FEDERAL MAGISTRATES COURT OF AUSTRALIA

NBKB v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 1046*

MIGRATION – Application to review decision of Refugee Review Tribunal – whether Tribunal failed to comply with s.424A or s.425 of the Migration Act – whether Tribunal failed to consider claim in relation to future fear – whether Tribunal failed to take relevant material into account.

Migration Act 1958 (Cth), ss.91R, 414, 415, 424A, 425, 430

Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473
Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576
Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Others (1996) 185 CLR 259
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323
MZXBQ v Minister for Immigration and Citizenship [2008] FCA 319
NBKT v Minister for Immigration and Multicultural Affairs (2006) 156 FCR 419
SAAP and Another v Minister for Immigration and Multicultural and Indigenous Affairs and Another (2005) 228 CLR 294
SBCC v Minister for Immigration and Multicultural Affairs [2006] FCAFC 129
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152
SZBYR v Minister for Immigration and Citizenship (2007) 81 ALJR 1190
SZCOQ v Minister for Immigration and Multicultural Affairs [2007] FCAFC 9
SZEEU and Others v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 150 FCR 214
SZEPZ v Minister for Immigration and Multicultural Affairs and Another (2006) 159 FCR 291
SZGNY v Minister for Immigration and Multicultural [2006] FMCA 1142
SZHUI & Ors v Minister for Immigration & Anor [2006] FMCA 1042
SZJGV v Minister for Immigration and Citizenship [2008] FCAFC 105
SZJHX v Minister for Immigration and Citizenship [2007] FCA 1337
SZJXH v Minister for Immigration and Citizenship [2007] FCA 1691
Wang v Minister for Immigration and Multicultural Affairs (2000) 105 FCR 548

Applicant:	NBKB
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 348 of 2007
Judgment of:	Barnes FM
Hearing date:	7 May 2008
Delivered at:	Sydney
Delivered on:	30 July 2008

REPRESENTATION

Counsel for the Applicant:	Ms A Seward
Solicitor for the Applicant:	Michaela Byers
Counsel for the Respondent:	Ms V McWilliam
Solicitors for the Respondent:	Clayton Utz

ORDERS

(1) That the application be dismissed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 348 of 2007

NBKB
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application for review of a decision of the Refugee Review Tribunal handed down on 9 January 2007 affirming a decision of a delegate of the first respondent not to grant the applicant a protection visa. The applicant, a citizen of the People's Republic of China, arrived in Australia in June 2004 and applied for a protection visa. The application was refused and the applicant sought review by the Tribunal. The applicant attended a Tribunal hearing on 21 October 2004.

2. On 7 December 2004 the Tribunal as originally constituted handed down a decision affirming the decision not to grant the applicant a protection visa. The applicant sought judicial review in this Court. On 1 September 2006 the Court made orders by consent remitting the matter to the Tribunal for reconsideration. It is that reconsideration

that is the subject of these proceedings. Future references to the Tribunal decision are references to the decision of the Tribunal as reconstituted.

3. The applicant attended a further Tribunal hearing on 22 November 2006. The Tribunal as reconstituted affirmed the decision of the delegate.

4. In a statement annexed to her protection visa application the applicant claimed to fear persecution in China based on her practice of Falun Gong in China since 1997. She claimed that in March 2001 she had been called to the local police station, arrested, detained by the Public Security Bureau (PSB) for three days and then sentenced to re-education through labour for one year in a specified labour camp.

5. The applicant described her punishment while in the labour camp, which included physical mistreatment after she had written something favourable in relation to Falun Gong. She claimed that in order to leave the labour camp she had to write a letter promising she would give up Falun Gong. She was released in March 2002 and thereafter she had to report to the local police station "*on call at all times*".

6. The applicant gave oral evidence at the first Tribunal hearing. The Tribunal as reconstituted had regard to this evidence. The Tribunal recorded in its decision that at the first hearing the applicant stated that she was involved in the alcohol business in the PRC, that she came to Australia to do business (which she did), and that when she first made travel arrangements and came to Australia she did not intend to stay outside the PRC. However on her second day in Australia she saw people practising Falun Gong in a park and this "*touched*" her and reagitated her interest in Falun Gong, which she had not practised "*for a period of time*". She claimed she was reminded of the crackdown on Falun Gong in the PRC and of the burden of being on PSB reporting conditions in the PRC. At the first Tribunal hearing she said that she was not thinking about seeking protection when she first came to Australia until that day in the park. She continued with her business (which involved travel to Adelaide). She also said that from that day to the time of the first hearing (21 October 2004) she had spoken to only one Falun Gong practitioner in Australia who did not seem to believe

her story about what happened to her in China. She claimed at the first Tribunal hearing that she sometimes did exercises in a park in Hurtsville and alone at home.

7. At the second Tribunal hearing on 22 November 2006 the applicant disputed having said at the first Tribunal hearing that she had originally planned to go back to the PRC. She also claimed that she had joined a regular Falun Gong study group in Parramatta in September 2004 (that is, before the first Tribunal hearing). When the Tribunal put to her that she had failed to mention this at the first hearing she said that was because she had just joined the group. She provided supporting statements from participants in the Parramatta group (and other material). None of the witnesses attested to knowing her earlier than November 2004.

8. After the hearing the applicant's adviser provided a written submission in relation to the applicant's practice of Falun Gong in Australia and a supporting statutory declaration from a Falun Gong practitioner certifying that the applicant had joined the Hurstville practising group from July 2004 to October 2004 to do Falun Gong exercises in a park Monday to Saturday and had participated in a rally to support withdrawal from the China Communist party. The adviser claimed that the applicant's Falun Gong activities had intensified after she "*lost*" at the first Tribunal and that this indicated that she was a genuine Falun Gong practitioner as her actions did not relate to the protection visa application.

The Tribunal decision

9. In its reasons for decision the Tribunal stated that it had before it the Department's file and had also had regard to material referred to in the delegate's decision and other material "*including the evidence the Applicant gave at the hearing before the previously-constituted Tribunal on 21 October 2004*". It referred to independent country information in relation to the situation of Falun Gong practitioners in China and summarised the applicant's claims made at various times.

10. In its findings and reasons the Tribunal accepted that the applicant had knowledge of Falun Gong exercises and of the basic principles behind those exercises and that she had "*some involvement with a group of Falun Gong practitioners in Hurstville*" up to around the time she gave evidence to the previously constituted Tribunal (21 October 2004). The Tribunal also accepted that the applicant subsequently joined a Falun Gong study group in Parramatta. It did not accept that she was involved with that group prior to the time of the first Tribunal hearing.

11. The Tribunal concluded that the applicant "*did not flee the PRC seeking protection and that she applied for protection in Australia as an afterthought*". It gave weight to the evidence that she came to Australia for both the stated and demonstrated purpose of doing business here and that she went from Sydney to Adelaide to conduct planned business meetings in relation to the production of red wine which she planned to import into China. It also gave weight to the applicant's claim that she only decided to claim protection in Australia after she witnessed Falun Gong practitioners doing exercises in Sydney and the fact that this was after she came to Australia for another purpose which she went on to pursue, as according to her oral evidence to the previously constituted Tribunal she did not apply for protection until after she went to Adelaide and pursued her business agenda there to some extent.

12. The Tribunal expressed "*great concern*" that the applicant having claimed that she had faced persecution in the PRC, that she was on reporting conditions with the police and that she had divorced her husband to help minimise the repercussions of a Falun Gong profile would apply for a passport "*for a reason not at all related to the* [Refugees] *Convention, leave the PRC purely for reasons of commercial business and apply for protection in Australia as an evident afterthought*".

13. The Tribunal continued:

> *In assessing whether or not the Applicant applied for protection in good faith, notwithstanding the evidence of afterthought, the Tribunal has taken a number of factors into account. The Tribunal has considered the Applicant's evident familiarity with*

> *the five Falun Gong exercises and the principles behind them, but gives this evidence no weight as it does not argue sincere adherence to the exercises or there* (sic) *principles, and does not help to argue that the Applicant was in any way familiar with Falun Gong culture prior to her arrival in Australia in June 2004.*

14. The Tribunal considered the applicant's oral evidence about her involvement in the alcohol trade over several years "*right up to*" the time she departed the PRC. It found that she had provided "*no plausible, consistent evidence to support her claim about having been detained*" for breaching the ban against Falun Gong. It found her explanation to the previously constituted Tribunal about the ease with which she had "*resumed*" work in her usual field of business despite her claim that her career was interrupted by a period in detention was "*an implausible one, relying on a selective and inconsistent argument regarding the effectiveness of contacts in the PRC*".

15. The Tribunal also found that it could not give any weight to the applicant's claims about the reasons for her divorce. It did not accept on the evidence before it that her divorce had anything to do with the Convention-related factors cited by her. It gave weight to her evidence to the first Tribunal indicating that her family were not living under any relevant pressure in China.

16. The Tribunal continued:

> *Significantly, the Tribunal gives weight to what it regards as an attempt on the Applicant's part to persuade it that she did not make claims to the previously-constituted Tribunal that she did indeed make in her oral evidence to that Tribunal. These claims related her intention to return to the PRC after conducting her business in Australia and her attempt to revise them* (sic) *claims damages her credibility, indicating that she is prepared to mislead the Tribunal in the hope of obtaining a favourable outcome in the matter under review. The Tribunal can find no basis for regarding the Applicant's afterthought in deciding to remain in Australia as one that has any ground in good faith.*

17. The Tribunal did not accept that the applicant's claims about her Falun Gong related experiences in the PRC were "*plausible, consistent or credible*".

18. While the Tribunal was prepared to accept that the applicant had "*in some way*" introduced herself to the Hurtsville Falun Gong group or "*something like it*" in mid-2004, as evidenced by her ability to perform some Falun Gong exercises at the October 2004 Tribunal hearing, it did not accept that the applicant joined the group for the reasons claimed. The Tribunal addressed the statutory declaration provided by a Falun Gong practitioner with the post-hearing submission from the applicant's adviser, but found that even if it accepted that the information in this statutory declaration was truthful it could not give it any weight as it was not persuaded by the contents of the statement that the activities attributed to the applicant were "*other than opportunistic*". The Tribunal found that the applicant's Falun Gong activities in Australia up to the time of the first Tribunal hearing (21 October 2004) constituted conduct undertaken by her for the purpose of strengthening her claim to refugee status and hence that such conduct had to be disregarded under s.91R(3) of the *Migration Act 1958* (Cth).

19. The Tribunal gave "*limited weight*" to the other statutory declarations submitted by the applicant attesting to her involvement in the Parramatta Falun Gong study group. While it accepted that she had attended that group and studied Falun Gong teaching as the statements attested, it found that these statements did not support her claim of her having joined the Parramatta group prior to the first Tribunal hearing. The Tribunal did not accept that the applicant joined the Parramatta group before November 2004 or that she did so for genuine reasons.

20. It addressed the claim that the applicant's Falun Gong activity in Australia had intensified when the delegate's rejection of her protection visa application was affirmed by the originally constituted Tribunal and the possible implication that she had "*intensified her Falun Gong activities as a means of coping with the psychological and spiritual stress of adverse decisions in her case*". However on the evidence before it the Tribunal found that the applicant's claim that her Falun Gong activity had intensified in November 2004 was "*further evidence of opportunism and afterthought on her part*". It concluded that it must disregard her increased involvement in Falun Gong study and exercises

at Parramatta and/or any other places after the time of her first Tribunal hearing under s.91R(3) of the Act "*as conduct she has undertaken for the purposes of strengthening her claim to refugee status*".

21. The Tribunal also gave no weight to the applicant's claim about having obtained her passport or any other travel authorisation by "*irregular or circumventive means*", finding that even if she did obtain the passport with the help of contacts, it did not accept that she did so for the Convention-related reasons claimed.

22. The Tribunal stated:

> *Having regard to s91R(3) of the Act, and finding that the Applicant is an unreliable witness in the present matter, the Tribunal is not satisfied that the Applicant faces a real chance of Convention-related persecution in the PRC. Her claimed fear of such persecution is not well-founded. She is not a refugee.*

23. The applicant sought review of the Tribunal decision by application filed in this Court on 6 February 2007. She relies on a further amended application filed on 7 May 2008.

Section 424A

24. The first ground in the further amended application is that the Tribunal failed to provide the applicant with a copy of the transcript of the hearing before the previously constituted Tribunal in accordance with ss.424A(1) and 441A of the *Migration Act 1958* and relied on questions put by the previously constituted Tribunal as part of its reasons for decision. The particulars to this ground are:

> *The Tribunal sets out at pages 13–15 of the Reasons for Decision an account of issues put to the Applicant by the previously constituted Tribunal which ought reasonably be assumed to have influenced the Tribunal's determinations with respect to matters not put to the Applicant at the hearing before the Tribunal and which are referred to in the Tribunal's determinations at page 17 of the Reasons for Decision. Those determinations were part of the reasons for affirming the decision under review.*

25. It was submitted for the applicant that the transcript of the first Tribunal hearing, or at least the questions put to the applicant by the first Tribunal member which were considered by the second Tribunal member in assessing the applicant's claims and evidence leading to the findings of implausibility, inconsistency and lack of credibility, ought to have been provided in writing to the applicant for comment together with an explanation of the significance of that information for the review, consistent with the principles in *SAAP and Another v Minister for Immigration and Multicultural and Indigenous Affairs and Another* (2005) 228 CLR 294 at [65] and *SZEEU and Others v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214. The Court has in evidence before it a transcript of each of the Tribunal hearings as annexures to the affidavit of Sue Archer affirmed on 1 May 2007 and filed on 14 May 2007.

26. In its reasons for decision the Tribunal stated that it had had regard to a range of material, including the evidence that the applicant gave at the hearing before the previously constituted Tribunal.

27. In concluding that it did not accept that the applicant's claims about her Falun Gong-related experiences in China were "*plausible, consistent or credible*", the Tribunal had regard to her evidence, including her oral evidence to the previously constituted Tribunal. It was said to be relevant that in describing that evidence it referred to the fact that the first Tribunal member had put certain matters to the applicant. Such matters were said to be the reason or part of the reason for the Tribunal's conclusion that it did not accept that the applicant's claims about her Falun-Gong related experiences in China were plausible, consistent or credible.

28. For example, the Tribunal recorded that at the first hearing the Tribunal put to the applicant that it was surprised that she did not know about the key event of the 1999 Falun Gong protest in Tianjin prior to the banning of Falun Gong given that she came from Tianjin. It also put to her that "*there did not appear to be anything to suggest that she would be regarded as a person of significant interest to PRC authorities*" and questioned her in relation to whether her name was on a blacklist. It put to her that had her name been on a blacklist she would have had

trouble gaining employment and travel authorisation. After the applicant stated that she lost some of her old customers in China because she supported Falun Gong, the first Tribunal put to her that "*she had said at the same hearing that she claimed to have been successful getting her old job back because her old customers valued her experience*". In response to this she was recorded as saying that some customers supported her whilst others stopped doing business with her.

29. It was submitted for the applicant that the findings of the Tribunal in part relied upon the evidence of the first Tribunal's questions (not simply the answers) so that such questions formed part of its reasons for decision and had to be put to the applicant in writing under s.424A whether or not the breach was trivial or any unfairness had occurred (see *NBKT v Minister for Immigration and Multicultural Affairs* (2006) 156 FCR 419 at [26] citing *SZEEU* at [215] and [231] per Allsop J). It was contended that the questions the first Tribunal member had asked the applicant on such matters at the first Tribunal hearing constituted "*information*" within s.424A(1) which did not fall within the exception in s.424A(3)(b) because the questions asked by the Tribunal were not information provided by the applicant. It was conceded that the answers to such questions were within the s.424A(3)(b) exception as information the applicant gave the Tribunal for the purposes of review.

30. In essence it was contended for the applicant that the Tribunal as reconstituted could not use the questioning of the Tribunal as originally constituted, in particular the pattern of questioning and responses, to come to a conclusion about inconsistencies in the applicant's evidence and her lack of credibility without at least putting the questions to the applicant for comment under s.424A of the Act. It was submitted that because this was information which came to the Tribunal as reconstituted it could not be said to constitute the second Tribunal member's subjective thought processes, albeit it may have arisen as part of the subjective thought processes of the first Tribunal member. It was submitted that the second Tribunal as reconstituted could not consider the responses which gave rise to findings of inconsistency or

lack of credibility without drawing the applicant's attention to the questions put by the first Tribunal member.

31. On the basis that "*information*" for the purposes of s.424A(1) is that of which one is told or appraised or knowledge communicated concerning some particular fact, subject, or event (see *NBKT* at [29] citing *SZEEU*), it was said that the first Tribunal member's questions amounted to knowledge of relevant facts or circumstances communicated to or received by the Tribunal as reconstituted and hence were within the concept of "*information*" notwithstanding that such information did not come from a source external to the Tribunal.

32. While it was conceded that authorities that had considered the concept of "*information*" had related to information that had come to the Tribunal from an external source, it was contended that a question by a previously constituted Tribunal nonetheless constituted knowledge of the relevant fact or circumstance received by the second Tribunal member.

33. Counsel for the applicant contended that the s.424A obligation and the reference to "*information that the Tribunal considers would be the reason or part of the reason for affirming the decision that is under review*" pertained to the particular member conducting the particular review at the relevant time, in this case the member constituting the Tribunal as reconstituted. On that basis it was suggested that the requirements of s.424A in relation to the Tribunal as originally constituted may differ from those applicable to the Tribunal as reconstituted, depending on what the particular Tribunal member decided would be part of the reason for the decision. It was pointed out that in *SZEPZ v Minister for Immigration and Multicultural Affairs and Another* (2006) 159 FCR 291 at [40] – [41] the Full Court of the Federal Court had stated that insofar as s.424A(1)(a) "*refers to a state of mind or mental process, it must be taken to refer to the state of mind or mental process of the particular member constituting the Tribunal for the purposes of the review*" and that this contemplated that such a particular member "*has turned his or her mind to the question of whether particular information would be the reason, or part of the reason, for deciding to affirm the delegate's decision*".

34. This ground is not made out. As counsel for the first respondent contended it has not been established that the questioning amounted to information that the Tribunal considered would be the reason or part of a reason for affirming the decision under review within s.424A(1). Insofar as it is relevant to have regard to the Tribunal's reasons for decision, while the Tribunal referred to the questioning of the applicant at the first Tribunal hearing in the claims and evidence part of the decision, at no stage in its findings and reasons did the Tribunal address the significance of such questioning. It did however have regard to the applicant's evidence at the first Tribunal hearing, that is her answers, and found that such evidence was not plausible, credible or consistent.

35. Even if questions may be characterised as "*information*" this does not suffice to bring s.424A(1) into play if such information is not of the nature specified in that sub-section. The fact that the Tribunal recorded the questions put to the applicant in the process of describing her evidence does not mean that those questions necessarily became information that was, or more accurately "*would be*", part of its reason for affirming the decision under review. In that respect I note that the operation of s 424A(1)(a) is to be determined "*in advance - and independently - of the Tribunal's particular reasoning on the facts of the case"* (see *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at [17] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ and see *MZXBQ v Minister for Immigration and Citizenship* [2008] FCA 319 and cases cited therein).

36. The Tribunal's description of what occurred at the first Tribunal hearing and the questions asked reveal that relevant issues were raised with the applicant and that she was given an opportunity to address Tribunal concerns about aspects of her claims and evidence. However it was the applicant's own evidence (in which the Tribunal found a lack of plausibility, consistency and credibility) that could be said to be information that the Tribunal considered would be the reason or part of the reason for affirming the decision under review – not the questioning that provided the framework in which such evidence was given to the Tribunal. Hence it is not necessary to determine whether questioning at a hearing conducted by a member other than the

Tribunal member in question could ever be information within s.424A(1).

37. While an aspect of the Tribunal's reasons for decision was that the applicant gave certain evidence to the previously constituted Tribunal in response to its questioning and that those answers were inconsistent, implausible and not credible, as conceded by the applicant such evidence from the applicant to the Tribunal as originally constituted is within the exception in s.424A(3)(b) as information that the applicant gave for the purposes of the review. It is well established that when a matter is remitted to the Tribunal for reconsideration the evidence before the Tribunal as originally constituted does not lose its character as information presented "*to the Tribunal*" for the purposes of the review (see *SZEPZ v Minister for Immigration and Multicultural Affairs and Another* (2006) 159 FCR 291 at [39]*; SZJHX v Minister for Immigration and Citizenship* [2007] FCA 1337 at [45]; *SZJXH v Minister for Immigration and Citizenship* [2007] FCA 1691 at [25]; *SZGNY v Minister for Immigration and Multicultural* [2006] FMCA 1142 at [21]; and *SZHUI & Ors v Minister for Immigration & Anor* [2006] FMCA 1042 at [62] – [63])

38. As the Full Court of the Federal Court stated in *SZEPZ* at [39]:

> … *when ss 421, 422 and 422A refer to* `a particular review*', they identify the review initiated under s 414(1) and culminating in a decision in accordance with s 430, being the review that a particular person, namely the applicant for review, has initiated in respect of an RRT-Reviewable Decision. The expression does not depend upon the identity of the particular member constituting the Tribunal. Rather, it refers to the function of the Tribunal to review a decision. Until the Tribunal has made a valid decision on the review that has been initiated by a valid application under s 414, it has a duty to perform that particular review. An invalid decision by the Tribunal is no decision at all but it does not follow that all steps and procedures taken in arriving at that invalid decision are themselves invalid. The Tribunal still has before it the materials that were obtained when the decision that had been set aside was made.*

39. Moreover the Tribunal's appraisal of the applicant's evidence at the first hearing, including its assessment of any inconsistencies, does not

constitute "*information*" for the purposes of s.424A(1) (see *SZBYR* at [18]).

40. No jurisdictional error is established on the basis contended for in ground one of the further amended application.

Section 425

41. The second ground in the further amended application is that the Tribunal failed to comply with s.425(1) of the Migration Act "*when it failed to raise with the Applicant during the hearing any issues regarding the Applicant's evidence to the previously constituted Tribunal regarding her activities in China and subsequently dismissed that evidence as not plausible, consistent or credible in its reasons for decision*".

42. The particulars to this ground are: "*The Tribunal failed to raise with the Applicant the evidence given only to the previously constituted Tribunal referred to at page 17 of the Reasons for Decision. These were issues arising in relation to the decision under review*" and "*The Tribunal's findings were in part based on a finding that the Applicant was an unreliable witness: page 18 of the Reasons for Decision"*.

43. Section 425(1) is as follows:

> *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.*

44. It was acknowledged that the Tribunal raised a number of issues with the applicant in the second Tribunal hearing which had also been raised by the previously constituted Tribunal. However it was contended for the applicant that the Tribunal gave no indication in the hearing on 22 November 2006 that other issues previously raised by the originally constituted Tribunal "*remained*" issues arising in relation to the decision under review for the purposes of s.425(1) (including, in particular, the applicant's account of her activities and detention in China). The applicant's original evidence as to these matters was not canvassed in the second hearing. The Tribunal nonetheless made

findings referring to such matters. The Tribunal's treatment of the record of the first hearing of 21 October 2004 was said to be a key factor in the determination that it was not satisfied that the applicant faced a real chance of Convention-related persecution in the People's Republic of China.

45. It was submitted that once the Tribunal invited the applicant to a second hearing the reconstituted Tribunal was required under s.425(1) to ensure that the applicant was notified of the issues arising in relation to the decision under review, in particular issues it later considered adversely to the applicant, consistent with *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 and *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576. The applicant contended that hence it was necessary for the Tribunal as reconstituted to raise with the applicant at the hearing issues that had been raised with her by the previously constituted Tribunal which remained dispositive issues from the perspective of the second Tribunal member, including issues relevant to the assessment of her credibility.

46. Counsel for the applicant referred to the discussion in *SZBEL* of the concept of "*issues arising in relation to the decision under review*" in s.425 of the Act, observing that the High Court had indicated (at [35]) that if the Tribunal was silent then such issues would at the least be the issues arising on the delegate's decision. It was suggested that if the Tribunal asked the applicant to attend a hearing, then there had to be issues arising on review. Here there had been a previous Tribunal hearing and a decision, but the decision had been set aside. Hence it was submitted that there was no Tribunal decision in which issues were identified as dispositive. Further, while what was discussed at the previous hearing was material to which the Tribunal as reconstituted had access, it was contended that just because the first Tribunal member had raised issues with the applicant that did not mean that the second Tribunal member would see those issues as relevant issues.

47. It was submitted that if the second Tribunal member was silent in relation to such matters then there was a failure to comply with s.425 of the Act. Reliance was placed on what was said at [35] in *SZBEL*:

> *The Tribunal is not confined to whatever may have been the issues that the delegate considered. The issues that arise in relation to the decision are to be identified by the Tribunal. But if the Tribunal takes no step to identify some issue other than those that the delegate considered dispositive, and does not tell the applicant what that other issue is, the applicant is entitled to assume that the issues the delegate considered dispositive are "the issues arising in relation to the decision under review".*

48. It was also submitted that if the second Tribunal member positively identified particular issues at a hearing and did not identify other issues, then whether or not such other issues had been identified in the delegate's decision or in a prior Tribunal hearing, such silence at the hearing amounted to a representation that issues not identified by the Tribunal as reconstituted in the Tribunal hearing were not issues arising on the review. It was suggested that in *SZBEL* the High Court had "*assumed*" that the issues arising in the delegate's decision had been identified by the Tribunal.

49. In essence it was contended that s.425 requires the particular Tribunal member to identify in the hearing conducted by that member all the dispositive issues from the perspective of that member, whether or not the applicant might have known from the delegate's decision or otherwise from what had gone before (including a prior Tribunal hearing) that these might be relevant issues.

50. In the particular context of this case it was contended by counsel for the applicant that it was apparent from the decision of the Tribunal as reconstituted that the inconsistency of the applicant's evidence at the first hearing was an issue arising on the review for the purposes of the decision of the Tribunal. Issue was taken with the fact that while the Tribunal as reconstituted had advised the applicant at the hearing that the evidence that she gave at the first Tribunal hearing was evidence that the Tribunal member may consider as evidence before him, it did not discuss or put to the applicant issues arising from that evidence about what happened in China or the consistency of her evidence before the previous Tribunal member. Rather other matters, such as the applicant's conduct in Australia, were discussed in the second hearing.

51. The applicant acknowledged that the subjective reasoning of the Tribunal member did not have to be communicated to the applicant under s.425, but contended that if the second Tribunal member was seen in his or her reasons for decision to adopt a line of questioning put at an earlier Tribunal hearing, that became an issue arising on the review and that it was therefore necessary for the second Tribunal member to put such material to the applicant in the hearing it conducted.

52. In *SZBEL* the appellant had claimed to fear persecution in Iran as a Christian. He made a number of claims in a statutory declaration accompanying his protection visa application. Three aspects of those claims about the events which preceded his jumping ship in Australia were found by the Tribunal to be implausible: that he had told his friends in his hometown of his interest in Christianity; that he was called before the ship's captain to explain this interest; and that he had temporarily left the ship in Australia to visit a doctor but returned to the vessel before he later jumped ship.

53. The delegate had dealt only with the last of these three aspects of the appellant's claims in concluding that he was not satisfied that the appellant had a genuine commitment to Christianity. The appellant had attended a Tribunal hearing during which he again recounted and amplified on the events in his statutory declaration.

54. However the High Court recorded (at [3]) that the Tribunal did not challenge or express any reaction to what the appellant said or invite him to amplify on any of the three aspects of his account that it later found to be implausible. The High Court considered whether the Tribunal had denied the appellant procedural fairness. The arguments before it were based on the principle enunciated by the Full Court of the Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591 – 592 as follows:

> *Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her*

> *interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.*

55. The High Court referred with approval to the Full Court's subsequent statement in *Alpahone* (at 590):

> *It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard.* ***That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues*** *and to be informed of the nature and content of adverse material.* (Emphasis added by the High Court).

56. In considering whether there had been a lack of procedural fairness the High Court had regard to the statutory framework in which the Tribunal exercised its power. As the Court observed (at [33]) the Act (in s.425(1)) defines the nature of the opportunity to be heard that is to be given to an applicant for review by the Tribunal. The Court stated (at [34] – [36]):

> *Those issues* [arising in relation to the decision under review] *will not be sufficiently identified in every case by describing them simply as whether the applicant is entitled to a protection visa. The statutory language "arising in relation to the decision under review" is more particular. The issues arising in relation to a decision under review are to be identified having regard not only to the fact that the Tribunal may exercise all the powers and discretions conferred by the Act on the original decision-maker (here, the Minister's delegate), but also to the fact that the Tribunal is to review that* particular *decision, for which the decision-maker will have given reasons.* (Footnote omitted).
>
> *The Tribunal is not confined to whatever may have been the issues that the delegate considered. The issues that arise in*

relation to the decision are to be identified by the Tribunal. But if the Tribunal takes no step to identify some issue other than those that the delegate considered dispositive, and does not tell the applicant what that other issue is, the applicant is entitled to assume that the issues the delegate considered dispositive are "the issues arising in relation to the decision under review". That is why the point at which to begin the identification of issues arising in relation to the decision under review will usually be the reasons given for that decision. And unless some other additional issues are identified by the Tribunal (as they may be), it would ordinarily follow that, on review by the Tribunal, the issues arising in relation to the decision under review would be those which the original decision-maker identified as determinative against the applicant.

It is also important to recognise that the invitation to an applicant to appear before the Tribunal to give evidence and make submissions is an invitation that need not be extended if the Tribunal considers that it should decide the review in the applicant's favour. Ordinarily then, as was the case here, the Tribunal will begin its interview of an applicant who has accepted the Tribunal's invitation to appear, knowing that it is not persuaded by the material already before it to decide the review in the applicant's favour. That lack of persuasion may be based on particular questions the Tribunal has about specific aspects of the material already before it; it may be based on nothing more particular than a general unease about the veracity of what is revealed in that material. But unless the Tribunal tells the applicant something different, the applicant would be entitled to assume that the reasons given by the delegate for refusing to grant the application will identify the issues that arise in relation to that decision.

57. In *SZBEL* the Court was of the view that the appellant was "*on notice*" of issues on which the delegate's decision was based, but not of the Tribunal's concern about other aspects of his account not indicated to be of issue in the delegate's decision and about which the Tribunal did not challenge him in the hearing (at [42]). The Tribunal did not have to put to the appellant any issue identified as dispositive by the delegate which the Tribunal also considered determinative (*SZBEL* at [45]). The appellant would be on notice that such matters were issues arising on the review by the Tribunal because of the manner in which they were dealt with in the delegate's decision. However, because the appellant was not put on notice by the Tribunal that his account of certain other

events may be in issue, based on what the delegate had decided he would have understood that the issue addressed by the delegate was "*the central and determinative question on the review"* (*SZBEL* at [43]). The Court continued "*Nothing the Tribunal said or did added to the issues that arose on the review"*. The High Court found that the Tribunal denied the appellant procedural fairness as it did not give him "*a sufficient opportunity to give evidence, or make submissions, about what turned out to be two of the three determinative issues arising in relation to the decision under review"* (at [44]).

58. There was no consideration in *SZBEL* of the scope of either s.425 or procedural fairness in relation to a reconsideration by the Tribunal after remittal. Nonetheless it is relevant to note that, as the High Court stated in *SZBEL* at [47]:

> *… there may well be cases, perhaps many cases, where either the delegate's decision, or the Tribunal's statements or questions during a hearing, sufficiently indicate to an applicant that everything he or she says in support of the application is in issue. That indication may be given in many ways. It is not necessary (and often would be inappropriate) for the Tribunal to put to an applicant, in so many words, that he or she is lying, that he or she may not be accepted as a witness of truth, or that he or she may be thought to be embellishing the account that is given of certain events. The proceedings are not adversarial and the Tribunal is not, and is not to adopt the position of, a contradictor.*

59. What is in issue in this case is whether on remittal a Tribunal is obliged by s.425 of the Act to raise with an applicant during a second Tribunal hearing issues that were canvassed at the first hearing conducted by a different member which are of concern to the second Tribunal member.

60. Insofar as it is contended that the Tribunal has to raise at a hearing issues canvassed in the delegate's decision which the particular Tribunal member also considers dispositive, that is not consistent with the approach in *SZBEL* or required by s.425. On the contrary, it is clear from *SZBEL* at [43] – [45] and from the wording of s.425 that the issues the delegate considered dispositive are issues arising on the review by the Tribunal. An applicant has the opportunity to address the issues considered in the delegate's decision in the course of the Tribunal review, whether by written submission or by seeking to give

particular evidence at the Tribunal hearing. The relevance of such issues is sufficiently identified by their consideration in the delegate's decision (see *SZBEL* at [35] and [44]) and the fact that the Tribunal is unable to make a favourable decision on the information before it. The High Court did not assume that the Tribunal in *SZBEL* had identified issues of concern addressed in the delegate's decision that remained of concern to it (cf *SZBEL* at [3]).

61. The delegate in this case found in light of country information about the situation in China that the ability of the applicant to obtain a passport and to depart from the PRC legally indicated that she was of no interest to the authorities for any Convention-related reason at the time she departed. The delegate also found that there was no indication that her situation had changed since that time. The delegate had regard to the fact that the applicant had lived at the same address in the PRC for over 10 years before her departure and the fact that she had provided no evidence to substantiate any of her claims to have suffered Convention-related persecution in the PRC.

62. Hence, as a starting point, the applicant was on notice of these matters as issues arising in relation to the decision under review. It was not necessary for the Tribunal to re-identify those issues in the course of a Tribunal hearing as dispositive issues.

63. *SZBEL* is not authority for the proposition that a reconstituted Tribunal must in all cases take the applicant through evidence given to the delegate (or to the Tribunal as originally constituted) and tell the applicant what it accepts and what remains of concern. Section 425 does not go so far as to require the Tribunal to give the applicant "*a running commentary upon what it thinks about the evidence that is given*" (*SZBEL* at [48] in relation to procedural fairness) or what it is minded to decide. Rather, consistent with the fact that it is a statutory embodiment of a procedural fairness obligation, s.425 requires "*the Tribunal*" to afford the applicant the opportunity to give evidence and to address "*the issues arising in relation to the decision under review*".

64. In this case at the first Tribunal hearing the Tribunal raised with the applicant the question of her activities and detention in China (transcript pages 21 - 22 and 27) and put to her concerns about the credibility of her evidence in that respect. Hence it was, or should have

been, apparent to the applicant that the Tribunal might reach an adverse conclusion on those aspects of her claims or have concerns about the consistency or plausibility of her claims. The fact that such matters were put to her at the first Tribunal hearing gave her the opportunity to address those issues as issues arising in relation to the review of the delegate's decision, both before the Tribunal as originally constituted and as reconstituted, by oral evidence or by written submissions. In *Alphaone* procedural fairness terms, because the Tribunal raised its concerns about the credibility of particular aspects of her claims about her past involvement in Falun Gong and consequential harm in China, it could not be said that an adverse conclusion on such matters was not obviously open on the known material. In fact this happened in the first Tribunal decision in which the Tribunal found that the applicant had no past association with Falun Gong and that her claims about past harm for reasons of Falun Gong adherence were without foundation because of the lack of credibility in relation to her claimed practice of Falun Gong and also because of issues about aspects of the applicant's claims about past harm in China. While the first Tribunal decision was invalid, the concerns expressed therein about the applicant's evidence about what occurred in China could be said to have sufficiently informed the applicant that everything she said in support of her application for review was a "*live issue*" (*SZBEL* at [43]) on remittal. As the High Court recognised in *SZBEL* at [47] such an indication "*may be given in many ways"*. What is important is that the issues that arise in relation to the decision under review are sufficiently identified to an applicant so that he or she has the requisite opportunity to address such issues in a hearing conducted in the course of the review.

65. At the second hearing on 22 November 2006 the Tribunal told the applicant that the evidence she gave at the first hearing "*is evidence that I may consider as evidence before me"* and that *"only his conclusions don't exist any more"* because of the successful judicial review application. While this properly informed the applicant that the Tribunal as reconstituted would reach its own conclusions, the reference to the fact that evidence at the previous hearing was evidence before the Tribunal also sufficiently alerted her to the fact that the discussion of issues at that hearing was material before it. In those circumstances, where issues had been raised with the applicant at the first hearing, it could not be said that the applicant was unaware of

their potential relevance to the Tribunal decision. The applicant had the opportunity to address such matters further (indeed, in this case the applicant was given an opportunity to make a post-hearing submission). The applicant would have been on notice of the matters raised by the first Tribunal as potentially dispositive issues arising in relation to the decision under review, just as she would have been if such matters had been raised in the delegate's decision, even if these issues were not specifically brought to her attention at the second Tribunal hearing.

66. As contended for the first respondent, it is relevant in this context that a Tribunal review continues until a valid decision is made under s.415 of the Act. A s.424A notice from the Tribunal as originally constituted can satisfy the obligations of the Tribunal as reconstituted in that respect without the need for a second s.424A notice (See *SZEPZ* at [43]). As the Full Court of the Federal Court stated in *SZEPZ* at [42]:

> *So long as an applicant has been given information that the member of the Tribunal who is to make the decision considers would the reason, or part of the reason, for affirming the decision under review and so long as the applicant understands why that information is relevant and has been invited to comment on the information, s 424A will be satisfied.*

67. Similarly, so long as "*the Tribunal"* has taken steps to identify issues other than those the delegate considered dispositive and told the applicant what those issues are, the applicant will be on notice of the issues arising in relation to the decision under review. While such issues must be identified from the perspective of the particular member who constitutes the Tribunal, neither the Migration Act nor principles of procedural fairness compel a conclusion that the issues must be identified by that particular Tribunal member, or that if the Tribunal as reconstituted holds a second hearing it is obliged to re-identify or confirm the dispositive relevance of issues that have been identified by the Tribunal as originally constituted, at least where it informs the applicant that the evidence from the first hearing is before it.

68. As the Full Court of the Federal Court stated in *SZPEZ* (at [38]) the Act requires review by the Tribunal, not review by a particular member. Section 425 requires identification of issues dispositive to the "*review*", that is the review initiated under s.414(1) culminating in a valid

decision in accordance with s.430. Their Honours stated in *SZPEZ* at [39]:

> *The expression does not depend upon the identity of the particular member constituting the Tribunal. Rather, it refers to the function of the Tribunal to review a decision. Until the Tribunal has made a valid decision on the review that has been initiated by a valid application under s 414, it has a duty to perform that particular review. An invalid decision by the Tribunal is no decision at all* ***but it does not follow that all steps and procedures taken in arriving at that invalid decision are themselves invalid****. The Tribunal still has before it the materials that were obtained when the decision that had been set aside was made.* (Emphasis added).

69. Hence, dispositive issues may be identified in a hearing conducted by the Tribunal as originally constituted, at least where the Tribunal as reconstituted holds a further hearing, thus affording the opportunity to the applicant to give evidence in relation to such issues. Such an approach is consistent with the fact that, as the High Court recognised in *SZBEL,* a delegate's decision may put an applicant on notice of relevant issues, notwithstanding that the Tribunal decision is made by a different decision-maker. So may the content of an earlier Tribunal hearing conducted as part of the same review, albeit by a different Tribunal member.

70. I note that this approach does not involve determination of whether the Tribunal as reconstituted is *obliged* to extend a second invitation under s.425 of the Act, as there was such a second invitation in this case.

71. In any event, if there was an obligation on the Tribunal as reconstituted to alert the applicant to the relevance of what occurred at the first Tribunal hearing, this was met by the Tribunal when it stated at the outset of the second hearing that the evidence that the applicant gave to the original Tribunal member was evidence that the second Tribunal member may consider as evidence before him. Clearly this indicated that the discussion of dispositive issues (in which the applicant was given an opportunity to explain aspects of her account in issue) was in evidence before the Tribunal. Such discussion put the applicant on notice that the credibility of her claims about events in China was in

issue and may be open to doubt from the perspective of the Tribunal however constituted (see *SZBEL* at [47]). Critically, she had a real opportunity to give evidence and present arguments on such matters in the course of the Tribunal review, including before the Tribunal as reconstituted, particularly as it could also be said that the first Tribunal decision (albeit invalid) sufficiently indicated and indeed made it clear to the applicant that the credibility of her claims about what occurred in China (and indeed all she had said in support of her application) was in issue on remittal, however the Tribunal was reconstituted (see *SZBEL* at [47]).

72. Finally I note that there may well be circumstances in which a reconstituted Tribunal does need to raise with an applicant particular issues not raised as matters of concern by a delegate or by the Tribunal as originally constituted. For example, if the Tribunal as originally constituted had said to an applicant that it accepted everything that was said, except on one matter and a subsequent Tribunal member took issue with what had previously had been accepted and decided the review on that basis, there may not have been compliance with s.425(1) if the Tribunal invited the applicant to a second hearing but said nothing about any possible doubt about matters previously accepted (see *SZBEL* at [37]). However that is not what occurred in this case.

73. No jurisdictional error has been established on the basis contended for under this ground.

Whether failure to consider relevant evidence

74. The third ground in the further amended application is that the Tribunal failed to properly consider the applicant's claim with respect to a well-founded fear of persecution in China should she return and therefore failed to comply with its obligations pursuant to ss.414 and 415 of the Migration Act. The particulars of this ground are as follows:

> *The Applicant's evidence to the Tribunal was that she had not changed her belief in Falun Gong, that she was no longer afraid and that she understood in Australia that she could enjoy the freedom of her belief.*
>
> *The Tribunal failed to ask:*

- *whether the Applicant would practise Falun Gong on her return to China;*
- *if the answer was no, why not and could the reason amount to relevant persecution such that the Applicant had a well-founded fear of persecution for a Convention reason should she return;*
- *If the answer was yes:*
  - *in what circumstances and why;*
  - *what would be the risk of the Applicant being discovered;*
  - *would any probable consequences associated with the risk of discovery amount to relevant persecution such that the Applicant had a well-founded fear of persecution for a Convention reason should she return.*

75. The applicant contended that the Tribunal erred in failing to consider the issue of what would happen on her return to China. This was said to be explicable by the stance it had taken in disregarding all evidence relating to the applicant's time in Australia and disregarding the evidence of the applicant's knowledge of Falun Gong for the purpose of assessing the sincerity of her adherence to Falun Gong. However it was contended that evidence arising from the applicant's activities in Australia and regarding her state of mind with respect to the practice of Falun Gong was relevant to what she would do when she returned to China (as distinct from what the authorities would do by reason of her conduct in Australia) and that the Tribunal's failure to consider this issue was a failure to exercise its jurisdiction (see *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473).

76. It was submitted that the Tribunal could not disregard the fact of the level of knowledge the applicant had obtained in relation to Falun Gong and her practical commitment at the time of the hearing and that it had to consider what she would do if she went back to China and what might happen to her on that basis. (See *NBKT* at [97] – [98] and

Wang v Minister for Immigration and Multicultural Affairs (2000) 105 FCR 548).

77. It was pointed out that the Tribunal had found that the applicant had engaged in conduct for the purpose of strengthening her claim, she had also indicated a belief that she could not remain silent and had to fight the persecution of Falun Gong and this was not considered by the Tribunal. It was submitted that even though the Tribunal had considered that the applicant's conduct in Australia was engaged in for the purpose of strengthening the claim, it did not find that such conduct did not happen or that the applicant did not have the knowledge of Falun Gong which she claimed and that as there was no finding that the applicant was not a genuine practitioner and that she did not genuinely have the knowledge she had, the Tribunal had to consider what would happen if she returned to China.

78. However the Tribunal reasons for decision reveal a comprehensive rejection of the applicant's claim to be a genuine Falun Gong practitioner based on an adverse credibility finding. The Tribunal found that the applicant was prepared to mislead it in the hope of obtaining a favourable outcome in the matter under review and that there was no basis for regarding her claim as having any basis in good faith. It did not accept that her claims about Falun Gong-related experiences in the PRC were "*plausible, consistent or credible*". The Tribunal went on to find not only that the applicant's conduct in Australia must be disregarded consistent with s.91R(3) of the Act, but also that she was an "*unreliable"* witness and on that basis it was not satisfied that she faced a real chance of Convention-related persecution in China.

79. While the Tribunal did not expressly say that the applicant was not a genuine practitioner of Falun Gong, this is apparent from a fair reading of the Tribunal decision, consistent with the approach in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Others* (1996) 185 CLR 259 and *SZCOQ v Minister for Immigration and Multicultural Affairs* [2007] FCAFC 9. *NBKT* does not assist the applicant because, contrary to the situation in that case, the Tribunal in this case was clearly of the view that the applicant was not genuine in

the sense of being a genuine Falun Gong practitioner. Further this is not a case in which a person decided to "*convert*" or adopt Falun Gong in Australia as was considered in *NBKT*.

80. As the Tribunal did not accept that the applicant was a genuine Falun Gong practitioner it was not necessary for it to consider whether she would face persecution in China by reason of her practice of Falun Gong should she return. In other words, because there was an adverse credibility finding involved in the rejection of the applicant's claims, the Tribunal did not have to ask the question or consider the issue raised in this ground in the manner discussed in *S395/2002*.

81. This means that it is not necessary to consider the recent decision of the Full Court of the Federal Court in *SZJGV v Minister for Immigration and Citizenship* [2008] FCAFC 105 to the effect that once conduct had been disregarded under s.91R(3) it could not lawfully be brought into account in determining whether a fear of persecution for a Convention reason was or was not well founded. Clearly this would apply to the knowledge gained by the applicant, but in any event the Tribunal did not accept the applicant's claims about the genuineness of her commitment to Falun Gong (cf *SZJGV* at [25]).

Whether the Tribunal failed to take relevant material into account

82. Ground four of the further amended application is that the Tribunal failed to take relevant material into account when it:

> *(a) treated the Applicant's evident familiarity with the five Falun Gong exercises and the principles behind them as incapable of arguing sincere adherence to the exercises or their principles.*
>
> *(b) disregarded all evidence of the Applicant's conduct in Australia for the purpose of assessing the whole of the Applicant's claim.*

83. The particulars to this part of the ground are as follows:

> *Section 91R(3) of the* Migration Act *applies to* sur place *claims. It does not exclude evidence for all purposes. It does not permit the Tribunal to disregard conduct in Australia which is evidence that the Applicant will act in a particular way on her return to China.*

84. Counsel for the applicant referred to the fact that at the hearing conducted by the Tribunal as reconstituted it assessed in some detail the applicant's knowledge of Falun Gong exercises and principles. In its reasons for decision it stated:

> *The Tribunal has considered the Applicant's evident familiarity with the five Falun Gong exercises and the principles behind them, but gives this evidence no weight as it does not argue sincere adherence to the exercises or there* (sic) *principles ...*

85. It was contended that this must be taken as a statement that the Tribunal did not consider a person's knowledge of Falun Gong as capable of being evidence of sincere adherence and therefore that it was not relevant to that issue. It was acknowledged that there was another aspect to the Tribunal reasoning in the sentence in issue, in that the Tribunal continued "*and does not help to argue that the Applicant was in any way familiar with Falun Gong culture prior to her arrival in Australia in June 2004*". However it was submitted that the first observation was a distinct aspect of the Tribunal's reasoning (a distinct thought) about the evidence of the applicant's familiarity with Falun Gong exercises and principles and that this part of its conclusion failed to take into account relevant information.

86. The submission was put on the basis that a person's knowledge of the practice and principles of a religion such as Falun Gong must be relevant to the question of whether or not the person was an adherent of that religion, consistent with what was said by the Full Court of the Federal Court in *SBCC v Minister for Immigration & Multicultural Affairs* [2006] FCAFC 129 at [45] as follows:

> *… the exploration of a person's religious knowledge in determining whether he or she is an adherent to a particular religion ... provides a rational foundation for determining whether a person's claim to profess a particular religion is genuine.*

87. It was pointed out that the Tribunal accepted that the applicant had introduced herself to the Hurstville Falun Gong group or something like it in mid-2004, that she had attended the Parramatta Falun Gong study group, albeit not before November 2004. While the Tribunal took issue with the genuineness of the applicant's behaviour in participating in such activities, it did accept that she had engaged in the practice of Falun Gong and in the study of Falun Gong. It was submitted that it was not open to the Tribunal to find that an applicant's evident familiarity with Falun Gong exercises and the principles behind them had no weight and could not be proof of "*sincere adherence*". While it was acknowledged that findings as to whether or not the applicant had conducted herself for a genuine purpose or in good faith were relevant to an assessment of her purpose in engaging in conduct, such findings were said not to be relevant in relation to whether or not she had fabricated the evidence of such participation.

88. It was also contended that it was clear at the time of the second Tribunal hearing that the applicant was a Falun Gong practitioner (albeit the Tribunal was not satisfied that the reason she had become a practitioner was not for the purpose of strengthening her claim). In these circumstances it was said to be necessary for the Tribunal to have regard to her evidence of familiarity with Falun Gong exercises and principles as relevant as to whether or not she sincerely adhered to the Falun Gong religion. Its failure to do so was said to result in jurisdictional error (*Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323).

89. The second aspect of this ground is a contention that the Tribunal erred in disregarding evidence arising out of the applicant's conduct in Australia in relation to what would occur if she returned to China. The applicant submitted that s.91R(3) of the Act does not provide that all evidence relating to a person's time in Australia is to be disregarded for all purposes and that the applicant's claimed belief at the time of the Tribunal hearing that she could not remain silent and must fight the persecution of Falun Gong members meant that the Tribunal had to consider what she would do on her return to China.

90. It was contended that the applicant's level of knowledge and practical commitment was relevant to be taken into account in relation to a

determination of what would occur on her return to China. Thus it was submitted that the Tribunal had erroneously applied s.91R(3) and had then failed to ask the question as to what would happen if the applicant returned to China and what would happen in terms of the attitude of Chinese authorities to her. It was said that in addressing that issue the Tribunal ought to have considered all the evidence of the applicant's level of knowledge of Falun Gong exercises and principles at the time of the decision and her practical commitment to Falun Gong as indicated by her evidence at the hearing (See *NBKT* at [86] – [99]).

91. However, as counsel for the first respondent contended, the Tribunal's statement in relation to "*sincere adherence*" has to be read in context. In particular the sentence in which this expression appears must be read as a whole and in the context of the Tribunal's findings and reasons. Read in this way it is apparent that the Tribunal was of the view that the applicant's familiarity with Falun Gong exercises and principles could not be used as evidence of sincere adherence *prior to her arrival* in Australia in June 2004 and her protection visa application of 2 July 2004. This statement does not amount to a finding that evidence of familiarity with Falun Gong could not be evidence of a person's sincere adherence to Falun Gong.

92. As the Tribunal stated at the commencement of the paragraph in question, it was addressing the issue of whether or not the applicant had applied for protection in good faith, notwithstanding the evidence of afterthought (that being a reference to its earlier finding that the applicant did not flee China seeking protection and that she applied for protection in Australia "*as an afterthought*").

93. The Tribunal accepted that the applicant had knowledge of Falun Gong exercises and the basic principles behind those exercises. While it also accepted that she had "*some involvement*" with Falun Gong practitioners in Hurstville up to the time she gave evidence to the Tribunal as originally constituted on 21 October 2004 and that she subsequently (but not before that time) joined a Falun Gong study group in Parramatta, in making the findings in question it gave weight to her evidence that she came to Australia to do business, the fact that she did so and that she only decided to claim protection in Australia after she saw practitioners doing exercises "***after*** *she came to Australia*

for another purpose" which she then went on to pursue. Based on these factors the Tribunal concluded that the applicant "*did not flee the PRC seeking protection and that she applied for protection in Australia as an afterthought*".

94. Nonetheless the Tribunal considered whether the applicant had applied for protection (on 2 July 2004) in good faith – that is as a genuine Falun Gong practitioner on the basis of her claimed experiences before the time of the protection visa application. It was in that context that the Tribunal stated:

> *In assessing whether or not the Applicant applied for protection in good faith, notwithstanding the evidence of afterthought, the Tribunal has taken a number of factors into account.* ***The Tribunal has considered the Applicant's evident familiarity with the five Falun Gong exercises and the principles behind them, but gives this evidence no weight as it does not argue sincere adherence to the exercises of there*** **(sic)** ***principles, and does not help to argue that the Applicant was in any way familiar with Falun Gong culture prior to her arrival in Australia in June 2004.*** *The Tribunal has considered the Applicant's oral evidence to the previously-constituted Tribunal about her involvement in the alcohol trade over several years, right up to the time she left the PRC for Australia, and has considered her claim about her career being interrupted by a period in detention for breaching the ban against Falun Gong. The Tribunal finds that the Applicant has provided no plausible, consistent evidence to support her claim about having been detained. The Tribunal has considered the Applicant's claim to the previously-constituted Tribunal about "resuming" work in her usual fiend* (sic) *of business and finds that her explanation for the ease with which she "resumed" that work, in the claimed circumstances, to be an implausible one, relying on a selective and inconsistent argument regarding the effectiveness of contacts in the PRC. The Tribunal has considered the Applicant's claims about the reasons for her divorce and finds that it cannot give these claims any weight. The Tribunal does not accept on the evidence before it that the Applicant's divorce had anything to do with the Convention-related factors cited by her. The Tribunal gives weight to the Applicant's evidence to the previously-constituted Tribunal in which she indicated that her family not living under any relevant pressure in the PRC.* (Emphasis added.)

95. It is apparent from the context in which the finding in issue appears that the Tribunal was considering whether or not the applicant was in fact a genuine Falun Gong practitioner in China. In this sense the reference to "*sincere*" involved consideration of whether the applicant's claimed adherence was "*genuine*". In that context, while there was evidence of the applicant's familiarity with Falun Gong exercises and principles, the Tribunal was of the view this did not demonstrate sincere adherence *at the time of the protection visa application.*

96. As counsel for the first respondent contended the Court should not be concerned with mere unhappy phrasing (*Wu Shan Liang* at 272). It is apparent that the Tribunal was considering whether or not the applicant was a genuine Falun Gong practitioner at the time of the protection visa application as the issue of "*good faith*" clearly related to that application. (Also see *SZCOQ v Minister for Immigration & Multicultural & Indigenous Affairs* [2007] FCAFC 9) The Tribunal did not err in the manner contended in ground 4(a). It did not treat the applicant's evidence of familiarity with Falun Gong exercises and principles as incapable of arguing sincere adherence to such principles. I note that this part of the Tribunal's reasoning did not involve the Tribunal having regard to conduct in Australia despite concluding that such conduct must be disregarded under s.91R(3) as considered in *SZJGV v Minister for Immigration and Citizenship* [2008] FCAFC 105.

97. In relation to the submission that the Tribunal failed to take relevant material into account when it "*disregarded*" all evidence of the applicant's conduct in Australia for the purpose of assessing the whole of her claim, as discussed above the Tribunal did not accept that the applicant was a genuine Falun Gong practitioner in China or that she became one in Australia. Hence this case is distinguishable from the circumstances considered in *NBKT* at [91] – [96] as the genuineness of the applicant's conduct and also of her claimed beliefs was rejected. This is apparent from the Tribunal's rejection of any possibility that the applicant's activities in Australia had any ground in good faith. Not only did the Tribunal find that it did not accept that the applicant joined the Hurstville group for the reasons claimed, it was also not persuaded that her activities between July and October 2004 as attested to in a witness statement were other than opportunistic. While it had regard to statutory declarations about her involvement in the Parramatta group

and accepted she joined the group and studied Falun Gong teaching there, it found that the statements did not support her claims about joining the Parramatta group before the first Tribunal hearing. It did not accept that she joined the Parramatta group before November 2004. It did not accept that the applicant joined the Parramatta group "*for the genuine reasons claimed*" and found that her claim about her activity having intensified in November 2004 was "*further evidence of opportunism and afterthought on her part*". The Tribunal concluded ultimately that the applicant was an unreliable witness.

98. In these circumstances, the Tribunal addressed the applicant's conduct in Australia but disregarded it under s.91R(3) as she had not satisfied it that she engaged in such conduct otherwise than for the purpose of strengthening her claims to be a refugee. It was not only acting in accordance with s.91R(3) in its assessment, but also was not obliged to consider the evidence of the applicant's conduct in Australia in relation to what would occur if she returned to China. Indeed, as the Full Court of the Federal Court has now made clear in *SZJGV* at [20] – [27], if it had considered her conduct in Australia as part of the reason for concluding she was not a refugee it would have fallen into error. As the Tribunal was not persuaded of the genuineness of the applicant's claimed beliefs, it is not necessary to consider whether a distinction can be drawn between having regard to conduct within s.91R(3) and beliefs or convictions for the purpose of considering whether an applicant has a well-founded fear of persecution.

99. No jurisdictional error has been established on the basis contended for in ground four.

100. As no jurisdictional error has been established the application must be dismissed.

I certify that the preceding one hundred (100) paragraphs are a true copy of the reasons for judgment of Barnes FM

Associate:

Date: 30 July 2008