

FTZK v MINISTER FOR IMMIGRATION AND BORDER CONTROL & ANOR
(M143/2013)

Court appealed from: Full Federal Court of Australia
[2013] FCAFC 44

Date of judgment: 6 May 2013

Date special leave granted: 8 November 2013

In December 1996 in the People's Republic of China (PRC) a 15 year old boy was kidnapped on his way to school. After an unsuccessful ransom attempt the boy was murdered by being tied up and thrown through a hole in the ice, where he drowned. His body was found the following day. In January 1997 the appellant (FTZK) successfully applied for a Class UC Temporary Business subclass 456 visa and arrived in Australia in February 1997. In May 1997 the appellant was implicated, by two co-accused in China, in the kidnapping and murder of the boy and a PRC warrant was issued for FTZK's arrest. In May 1998 the two co-accused were executed by the Chinese authorities.

In December 1998 FTZK lodged a protection visa application (and received a bridging visa while that application was considered). He stated he had been subjected to detention and torture in China as a practising Christian. The application was refused by a delegate of the first respondent (the Minister) in January 1999. Ultimately the Refugee Review Tribunal (the RRT) affirmed the delegate's decision and subsequently his bridging visa ceased. FTZK disappeared into the community and could not be located; consequently his immigration status became that of an "unlawful non-citizen". In February 2004 his whereabouts were discovered and he was taken into detention pending return to China. In June 2004 the appellant was advised of the PRC arrest warrant by an officer of the Minister.

FTZK filed an application in 2007 in the High Court seeking, inter alia, a review of the RRT decision that had rejected his claim for refugee status. Ultimately, after remitter to the Federal Court and a series of legal proceedings, in May 2011 a delegate of the Minister decided that it was not satisfied that FTZK was owed protection obligations under the *Migration Act* on the grounds that Article 1F(b) of the Refugees Convention had application. In May 2012 the second respondent (the AAT) affirmed the delegate's decision.

Article 1F of the Refugees Convention states:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that ... he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.

It was not in dispute in the AAT that the each crime alleged was a "serious non-political crime". The issue before the AAT was whether there were "serious reasons for considering" that FTZK had committed the crime or crimes alleged. FTZK denied any knowledge of, or involvement in, the kidnapping and murder of the boy, or the two co-accused. The AAT had before it a copy of the PRC warrant, a copy of the case summary report, including transcripts of interviews with the two co-accused, and the autopsy report from the Chinese authorities. The AAT stated that

it took into account the allegations contained in the documents from the Chinese authorities. It was satisfied that FTZK left China shortly after the crimes were committed and that he provided false information to the Australian authorities in order to obtain a business visa and again later when he applied for a protection visa. Further that he was evasive when giving evidence as to his religious affiliations in Australia and China. It also took into account that he attempted to escape from detention in 2004 and that he intended to again live unlawfully in the Australian community. FTZK advanced what were said to be innocent explanations for his conduct. The AAT concluded that on the totality of the evidence before it, there were serious reasons for considering that FTZK had committed the crime or crimes alleged.

In May 2013 the Full Federal Court (Gray & Dodds-Streeton JJ, Kerr J dissenting) dismissed FTZK's appeal. FTZK had submitted that the reasons of the AAT disclosed that it had taken into account "matters not probative and therefore ha[d] misconstrued its function" and so fallen into jurisdictional error. The majority was of the view that, although the AAT had failed to expressly state the basis of the relevance of the factors it took into consideration, this did not rob them of their objective relevance. Kerr J (dissenting) found that the AAT's reasons revealed that findings of flight and consciousness of guilt critical to its conclusion had not been made and that as a consequence, it had relied on irrelevant considerations.

The grounds of appeal include:

- The Full Court erred:
 - a) In finding that it was unnecessary for the reasons of the Tribunal to state the basis on which it found irrelevant the factors it took into consideration; and/or
 - b) In finding such factors to be relevant "on an objective basis" and/or incapable of any "other logical construction".
- The Full Court erred in reading into the Tribunal's decision, findings on critical issues of fact which had not been made by the Tribunal and in extrapolating from there to the decision reached by the Tribunal, thus effectively conducting a merits review of the decision reached rather than examining whether or not the Tribunal fell into legal error in undertaking its task.