 1891 of 2016 |
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| BETWEEN: | SZFRGFirst AppellantSZFRHSecond Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONRespondent |

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| JUDGE: | PERRY J |
| DATE OF ORDER: | 17 FEBRUARY 2017 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellants are to pay the costs of the respondent as agreed or assessed.

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

REASONS FOR JUDGMENT

PERRY J:

##### INTRODUCTION

1. This is an appeal from a decision of the Federal Circuit Court dismissing the appellants’ application for judicial review of a determination by an officer of the Department of Immigration and Border Protection (the **Department**). By that determination, the Department concluded that a purported application for a Protection (subclass 866) Visa lodged by the appellants was not a valid application.
2. The notice of appeal raises one ground as follows:

I argued my case before Judge Street and relied on my Affidavit before the Court and still believe that I have an arguable case because I have never been assessed under complimentary [sic] protection.

1. On 14 November 2016 the Registrar made directions for the filing of written submissions by the appellants no later than 10 days before this hearing. No submissions were filed in accordance with that direction.
2. The respondent, the Minister for Immigration and Border Protection (the **Minister**), filed submissions in accordance with those directions on 8 February 2017, submitting that the appeal is misconceived and should be dismissed with costs. While the Minister posted those submissions to the appellants, the appellants advised that they had not received a copy of them. I see no reason not to believe the appellants, as did the Minister. The appellants confirmed that the submissions were sight translated to them immediately before the hearing began by the Court appointed interpreter. While the appellants sought an adjournment of the hearing, that was opposed by the Minister.
3. In the circumstances, I declined to adjourn the hearing because I considered that the Minister’s written submissions simply sought to uphold the decision of the primary judge and did not depart from the case apparently presented by the Minister below. Nonetheless, I considered that it would be appropriate to grant the appellants leave to file a written submission after the hearing so as to extend to them the opportunity to respond to the Minister’s submissions in a more considered way. No submissions were filed pursuant to that leave.

##### BACKGROUND

1. The appellants are citizens of Indonesia. They arrived in Australia on 1 June 1998, having previously visited in mid-1997. On 9 June 1998, the appellants lodged a combined application for protection visas under the *Migration Act 1958* (Cth) (the **Act**). That application included the appellants’ two children, then aged about nine and seven respectively.
2. On 26 June 1998, the delegate refused to grant the protection visas. That decision was affirmed on review by the then Refugee Review Tribunal (the **Tribunal**) on 11 November 1999. No challenge was made to the Tribunal’s decision until late 2005 when judicial review proceedings were commenced in the then Federal Magistrates Court of Australia. That application was dismissed on 26 July 2006: [2006] FMCA 1165.
3. With effect as and from 24 March 2012, the Act was amended by the *Migration Amendment (Complementary Protection) Act* *2011* (Cth). Those amendments enacted the complementary protection regime. In particular, under s 36(2)(aa) the Minister may grant a protection visa to a non-citizen on the ground that the Minister is satisfied that Australia has protection obligations “*because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm*”. The Minister may also grant a protection visa to a non-citizen where satisfied that the noncitizen is a member of the same family unit as a non-citizen to whom complementary protection obligations are owed (s 36(2)(c)). It is a criterion of the grant of a protection visa under the complementary protection regime enacted by s 36(2)(aa) that the Minister is not satisfied that the person is entitled to a protection visa under s 36(2)(a), i.e., that Australia has protection obligations because the non-citizen is a refugee. Section 36(2)(aa), in other words, creates an alternative basis for the grant of a protection visa where the Minister is not satisfied that the person is a refugee.
4. On 3 July 2013, the Full Court of the Federal Court delivered judgment in *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71;(2013) 212 FCR 235 (***SZGIZ***). In that case, the Court held that s 48A of the Act does not prevent a non-citizen whose application for a protection visa has been refused under s 36(2)(a) from making a further protection visa application based upon the alternative criteria in s 36(2)(aa).
5. However, with effect from 28 May 2014, s 48A of the Act was amended by the *Migration Amendment Act 2014* (Cth). This amendment was intended to remove the capacity for non-citizens to re-apply for a protection visa under the complementary protection regime, thereby reversing the decision in *SZGIZ*. That section was subsequently further amended including by the *Migration Legislation Amendment Act (No 1) 2014* (Cth) and the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). Section 48A as at the relevant time is set out at [18] below.
6. Subsequently on 3 March 2016 the appellants purported to lodge new protection visa applications. However by letter dated 26 May 2016, the Department informed the appellants that the applications were not valid.
7. By their application for judicial review in the Court below, the appellants contended that:

The Department of Immigration failed to take into consideration my right to apply for a protection visa under complimentary as it was decided by the Court that any applicant for refugee’s entitled to reapply if the issue of complementary protection was not considered. This should not apply to me as I was refused a protection visa on 26 June 1998 and section 48A should not apply to me.

(errors in the original)

1. As the Minister submits, it seems reasonably clear that the appellants intended to rely upon the decision in *SZGIZ* to contend that they had an entitlement to lodge a further protection visa application based on complementary protection claims as those claims had not been determined on the earlier protection visa application which was made before the enactment of the complementary protection regime.
2. On 2 November 2016, the Court below held that it was bound by the Full Court decision in *AZABF v Minister for Immigration and Border Protection* [2015] FCAFC 174; (2015) 235 FCR 150 (***AZABF***) to hold that a further protection visa application on the grounds of complementary protection could not validly be made by a non-citizen in the migration zone after the commencement of the *Migration Amendment Act 2014* (Cth) on 28 May 2014: reasons below at [18] and [22]. Accordingly the Court below held that there was no error in the Department’s decision to refuse to accept the application for a protection visa made on 3 March 2016 on the grounds that it was invalid.

##### CONSIDERATION

###### The appellants’ submissions

1. Both appellants (husband and wife) made oral submissions. They also handed up at the hearing a 1 page submission in the following terms:

Firstly I rely on the documents in the Appeal Book especially my application under Migration Act which appears in Part 1 and my Affidavit which appears in Part 3 of the Appeal Book which explains my history and my arguments, especially that the Department never dealt with complimentary protection.

At all times I notified the Department about my address and contact details.

I understand that the Respondent in Part 4, page 2, of the Appeal Book point 8 relies on SZGIZ in which s.36 of the Act indicates that I can apply and then it says that on 28 May 2014 a new law amending the section 48A.

I was not aware of the amendment and even though the amendment took place I do believe that the Department must accept my application for protection visa which was lodged on or around 3 March 2016.

I am still of the view that I have an arguable case and when the Full Court on 3 July 2013 that we are not barred by s.48A to lodge a fresh application I did not receive any letter from the Immigration to tell me or invite me to lodge the application.

My wife and I experienced serious harm in Indonesia and recently we sent a letter to the Minister for his intervention and it was not referred to him. I do believe that I am a victim of law and the Department failed to give me natural justice and fairness.

1. As developed orally, it is apparent that the appellants raise three issues as follows:
2. *Issue 1:-* the Federal Circuit Court incorrectly dismissed the appellants’ application for judicial review on the ground that s 48A of the Act prevented them from making a valid second protection visa application;
3. *Issue 2:‑* the Department should have advised them that they could make a second protection visa application when the decision in *SZGIZ* was handed down;
4. *Issue 3:‑* it would be unfair not to grant them protection visas as they had lived in Australia for 19 years and had made a positive contribution to the community. They also had children in Australia and two grandchildren.
5. In addition, the appellants mentioned that they had requested Ministerial intervention and asked the Court to recommend that the Minister intervene. However, as I explained at the hearing, the role of the Court is more limited: see further at [23] below.

###### Issue 1: effect of the amendments to s 48A of the Act

1. Section 48A as at 3 March 2016 when the appellants purported to lodge new protection visa applications relevantly provided:

**48A No further applications for protection visa after refusal or cancellation**

1. Subject to section 48B, a non-citizen who, while in the migration zone, has made:

(a) an application for a protection visa, where the grant of the visa has been refused (whether or not the application has been finally determined); or

(b) applications for protection visas, where the grants of the visas have been refused (whether or not the applications have been finally determined);

may not make a further application for a protection visa, or have a further application for a protection visa made on his or her behalf, while the non-citizen is in the migration zone.

…

(1C)  Subsections (1) and (1B) apply in relation to a non‑citizen regardless of any of the following:

(a) the grounds on which an application would be made or the criteria which the non‑citizen would claim to satisfy;

(b) whether the grounds on which an application would be made or the criteria which the non‑citizen would claim to satisfy existed earlier;

(c) the grounds on which an earlier application was made or the criteria which the non‑citizen earlier claimed to satisfy;

(d) the grounds on which a cancelled protection visa was granted or the criteria the non‑citizen satisfied for the grant of that visa.

…

(2)  In this section:

application for a protection visa means:

(aa) an application for a visa of a class provided for by section 35A (protection visas—classes of visas), including (without limitation) an application for a visa of a class formerly provided for by subsection 36(1) that was made before the commencement of this paragraph; or

…

1. In *AZABF* the non-citizen had unsuccessfully applied for a protection visa before the enactment of the complementary protection regime under the Act. Following the enactment of s 36(2)(aa) and s 48A, he made a second application for a protection visa in reliance upon the alternative criteria for the grant of a protection visa under s 36(2)(aa). The Full Court held that there was no error in the decision by a delegate of the Minister that his application was not valid because it was barred by s 48A. In this regard, the Full Court, held at [25] –[27] that:

25. The terms of ss 48A(1), 48A(1C), 48A(2)(aa) and 36(2)(aa) of the Act read together act as a bar to the lodgement by the appellant of his second application for a protection visa. In particular, we note:

* section 48A(1C)(b), which provides that s 48A(1) applies such that a non-citizen who has made a previously unsuccessful application for a protection visa may not make a further application for a protection visa, whether the grounds on which an application would have been made or the criteria which the non-citizen would claim to satisfy existed earlier;
* section 48A(2)(aa), which defines “application for a protection visa” as including an application for a visa that, under the Act or the regulations in force at any time, is or was a visa of the class known as protection visas; and
* section 36, which is headed “Protection visas – criteria provided for by this Act”, and in particular s 36(2)(aa) which provides that a criterion for a protection visa is that the applicant for the visa satisfy the Minister of (in effect) Australia’s complementary protection obligations to that applicant.

26. It is clear to us that it is irrelevant whether the grounds or criteria on which a non-citizen relies in his or her subsequent protection visa application were available for reliance by that visa applicant at an earlier point in time (including the time when the non-citizen made an earlier protection visa application). We do not accept the submission of the appellant that the language of s 48A(1C)(b) is ambiguous. Section 36(2) unambiguously sets forth the “criterion for a protection visa”. And s 48A(1C) is equally unambiguous when it relevantly provides in s 48A(1C)(b) that a person may not make a further application for a protection visa “regardless of … the grounds on which an application would be made or the criteria which the non-citizen would claim to satisfy existed earlier”. Even though the “criterion” now sought to be relied upon, namely s 36(2)(aa) did not exist as at the date of the earlier application, s 48A(1C)(b) is unambiguous in its prohibition on a further application being made “regardless of … whether” the criterion now relied upon “existed earlier”. We note that the plain language of the legislation is supported by the Explanatory Memorandum, which details the policy behind the introduction of s 48A(1C). In our view the decision of the Full Court in *SZGIZ* has been superseded by the 2014 Amendment Act, to the extent that that decision permitted a person whose application for a protection visa has been rejected to make another application based on a different criterion in s 36(2) of the Act.

27. In light of the statutory regime following the commencement of the 2014 Amendment Act (and in place at the time the appellant made his second visa application), it follows that it is irrelevant that the appellant could not, in 2009 at the time of his first protection visa application, have relied on the complementary protection provisions in s 36(2)(aa) of the Act. It is not in dispute that the appellant has previously sought, and been denied, a protection visa. Section 48A(1) of the Act prohibits him lodging another application for a protection visa.

1. The decision in AZABF concerned s  48A as originally enacted: *AZABF* at [14]. As earlier mentioned, the provision has since been amended: see above at [10]. However, those amendments have not amended the provision in any material respects. It follows that I am bound by the Full Court’s decision in *AZABF*, as was the Court below, to hold that the Department did not fall into error in holding that the appellants’ protection visa application lodged on 3 March 2016 was invalid by reason of s 48A of the Act.

###### Issue 2

1. The Minister submitted that the alleged obligation upon the Department to notify the appellants of the decision in *SZGIZ,* or that the Act was about to be amended so as to preclude a second visa application being made reversing the decision in *SZGIZ,* was untenable. In this regard, he emphasised that the appellants had not identified the source of the obligation, any particular circumstances said to give rise to the obligation in their case, or to whom the obligation was owed aside from the bare assertion that it was owed to them. I accept the Minister’s submissions. The appellants’ submission is unsupported by any authority or statutory provision.

###### Issue 3

1. The appellants’ submission that the decision to reject their applications was unfair ultimately amounts to the appellants expressing their disagreement with the outcome of the Tribunal’s decision*.* One can readily sympathise with the appellants’ situation and accept that the loss of the opportunity to lodge a second protection visa application and to have a consideration of whether Australia owes complementary protection obligations to them before the amendment on 28 May 2014 may be a harsh result for individuals who have lived for a lengthy period in Australia, have children and grandchildren here, and have apparently made a positive contribution to the Australian community.
2. However, the jurisdiction of the Federal Circuit Court is limited to considering only the lawfulness of the Department’s refusal to accept the visa application as valid: see by analogy *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at [13]; [2009] HCA 39 at [13] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). In turn, this Court is required on an appeal from the Federal Circuit Court under s 24 of the *Federal Court of Australia Act 1976* (Cth) to consider whether there is error in the decision of the Court below. As such neither this Court nor the Federal Circuit Court has jurisdiction to decide whether the appellants should be granted a visa; nor to require the Tribunal to consider whether they should be granted a protection visa on complementary protection grounds despite the operation of s 48A of the Act. I agree in this regard with the observations by the primary judge at [21] of that decision that:

I note the applicants' deep wish to advance their personal circumstances to the Court in support of the application for relief. The Court accepted that the applicants appear to have been constructive members of the community, albeit unlawful [non-citizens], and that there may be considerable merit in the applicants' desire to continue to remain in Australia and to contribute to the Australian community. However, this Court does not have the power to grant relief based on compassionate grounds and cannot make any finding in relation to the merits of the decision of the Minister.

##### CONCLUSION

1. It follows for these reasons that no error has been shown in the decision of the Court below and the appeal must be dismissed with costs.

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| I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perry. |

Associate:

Dated: 3 March 2017