FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZIWY v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 1641*

MIGRATION – RRT decision – Chinese applicant fearing persecution as Christian – disbelieved by Tribunal – failure to consider concerns of applicant's solicitor about mental impairments – failure to inquire into medical records of immigration detention – evidence establishing impairment before the Court – unfairness affecting applicant's attendance at hearing – jurisdictional error found – matter remitted.

Migration Act 1958 (Cth), ss.418(3), 422B(1), 425, 425(1)

Applicant NAFF of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 221 CLR 1
Minister for Immigration & Multicultural Affairs v Yusuf (2001) 206 CLR 323
Minister for Immigration & Multicultural & Indigenous Affairs v SCAR (2003) 128 FCR 553
Minister for Immigration & Multicultural & Indigenous Affairs v SGLB (2004) 207 ALR 12
NAIS v Minister for Immigration & Multicultural & Indigenous Affairs [2005] HCA 77
SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs [2006] HCA 63
SZFDE v Minister for Immigration & Citizenship [2007] HCA 35
WAGP v Minister for Immigration & Multicultural & Indigenous Affairs (2006) 151 FCR 413
WAIJ v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 80 ALD 568

Applicant:	SZIWY
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG1544 of 2006
Judgment of:	Smith FM

Hearing date:	19 July 2007
Date of Last Submission:	23 August 2007
Delivered at:	Sydney
Delivered on:	12 October 2007

REPRESENTATION

Counsel for the Applicant:	Mr I Archibald
Solicitors for the Applicant:	Michaela Byers, Solicitor
Counsel for the First Respondent:	Mr J Smith
Solicitors for the Respondents:	Clayton Utz

ORDERS

(1) A writ of certiorari issue directed to the second respondent, quashing the decision of the second respondent handed down on 4 May 2006 in matter N0653327.

(2) A writ of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent dated 17 March 2006.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG1544 of 2006

SZIWY
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. The applicant is a woman in her 50s who came to Australia from China to visit her daughter. She remained illegally, and was taken into immigration detention in 2006. There, she was assisted by a solicitor from the Legal Aid Commission to make an application for a protection visa.

2. She claimed to have come from a Christian family, to have witnessed the persecution of her mother during the Cultural Revolution for her religious beliefs, and to have secretly attended an unregistered "underground" Church before coming to Australia. A letter from her pastor in China, said that she *"has a firm faith in Jesus Christ and Christianity"*. It said that on one occasion she had been *"thrown into prison"* and that this had left her constantly nervous and weak. She attended several churches in Australia, and in 2004 she joined the

Mandarin congregation of a Presbyterian Church. She said that she was *"terrified to return to China as I fear the Chinese authorities will target me"*, because they knew that she was committed to Christianity and opposed the official attitude to Christian Churches.

3. A delegate of the Minister refused her visa application on 17 March 2006. His decision was affirmed by the Refugee Review Tribunal on 4 May 2006. The applicant was still held in immigration detention at that time.

4. The Tribunal was not satisfied that the applicant faced persecution for a Convention reason in her youth, when she was sent to the countryside during the Cultural Revolution. In relation to her fears relating to her religion, the Tribunal said that her knowledge of the Bible was *"fairly negligent"* (sic: negligible), as was her knowledge of the doctrines and practices of Presbyterians. It said: "*She could not say who actually established the Presbyterian Church. When asked about the main characteristics of Presbyterianism – namely what is important to them, her answer was generic and she was unable to elaborate on any details*". The Tribunal found that the applicant "*has been deceptive and untruthful about her claims and gives them no weight*". It said that *"in the light of the applicant's grave credibility concerns"* it could give no weight to evidence given by the Minister of the applicant's Sydney Church, and for the same reason *"it cannot rely on"* the Chinese documents which corroborated her history in China.

5. The applicant now asks the Court to set aside the Tribunal's decision, and to order it to reconsider her refugee claims. I can only make these orders if I am satisfied that its decision was affected by jurisdictional error. I do not have authority to decide whether the applicant's refugee claims are true, nor whether she should be granted a protection visa or any other permission to stay in Australia.

6. The grounds of review raise essentially two issues:

    i) whether the applicant was denied a fair opportunity to present her case to the Tribunal, because she was suffering from mental impairments when she attended a hearing on 1 May 2006, or because the Tribunal did not investigate and consider whether that was the situation; and

ii) whether the Tribunal improperly thought that it could disregard the evidence corroborative of the applicant's history.

7. As I shall explain, I have decided that there was material before the Tribunal raising serious doubts whether the applicant had the mental capacities which the Tribunal assumed. The Tribunal did not take this material into account when forming its adverse opinions of her evidence, nor investigate her mental condition – for example, by calling for her medical records from Villawood – so as to inform its assessment of her evidence and to decide whether she had been able adequately to present her case at the hearing. On the evidence now before the Court, it is probable that the applicant was suffering from mental impairments which affected her ability to present her case. I consider that these circumstances gave rise to jurisdictional error affecting the Tribunal's decision, arising from the failure of the Tribunal's procedures to afford to the applicant entitlements conferred by s.425(1) of the *Migration Act 1958* (Cth).

8. I am inclined also to conclude that the Tribunal's cursory dismissal of the corroborative evidence reveals jurisdictional error similar to the error found by a majority in the Full Court in *WAIJ v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 80 ALD 568 at [26]-[30] and [49]-[52], but I have not found it necessary to arrive at a concluded opinion on this ground.

The applicant's mental condition was an issue before the Tribunal

9. The applicant's Legal Aid solicitor was appointed under a legal referral scheme established and funded by the Department of Immigration. In her covering letter enclosing the visa application, the solicitor referred to interviewing the applicant for a number of hours on two occasions. She said:

> *I am very concerned about her confused presentation and whether this reflects mental ill-health. I have found that at times she is unable to answer questions and often provides contradictory responses within a very short time. It has been very difficult to prepare a detailed statement of her claims because of her confusion.*

I request that Ms [applicant] be seen by medical personnel at the Detention Centre and that some assessment of her mental health be undertaken.

10. When completing the form of visa application on behalf of the applicant, the solicitor responded positively to the question: *"If you are called for an interview, are there any factors we will have to take into account (such as access for a disabled person)?"* She gave the details: *"confused presentation"*.

11. Evidence now before the court shows that concerns about the applicant's mental health had been recorded on a medical file when she was first taken into immigration detention. She exhibited signs of self-harm, and a history of this had been given to the police by her daughter. A doctor diagnosed an "anxiety problem", and referred her to a psychiatrist. His examination occurred in early April 2006. His notes recorded that she was *"guarded, angry, uncooperative, suggestible"*, and that she *"declined psychotropic medication + declined to let me telephone her daughter"*. He was able only to opine *"likely personality problems/disorder"*.

12. When making his decision, the delegate did not call for any of this information concerning her mental condition. Referring to the solicitor's statements, he said *"while this information may indicate that there are humanitarian considerations affecting the applicant, these are not matters that I have the legal discretion under the Migration Act to consider in this assessment"*. This reflected a serious misapprehension as to the need for a refugee decision-maker to take into account available evidence as to any mental impairment which might assist the proper evaluation of a claimant's history and fears of persecution.

13. A similar misapprehension might also account for the fact that none of the applicant's known medical history or records was conveyed by the Secretary to the Tribunal. This, in my opinion, was required by s.418(3) of the Migration Act, since medical records in the possession or control of the Secretary bearing on the evaluation of the applicant's credibility were *"relevant to the review"* of the delegate's decision. However, that omission does not of itself vitiate the subsequent

decision of the Tribunal (see *WAGP v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 151 FCR 413 at [63]).

14. The Tribunal had before it the applicant's solicitor's originally expressed concerns, and these were repeated in her submissions to the Tribunal lodged on 21 April 2006. She said:

> *Ms [applicant] has had on-going medical treatment for anxiety and depression in both China and Australia. Her well-being is currently closely monitored in the Detention Centre. Her health conditions impact on Ms [applicant's] ability to cope with emotional situation and provide consistent evidence.*
>
> *I request that you take these submissions into consideration in determining Ms [applicant's] application for protection in Australia.*

15. One of the corroborative documents forwarded to the Tribunal was a translation of a letter from a church pastor in China. This presented a picture of the applicant as a person traumatised by an incident of persecution:

> *Along with her mother, [the applicant] often went to underground church to attend church services. As the activities of underground church were restricted and the conditions were very tough, people had to be very careful under adverse circumstances.*
>
> *However, the bad luck was still not averted and the family members were persecuted. [The applicant] was implicated and was thrown into prison and detained for one day and one night. She was not allowed to eat and sleep. She was so scared that she started to be in a trance. Since then, she began to suffer from depression and heart disease. Although she had been treated in many ways, she remained unable to withstand the interference and blows of any unexpected incidents. She was constantly nervous and weak. As she personally witnessed that so many people had been persecuted, especially when she saw that a presbyter at [name] underground church had been arrested and sentenced and later on died in the prison, she felt very depressed and scared.*
>
> *In addition, it has become aware that the government had looked for trouble against more than twenty people in our nearby cities and countries. Some people were arrested. Some managed to escape. These events dealt greater blows on her. This event hurt her so deeply that even after so many years, she has still been*

perplexed by it and cannot free herself from the suffering. As she has not been able to recover from her medical conditions, she cannot weather any signs of disturbance or troubles.

16. The applicant was brought from immigration detention to a hearing of the Tribunal on 1 May 2006. Her solicitor did not attend, but brief evidence was taken from her Australian Church pastor. Notwithstanding that the hearing lasted nearly three hours, with a nine minute rest period, the transcript is quite brief. This tends to confirm my impression from reading the transcript, that the applicant gave her evidence in a very hesitant and slow manner. The Tribunal was able to elicit brief responses to most of its questions, but they exhibited some confusion and an abnormal paucity of memory. At no time did the Tribunal ask questions to explore the applicant's mental health or medical history, even when the applicant complained (at p.27): *"I'm sorry, I can't remember so clearly now … If I was not put into the detention centre I might have clearer mind. I'm so confused now"*. However, the applicant's answers were generally responsive and, from reading the transcript alone, I would not find that she exhibited obvious mental impairments at the hearing.

17. On all the evidence before me, including the psychological evidence to which I shall refer below, I conclude that, at least, her demeanour at the hearing was probably equivocal as to the existence of mental impairment affecting her ability to give a reliable history of past events, and to cope with an oral examination on Presbyterian Christianity.

18. What also emerges from my reading of the transcript, and from the Tribunal's subsequent statement of reasons, is that the Tribunal made assumptions as to a level of knowledge of Christian literature and, in particular, of the origins and defining characteristics of Presbyterian congregations, which were dubious for a person with the simple and troubled Christian background claimed by the applicant. As Ms Lee suggests in her psychological report, it was clearly open to the Tribunal to assess the applicant as a woman whose *"religious faith and practice is more about her thoughts and feelings and less about rules and details of the Presbyterian Church"*. This is an aspect of the matter which has not been directly raised in the applicant's grounds of review, and relates to the merits of the Tribunal's conclusions. However, the approach taken by the Tribunal at the hearing and in its reasons tends to

confirm my opinion that the Tribunal did not sufficiently reflect upon the mental and personality characteristics of the applicant. I consider that this may account for its failure to appreciate a need to consider the issues of mental impairment raised by her solicitor.

19. However, for whatever reason, it is clear that the Tribunal gave no express consideration in its statement of reasons to the concern about the applicant's mental condition which had been raised by her solicitor, both with the Department and the Tribunal. It nowhere referred to those concerns, and nowhere in its reasons discussed whether and how they should be investigated or taken into account.

20. There is no suggestion in any of the documents reproduced in the Court Book, that the Tribunal ever considered asking the Secretary to produce medical records from Villawood, or to obtain a psychological or psychiatric assessment. There is no suggestion in its statement of reasons, that it ever considered whether an evaluation of the applicant's evidence could be assisted by such evidence. In this case, I would draw the implication from the absence of any discussion on the topic in its statement of reasons, that the Tribunal thought that such considerations were legally irrelevant (cf. *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [10], [35], [69], [75]).

Evidence establishing an impairment is now before the Court

21. As I shall explain, my above findings may themselves allow me to find jurisdictional error vitiating the Tribunal's decision. However, further support for finding a failure of jurisdictional obligations also arises from the medical evidence which was not before the Tribunal. This establishes that, in fact, the applicant's mental capacities probably were materially impaired at the hearing, so that the Tribunal incorrectly assumed the contrary when assessing her evidence. This resulted in clear unfairness in how the applicant's refugee claims were addressed by the Tribunal.

22. An affidavit by the applicant recounts a history in which the applicant was assaulted by a Chinese policeman in October 1998, after being arrested with the participants in a Christian group meeting. She said that she fell to the ground after being kicked very hard, and that the

policeman *"then hit me with his fist and I was rendered unconscious for a significant period"*. She subsequently suffered from constant headaches for a year, and was treated in hospital. In relation to her condition while at Villawood, she said:

> *11. Immediately after I was detained in Australia I was under observation for 48 hours and received some form of psychological treatment in Villawood Immigration Detention Centre.*
>
> *12. I was extremely concerned and distressed about disclosing my story to the legal aid solicitor and I tried to give the answers that I thought the solicitor wanted to hear. I suffered depression and trauma for the duration of my stay in detention.*

23. The Minister's counsel did not seek to cross-examine the applicant on these statements, and they are confirmed by the medical evidence from the files of the Department to which I have referred above.

24. The applicant also presented two expert reports, whose probative contents were not challenged by the Minister.

25. Ms Jasmine Sliger, a registered psychologist, reported upon interviews she conducted with the applicant in October 2006. She referred to the applicant's history of assault by the police, and suggested that the applicant might have been concussed. From this history and her observations, she raised an issue whether the applicant suffered from ongoing neurological problems, but pointed to the difficulty obtaining a neuropsychological assessment. Her own conclusion was:

> *The results of this assessment reveal that [the applicant] is suffering from Post Traumatic Stress Disorder. This occurred when she was detained and the by product of this has been her suffering a major depressive episode which is ongoing. …*

26. Ms Sliger reviewed the transcript of the Tribunal's hearing, and observed that *"her vagueness is not unusual considering her trauma. Her inability to recall activities places, events and times are also consistent with diagnostic criteria C for Post Traumatic Stress Disorder"*. She also said: *"if placed in a witness situation (as in the tribunal situation) she should have a few sessions with a psychologist that she trusts beforehand so that she can be eased into the process"*.

27. Ms Peggy Lee, a registered psychologist speaking fluent Mandarin, reported her assessment of the applicant's condition in March 2007. She reviewed material including the detention centre medical records and the results of her own psychological tests, and concluded that the applicant was suffering *"chronic anxiety, extreme stress and major depression"*. She noted memory difficulties, slow thought processes, difficulties with concentration, and preoccupation.

28. I conclude from this material, considered in the light of the contemporaneous lay observations of the applicant's solicitor, the medical records from Villawood, and my reading of the transcript, that the applicant was probably suffering impairments from mental illness at the time of her interview by the Tribunal, and that her impairments probably affected her ability to respond "normally" to the Tribunal's questions seeking to investigate and assess her claimed history. I consider that had the Tribunal known of her medical condition it is probable that its evaluation of the credibility of the applicant's history would have been materially affected, and it is quite possible that the conclusions it drew might have been significantly different.

Jurisdictional failure of requirements under s.425

29. Section 422B(1) of the Migration Act, as applicable to the present matter, provided that the procedural provisions of Division 4 of Part 7 of the Act are *"taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with"*. In that Division, an important provision dealing with procedural fairness is found in s.425(1), which provides that *"the Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review"*.

30. Notwithstanding some doubt in the Federal Court whether this section raises merely a requirement to give a hearing invitation, recent judgments of the High Court locate within s.425(1) a significant right for an applicant to participate in a real and meaningful hearing, which in fact affords the opportunity described in s.425(1) (see *SZFDE v Minister for Immigration & Citizenship* [2007] HCA 35 at [30]-[35], [48]-[53], also *Applicant NAFF of 2002 v Minister for Immigration &*

Multicultural & Indigenous Affairs (2004) 221 CLR 1 at [27] and [32], *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 77 at [37], [164], and [171], and *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] HCA 63 at [26]-[29], and [32]-[37]). *SZFDE* confirms the opinion of a Full Court in *Minister for Immigration & Multicultural & Indigenous Affairs v SCAR* (2003) 128 FCR 553 at [37], that a breach of s.425 can occur as a result of circumstances unknown to the Tribunal and beyond its control. It also supports the Full Court's opinion at [38] as to the jurisdictional nature of the requirements implicit in s.425(1).

31. In *SCAR*, an applicant gave evidence at a hearing in a noticeably vague and confused manner. Unknown to the Tribunal, he had received recent news of his father's death, and in the opinion of a psychologist he was *"in no condition to handle this interview"*. The Full Court said at [14]: *"Clearly if the Tribunal had been aware of the respondent's distress it may have proceeded differently. At the very least it may not have made the credibility findings it did make in light of the alternative explanation for the inadequacy of that evidence"*.

32. At [37], they said *"the statutory obligation upon the Tribunal to provide a 'real and meaningful' invitation exists whether or not the Tribunal is aware of the actual circumstances which would defeat that obligation"*. They included in the circumstances where a breach of s.425(1) would occur *"where the fact or event resulting in unfairness was not realised by the Tribunal"*. In the case before them, they concluded that the refugee claimant *"did not receive the fair hearing required by the Act"*, because the Tribunal had assessed the applicant's credibility adversely by reference to his vague responses, without taking into account the possible explanation given by the psychologist.

33. I consider that the present case falls within the principles and circumstances found in *SCAR*. As I have found above, I am satisfied that the applicant's capacities as a witness were materially affected by mental impairments at the hearing, and that these were not taken into account by the Tribunal before concluding that the applicant was not *"a witness of truth"* and *"has been deceptive and untruthful"*. This resulted in an unfairness, which establishes a breach of the Tribunal's obligations under s.425(1).

34. I accept that, unlike *SCAR*, in the present case the unfairness of the hearing might not have been remedied by adjourning the hearing or affording a further hearing, due to the chronic nature of her impairments. I also accept that the Tribunal's duty to complete a review of the delegate's decision might in such a case result in its inability ever to be able to afford the applicant a hearing in which she could give evidence unhampered by mental impairments. However, the essential unfairness in this case, as in *SCAR*, arose from the Tribunal's assessment of the applicant's evidence given at the hearing as if she were a person without impairment.

35. The unfairness in relation to the hearing also arose in this case from the Tribunal's failure to take into account the concern about the applicant's mental capacities which was raised by her solicitor. I have made findings in relation to this above. The Tribunal failed to consider that concern in both a substantive and a procedural way. Substantively, the failure contributed to an unfair process of assessment of the applicant's evidence given at her hearing. The failure therefore supports my conclusion that a breach of s.425(1) occurred.

36. Procedurally, the Tribunal failed to consider whether to investigate the issue of the applicant's mental capacities, and, in particular whether to call for medical records available at Villawood or for other psychological assessments, before reaching conclusions on the applicant's evidence and completing its review. In my opinion, this failure also resulted in jurisdictional error. In the circumstances known to the Tribunal which I have found above, I consider that it was not open to the Tribunal to proceed without first considering what, if any, inquiries should have been made into the concerns raised by the applicant's solicitor. The failure of the Tribunal to consider whether to investigate the applicant's mental capacities constituted, in my opinion, a failure *"to comply with the duty imposed by s.414(1) to conduct the review and the duty under s.425(1) to hear from the [applicant]"* (cf. *Applicant NAFF of 2002* (supra) at [32]-[34]).

37. Counsel for the Minister submitted that no obligations arose to consider inquiring into whether the applicant's evidence might be affected by mental impairments. He relied upon the statement in *Minister for Immigration & Multicultural & Indigenous Affairs v SGLB*

(2004) 207 ALR 12 at [43] that *"whilst s.427 of the Act confers power on the tribunal to obtain a medical report, the Act does not impose any duty or obligation to do so"*.

38. However, in *SGLB* there was no doubt that the Tribunal did consider exercising these powers. That case gives no support to a submission that the Tribunal is not obliged to consider investigating whether an applicant's capacities to participate in a hearing are affected by mental impairments, where this issue is raised before it with substance. Rather, it suggests the opposite.

39. In *SGLB* the Tribunal did consider an issue of impairment raised by material before it. It considered the need for medical investigations, and arranged for investigations and a report by a psychologist. It obtained evidence of mental impairments, and properly took into account that the applicant was suffering from PTSD when evaluating the applicant's evidence (see [14], [40] and [121]). In this procedure, the Tribunal is described as proceeding with *"scrupulous fairness"* at [10], and as going *"to great lengths to accommodate"* the refugee claimant at [33]. The opinions given in the High Court at [1] and [45], that no failure of procedural fairness had occurred, must be understood in that context. The argument which was rejected by the High Court was that further medical assessments should have been engaged in.

40. In the present case, the Tribunal made no inquiries into the concerns of the applicant's solicitor, even obviously reasonable and readily available inquiries as to the medical records held by the Department of Immigration. It disregarded the issue of impairment raised before it, and proceeded to assess the applicant's evidence unaided by any assessment of her possible impairments. In my opinion, this has resulted in jurisdictional error which vitiated its decision to affirm the delegate's decision.

41. For all the above reasons, I consider that the applicant is entitled to relief by way of writs of certiorari and mandamus.

I certify that the preceding forty-one (41) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 12 October 2007