FEDERAL COURT OF AUSTRALIA

SZTQL v Minister for Immigration and Border Protection (No 2) [2015] FCA 548

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| Citation: | SZTQL v Minister for Immigration and Border Protection (No 2) [2015] FCA 548 |
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| Appeal from: | SZTQL v Minister for Immigration and Border Protection and Anor [2014] FCCA 2147 |
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| Parties: | **SZTQL v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & REFUGEE REVIEW TRIBUNAL** |
|  |  |
| File number: | NSD 894 of 2014 |
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| Judge: | ALLSOP CJ |
|  |  |
| Date of judgment: | 4 June 2015 |
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| Catchwords: | **MIGRATION** – whether the Refugee Review Tribunal impermissibly had regard to findings and evidence from an earlier Tribunal’s decision record that had been quashed for reasonable apprehension of bias – whether the Tribunal erred in the characterisation and analysis of the “particular social group” – whether the primary judge erred in finding that the “real chance test” had been properly applied by the Tribunal – whether the Tribunal’s findings sufficiently engaged s 36(3) of the *Migration Act 1958* (Cth)  |
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| Legislation: | *Migration Act 1958* (Cth) s 36(3)  |
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| Cases cited: | *Applicant S v Minister* [2004] HCA 25; 217 CLR 387*Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; 209 CLR 597*SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80*SZTQL v Minister for Immigration and Border Protection* [2014] FCA 1317  |
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| Date of hearing: | 10 April 2015 |
|  |  |
| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 37 |
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| Counsel for the Appellant: | Mr J R Young |
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| Solicitor for the Appellant: | G & S Law Group |
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| Counsel for the First Respondent | Mr J P Knackstredt |
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| Solicitor for the First Respondent | Clayton Utz Lawyers |
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| Counsel for the Second Respondent | The Second Respondent entered a submitting appearance, save as to costs |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 894 of 2014 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | SZTQLAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentREFUGEE REVIEW TRIBUNAL Second Respondent |

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| JUDGE: | ALLSOP CJ |
| DATE OF ORDER: | 4 June 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal be dismissed with 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 894 of 2014 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | SZTQLAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentREFUGEE REVIEW TRIBUNAL Second Respondent  |

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| JUDGE: | ALLSOP CJ |
| DATE: | 4 June 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

# ALLSOP CJ

1. This is an appeal from the dismissal on 4 August 2014 by the Federal Circuit Court of an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) made on 11 November 2013 affirming the decision of a delegate of the Minister not to grant a Protection (Class XA) visa. (See *SZTQL v Minister for Immigration and Anor* [2014] FCCA 2147.)
2. On 28 November 2014, the time for the filing and serving of a notice of appeal was extended. (See *SZTQL v Minister for Immigration and Border Protection* [2014] FCA 1317.) At the hearing of the appeal on 10 April 2015, the Court was assisted by the helpful submissions of Mr Young and Mr Knackstredt, both of counsel.
3. The matter has a little history. On 25 July 2013, a Full Court (Flick J and Robertson J and myself) allowed an appeal from the Federal Circuit Court and set aside an earlier decision of the Tribunal (made on 21 August 2012). (See *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80.) These orders were made because the Court concluded that the way the appellant had been treated by the first Tribunal member at the hearing had created a reasonable apprehension of bias. It is sufficient to refer to [35] in the reasons of Flick J:

In the circumstances of the present case it is concluded that the Appellant has established that a reasonable bystander might conclude that the Tribunal member might not be open to persuasion. A reasonable apprehension of bias, it is thus concluded, has been made out. This conclusion has been reached because:

• the exchanges that occurred went well beyond a mere expression of reservation as to whether what the Tribunal member was being told should be accepted – the exchanges exposed the Tribunal member expressing a concluded view before the entirety of the hearing had even concluded that she “*[did not] believe any of that*” and that she “*[did not] believe what you’ve told me about this Muslim girl*” and that she “*[did not] believe … that you’ve been pursued by the YCL*”;

• the fact that those exchanges expressing a concluded view as to what the Tribunal member was saying should not be “*believed*” were not confined to an isolated instance but were repeated throughout the hearing;

• the manner in which some of the questioning proceeded conveyed or was capable of conveying an overall assessment as to the evidence being given by the Appellant – the Appellant being told on at least two occasions not to be “*silly*”; and

• the Appellant when asking “[w]*hat else can I say*” was told by the Tribunal member that she did not “*know what you can say because I don’t believe … what you’ve told me…*”.

This conclusion is also reinforced by:

• the expression by the Tribunal member of her own value judgment that the Appellant’s claim to have made the Muslim girl pregnant would have “*absolutely disgraced*” the family of the girl and would have been “*a great disgrace*” as the Appellant would have “*dishonoured this girl*…”. Such expressions went beyond a means of eliciting a response from the Appellant and trespassed into the area of a concluded view that a failure on the part of the Appellant “*to do something*” could only be explained by the claim not being genuine.

A reasonable opportunity to be heard, it is concluded, requires that a decision-maker provide a claimant with an opportunity to be heard and an opportunity for the claimant to advance the entirety of his factual material and submissions before a conclusion is reached.

1. I agreed with Flick J and Robertson J in allowing that appeal, and noted at [4] in my reasons:

A person in the appellant’s position, if the possibility of the truthfulness of his need for protection is to be assumed, as the undergoing of the very process of review dictates, is entitled to an apparently fair and dispassionate hearing, free of the appearance of premature assertions of disbelief, laced with moralising speeches. That does not mean that robust, vigorous questioning is not permitted, indeed perhaps called for. If a body of evidence or history during the process of the hearing lacks credibility or coherence, the Tribunal may feel bound, in fairness, to point that out. That is, however, not what happened here. The Minister argued that the assertions of disbelief and other statements by the Tribunal should be understood as expressions of difficulty with the evidence and requests for further assistance. No fair-minded observer, recognising the position of the applicant for a visa, would have so understood them.

## Background

1. The appellant is a young Nepalese man who was born in January 1989. He arrived in Australia in February 2009 on a student visa. He applied for protection in September 2011. He is Hindu. He claimed that while in Nepal he had a sexual relationship with a young Muslim woman who lived nearby. She became pregnant. He said that the young woman’s family reported the matter to the Young Communist League (the YCL), and that prior to this the YCL had assaulted members of his family (including himself) in furtherance of extortion of donations.
2. The grounds put forward by the migration agent in 2011 encapsulated the claims of the appellant:
* **Membership of a Particular Social Group:** The applicant has informed us that he fears persecution due to the Convention reason of his **membership of a particular social group.** As per the information provided to us by the applicant, he is from a Hindu family. He fell in love with a Muslim girl who was his neighbor. As a result of their physical relationship, the girl fell pregnant. As the applicant is Hindu, the family of the girl became very angry and they were completely against the relationship. The applicant has advised us that due to this, some Muslim men vandalised his residential building. According to the claim, the people from Muslim community are still after him.
* **Political Opinion:** The applicant has advised us that his father is a businessman and an active supporter of the Communist Party of Nepal (Unified Marxist and Leninist) (CPN-UML). The members of Young Communist League (YCL) which is a youth wing of the Unified Communist Party of Nepal (Maoist) (UCPN- Maoist) used to ask his father for donations. However, because he did not support the Maoists, he would refuse to donate any money to them. The applicant states that like his father, he is also an active member of the CPN-UML. Because the members of YCL were already against the applicant’s family, they used their tense relationship with the Muslim community to their advantage. They sided with the Muslim community. The applicant advises that his father, brother and himself were physically assaulted by the YCL cadres. He fears that if he returns, he will be persecuted by them again.
1. The notice of appeal as pressed contained five grounds (grounds 2 to 6) that fell into three categories. The first category (grounds 2 to 4) concerned the use by the second Tribunal of the first Tribunal’s decision. The primary judge was said to have erred by failing to conclude that the second Tribunal should not have had regard to the evidence and findings of the first Tribunal, and by doing so the second hearing became infected with the apprehended bias of the first; or alternatively, failing to conclude that, if it was permissible to draw upon the record, the second Tribunal should have taken into account the fact that the first Tribunal had been set aside by the Full Court.
2. The second category (ground 5) concerned the question of particular social group. The primary judge was said to have erred by failing to conclude that the second Tribunal erred by concluding that Hindus who make Muslim girls pregnant do not constitute a particular social group in Nepal, in circumstances where the particular social group put forward was different.
3. The third category (ground 6) concerned the real chance test. The primary judge was said to have erred by failing to conclude that the second Tribunal did not apply the real chance test to the claims as they related to the future.
4. One further issue arose. The Minister relied on s 36(3) of the *Migration Act 1958* (Cth) such that, even if there was shown to be some error in the second Tribunal’s approach, it otherwise relevantly made findings sufficient to engage s 36(3).

**36 Protection visas—criteria provided for by this Act**

…

(3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

## First category – the impermissible use of the first Tribunal’s reasons

1. It is important to state at the outset that the appellant was assisted at the hearing by a registered migration agent and an interpreter. There was no suggestion that the appellant was denied any opportunity to place material before the second Tribunal. Nor was there any evidence before the Circuit Court that at the first Tribunal hearing the appellant was so overborne by the conduct of the member that he could not express himself with clarity.
2. At para 11 of its reasons, the second Tribunal set out paras 30 to 52 of the first Tribunal’s reasons as a “convenient summary” of the evidence provided to the first Tribunal.
3. Then at paras 12 to 37, the second Tribunal set out the evidence given at the second hearing.
4. In its findings and reasons (from para 38 onwards) the Tribunal directed itself as to the caution necessary in making credibility findings. At para 40 the Tribunal made the following comment:

In this instance, careful consideration of successive evidence provided by the applicant reveals a pattern of inconsistency and imprecision about key matters, including approaches by the girl’s family and by Maoists in 2007/2008. The Tribunal has therefore approached the applicant’s evidence with caution and has not been prepared to accept it uncritically at face value.

1. At para 42 of the reasons the Tribunal drew the conclusion from the inconsistencies it perceived that his claims were exaggerated (“embroidered and embellished”).
2. The first point made by Mr Young was that these inconsistencies included matters that the first Tribunal had expressed at paras 41 and 42 of its reasons.
3. I do not consider that the second Tribunal in setting out the findings of the first Tribunal as a record of what was said at the first hearing could be seen by an impartial observer as in any way biased or unable or unwilling to deal with the matter fairly. Absent evidence that the appellant was unable at the first hearing to express himself properly because of the behaviour of the first Tribunal member, all that can be said of the second Tribunal at this point is that it took into account in assessing the evidence of the appellant matters that he had said to the first Tribunal.
4. Separate and specific complaint was made by Mr Young about para 44 of the second Tribunal’s reasons, which was in the following terms:

The applicant submitted and relied upon a newspaper report of an attack on his home (following paragraph 9 above, see the paragraph numbered 27 in summary of evidence provided to the Department). The authenticity of this report (the original of which was submitted as a newsprint broadsheet) was questioned both by the delegate and by the previous Tribunal. It is the case that document fraud is common in Nepal and the previous Tribunal identified certain physical features of the original which suggested that it had been inserted or copied onto an original. This Tribunal found the physical indications inconclusive. On the other hand, an item may be genuinely printed in a newspaper but contain fabricated or inaccurate material. The Tribunal noted a number of aspects of the report which were inconsistent with the evidence provided directly to it at hearing by the applicant: for example, it states that the applicant and his brother were injured in the YCL attack. The Tribunal is therefore not prepared to accept the news report as reliable or authoritative corroborative evidence.

1. It was submitted by Mr Young that this revealed that the second Tribunal had taken into account the views and findings of the first Tribunal. I do not agree. The reasons reveal a separate and independent conclusion about the newspaper material.
2. It can be accepted that as Gaudron and Gummow JJ said in *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11;209 CLR 597 at 614-615 [51] “a decision that involves a jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all”. That does not, however, mean that the first Tribunal’s decision and reasons did not exist. Nor did it mean that some references to them by the second Tribunal would lead to a reasonable apprehension of bias.
3. Nor was there any error in the second Tribunal failing expressly to say that it took into account the Full Court’s decision about the first decision. The second Tribunal’s reasons demonstrate a separate and independent analysis, without reliance upon conclusions or reasoning of the first Tribunal other than as a record of what was said and what had happened.
4. The first category of grounds fails.
5. I should add that the Minister objected to these grounds having raised as not raised below. I reject that submission. They could not have been the subject of evidence in the way they were put. It was in the interests of justice to permit the issues to be ventilated.

## Second category – particular social group

1. The appellant’s claim in this regard can be seen in the paragraph from his migration agent’s submission in 2011: see [6] above. Mr Young accepted that it was not there submitted with precision. He relied, however, on how his claims were summarised by the second Tribunal at para 41 at the beginning of the reasoning:

…

* the applicant fears persecution as a member of a particular social group because he is Hindu and had a relationship with a Muslim girl…who became pregnant.
1. At para 52 of its reasons the second Tribunal stated the following as the totality of its reasons on the subject:

If the applicant was not attacked or harmed by the Muslim family of [the girl]…it is difficult to understand why he might be now, 5 years later. It is conceivable, albeit unlikely, that should the applicant return to his home…animosities might be revived and he might come under some pressure in relation to [the Muslim girl] (and/or their child), short of actual harm. The Tribunal is satisfied that this would not amount to persecution for a Convention reason, including as a member of any particular social group. Nor does the Tribunal accept that Hindus who make a Muslim girl pregnant constitute a particular social group in Nepal.

1. Mr Young submitted that this was too narrow a group because of its terms on pregnancy. He submitted that the group was those who have offended social mores as a member of the majority religion having sexual relations with a person of a minority religion.
2. In *Applicant S v Minister* [2004] HCA 25; 217 CLR 387 at 400-401 [36] Gleeson CJ, Gummow and Kirby JJ said:

Therefore, the determination of whether a group falls within the definition of "particular social group" in Art 1A(2) of the Convention can be summarised as follows. First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". As this Court has repeatedly emphasised, identifying accurately the "particular social group" alleged is vital for the accurate application of the applicable law to the case in hand.

(footnotes omitted)

1. One of the difficulties that faces the appellant in this regard is understanding how the matter was put to the Tribunal. It is debateable whether what appears at para 52 of the reasons is a fair encapsulation of what the appellant’s migration agent had put forward. Much would depend upon how the matter was articulated before the second Tribunal. That question (being a matter of evidence) was not agitated before the primary judge because the point was not taken before him. Nor was there any evidence about it before me.
2. Further, the Tribunal found that none of the threats of harm occurred. It is important to see the full nature of the findings at paras 47 to 51 leading up to the findings on particular social group in para 52:

47. There was said to be a long history of the YCL coming to ask for donations from the applicant’s father (a member of another party). In his original statement the applicant had claimed that they used to give donations to YCL but his later evidence, including at the recent hearing, was that they had not responded to the requests for donations. These requests were regularly refused and nothing happened; the applicant’s father was not harmed. After careful consideration, the Tribunal reached the conclusion that the particular incident relied upon by the applicant was simply the latest of these requests and with a similar outcome. This has been conflated with the issue surrounding the relationship with [the Muslim girl]; perhaps the YCL members made some reference to situations which would have become widely known in the local community. However, the Tribunal does not accept that the YCL made demands in relation to [the Muslim girl], including financial support, or in any meaningful sense took up the issue, when [the Muslim girl’s] own family had not made such demands or threatened the applicant in relation to [the Muslim girl]. It is hard to see that requests for donations, however emphatically made, which when unmet resulted in no harm, of themselves amount to serious harm or significant harm.

48. The Tribunal does not accept that such requests were related to the situation with [the Muslim girl] as they long preceded that relationship. Nor does the Tribunal accept that these approaches arose essentially from the political opinion of the applicant and/or his father. Significantly, these demands were not actually made of the applicant himself, only of his father. There is ample evidence (not least, from other applicants before the Tribunal) that generally businesses in Nepal have received forceful requests for donations for different parties. The Tribunal has seen no evidence that only members of a particular party received such demands and threats or that members of other parties (or of no party) were exempted from such demands. Nor was there evidence before the Tribunal that businessmen were singled out because there was an animus against them or intention to persecute them as members of a particular social group. The Tribunal is satisfied that the applicant’s father was asked for money because he ran a business and was therefore opportunistically extorted (like many other businessmen in Nepal) as someone in position to actually provide money. This is consistent with a pattern of extortion and fund-raising directed at businessmen in Nepal.

49. Although the Tribunal accepts that the applicant’s father as a Nepalese businessman did receive demands for money over a period of time, the Tribunal notes the applicant’s evidence that his father had rejected or ignored such demands. It does not appear that his father suffered any serious or significant harm for this reason including during the five years since the specific incident complained of, during which period the applicant’s father remained living at the same place. The Tribunal does not accept that the YCL and/or Maoists have targeted the applicant or that they pursued him to Kathmandu. The Tribunal does not accept that the YCL has threatened to kill the applicant if he returns.

50. The Tribunal does not accept that the Maoists and/or YCL have made any specific demands of, or threats against, the applicant and therefore does not accept that he faces a real chance of serious harm or a real risk of significant harm from them in the reasonably foreseeable future for that reason.

51. The Tribunal accepts that the Muslim family of [the Muslim girl] were angry with the applicant but notes that in his evidence before the present Tribunal the applicant did not claim that they had attacked or threatened him or that they had made any specific demands of him. The Tribunal rejects suggestions in earlier evidence that since the applicant’s departure the Muslim family have threatened or attacked the applicant’s family. Further, if there had been a real threat of serious harm to the applicant’s family, or attacks on their property, it is difficult to imagine why they would not seek the assistance of the authorities.

1. It was submitted by the Minister that the whole analysis undermines any basis for a finding of a reasonable apprehension of persecution for this reason.
2. Whether or not the last point is correct, the point is one which could have been dealt with by evidence below. For that reason it should not be permitted to be relied on.

## Third category – real chance

1. Mr Young submitted that the error in approach was illuminated in para 50 of the second Tribunal’s reasons. That paragraph reveals, he submitted, a concentration upon the past and a failure to assess the future.
2. I do not accept this submission. A fair reading of the whole of the reasons discloses attendance to the real chance test. Future harm or its possibility was considered: paras 50 and 52. The past was used as a guide to the future. In the circumstances of these claims, the past could be seen as a reasonably reliable ground to the future. The only real basis for a fear of the future was the asserted events of the past which were not accepted. In these respects, I broadly agree with the conclusions of the primary judge on this point, being the only point effectively raised before him.
3. There was some suggestion in the submissions that the second Tribunal did not apply the real chance test to a claim in relation to extortion as a member of a particular social group, being families of businessmen in Nepal. This matter was not raised before the primary judge. It may have been met by evidence as to how the Tribunal hearing was conducted. It was said by the Minister not to have been raised below. Thus it should not be permitted to be ventilated. The findings at paras 47 and 49 of the second Tribunal’s reasons about the appellant’s father and the lack of harm and the lack of serious harm undermines any conclusion of likely injustice in this approach.
4. I am not persuaded of any error in assessing any real chance of persecution given the clarity of the factual findings about the past.

## The s 36(3) point

1. The above makes it unnecessary to deal with s 36(3).

## Orders

1. The appeal should be dismissed with costs.

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| I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop. |

Associate:

Dated: 3 June 2015