FEDERAL COURT OF AUSTRALIA

SZTSY v Minister for Immigration and Border Protection [2015] FCA 715

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| Citation: | SZTSY v Minister for Immigration and Border Protection [2015] FCA 715 |
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| Appeal from: | SZTSY v Minister for Immigration & Anor [2015] FCCA 229 |
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| Parties: | **SZTSY v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and REFUGEE REVIEW TRIBUNAL** |
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| File number: | NSD 145 of 2015 |
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| Judge: | **PERRAM J** |
|  |  |
| Date of judgment: | 15 July 2015 |
|  |  |
| Catchwords: | **MIGRATION** – appeal from decision of Federal Circuit Court dismissing application for review of Refugee Review Tribunal’s decision – whether Tribunal’s decision vitiated by jurisdictional error  |
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| Cases cited: | *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 cited*Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 cited*SZQGA v Minister for Immigration and Citizenship* (2012) 204 FCR 557 cited*SZTSY v Minister for Immigration & Anor* [2015] FCCA 229 cited  |
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| Date of hearing: | 7 May 2015 |
|  |  |
| Place: | Sydney |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 20 |
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| Counsel for the Appellant: | The Appellant appeared in person |
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| Counsel for the First Respondent: | Ms B Anniwell |
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| Solicitor for the First Respondent: | Australian Government Solicitor |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting appearance |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 145 of 2015 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | SZTSYAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentREFUGEE REVIEW TRIBUNALSecond Respondent |

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| JUDGE: | PERRAM J |
| DATE OF ORDER: | 15 JULY 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

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

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 145 of 2015 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | SZTSYAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentREFUGEE REVIEW TRIBUNALSecond Respondent |

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| JUDGE: | PERRAM J |
| DATE: | 15 JULY 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

1. This is an appeal from the Federal Circuit Court which refused the appellant’s application for orders quashing an earlier decision of the Refugee Review Tribunal (‘the Tribunal’). The Tribunal affirmed an earlier decision of a delegate of the Minister who had refused to grant the appellant a protection visa. The Federal Circuit Court’s decision is entitled *SZTSY v Minister for Immigration & Anor* [2015] FCCA 229 and was given by Judge Nicholls on 6 February 2015. For the reasons which follow the appeal should be dismissed with costs.

### The Appellant’s Claim for Protection

1. The appellant is a citizen of Bangladesh who is approximately 35 years old. He first entered Australia in October 2011 travelling on a valid Subclass 456 visa, a short term business visa usually of three month’s duration. The visa was due to expire on 28 November 2011. On that day the appellant lodged an application for a protection (class XA) visa, i.e., a refugee visa.
2. The application was accompanied by a statement which set out the basic elements of the appellant’s story and the basis for his claim to be entitled to a protection visa. In a nutshell, the appellant said he was a Hindu and had suffered in Bangladesh as a result of his religion. In around 1995 he had taken up actively preaching Hinduism and this had only made things worse. He claimed that in 1995 he had been beaten up by his college friends after discussing Hinduism with them and that in 1996, such was the danger to him, that he had been forced to flee to Dhaka. In Dhaka he had joined up with the International Society for Krishna Consciousness (‘ISKCON’), that is to say, the Hare Krishnas. He says he became heavily involved with them.
3. In 1997 he claimed that whilst attending a meeting of ISKCON he, along with others, was violently attacked by Muslim fanatics. His house was also vandalized and looted. As a result of the attack, in which he was injured, he was confined to a wheelchair. He did not recover from this until 2001.
4. He also claimed that after 2001 he worked as a journalist and that in that capacity he had written pieces which were against the interests of the elites and various fanatics. This had caused difficulties for his family. Furthermore, so he claimed, on 25 May 2011 he was stopped at a bus stop and attacked by Muslim fanatics. It was these circumstances that then caused him to flee to Australia.

### The Visa Application

1. As I have said, the appellant lodged his application for the protection visa on the day his short term visa expired, 28 November 2011. In due course, a delegate of the Minister interviewed him on 29 May 2012. Nearly six months later, the delegate made a formal decision refusing to grant the visa. The appellant then applied on 28 November 2012 for a review of that decision by the Tribunal. As part of that process, on 16 September 2013 the appellant’s solicitors submitted a detailed written submission to the Tribunal on his behalf. On 16 October 2013, nearly a year after the application for review had been filed, the Tribunal conducted a hearing which the appellant attended. On 16 December 2013, the Tribunal concluded that the Commonwealth did not owe the appellant any protection obligations and affirmed the delegate’s earlier decision to refuse to grant the visa.

### The Tribunal’s Decision

1. The Tribunal’s principal conclusion was (at [10]) that the appellant was ‘not a credible witness and has not been truthful in his evidence about the claimed events in Bangladesh’. It set out four reasons why it came to that view, to which I will turn in a moment. It did, however, accept (at [32]) that his religious beliefs as a Hindu were sincere and that he was indeed a member of ISKCON. The upshot of these two conclusions was that the Tribunal accepted that the appellant was a Hindu, and a practising one at that, but not that he had ever been attacked in the manner he suggested. It did not believe that he had been attacked by his friends for discussing Hinduism with them or that he had been attacked by Muslim fanatics (either at the meeting or later at the bus stop).
2. The Tribunal then proceeded to consider the position of Hindus and, more particularly, Hare Krishnas in Bangladesh. Whilst accepting that there were incidents of violence against Hindus and Hare Krishnas, it is apparent that the Tribunal did not regard these as being significant in the overall scheme of things. It concluded that there was no real chance that the appellant would be harmed if returned to Bangladesh on account of his religious beliefs. The Tribunal considered that the claim based on his being a journalist was not pursued. Consequently, the Tribunal decided that he was not entitled to a protection visa.

### The Hearing in the Federal Circuit Court of Australia

1. The hearing took place before Judge Nicholls on Friday 29 August 2014. The appellant had lodged an application with the Federal Circuit Court seeking orders quashing the Tribunal’s decision and requiring it to re-determine his review application according to law. That written application asserted three grounds for the grant of such relief: first, it was said that the Tribunal had failed to take into account relevant considerations, to ask relevant questions and had failed ‘to engage in a constructive inquisitorial inquiry’; secondly, to have failed to consider his claims according to law; and, thirdly, to have failed to assess his claim according to law. The difference between the second and third grounds was only the difference between the words ‘assess’ and ‘consider’.
2. Each of these claims was particularised, however, and the particulars gave them more substance. The relevant considerations ground (ground one) turned out to involve a contention that the Tribunal had failed to take into account the fact that some political parties in Bangladesh were promoting Islam as the State religion. This mattered because the appellant had claimed in the Tribunal that these political parties would impute to him some kind of political opinion to which they were disinclined. This claim had been articulated in a written submission prepared by his solicitors dated 13 September 2013. The claim appeared on the first page of the submission in a part which was evidently a summary of submissions developed in the body of the document. Understandably, in this section no detail was provided to make good the allegations. This submission was 95 pages in length. Judge Nicholls examined this document and was unable to discern in it anything bearing upon the contention that the appellant might have imputed to him the suggested political opinion. I too have examined this document and whilst I accept that it says a great deal about the adverse position of Hindus in Bangladesh, it says nothing about adverse political opinions which might be imputed to them by others. Consequently, no submission of any substance was made to the Tribunal about the issue of imputed political opinion. It made no error in not dealing with an argument which was not advanced to it. The Federal Circuit Court committed no error in reaching that conclusion.
3. The second ground, together with its particulars, involved an alleged failure by the Tribunal to consider the appellant’s claim that he belonged to a particular social group, namely, members of families of Hindu preachers.
4. An argument to that effect had been advanced at p 69 of the 95 page written submission. The submission was in these terms:

‘Particular social group (iii): Member of a family preaching Hinduism

133. We submit that Members of a family unit preaching Hinduism are a particular social group. The immutable characteristic of this particular social group is Members of a family unit preaching Hinduism which distinguishes this group from the rest of the society. Further, this shared characteristic is not the shared fear of persecution. The reports mentioned earlier indicate that Hindus continue to face serious harm at the hands of Islamic fundamentalists. Accordingly, we submit that our applicant who may be easily identified in Bangladesh due to his physical appearance and his religious association with ISKCON will face a real chance of persecution in Bangladesh.’

1. There is no doubt, therefore, that the appellant was given the opportunity to advance the argument and, indeed, did. Although the Tribunal did deal with the appellant’s argument that he had a well-founded fear of persecution because he was a Hindu or because he was a Hindu preacher, it omitted to deal with the claim that he had a well-founded fear because he was a member of a family unit preaching Hinduism. The basic question which this raises is whether this was a denial of procedural fairness: *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 at 394 [24] and 408 [95]; *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 356 [90].
2. The Federal Circuit Court rejected the argument in four steps. First, it thought that the Tribunal had dealt with the claim based on the proposition that he was a Hindu preacher (at [74]). Secondly, whilst there was a difference in emphasis between membership of the social group of Hindu preachers and membership of the social group of members of families of Hindu preachers there was nothing in the material to suggest that the fear of harm in either case differed. Thirdly, the appellant’s submissions in writing accepted that his family were not, in fact, a family of preachers. What he was saying was that he had received his Hinduism from his father. The written submission to this effect was set out at [78] in these terms:

‘“[3.2] It is true that I have made no factual claim as to my family being a family of ‘Hindu Preachers’. Tribunal has failed to consider my situation and it is not an essential for anyone to be a preacher with a family background with preaching…”’

1. Fourthly, the Court accepted the Minister’s argument that the group of members of families of Hindu preachers could not be a social group under the Convention in this case because there was no evidence before the Tribunal that that group had any group characteristics such as to make the concept of membership thereof meaningful.
2. The first and second points raise difficult questions about the course a court is to take when confronted with apparently unimportant breaches of procedural fairness: cf. *SZQGA v Minister for Immigration and Citizenship* (2012) 204 FCR 557 at 591 [157]-[158].
3. However, in circumstances where the appellant expressly said in the Federal Circuit Court that he was making no factual claim that his family was a family of preachers, it seems impossible to say that this case was truly being advanced. In light of that information the Federal Circuit Court was correct to dismiss the ground.
4. The third ground concerned the same issue (that is to say, membership of the group of persons belonging to families of preachers) but this time it was said that the Tribunal failed to consider the issue as one involving complimentary protection. The manner in which ground 2 was resolved requires the same outcome in the case of ground 3. In substance, no such case was advanced to the Tribunal and no obligation to consider it arose. No error is shown in the Federal Circuit Court’s identical conclusion.
5. At the hearing in this Court, the appellant tendered material to show that he had been attacked. The Tribunal also considered this material and concluded that it had been manufactured. It was particularly moved by the fact that the photograph in one of the newspapers stories was the same as the appellant’s passport photograph. Leaving to one side all technical legal issues of form, I do not think that it would be appropriate to interfere in a case such as this with the Tribunal’s findings of fact.
6. I accept that the appellant is, as he suggests, a Hindu and that he is genuinely worried about what will happen to him if he is repatriated to Bangladesh. However, this does not have the consequence that I can detect any error in the decision of the Federal Circuit Court. The appeal must be dismissed with costs.

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| I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram. |

Associate:

Dated: 15 July 2015