



HIGH COURT OF AUSTRALIA

12 November 2014

MINISTER FOR IMMIGRATION AND BORDER PROTECTION v SZSCA & ANOR

[2014] HCA 45

Today the High Court, by majority, held that the Refugee Review Tribunal failed to properly address whether an applicant for a protection visa had a well-founded fear of persecution.

The first respondent ("the respondent"), an Afghan citizen of Hazara ethnicity, arrived in Australia by boat on 21 February 2012. Before coming to Australia, the respondent had lived in Kabul with his family and worked as a self-employed truck driver transporting construction materials between Kabul and Jaghori. Around late January 2011, the respondent was stopped en route to Jaghori by the Taliban, who warned him not to carry construction materials. Thereafter, he took measures to avoid Taliban checkpoints, but continued to carry construction materials. In about November 2011, another truck driver showed the respondent a letter from the Taliban which called on "local council people to perform their Islamic duty ... to get rid of" the respondent. The respondent left Afghanistan 10 days later.

The respondent's application for a protection visa was refused by a delegate of the Minister and that decision was affirmed by the Tribunal. The Tribunal accepted that, if the respondent was again intercepted by the Taliban on the roads on which he usually travelled, he would face a real chance of serious harm and even death for a reason specified in the Refugees Convention. However, the Tribunal found that the risk of persecution would only arise on these roads, which could be avoided by the respondent. It therefore concluded that the respondent did not satisfy the criteria for the grant of a protection visa.

The Tribunal's decision was quashed by the Federal Circuit Court of Australia and an appeal from that Court was dismissed by a majority of a Full Court of the Federal Court of Australia. Both Courts considered that the Tribunal had committed the error identified by the High Court in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473; [2003] HCA 71. By grant of special leave, the Minister appealed to the High Court.

The High Court unanimously held that the Tribunal did not fall into the error identified in *S395*, but that the Tribunal was required to address whether it would be reasonable to expect the respondent to remain in Kabul and not drive trucks outside it. A majority of the Court held that the Tribunal had failed to address that question and was therefore unable to make a final determination as to whether the respondent had a well-founded fear of persecution. As this constituted an error of law, the Court dismissed the appeal.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*