

SZFDE & ORS v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS & ANOR (S118/2007)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 3 October 2006

Date of grant of special leave to appeal: 2 March 2007

In February 2002 a Lebanese family comprising a husband, wife and two children ("the family") arrived in Australia. On 23 March 2002 they applied for protection visas based on the Applicant wife's claim that she feared persecution because of her political opinions. She also claimed to be a member of a particular social group comprised of Islamic women who were perceived as having transgressed the customs of Islamic society. On 29 August 2002 a Departmental delegate refused their applications and they then applied to the Refugee Review Tribunal ("RRT") for a review of that decision.

Unfortunately for the family they were introduced to Mr Hussain, a man who said that he was a solicitor experienced in migration matters. They then engaged him to represent them in the RRT. As it turns out, Mr Hussain had been struck off as a solicitor in December 2001 and was deregistered as a migration agent in March 2002. He gave the family advice which was not only bad, but fraudulent. Mr Hussain told them not accept an invitation to appear before the RRT at an oral hearing because their application would be refused. He also said he was going to write to the Minister for Immigration & Multicultural Affairs ("the Minister") and that he was worried that the family may say something inconsistent to the RRT. Despite having their doubts about this, the family took Mr Hussain's advice. On 11 October 2003 the RRT refused their application for review, noting that the wife had not appeared before it and that there were relevant matters it had wanted to explore with her.

On 20 December 2005 Magistrate Scarlett upheld the family's application for judicial review. His Honour found that the family had been dissuaded from appearing before the RRT by the fraud of the agent. He then quashed its decision and remitted the matter for reconsideration. The Minister then appealed.

On 3 October 2006 a majority of the Full Federal Court (Allsop & Graham JJ, French J dissenting) upheld the Minister's appeal. While Justice Allsop acknowledged the impact of Mr Hussain's fraud on the family, his Honour found that it did not follow that the RRT's decision was itself induced or affected by fraud. His Honour also held that there was no basis to conclude that there had been any denial of procedural fairness. Justice Allsop further held that the agent's dishonesty had not denied the RRT the authority to decide the application for review under the *Migration Act 1958* ("the Act"). His Honour held that the family's real complaint was not about the RRT's processes, but with Mr Hussain's conduct.

Justice Graham found that the Magistrate had erred in finding that Mr Hussain's actions had "deprived the invitation to the hearing from its quality of being a meaningful invitation under section 425". His Honour held that an invitation to a hearing under section 425 of the Act needed only to comply with the requirements of sections 425(1), 425A and 426 of the Act. The RRT did not therefore commit jurisdictional error by proceeding to decide the application for review.

Justice French agreed that there had been no denial of procedural fairness, but he did find that the lead-up to the RRT's decision was compromised by Mr Hussain's fraud. The apparent consent by the Applicant wife to have her application decided without a hearing had been obtained by that fraud. It followed therefore that the RRT's decision was itself affected by it.

On 5 April 2007 the Minister filed a notice of contention, the grounds of which include:

- The Full Federal Court failed to find and should have found that:
 - a) Magistrate Scarlett did not find that Mr Hussain acted fraudulently in advising the family either that it would be best for them not to attend before the RRT or that the RRT was "not accepting any visa applications at all at the moment"; or
 - b) in the alternative, if Magistrate Scarlett did so find, his Honour erred in making such a finding when there was no evidence that Mr Hussain did not hold opinions to that effect.

The grounds of appeal include:

- The Full Federal Court ought to have held (and erred in that it failed to hold) that the decision of the RRT to dismiss the family's application for review was liable to be quashed upon the issue of a writ of certiorari because:
 - a) as found by French J, the decision was induced or affected, and therefore vitiated by fraud of Mr Hussain (a person whose practicing certificate as a solicitor, and whose registration as a migration agent, had been cancelled unbeknown to the family, but who, having falsely represented himself to the family to be a solicitor entitled to act for them as such, was shown in the records of the RRT as an "Authorised Recipient" of the family for the purpose of section 441G of the Act).
 - b) further and alternatively, the RRT failed to comply with section 425(1) of the Act in that:
 - (i) by the fraudulent intervention of Mr Hussain, letters of invitation addressed by the RRT to the family (pursuant to sections 425(1), 425A, 441A(4) and 441G of the Act) were not effectively communicated to them, but were negated, discounted or qualified by Mr Hussain's insistent, fraudulent misrepresentations to the

effect that they should not appear before the RRT because the RRT was not granting any applications for review and any appearance by them before the RRT could, accordingly, only harm representations he proposed as their solicitor to make to the Minister; and

- (ii) for the purpose of section 425(2)(b) of the Act, the "consent" of the family to the RRT deciding the application for review without them appearing before it was vitiated by Mr Hussain's fraud.
- c) further and alternatively, the decision was affected by a denial of procedural fairness in that:
- (i) the principles of procedural fairness are predicated upon an absence of fraud affecting the decision making process; and
 - (ii) the fraud of Mr Hussain deprived the RRT's decision making process of that foundation.