FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZILQ v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 483*

MIGRATION – RRT decision – Chinese applicant claiming persecution for Christian religion – previous Tribunal decision quashed – no obligation to invite to second hearing – s.424A letter sufficiently sent to agent's facsimile number – no warning required of s.91R(3) issue concerning religious activities in Australia – interpreter at hearing not inadequate – application for judicial review dismissed.

Migration Act 1958 (Cth), ss.36, 91R, 91R(3), 412, 414A, 414A(1)(b), 415(2), 418(2), 422, 424A, 424A(1), 424A(2), 425, 425(1), 425(2), 430, 430(1), 441AA, 441A(5), 441G(1), 474(1), 476(1), 477(1), 477(2), 494B(5)
Migration Regulations 1994 (Cth), reg.5.02

Appellant P119/2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 230
Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576
Le v Minister for Immigration and Citizenship [2007] FCAFC 20
Liu & Anor v Minister for Immigration & Multicultural Affairs (2001) 113 FCR 541
Minister for Immigration & Multicultural Affairs v Wang (2003) 215 CLR 518
Minister for Immigration & Multicultural & Indigenous Affairs v SZFML & Anor (2006) 154 FCR 572
Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476
SAAP v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 215 ALR 162
Song & Anor v Minister for Immigration [2005] FMCA 685
SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs [2006] HCA 63
SZEPZ v Minister for Immigration & Anor [2005] FMCA 1614
SZEPZ v Minister for Immigration & Multicultural Affairs [2006] FCAFC 107
SZFAS v Minister for Immigration & Anor [2006] FMCA 1029
SZGNY v Minister for Immigration & Anor [2006] FMCA 1142
SZGNY v Minister for Immigration & Citizenship [2007] FCA 384
VWFY v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 1723

Applicant: SZILQ

First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG3769 of 2006
Judgment of:	Smith FM
Hearing date:	26 March 2007
Delivered at:	Sydney
Delivered on:	16 April 2007

REPRESENTATION

Counsel for the Applicant:	Mr M Jones
Solicitors for the Applicant:	Michael Jones, Solicitor
Counsel for the First Respondent:	Mr J Smith
Solicitors for the Respondents:	Clayton Utz

ORDERS

(1) The time for making the application provided by s.477(1) of the *Migration Act 1958* (Cth) is extended so as to include 15 December 2006.

(2) The application is dismissed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG3769 of 2006

SZILQ
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application filed on 15 December 2006 under s.476(1) of the *Migration Act 1958* (Cth) ("the Migration Act"), which seeks orders by way of judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") dated and handed down on 14 November 2006. The Tribunal affirmed a decision of a delegate made on 16 December 2005, which refused to grant a protection visa to the applicant.

2. Under s.476(1) the Court has "*the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution*", but its powers are confined by s.474(1) so that I do not have power to set aside the Tribunal's decision unless I am satisfied that it was affected by jurisdictional error (see *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476). I do not have power myself to decide whether the applicant's claims should be believed, nor whether he qualifies for a refugee visa.

3. The applicant was held in immigration detention at the time of lodgement of his protection visa application on 29 November 2005, and has subsequently continued to be detained. Expedited procedures have therefore been adopted in the Tribunal and in this Court. However, the proceedings in both places have been protracted by reason of an earlier decision of the Tribunal, made on 17 February 2006, which was challenged in this Court and was set aside under consent orders made on 13 July 2006.

4. The first decision of the Tribunal is in evidence before me, and I am advised by the Minister's counsel that its quashing followed a concession that it revealed a failure by the Tribunal to follow s.424A(1) of the Migration Act in relation to some information relied upon by it. It is unnecessary for me to examine this further, since it is not contended that the present Tribunal fell into the same error.

5. The present application to the Court was filed three days after the expiry of the 28 day period provided under s.477(1) of the Migration Act. The Minister's response took this point, and that the applicant had not applied for an extension of time under s.477(2). However, at the first court date before me on 17 January 2007, I allowed an oral application to amend the original application to include an application to extend. A written application for an extension was also filed within the period required under s.477(2). The Minister's counsel did not oppose my granting an extension of time. Taking into consideration the interests of the administration of justice, I consider that it is appropriate to extend time, noting the very brief period of extension required, and the applicant's explanation that it resulted from difficulties encountered when sending facsimiles to the Federal Court Registry from Villawood detention centre.

The applicant's refugee claims

6. The applicant arrived in Australia in June 2004 on a business visa. He overstayed his visa, and was first taken into detention in August 2004. He was released on a bridging visa granted on condition that he would arrange his own departure. He did not leave, but was taken into detention again in November 2005. He was then referred to a

migration agent, Ms Stotz, for assistance in making a protection visa application. This was lodged on 29 November 2005.

7. The application explained the applicant's reasons for leaving his claimed country of nationality, the People's Republic of China, and seeking protection in Australia:

> *I am a Christian. My family members have been Christians for a few generations. In my hometown, in my village, there are only 2 religions: Catholic and Christian. In 2002 we wanted to renovate the existing Church, but we were not allowed. The PSB will not allow us to do this and decided to demolish the Church.*
>
> *When the PSB came to demolish the Church we argued with them and then they arrested us. There were 30 or 40 people arrested. We were trying to stop them from demolishing our Church. We fought with them – throwing bricks.*
>
> *I was not arrested, but the PSB came to my house a few days later looking for me, but they did not find me.*
>
> *They came to my house again and this second time they arrested me. I was detained for 7 months.*
>
> *They took me to Court for sentencing. On the way to Court I escaped. I was then arrested again. They arrested me for 2 reasons: for the events that took place when we did not want our Church to be demolished and because of the One-Child Policy. I have 3 children and this is not allowed in China.*
>
> *They took me to Court and I was sentenced to 6 years imprisonment. When they were taking me from Court I escaped again.*
>
> *I hid myself in different places until I was able to come to Australia.*

8. A delegate refused the application on 16 December 2005. In relation to the claimed fear under the Chinese one-child policy, the delegate found that this arose out of the enforcement of a law of general application and was "*outside the Convention*". In relation to the applicant's claims to fear harm as a result of charges arising from an altercation over the demolition of a church, the delegate said that he was "*not satisfied that his claimed fear of harm for reason of his religion is well-founded*". The delegate noted that the applicant had obtained a passport in 2003,

after the claimed events of 2002, and had left China legally through Shanghai in his own name and photographic identity. The delegate considered it *"implausible that a person who has been convicted of a crime and subsequently sentenced to a lengthy term of imprisonment would have been granted an exit visa"*, and was not satisfied *"that the applicant is wanted by the authorities as he claims"*.

9. The applicant's application to the Tribunal for review was lodged on 18 December 2005, and indicated that the applicant would be assisted by "Legal Aid". However, on 23 December 2005, Ms Stotz sent to the Tribunal by facsimile a letter confirming her appointment as the applicant's agent in the proceedings. This said: *"following our telephone conversation yesterday I am forwarding Form 956"*. The enclosed form was a copy of her original *"appointment of a migration agent"* given to the Department when lodging the protection visa application. This contained a tick in a box indicating that she did not agree *"to the department communicating with you by fax, e-mail or other electronic means"*, and a request by her: *"please forward all decisions by Registered Post"*. However, at all times, both before and after the making of the first decision of the Tribunal, she corresponded with the Tribunal on behalf of the applicant only by way of facsimile to and from a facsimile number appearing on her business letterhead.

10. On 6 February 2006, the applicant and his agent attended a hearing conducted by the Tribunal as originally constituted. Shortly before the hearing, the agent forwarded a general submission dealing with human rights in China. The member who ultimately decided the matter after it was remitted by the Court, said that she *"listened to the recording"* of that hearing, and she set out her own summary of the hearing in her statement of reasons. A transcript of the tape is in evidence before the Court, and confirms the accuracy and sufficiency of her summary of what was said in English. I shall consider, below, the sufficiency of the translation service provided on that occasion.

11. At the hearing, the applicant said that his claimed detention was not because he breached the one child policy, and he said *"not really"* when asked if he feared anything because he breached the one child policy. He maintained the claim that in 2002 he was arrested, detained for more than two months, and sentenced to six years jail *"for the*

fighting" when he tried to protect his church from demolition. However, he claimed to have been arrested and to have escaped only once. He said that his family had been a Christian family for generations, but *"asked several times whether he had been baptised, the applicant did not understand what was meant by this"*, and he showed a poor knowledge of the Bible. He claimed to have attended a church in Cabramatta, but could not identify it and produced no corroboration. The Tribunal asked him to explain *"how was it possible that he had been issued with a passport in his own name and with all his details in it and allowed to leave China, even though he had been sentenced to 6 years prison"*. The applicant claimed this had been done by bribery. The applicant's agent was given the opportunity to make a post-hearing submission, but did not do this.

12. On 3 October 2006, following the remitter of the matter, the Tribunal served a s.424A(1) invitation to comment on information concerning the applicant's travel to Australia, the delay in making his protection visa claims, and the inconsistency between his oral evidence and his protection visa application statement as to the number of times that he was arrested and escaped.

13. The letter also informed the applicant that a new member of the Tribunal would listen to the tape of the previous hearing, and might not invite him to another hearing. His agent's response requested a further hearing, including upon a claim that the applicant needed a Fuzhou interpreter, rather than the Mandarin interpreter who had been provided previously. In response, a letter from the Tribunal said:

> *In your letter dated 19 October 2006, you make reference to a request that a Fuzhou interpreter be provided should the Tribunal grant you a second hearing. The Tribunal notes that you were invited to attend the Tribunal on 6 February 2006. The invitation to a hearing was addressed to your current advisor and a response to the hearing invitation was sent by facsimile to the Tribunal. In response to the inquiry as to whether an interpreter was required, the response states that an interpreter in the Mandarin language was required. The Presiding Member has listened to a portion of the Tribunal hearing tape. The previous Presiding Member asked you what languages you spoke and the reply was Mandarin. There was no reference to the Fuzhou language. You were also asked if you had any difficulty with the interpreter and you replied that you did not. The Tribunal notes*

> *that the interpreter issue was not raised by you before the previously constituted Tribunal or the Federal Court.*

14. The Tribunal said that it was not obliged to invite the applicant to a second hearing, and that *"unless your responses to the Tribunal's s424A letter satisfy the Tribunal it is sufficiently reasonable or otherwise necessary to do so, or for some other reason the present Tribunal believes it is sufficiently reasonable or otherwise necessary to do so, the Tribunal as presently constituted does not intend to offer you a further hearing"*.

15. The agent's response to the s.424A invitation was forwarded by fax on 8 November 2006. It addressed the matters raised, and maintained that the applicant *"did have problems communicating with the Mandarin Interpreter at the Hearing"* and that there were other reasons for providing a second hearing. The letter enclosed a letter in Chinese from the applicant's church in China. According to a translation obtained by the Tribunal, this said that he *"accepted the belief of Christianity more than ten years ago and the whole family became followers of Christianity"*. It said the applicant was baptised in 1990, and had fled to Australia after *"brawls in the Church"* with his relations who *"were always trying to stop his belief"*. A letter was also enclosed from a pastor of the *"Hillsong emerge centre"* which said:

> *Our team from the Hillsong Church, had been conducting Sunday Church services and a mid week bible studies in the [Villawood Immigration Detention] Centre, of which Mr. [Applicant] had been regularly attending during the inside the Detention. My understanding is that he had been in the country for quite some time, and detained in Villawood over a year. I had a privilege of baptizing him at the centre, and quite encouraged to see how his faith had grown tremendously.*

The Tribunal's reasons

16. In its statement of reasons, the Tribunal traced the above history of the matter. In relation to holding a second hearing, the Tribunal said:

> *The Act provides that the Tribunal must invite an applicant to appear before it and present arguments (s.425(1)). The Tribunal discharged this obligation on 6 February 2006, and the applicant took up the opportunity to give oral evidence on the matters*

raised in his Protection Visa application. As noted above, the Tribunal (as currently constituted) has listened to the recording of the hearing of 6 February 2006.

The Tribunal considered whether or not it was desirable to invite the applicant to a further hearing. It was with this issue in mind that it asked the applicant to respond to issues relating to s.424A of the Act and to submit all further evidence or submissions he wished the Tribunal to consider. Had the applicant provided in his response details of fears other than those contained in his Protection Visa application and discussed during the hearing on 6 February 2006, the Tribunal would have invited him to a further hearing at which he could elaborate on them. However, in the absence of any such fears the Tribunal considers it unnecessary to have a second hearing, as it considers the issues raised in the Protection Visa application were adequately canvassed and explored at the hearing in February 2006.

The Tribunal, in its discretion has decided not to hold a further hearing. The matter has therefore been decided on the basis of the information now before the Tribunal.

17. The Tribunal's *"Findings and Reasons"* commenced by making a general finding about the applicant's credibility. It said:

> *The applicant's claims are entirely dependent upon an acceptance of him as a credible witness. The applicant was not generally credible and the Tribunal does not regard the inconsistencies and other matters dealt with above as explicable in terms of any difficulty he faces as an asylum seeker. The Tribunal does not accept the applicant as credible and consequentially rejects all of his material claims.*

18. In relation to the applicant's claims concerning the one-child policy, the Tribunal noted the applicant's evidence to the hearing, and said that it was satisfied *"that there is not a real chance that the applicant would be subjected to serious harm amounting to persecution if he returned to China now or in the reasonably foreseeable future because of breaching the One-Child Policy"*.

19. In relation to his claims based on religion, the Tribunal referred to difficulties in the applicant's evidence, including his understanding of baptism, his knowledge of the Bible, his delay in lodging a protection visa application, and his ability to leave China on his own passport.

The Tribunal was not satisfied that he was baptised in China, nor that he left China because of a fear of persecution.

20. In relation to his Christian activities in Australia, the Tribunal said:

> *The applicant during his evidence before the Tribunal in February 2006 stated that he read the Bible every day at the Detention Centre. He also produced a leaflet written in Chinese characters which he claimed had been given to him at a service at Villawood. On 3 November 2006 the applicant forwarded to the Tribunal a letter dated 22 September 2006 from [a pastor] from the Hillsong Church. The pastor refers to baptising the applicant at Villawood. As to whether circumstances have so changed since the applicant's departure from China that now he could be said to have a well-founded fear of Convention related persecution, I accept that he has recently been baptised as a Christian in Australia. However, in determining whether a person has a well-founded fear of being persecuted for one or more of the Convention reasons the Minister must disregard any conduct engaged in by the person in Australia unless he or she satisfies the Minister that he or she engaged in the conduct otherwise then for the purpose of strengthening a claim to be a refugee (see section 91R(3) of the Act).*
>
> *In the present case I am not satisfied that the applicant attended services and Bible studies and was baptised as a Christian in Australia (Villawood) other than for the purpose of strengthening his claim to be a refugee. I find that the applicant has involved himself in these Christian activities at Villawood for the sole purpose of enhancing his claim to be refugee. Given that I have not accepted that his Christian activities in Australia are genuine, and have found that the applicant was not involved in Christian activities in China, there is nothing to suggest he will continue to practice if he returns to China, nor that the baptism involvement with Christian services at Villawood Detention Centre will have any adverse consequences for him in China.*

21. The Tribunal referred to the Chinese documents forwarded to the Tribunal, and said:

> *In making the above findings I have had regard to the documents forwarded by the applicant which attest to his being a Christian (p 13 and 14 above). However, given the degree of the credibility problems with the evidence of the applicant, I cannot give any weight to the statements provided in this document. In light of the fundamental lack of credibility within the applicant's evidence I*

am not satisfied that the statements relating to the applicant's material claims in the documents are true.

22. It concluded:

> *Overall, I do not accept the applicant was a member of any particular Christian church in China. I am not satisfied that the applicant was detained, charged and sentenced to a 6 year term of imprisonment for any Convention reason. I am not satisfied that the applicant was forced to go into hiding because of a fear of persecution. I do not accept that the applicant was or currently is of any adverse interest to the Chinese authorities. There is no credible evidence upon which I could find that the applicant stands at risk of suffering serious harm in the reasonably foreseeable future if he returns to China.*
>
> *Accordingly, I am unable to find that the applicant has a well founded fear of persecution for a Convention reason.*

23. The applicant's solicitor argued four grounds of review which were set out in a further amended application filed at the hearing. They challenged some aspects of the above procedure and reasoning. I shall address each of them separately.

Ground 1

24. Ground 1 contends that the Tribunal made a jurisdictional error "*by failing to invite the applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review*". The applicant contends under this ground that the provisions of s.425(1) of the Migration Act established a duty on the Tribunal which was mandatory, consequent upon the remitter of the matter after the setting aside of the first decision of the Tribunal. The Tribunal therefore erred by considering that it had a discretion whether to invite the applicant to a second hearing.

25. I note that it was not contended that, if the Tribunal were correct in thinking that the power to invite the applicant to a second hearing was discretionary, its discretion miscarried by reason of any failure to consider relevant matters or otherwise.

26. Section 425 provides:

Tribunal must invite applicant to appear

(1) 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.

(2) Subsection (1) does not apply if:

(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or

(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or

(c) subsection 424C(1) or (2) applies to the applicant.

(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.

27. The applicant's solicitor argued that s.425 required the Tribunal, after the quashing of an earlier decision, to conduct a further hearing in every case to which s.425(2) did not apply. He referred me to *Minister for Immigration & Multicultural Affairs v Wang* (2003) 215 CLR 518 at [68], where Gummow and Hayne JJ referred to the effect of an order setting aside a Tribunal decision under the Federal Court's previous judicial review jurisdiction. They said:

> *Whether any findings from the first review would be preserved would entirely depend upon the view formed by the Tribunal in conducting the second review. On that second review the respondent, as applicant for a visa, could be expected to appear to give evidence and present arguments (s 425), and, so far as the Court's orders were concerned, it was a review to be conducted in the ordinary way. …*

However, it was not an issue in *Wang* whether the Tribunal would be obliged in every case to invite an applicant to a further hearing, and I cannot read the above statement as suggesting this.

28. In my opinion, the issue is to be determined by reference to the reasoning accepted by the Full Court in *SZEPZ v Minister for Immigration & Multicultural Affairs* [2006] FCAFC 107. That case concerned whether the obligation to invite written comments on

adverse information under s.424A(1) was required to be repeated after the quashing of an earlier Tribunal decision. As with s.425, the obligation is expressed to be on *"the Tribunal"*. At first instance, in *SZEPZ v Minister for Immigration & Anor* [2005] FMCA 1614 at [16]-[20], I inferred in a situation such as the present that the Tribunal had been reconstituted under s.422, and that the record which could be addressed by the reconstituted Tribunal included a s.424A notice and the applicant's response given before the setting aside of the previous decision.

29. On appeal, the Full Court did not find it necessary to reach a conclusion whether I was correct in this reasoning, but it accepted my alternative reasoning that the "review" which was being conducted by the reconstituted Tribunal was the review originally initiated by the application for review. At [39] their Honours said:

> *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.*

30. I have followed this reasoning, in a case where the Tribunal took into account the previous Tribunal's account of a hearing conducted by it under s.425 (see *SZGNY v Minister for Immigration & Anor* [2006] FMCA 1142 at [18]-[25], upheld by Emmett J in *SZGNY v Minister for Immigration & Citizenship* [2007] FCA 384).

31. The applicant's solicitor sought to distinguish *SZEPZ* on the basis that it concerned the performance by a Tribunal of its obligations under s.424A and not s.425. However, I do not consider that this distinction allows me to avoid the reasoning adopted by the Full Court. This turned upon an analysis of the "review" proceeding before the Tribunal, as one which commenced with the filing of a valid application for review under s.412 and was concluded only when a valid decision on that review was made under ss.415(2) and 430. Within that proceeding, the mandatory procedural duties of "the Tribunal" which, on their proper construction arise only once in a

review proceeding, may be satisfied at any point of time during the review proceeding, regardless of whether this occurs before or after the Tribunal is reconstituted after the quashing of an invalid decision which purported to conclude the review. Applying this analysis, I can see no relevant distinction between the Tribunal's duties under ss.424A and 425.

32. The solicitor for the applicant also sought to distinguish *SZEPZ*, by reference to a provision which was inserted into the Migration Act by recent amendments. This imposes a 90 day target for the determination of a proceeding before the Tribunal. Section 414A now provides:

> ***Period within which Refugee Review Tribunal must review decision on protection visas***
>
> *(1) If an application for review of an RRT-reviewable decision:*
>
> *(a) was validly made under section 412; or*
>
> *(b) was remitted by any court to the Refugee Review Tribunal for reconsideration;*
>
> *then the Refugee Review Tribunal must review the decision under section 414 and record its decision under section 430 within 90 days starting on the day on which the Secretary gave the Registrar the documents that subsection 418(2) requires the Secretary to give to the Registrar.*
>
> *(2) Failure to comply with this section does not affect the validity of a decision made under section 415 on an application for review of an RRT-reviewable decision.*

33. I can find nothing in the language of this provision which requires a reconsideration of the analysis of a review proceeding provided by *SZEPZ*. I cannot read s.414A as raising a new obligation on the Secretary under s.418(2) in cases where the Secretary has already performed that obligation prior to a remittal by a Court, nor an implication that any other procedural step in the proceedings on a review which occurred prior to the remission of a matter must be repeated after the remission. The only intention of the amending provision which I can perceive in paragraph (b) of s.414A(1) is that a 90 day target is to continue to run in such a case.

34. Section 414A appears poorly drafted, and to give reasonable effect to its intention it may be necessary to find an implication in s.414A that the 90 day period arising under (b) is to be calculated without reference to the period before the remitting order or without reference to the period of judicial review. However, even if these implications are not open, and even if it might appear unlikely in many cases that the resumed review could be concluded within the literally described 90 day period, I am unable to find in s.414A an indication that the review proceeding which the Tribunal is required to continue by reason of a court order is to be deemed to have been initiated afresh, and that the resumed proceeding is to be conducted in disregard of all the proceedings leading to the decision which was quashed.

35. Nor, in my opinion, did the terms of the court's order for remission in the present case give rise to any duty to perform duties which had previously been validly performed in the review proceeding. In the present case, the terms of the order for a writ of mandamus were that the Tribunal "*redetermine the matter according to law*". This required only that the Tribunal should make a decision on the review under ss.415(2) and 430(1) which validly determined the matter. It made no requirement which is not otherwise found in the legislation as to any procedure to be followed, or repeated, before the ordered redetermination was to be made.

36. In my opinion, the Tribunal in the present case performed its duty to send an invitation under s.425(1) in relation to the applicant's application for review when it invited the applicant to the hearing held on 6 February 2006. The relevant precondition on jurisdiction was therefore performed at that time (cf. *Minister for Immigration & Multicultural & Indigenous Affairs v SZFML & Anor* (2006) 154 FCR 572 at [58]-[62]). In my opinion, the Tribunal was correct in thinking that, although it had a discretion to invite the applicant to a further hearing, it was not bound to do this (cf. *SZFML* (supra) at [82], *Liu & Anor v Minister for Immigration & Multicultural Affairs* (2001) 113 FCR 541 at [54], and *SZFAS v Minister for Immigration & Anor* [2006] FMCA 1029 at [17])).

37. I therefore would not accept this ground of review.

Ground 2

38. This ground contends that the Tribunal's invitation sent on 3 October 2006 under s.424A(1) (see above at [12]) was not served in the manner required by s.424A(2) because it was sent to the applicant's agent's facsimile number.

39. Summarising the relevant facts:

- The applicant's application to the Tribunal did not appoint an authorised recipient, and requested that correspondence should be sent to him at Villawood.
- On 23 December 2005, the Tribunal received a letter from the applicant's original migration agent, confirming her appointment for the purposes of the review proceeding. This was received by facsimile, and showed the agent's business address, including a facsimile number, on her letterhead.
- The letter enclosed a copy of the notice of appointment previously given to the Department, which had suggested that the Department should not communicate with her electronically (see above at [9]).
- In all the subsequent extensive correspondence between the agent and the Tribunal, the agent sent letters to the Tribunal by facsimile, and the Tribunal sent all its communications to the agent's identified facsimile number. No objection nor request for any alternative mode of correspondence was ever requested by the agent.
- The agent undoubtedly received the s.424A invitation sent by facsimile, since this gave rise to further correspondence concerning an extension of time for response and other matters. All this was conduced by facsimile.

40. The applicant's solicitor relied upon the agent's denial of agreement to communicating with the Department by electronic means, and argued that this meant that the Tribunal had invalidly served its s.424A invitation on the applicant's agent by facsimile. He argued that this amounted to jurisdictional error, by reason of the reasoning in *SAAP v*

Minister for Immigration & Multicultural & Indigenous Affairs (2005) 215 ALR 162.

41. Section 424A(2) provides:

> *(2) The information and invitation must be given to the applicant:*
>
> *(a) except where paragraph (b) applies–by one of the methods specified in section 441A; or*
>
> *(b) if the applicant is in immigration detention–by a method prescribed for the purposes of giving documents to such a person.*

42. In the present case, the *"method prescribed for the purposes of giving documents"* to a person in immigration detention, was found in reg.5.02 of the *Migration Regulations 1994* (Cth), which provided:

> ***Service of document on person in immigration detention***
>
> *For the purposes of the Act and these Regulations, a document to be served on a person in immigration detention may be served by giving it to the person himself or herself, or to another person authorised by him or her to receive documents on his or her behalf.*

43. In the absence of any specific procedure defining how the Tribunal was to "give" the s.424A invitation to the applicant's authorised recipient, s.441AA gave a general discretion:

> ***Giving documents by Tribunal where no requirement to do so by section 441A or 441B method***
>
> *If:*
>
> *(a) a provision of this Act or the regulations requires or permits the Tribunal to give a document to a person; and*
>
> *(b) the provision does not state that the document must be given:*
>
> *(i) by one of the methods specified in section 441A or 441B; or*

(ii) by a method prescribed for the purposes of giving documents to a person in immigration detention;

the Tribunal may give the document to the person by any method that it considers appropriate (which may be one of the methods mentioned in subparagraph (b)(i) or (ii) of this section).

Note: Under section 441G an applicant may give the Tribunal the name of an authorised recipient who is to receive documents on the applicant's behalf.

44. This provision for "giving" communications to the applicant, applied also to giving them to an authorised recipient "*instead of the applicant*" under s.441G(1) (see *Le v Minister for Immigration and Citizenship* [2007] FCAFC 20 at [19], and *Song & Anor v Minister for Immigration* [2005] FMCA 685 at [33]).

45. Counsel for the Minister submitted that s.441AA gave the Tribunal power to choose any appropriate method of communicating to the applicant's agent, including by facsimile to the number shown on her letterhead, if it thought that this was "appropriate". In circumstances where this had become the usual and apparently reliable mode of communication, it was clearly open to the Tribunal to adopt that opinion. I accept this submission.

46. I also accept his alternative submission, which assumed that the Tribunal might have considered it appropriate to adopt the method set out in s.441A(5) (cf. *Le v Minister for Immigration and Citizenship* [2007] FCAFC 20 at [22]). This provided:

Transmission by fax, e-mail or other electronic means

(5) Another method consists of a member, the Registrar or an officer of the Tribunal, transmitting the document by:

(a) fax; or

(b) e-mail; or

(c) other electronic means;

to the last fax number, e-mail address or other electronic address, as the case may be, provided to the Tribunal by the recipient in connection with the review.

47. Counsel for the Minister argued that in the present case, the repeated tendering to the Tribunal by the applicant's agent of her office facsimile number, and her failure to voice any objection to its communicating with her at that number, amounted to that number being *"provided to the Tribunal by the recipient in connection with the review"*. I accept that submission. The words *"provided … in connection with the review"* are broad, and do not carry the implication of an agreed or designated address for receiving documents, which is found, for example, in another service provision of the Migration Act, s.494B(5) which refers to a facsimile number *"provided to the Minister by the recipient for the purposes of receiving documents"*.

48. Moreover, even if it were necessary to find consent by the agent for the Tribunal to send correspondence to her facsimile number, I consider that this was implicit in the manner in which the agent had conducted her correspondence with the Tribunal prior to the sending of the s.424A(1) invitation. I do not consider that the fact that her original notification of her address for service to the Department did not provide an agreed facsimile number and requested the Department that "all decisions" should be "forwarded by registered post", requires a different conclusion.

49. For all these reasons I would reject this ground.

Ground 3

50. This ground contends:

> *The Tribunal committed further jurisdictional error by making a finding under s 91R(3) of the Act in relation to the applicant's conversion to Christianity without having any evidence of such a finding and without having put such an allegation to the applicant.*

51. As developed by the applicant's solicitor, the ground challenged the Tribunal's reasoning in relation to the applicant's evidence concerning his Christian activities in Australia. It was argued that the applicant was never put on notice, whether at the first hearing, or in the Tribunal's s.424A invitation, or in any further notice or hearing which the Tribunal might have conducted, that the purposes for which he

participated in Christian activities at Villawood was a matter upon which the Tribunal might make adverse findings in terms of s.91R(3).

52. Section 91R(3) provides:

> *(3) For the purposes of the application of this Act and the regulations to a particular person:*
>
> *(a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;*
>
> *disregard any conduct engaged in by the person in Australia unless:*
>
> *(b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.*

53. I have extracted the relevant passage of the Tribunal's reasons above at [20]. The applicant's solicitor argued that this revealed a failure to comply with requirements of procedural fairness which the High Court recently has held arise under s.425(1) in *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] HCA 63 at [27], [33] and [37]. He submitted that *"the question as to whether the applicant's behaviour in detention was engaged in wholly for the purpose of strengthening his claim was not put to [the applicant]"* by the Tribunal. Nor was it an issue upon which the delegate had decided the matter. The applicant was therefore given no notice that this was a *"live issue"* and was denied procedural fairness in the same manner as was found in *SZBEL* at [42]-[43].

54. Counsel for the Minister accepted that the Tribunal never specifically put to the applicant that it might not be satisfied in terms of s.91R(3). However, he submitted that the present case had no similarity with *SZBEL*, where the High Court held that an applicant could assume that the issues arising from his refugee claims which he should address in the review were those identified from the delegate's reasoning concerning those claims. Counsel argued that the present case presented a different situation, where the new issue arose from an

assessment of the applicant's evidence on a new matter which was given to the Tribunal itself.

55. He argued that the High Court's references at [29] and [32] to principles articulated in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 indicated acceptance that an applicant could be regarded as being on general notice that his new evidence would be assessed by reference to the relevant statutory tests. In particular, the Tribunal was not required to warn nor foreshadow that, in relation to the applicant's new evidence concerning his conduct in Australia subsequent to the delegate's decision, it would be obliged to address his motivations for that conduct by reference to s.91R(3) and that it might not be satisfied by the evidence in terms of that provision.

56. The element of procedural fairness which was emphasised by the High Court in *SZBEL* at [32] was the *"opportunity of ascertaining the relevant issues"* in the situation of a review of a delegate's decision on claims presented in a visa application. The High Court also emphasised at [29] that this opportunity extended to *"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"*.

57. In the present case, the delegate's decision assumed that the applicant was a Christian, but included a general finding of *"doubts about the veracity of his claim that he may be harmed upon return to China for reason of his religion"*. However, it should have been apparent to the applicant from the questioning at the hearing held on 6 February 2006, if not earlier, that a general doubt about his credibility might also be held by the Tribunal, and that this might extend to the existence of his claimed religious beliefs and activities in China. It was to meet this issue that the applicant himself presented his Christian activities in Australia while held in immigration detention, as corroborative evidence of his religious beliefs and commitment, and therefore as corroborative of his claimed fear of persecution.

58. In a situation where there was a statutory obligation on the Tribunal to consider whether the new evidence of conduct in Australia satisfied it

in terms of s.91R(3), I consider that this issue should be regarded as "apparent from" or "obviously open" on the evidence presented by the applicant himself to the Tribunal. An assessment of the applicant's motives for engaging in Christian activities while held in Villawood was a necessary part of its assessment of his evidence to decide whether it supported his fear of being persecuted in China as a Christian. This should have been apparent to the applicant and his advisor. In my opinion, the applicant should be taken to have been fully aware that this assessment would be addressed by reference to the definition of refugee as adopted and modified by ss.36 and 91R of the Migration Act. I do not consider that procedural fairness required any specific warning as to how the assessment of his new evidence might be approached in terms of those legislative provisions.

59. I therefore do not accept this ground.

Ground 4

60. This ground contends another failure in relation to the Tribunal's obligations under s.425(1): that *"the Tribunal failed to arrange for proper interpretation into English of the Applicant's evidence at the hearing"* held on 6 February 2006.

61. Although the applicant's agent had strenuously argued to the Tribunal for a second hearing on the basis that the applicant had encountered problems of communication at the first hearing due to the failure to provide a Fuzhou interpreter, no evidence nor submissions were presented to the Court in support of such a contention. The Tribunal addressed the point both in correspondence with the agent, and in its decision. It is unnecessary for me to say more than that, on the evidence before me, the complaint is not shown to have any substance.

62. The present ground was supported only by an affidavit by a professional interpreter, qualified to translate between Mandarin and English. This was served too late for the Minister's legal representatives to take instructions on the opinions set out in the affidavit. I allowed it into evidence only to the extent that it suggested mistranslations by the interpreter at the hearing before the Tribunal, excluding any parts which were argumentative or speculative about the

applicant's responses. I also reserved the Minister's right to apply for an adjournment if this should appear necessary. Ultimately, counsel for the Minister did not seek an adjournment, but relied upon a submission that such mistranslations as were identified in the affidavit did not establish any significant or material failure of communication between the applicant and the Tribunal.

63. Under authorities which were accepted by both legal representatives, to establish a breach of s.425 it is necessary to establish failures of interpretation at a hearing which can be characterised as showing *"[a] standard of interpretation … so inadequate that the [applicant] was effectively prevented from giving evidence at the Tribunal"*, or *"errors … material to the conclusions of the Tribunal adverse"* to the applicant (cf. *Appellant P119/2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 230 at [17], [22], [35], and *VWFY v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1723 at [9]).

64. In the present case, only one error of any real substance by the interpreter provided at the hearing held on 6 February 2006 is suggested by the expert evidence tendered by the applicant. Other criticisms in the affidavit were not pursued in the oral submissions of the applicant's solicitor.

65. The error arose at one stage of the hearing, when the Tribunal questioned the applicant concerning what had happened at the *"services"* held at the church which the applicant claimed to have attended in China. According to the applicant's expert, the interpreter used a Chinese word for "services in general", as in "the services industry", rather than the word for "religious (church) services". However, this part of the English transcript suggests that it was apparent to the presiding member, and also to a subsequent member listening to the tapes, that an unidentified difficulty in communication had occurred at this point. This appears from the applicants translated responses, from the re-framing of questions by the member conducting the hearing, and from the member's pursuit of alternative lines of questioning to test the applicant's claimed Chinese church activities. Ultimately, the applicant's responses to questions about the "services" did not provide a stated reason for the present Tribunal's finding that he

was "*not involved in Christian activities in China*". I would not find that the mistranslation had any material influence on the Tribunal.

66. Considering the whole of the transcript of the hearing and the evidence tendered for the applicant, I am not satisfied that the error in relation to the interpretation of "services", nor any other aspects of the interpretation at the Tribunal's hearing, requires a finding that the applicant was generally denied the opportunity required by s.425 in relation to the provision of a sufficient level of interpreting services, nor that it materially affected the present decision. I therefore do not accept this ground of review.

67. Generally, I have not been persuaded that the Tribunal's decision was affected by any jurisdictional error. The decision was therefore a privative clause decision, and I must dismiss the application.

I certify that the preceding sixty-seven (67) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 16 April 2007