

MINISTER FOR IMMIGRATION AND BORDER PROTECTION v SZSCA & ANOR
(S109/2014)

Court appealed from: Full Court of the Federal Court of Australia
[2013] FCAFC 155

Date of judgment: 10 December 2013

Special leave granted: 16 May 2014

The First Respondent is an Afghani citizen of Hazara ethnicity who claimed to fear persecution due to his membership of a particular social group, namely “truck drivers who transported goods for foreign agencies”. He also claimed to fear persecution based upon political opinions imputed to him by the Taliban. A delegate of the Appellant refused the First Respondent a protection visa, as did the Refugee Review Tribunal (“RRT”). While the RRT accepted the plausibility of the threats made against the First Respondent, it concluded that he could avoid persecution if he returned to Kabul and changed his occupation.

On 7 June 2013 Judge Nicholls upheld the First Respondent’s application for judicial review of the RRT’s decision.

On 10 December 2013 the Full Federal Court (Robertson & Griffiths JJ; Flick J dissenting) dismissed the Appellant’s subsequent appeal. The majority concluded that the RRT had committed a jurisdictional error by reasoning that the First Respondent could avoid persecution in Afghanistan by making certain choices as to his profession and his domicile. In doing so, their Honours held that the RRT had limited itself to what the First Respondent *could* reasonably do upon his return to Afghanistan rather than what he *would* do. It had also not properly examined the reasons why the First Respondent would not earn his living as before.

Justice Flick however would have allowed the appeal. His Honour found that there was no absolute right for a protection visa claimant to engage in behaviour unrelated to the specific categories of protection afforded by the Refugees Convention. This was especially in circumstances whereby such behaviour may result in the imputation of a particular political opinion, thereby leading to threats of persecution. Justice Flick noted that it was this type of conduct which the RRT reasoned could be avoided, with the attendant threats of persecution likewise being avoided. His Honour held that neither the Refugees Convention, nor the relevant case law, precluded the course of reasoning pursued by the RRT in this matter. Judge Nicholls therefore had erred in deciding otherwise.

The grounds of appeal include:

- Contrary to the findings of the Full Court, *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 did not have the consequence that the decision of the RRT in the present matter was vitiated by jurisdictional error.