



HOW A MIGRATION AGENT'S FRAUD CAN INVALIDATE A TRIBUNAL DECISION

By Cahal Fairfield

In public law, the High Court has regarded fraud to be an 'established ground' for the grant of *certiorari* to quash a decision of an inferior court or tribunal.¹

In the migration context, however, visa applicants sometimes complain of receiving incorrect or negligent advice from third parties, usually migration agents or advisers, on the basis of which they decide not to attend a hearing of the Refugee Review Tribunal (the Tribunal). This can result in the Tribunal making a decision 'on the papers'. In *SZFDE v Minister for Immigration and Citizenship*,² the High Court recently considered the threshold at which such conduct or advice by a migration agent could invalidate the decision of the Tribunal. In *SZFDE*, in a unanimous joint judgment, the High Court allowed an appeal from the Full Federal Court.³ The Federal Court, by majority, had allowed an appeal from the Federal Magistrates Court,⁴ which had granted, among other things, *certiorari* to quash a decision of the Tribunal.

The appellants, a couple from Lebanon and their two children, had sought a protection visa based on the wife's claim that she had a well-founded fear of persecution because of her published views questioning the position of women in the Islamic tradition. In its reasons for rejecting the application, the Tribunal noted that the appellants, although invited to do so, had not appeared before it, and there had been relevant matters that it would have wished to explore with the applicant wife. The appellants had not attended the Tribunal hearing because they relied upon the fraudulent advice of a purported registered migration agent, to whom they had paid \$8,400 by way of fees, and lent a further \$5,000. The migration agent was said to have represented himself to the appellants as a solicitor and registered migration agent, but his practising certificate had been cancelled and his registration as a migration agent had been cancelled by the Migration Agents Registration Authority.

The High Court noted that the respondent, the Minister for Immigration and Citizenship, had submitted that, in

order for the appellants to succeed, it was necessary to demonstrate fraud 'by' or 'on' the Tribunal. The Minister submitted that here the agent had committed no such fraud. The High Court found that, in resolving the appeal, it was sufficient to accept the Minister's proposition without having to go further and decide whether it would be sufficient for the appellants to establish, for example, fraud 'on' themselves by the agent.⁵

The High Court also found that resolving the appeal did not require considering the general scope for judicial review for 'third party fraud' where neither the applicant nor the administrative decision-maker colluded with the fraud or knew of it before making the decision. Rather, the appeal could be resolved after 'close attention to the nature, scope and purpose of the particular system of review by the Tribunal which the [Migration] Act establishes and the place in that system of registered migration agents.'

The High Court reasoned that the provision in the *Migration Act* obliging the Tribunal to invite a visa applicant to appear before it (s425(1)) and the provision empowering the Tribunal to make a decision where the applicant does not appear (s426A), which the High Court characterised as a jurisdictional fact, are of central importance for the operation of the legislative scheme laid down in Dv 4 Part 7 (ss442B-429A) of the *Migration Act*. The fraud of the agent had the immediate consequence of stultifying the operation of the scheme to afford natural justice to the appellants. Even though the Tribunal had undoubtedly acted on an assumption of regularity, because of the agents' fraud it was 'disabled from the due discharge of its imperative statutory functions with respect to the conduct of the review. That state of affairs merits the description of the practice of fraud "on" the Tribunal.'⁶

Finally, the High Court emphasised that the decision should not be misunderstood. It emphasised that here were sound policy reasons why a person, whose conduct before an administrative tribunal had been detrimentally affected by bad or negligent advice 'or some other mishap', should not be heard to complain that the detriment vitiates the decision.

The Court emphasised that this decision 'stands apart from and above such considerations'.⁷

In the light of that qualification, the application of *SZFDE* may arguably be limited to cases involving a finding of fraud by a migration agent or lawyer causing a visa applicant not to attend a hearing before a Tribunal in circumstances where the Tribunal makes a decision 'on the papers' adverse to the applicant.

SZFDE, therefore, does not affect the correctness of judgments such as *SQMB v Minister for Immigration Multicultural and Indigenous Affairs*,⁸ where the Court rejected a visa applicant's evidence that he had not attended a tribunal hearing by reason of fraud by his migration agent, or *SZGQL v Minister for Immigration and Multicultural Affairs*,⁹ where, unlike *SZFDE*, the Court found that there was insufficient evidence upon which to draw an inference of fraud.

For the same reason, *SZFDE* is unlikely to affect the correctness of judgments such as *SZIWW v Minister for Immigration & Citizenship*¹⁰ where, although the Court perhaps erroneously attached significance to the absence of 'active engagement in misadventure' by the Tribunal, it also made no finding of fraud or misadventure by any third party. ■

Notes: **1** *Craig v South Australia* (1995) 184 CLR 163 per Brennan CJ, Deane, Toohey, Gaudron and McHugh JJ at 176. **2** [2007] HCA 35. **3** [2006] FCAFC 142; (2006) 154 FCR 365; (2006) 92 ALD 1 Allsop and Graham JJ (French J dissenting). **4** *SZFDE v Minister for Immigration* [2005] FMCA 1979 (Scarlett FM). **5** At [6] of the judgment. **6** At [51] of the judgment. **7** At [53] of the judgment. **8** [2005] FCA 98. **9** [2006] FCA 1420. **10** [2007] FCA 238. Greenwood J dismissed an appeal from the Federal Magistrates Court (Scarlett FM).

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