FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZLHP v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 359*

MIGRATION – Visa – Protection (Class XA) visa – Refugee Review Tribunal – application for review of a decision of the RRT affirming a decision of a delegate of the Minister not to grant a protection visa – applicant a citizen of China – Falun Gong – where applicant did not attend the RRT hearing – alleged fraud of migration agent – applicant party to fraud – delay – discretionary of relief – application dismissed.

Judiciary Act 1903 (Cth), s.39B
Migration Act 1958 (Cth), ss.417, 422B, 426A, 474

SZFDE v Minister for Immigration & Citizenship [2007] HCA 35
Wati v Minister for Immigration & Ethnic Affairs (1996) 71 FCR 103
Jama v Minister for Immigration & Multicultural Affairs [2000] FCA 5424
Minister for Immigration & Multicultural Affairs v Bhardwaj [2002] HCA 11
Plaintiff S157 of 2002 v Commonwealth of Australia (2003) 195 ALR 24
NAWZ v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 199
SZHTW v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 1086
SZGJO v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 393

Applicant:	SZLHP
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2815 of 2007
Judgment of:	Scarlett FM
Hearing date:	18 December 2007
Date of Last Submission:	18 December 2007

Delivered at:	Sydney
Delivered on:	31 March 2008

REPRESENTATION

Counsel for the Applicant:	Mr Prince
Solicitors for the Applicant:	SBA Lawyers
Counsel for the Respondent:	Mr Johnson
Solicitors for the Respondent:	Australian Government Solicitor

ORDERS

(1) The Application is dismissed.

(2) The Applicant is to pay the First Respondent's costs fixed in the sum of $9,250.00.

(3) I allow (6) months to pay.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2815 of 2007

SZLHP
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Application

1. The Applicant is a citizen of China who is asking the Court to review a decision of the Refugee Review Tribunal signed on 24th January 1999 and handed down on 27th January 1999. The Tribunal affirmed the decision of a delegate of the Minister not to grant the Applicant a protection visa.

2. The grounds upon which the Applicant relies are set out in an amended application filed in Court on 5th November 2007. He claims that the decision of the Minister's delegate was affected and induced by fraud on the part of his migration agent. The Applicant also claims that the decision of the Refugee Review Tribunal was induced and affected by fraud on the part of the migration agent.

3. The Applicant now seeks these orders:

a) Declaration that the First Respondent (the Minister) and the Second Respondent (the Tribunal) both erred in law in arriving at their respective decisions as each decision making process was affected by the fraud of a third party.

b) Further, and in the alternative, a declaration that because of the fraud the decisions were made in excess of jurisdiction and are null and void.

c) An order that a writ of certiorari be directed to the Respondents to quash the decisions.

d) An order that a writ of prohibition be directed to the Respondents prohibiting them from acting upon or giving affect to or proceeding further upon the decisions.

e) An order that the matter be remitted to the Tribunal for redetermination in accordance with the law.

f) An order for costs.

Background

4. The Applicant arrived in Australia on 30th December 1997. He claimed to be a citizen of Indonesia. He applied to the then Department of Immigration & Multicultural Affairs for a protection visa on 13th February 1998. The application claimed that the Applicant would be harmed by the Indonesian government. The application sets out five grounds under the Refugees Convention.

> *(1) Race: "As a Chinese descendant I have been excluded from the Indonesian community and society."*
>
> *(2) Religion: "Christianity, which is a minority religion, not permitted to practise in Indonesia."*
>
> *(3) Nationality: "Neither Chinese nor an Indonesian."*
>
> *(4) Social Group: "Social outcast as a Chinese descendant."*
>
> *(5) Political Opinion: "Different from that of the local government in power in Indonesia. Besides, as I was heavily*

and actively involved in pro-democracy activities in China I was persecuted by Chinese authorities, too."[1]

5. On 19th February 1998 a delegate of the Minister refused the application for a visa.

6. On 26th March 1998 the Tribunal received an application for review of the delegate's decision in the name under which the Applicant had applied for a visa. The application gave a Post Office Box number at Flemington Markets as the Applicant's address for correspondence. The application did not disclose the name of any migration agent or other adviser.

7. The Tribunal wrote to the Applicant at that Post Office Box number on 30th March 1998 acknowledging receipt of the application for review. The Tribunal wrote again to the Applicant on 12th October 1998 in a letter headed: "Notice under s.426 of the Migration Act." That letter said, relevantly:

> *The Tribunal has looked at all the material relating to your application but it is not prepared to make a favourable decision on this information alone. You are now entitled to come to a hearing of the Tribunal to give oral evidence in support of your claims. You are also entitled to ask the Tribunal to obtain oral evidence from another person.*[2]

The Tribunal's letter asked the Applicant to tell the Tribunal whether or not he wanted to go to the tribunal to give oral evidence.

8. On 3rd November 1998 the Tribunal sent the same letter to the Applicant again; only this time it sent the letter to the Applicant's home address. This letter was returned unclaimed.

9. On 9th November 1998 the Tribunal received a "Response to Hearing Offer" form duly completed, indicating that the Applicant wished to attend the hearing and would require a Mandarin interpreter.

10. The Tribunal then scheduled a hearing for Tuesday 5th January 1999 and wrote to the Applicant on 13th November 1998 advising him of the hearing date.

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[1] See Court Book at 19.
[2] See Court Book at 54.

11. The Tribunal received a letter dated 4th January 1999 purportedly from the Applicant advising that he was sick and seeking an adjournment. A medical certificate was attached from a doctor in Bankstown advising that the Applicant was suffering from back pain and would be unfit for duty for two days.

12. The Tribunal wrote to the Applicant on 5th January 1999 informing him that his hearing had been postponed to 21st January 1999.

13. The Applicant did not attend the hearing.

14. The Tribunal signed its decision on 24th January 1999 and posted a copy to the Applicant on 27th January 1999. A copy of the Tribunal decision can be found at pages 75 to 81 of the Court Book. The Tribunal noted that:

> *The applicant has been put on notice by the Tribunal that it is unable to make a favourable decision on the information before it but has not provided any further information in support of his claims despite ample opportunity to do so. Nor has he given the Tribunal the opportunity to explore aspects of his claims with him.*[3]

15. The Tribunal was not satisfied on the evidence before it that the Applicant had a well-founded fear of persecution within the meaning of the Convention and affirmed the decision not to grant a protection visa.

16. On 11th February 1999 a letter, purportedly from the Applicant, was sent to the then Minister seeking the exercise of the Minister's discretion under s.417 of the Migration Act. The parliamentary secretary to the Minister, Senator Patterson, advised the Applicant in a letter dated 10th August 1999 that the matter was under consideration.[4]

17. An officer from the Ministerial Interventions Unit of the Department of Immigration & Multicultural Affairs wrote to the Applicant a letter that appears to be dated 8th December 1999 advising that the Minister had decided not to consider exercising his power under s.417 of the Migration Act.

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[3] Court Book 79 and 80
[4] Court Book 80

18. On 18th May 2006 the Applicant was taken into immigration detention. On 15th June 2006 he faxed a letter to the then Minister again asking for Ministerial intervention under s.417 of the Act. The letter included this paragraph:

> *When I first arrived here, I was naïve and ignorant of your society and culture, and unfortunately also ignorant of your laws and legislations. Knowing no-one and little English I trusted an Immigration Agent based in Sydney called "An Qi" with my full application for refugee in your country. I didn't know they used an Indonesian name on my application called Kalalo Denny Dendeng. I was kept in the dark with regards to the other information and details on my application.*[5]

19. The application was acknowledged in a letter dated 28th June 2006. On 15th September 2006 an officer of the Ministerial Intervention Unit wrote to the Applicant advising him that his application had been assessed under the guidelines both for s.48B and s.417 of the Act. However the application was unsuccessful.

20. The Applicant applied for another visa in his own name on 16th October 2006 enclosing documents in English and Chinese. The Applicant's statement again referred to his having entrusted his application to a local migration agent whose name he had found in a Chinese newspaper. He claimed he had paid her $2,000.00 and she lodged an application for asylum under the name of an Indonesian person. Later he found out that he had been taken in.[6]

The Applicant's Grounds of Review

21. The Applicant sets out his grounds for review in some detail in his amended application. He claims that he is a Chinese national who fled China in 1997 fearing persecution on religious grounds.

22. The Applicant claims that he arrived in Australia on 30th December 1997 on a false Indonesian passport.

23. On or about January 1998 after reading an advertisement in a Chinese language newspaper published in Sydney, the Applicant contacted a

[5] Court Book 98
[6] Court Book 107

migration agent known as An Qi (in Chinese) or Grace Chen (in English). The migration agent was a registered migration agent number 9688515 based in Bankstown who spoke both Mandarin and English.

24. The Applicant claims to have paid the migration agent an initial sum of $500.00 for migration advice and assistance. He claims that the migration agent advised that as he did not have identity papers for his true identity, the best thing to do was to lodge a protection visa application using his Indonesian identity and that she would attend to this on his behalf.

25. The Applicant did not speak or understand English and relied entirely on the migration agent. On 13th February 1998 the migration agent lodged an application for a protection visa in the name of the Applicant's Indonesian identity.

26. Particulars:

    a) The application was prepared entirely by the migration agent without reference to the Applicant or to the facts giving rise to the Applicant's entitlement to protection.

    b) The migration agent concocted without reference to the Applicant the matters set out in the application which were relied upon to ground the application.

    c) The matters set out in the application were unrelated to the Applicant.

    d) The Applicant himself signed the application using the false signature from the Indonesian passport but did not know or understand the contents of what he signed.

27. The Minister's delegate refused the application on 19th February 1998. The applicant claims the Minister's decision was affected and induced by fraud on the part of the migration agent.

28. In March 1998 the migration agent informed the Applicant that for a fee of $1,000.00 she would make an application to the Refugee Review Tribunal for a review of the delegate's decision.

29. The Applicant paid the $1,000.00 to the migration agent.

30. On or around 26th March 1998 the migration agent lodged an application to the Tribunal for review of the delegate's decision purportedly on behalf of the Applicant. The application was made in the Indonesian name on the false passport.

31. The Applicant did not sign the application nor did he know or approve the contents of the application.

32. The migration agent told the Applicant that she did not need to know anything about the true reasons the Applicant was entitled to protection.

33. The migration agent made written submissions to the Tribunal in support of the application without reference to the Applicant or to the true reasons the Applicant claimed to be entitled to protection.

34. Towards the end of 1998 the migration agent advised the Applicant that a date for a hearing with the Tribunal had been set and further fraudulently advised the Applicant not to attend.

35. Particulars:

    a) The migration agent told the Applicant that as the application had been made under a false Indonesian identity and as the Applicant spoke only Mandarin, the falsity of the application would be discovered if the Applicant attended the hearing.

    b) The migration agent told the Applicant that he would be arrested and deported at the hearing when the falsehood was discovered.

36. The Applicant did not attend the hearing of the Tribunal because of what the migration agent told him; in circumstances where he believed he had no other choice.

37. The Tribunal was denied the opportunity to meet the Applicant and be presented with oral evidence because of the fraudulent advice of the migration agent.

38. On or around 24th January 1999 the Tribunal affirmed the delegate's decision not to grant the Applicant a protection visa.

39. The RRT decision was induced by fraud.

40. The Tribunal erred in law in arriving at its decision as its decision making process was induced and affected by the fraud of the migration agent.

41. Contrary to s.420 of the Migration Act as it was at the relevant time, the Tribunal did not review the delegate's decision according to substantial justice and the merits of the Applicant's case.

42. The Tribunal exceeded jurisdiction in arriving at the decision in that a breach of the rules of natural justice occurred in connection with the making of the decision.

43. The Applicant did not receive actual notification of the decision of the Refugee Review Tribunal until on or about 12th September 2007.

44. Since the Respondents became aware of the Applicant's true identity in about May 2006 the Respondents have refused to consider the Applicant's claim of entitlement to protection.

Evidence

45. The Applicant sought to rely on four affidavits:

    a) His own affidavit of 8th October 2007.

    b) An affidavit of Frances Lillian Milne dated 8th October 2007.

    c) An affidavit of Frances Lillian Milne dated 19th November 2007.

    d) An affidavit of Christine Joanne Grygiel, sworn on 14th November 2007.

46. Only the Applicant was required for cross-examination. His evidence was that he was a citizen of China. He claimed to have married in 1991 and has two children, a boy aged 13 and a girl aged 16.

47. The Applicant claimed to have become a Christian early in life. He attended underground churches and Bible study groups. He deposed that the underground church meetings had to be conducted in secret because they were afraid of the police.

48. The Applicant deposed that the police first took an interest in the Applicant's underground church in about 1990 when they warned his father about having a gathering of people at his house.

49. The police raided the house in 1993 arresting the Applicant's parents and one of his brothers. The Applicant's father was imprisoned for one and a half years and is no longer able to work due to ill health.

50. The Applicant claimed in his affidavit that the police tried to arrest him on two occasions. In 1996 his finger was jammed in a door during a police raid and he lost the top portion of his finger. The Applicant left China in June or July 1997. He travelled to Indonesia on a Chinese passport in another name. This was arranged by a people smuggler.

51. The Applicant claimed that he waited in Indonesia for about five months until he obtained a false Indonesian passport. He used this document to travel to Australia.

52. The Applicant deposed that after he arrived in Australia he saw an advertisement in a Chinese newspaper for a migration agent called An Qi. He went to see her at her house in Bankstown and she told him he could apply for a protection visa. The agent told the Applicant that since he had no Chinese identity papers she would use his Indonesian passport to lodge the protection visa application. He signed a statement authorising the migration agent to act for him. He claimed that this was the only document he signed.

53. The Applicant deposed that three weeks later the migration agent told him his visa application had been rejected. He stated that he later met the agent in her car. She told him she would apply to the Refugee Review Tribunal for a review of the decision. He agreed and paid her $1,000.00. He claimed that he signed nothing.

54. The Applicant deposed that the migration agent was not interested in his claim to fear persecution in China because he was a Christian saying:

> *You are holding an Indonesian passport so your story is irrelevant.*

55. The Applicant claimed that the migration agent told him not to go to the Tribunal hearing. She said:

> *You do not speak Indonesian so they will know that you are not Indonesian and they will refuse your case and deport you on the spot. You should get a doctor's certificate so you do not have to attend the hearing.*

56. The Applicant deposed that he obtained a medical certificate and gave it to the migration agent.

57. The Applicant claimed that he met the migration agent a third time, again in her car, when she told him the Tribunal had refused his application. He stated that she told him he could apply to the Court which would cost $3,000.00 which he did not have.

58. The Applicant deposed that the agent told him she could apply to the Minister in his Indonesian name for a fee of $200.00. He claimed he never saw the migration agent again.

59. The Applicant deposed that he tried to contact the migration agent a couple of times without success.

60. In cross-examination by Mr Johnson of counsel, who appeared for the Minister, the Applicant said that he first went to the migration agent about two or three weeks after he had arrived in Australia.

61. The Applicant admitted that he had gone from China to Indonesia on a false Chinese passport on a name not his own. He conceded that in Indonesia he obtained a false Indonesian passport, also in a name not his own. He travelled to Australia on that false Indonesian passport.

62. The Applicant was shown the copy of the false Indonesian passport.[7] And denied that he had signed it. He denied that the handwriting on it was his.

63. The Applicant was shown a copy of the card that was filled in when he arrived at Sydney airport.[8] He agreed that he signed that card and said that when he was in Indonesia the person who gave him the Indonesian passport told him to imitate that signature.

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[7] Court Book 107.
[8] Court Book 26.

64. The Applicant agreed that he obtained the medical certificate to give to the Refugee Review Tribunal. He said the migration agent had told him to do so.

65. The Applicant initially denied that his purpose in obtaining the medical certificate was to try to hide from the tribunal that he was not the person he was pretending to be. He repeated that the migration agent had told him to get the medical certificate saying:

> *You can't speak a word of the Indonesian language.*

66. The Applicant agreed that if he had gone to the Tribunal he would have been found out as not being an Indonesian.

67. The Applicant was shown a copy of the letter to the Tribunal of 4th January 1999 asking for an adjournment and enclosing the medical certificate.[9] The Applicant said he could not remember if the signature was in his handwriting. He said that he only remembered that in 1998 he signed one document.

68. Mr Johnson showed the Applicant the copy of the application to the Refugee Review Tribunal bearing what purported to be his signature.[10] He said he could not remember if the signature on it was his.

69. When it was put to him that all the signatures were his, the Applicant maintained that he only remembered signing once. Later, the Applicant said that it was possible that he had made a mistake about whether or not he had signed any protection visa documents saying that he was "in a rush".

70. The Applicant agreed with the proposition put to him by counsel for the Minister that he knew the claims made to the Department related to a false identity and that he knew that a claim was being made in relation to a person he was pretending to be.

71. The Applicant said that he told the migration agent about his situation in China but she said:

> *You have an Indonesian passport. It's too hard.*

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[9] Court Book 69.
[10] Court Book 49.

72. The affidavit of Christine Grygiel, who is a solicitor, is relevant to the fact that the Applicant's legal advisers have taken steps to alert the migration agent, Grace Chen, to the existence of these proceedings.

73. In her affidavit Ms Grygiel deposes to having sent to Ms Chen at her registered business postal address, copies of the amended application and the Applicant's affidavit of 8th October 2007. She also sent a covering letter to Ms Chen saying relevantly:

> *Our client instructs us that you previously provided him with your services as a Migration Agent and made application on his behalf to the Minister for Immigration & Citizenship (as now known) and to the Refugee Review Tribunal (RRT).*
>
> *The effect of his instructions as we understand them is that the decision of the Minister and the RRT were both affected and induced by fraud on you and thus have fallen into jurisdiction error within the meaning in SZFDE v Minister for Immigration & Citizenship [2007] HCA 35.*
>
> *We enclose a copy of our client's application to the Federal Magistrates Court of Australia and accompanying affidavit.*
>
> *We invite you to comment on the claim of our client and to provide us with any response or explanation you may have.*

74. In her affidavit Ms Grygiel deposed that she had not received a response from Ms Chen.

Submissions

75. The Applicant, in an outline of submissions filed on 3rd December 2007, concedes that he has not had his claim for protection as a refugee assessed under his true name and identity.

76. The Applicant also submits that the migration agent acted fraudulently in a number of respects in assisting the Applicant to apply for a protection visa.

77. The Applicant submits that the agent acted fraudulently in these ways:

a) Firstly, the migration agent fraudulently advised the Applicant to maintain the false name and identity contained in the Indonesian passport in making his protection visa application.

b) Secondly, the migration agent fraudulently concocted the facts set out in the application without reference to the Applicant's true entitlement to protection and without informing the Applicant of its contents.

c) Thirdly, the migration agent fraudulently indicated on the protection visa application that the Applicant had not received assistance from a migration agent in preparing the application.

d) Fourthly, the migration agent fraudulently advised the Applicant to sign the protection visa application using the signature of the false identity in the Indonesian principles.

e) Fifthly, the migration agent submitted the protection visa application to the Minister purportedly on behalf of the Applicant in full knowledge of the fraudulent contents.

78. The Applicant also submits that the migration agent acted fraudulently in a number of respects in assisting the Applicant to apply to the Tribunal for review of the Minister's (or the delegate's) decision:

> *(a) Firstly, the migration agent fraudulently advised the Applicant to maintain the false name and identity contained in the Indonesian passport in making the application for review.*
>
> *(b) Secondly, the migration agent fraudulently concocted the facts set out in the application without reference to the Applicant's true entitlement to protection and without informing the Applicant of its contents.*
>
> *(c) Thirdly, the migration agent fraudulently indicated on the protection visa application that the Applicant had not received assistance from a migration agent in preparing the application. (NB: There appears to be an error and the Applicant may mean, "The application for review" rather than protection visa application.)*
>
> *(d) Fourthly, the migration agent lodged the application for review by the Tribunal without having the Applicant sign*

the document and it is submitted, fraudulently signing or facilitating a third party to sign the document purportedly as the Applicant.

(e) *Seventhly, (there is no fifthly or sixthly), the migration agent advised the Applicant to not attend the hearing for fraudulent reasons.*[11]

79. The Applicant submits that the Court should find that:

a) The migration agent had real or constructive knowledge that the Applicant's non-attendance at the hearing would be fatal to the Applicant's chances of being granted a protection visa.

b) The migration agent advised the Applicant not to attend the hearing despite having accepted money from the Applicant for assistance.

c) The migration agent's advice not to attend the hearing was motivated by a desire to avoid her fraudulent actions being revealed at the hearing.

80. The Applicant submits that the fraud in this case is not limited to the actions of the decision maker, a party or their representative and that the relevant consideration is that the Tribunal's decision in question is actually induced or affected by fraud. (See *SZFDE v Minister for Immigration & Citizenship*[12]; *Wati v Minister for Immigration & Ethnic Affairs*[13] at [112], *Jama v Minister for Immigration & Multicultural Affairs*[14].)

81. The Applicant submits that the decision of the Tribunal was actually induced and affected by third party fraud in two ways:

a) The decision was based wholly on the written application which was fraudulent in nature and content because of the actions of the migration agent and;

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[11] Outline of submissions of the Applicant 17(a) to (e)
[12] [2007] HCA 35
[13] (1996) 71 FCR 103
[14] [2000] FCA 5424

b) The immediate consequence of the fraud of the migration agent was to frustrate the operation of the legislative scheme to afford natural justice to the Applicant.

82. The Applicant submits that s.420(2)(b) of the Migration Act requires that when reviewing a decision the Tribunal must act in accordance with substantial justice and the merits of the case. If the information provided to and relied on by the Tribunal is premised on a false name and identity it cannot be said that regard has been given to the actual merits of the Applicant's case in his true name and identity.

83. The Applicant also submits that the legislative requirement in s.425(1) of the Act as it then was that the Tribunal must give the Applicant an opportunity to appear before it to give evidence is an imperative provision designed to ensure each applicant is accorded procedural fairness in the review process. The importance of this provision is reinforced by s.422B of the Act.

84. The Applicant accepted the fraudulent advice of the migration agent not to attend the hearing and because of this the Tribunal was denied the opportunity to meet the Applicant and hear his evidence.

85. The acceptance by the Applicant of the fraudulent advice resulted in the subversion of s.425 which effectively operated to further subvert the Tribunal's observance of its obligations to accord the Applicant procedural fairness. (*SZFDE* at [32]).

86. The Applicant also submits that the fraud of the migration agent effectively disabled the Tribunal from the due discharge of its statutory functions and amounted to third party fraud having been perpetrated on the Tribunal. (*SZFDE* at [51]).

87. Through no fault of its own the Tribunal decision is not a decision at all as its jurisdiction remains constructively un-exercised. (See *Minister for Immigration & Multicultural Affairs v Bhardwaj*[15]; also *Plaintiff S157/2002 v Commonwealth of Australia*[16]*).*

[15] [2002] HCA 11
[16] (2003) 195 ALR 24 at [45] - [46]

88. For the above reasons the Applicant submits that the Tribunal decision is a not a privative clause decision.

89. The Applicant's submissions also address the Minister's contention that the relief sought by the Applicant should not issue as a matter of discretion due to the delay in bringing the proceedings. The Applicant contends that the delay in approaching the Court is:

   i) Coupled with the Applicant's inability to speak English was his fear of exposing his illegal status to anyone, having no knowledge of the Australian legal system and the rights it accords him and

   ii) Having made the decision to return to China in early 2007 the Applicant received new information that the Chinese authorities were still searching for him. This re-established and compounded his fear that he would be persecuted upon returning to China.

90. The Applicant contends that he has complied with the statutorily mandated time period for applying to the Court for relief. Presumably this is because the Applicant claims that he was never notified of the Tribunal's decision in the manner mandated by the Act and consequently, s.477 of the Act does not apply.

91. The Applicant also submits that there is no prejudice to the Minister in granting the relief sought. No evidentiary issues arise which would suffer by the effluxion of time. He submits that the impugned decision continues to have a devastating effect on him, particularly having regard to s.48A of the Act.

92. The Applicant contends that if the Tribunal decision was attended by jurisdictional error which may be corrected at a hearing according to law, then there is no rational reason for exercising the discretion to withhold relief.

93. Counsel for the Minister, Mr Johnson, submits that this case is clearly distinguishable from *SZFDE*. In that case the Applicant for judicial review did not collude in the fraud practised on the Refugee Review Tribunal. She did not learn of the fraud until later and then complained of it in subsequent proceedings.

94. In this case it is submitted the Applicant, even on his own account, knowingly participated in putting forward to the Minister's Department and to the Tribunal a claim that he knew was fraudulent.

95. Mr Johnson also submitted that not all that the Applicant said in his affidavit is true, especially where he claims that he only signed the one document. He also submitted that the Applicant's evidence in cross-examination was shaken.

96. Mr Johnson submitted that there are discretionary reasons for refusing relief:

a) The Applicant attempted to practise deception upon the Minister and upon the Tribunal by a bogus claim and a false identity. Discretionary relief in such circumstances is supported by *NAWZ v Minister for Immigration & Multicultural & Indigenous Affairs*[17].

b) The Applicant's delay in commencing proceedings.

97. Finally, Mr Johnson submitted that the Applicant's claim for relief with respect to the delegate's decision is incompetent. The Court does not have power to review a primary decision. See section 476(2)(a).

Conclusions

98. This is a case where there is evidence of fraudulent behaviour by the Applicant's migration agent who has been made aware of the allegations against her in this case but has chosen to make no comment. I am satisfied that the Court should refer the decision to the Migration Agents' Registration Authority.

99. In my view this case can be distinguished from *SZFDE* on its facts. In *SZFDE*, which I heard at first instance, the Applicant was in no way party to the fraud by the purported migration agent but a victim of it.

100. In this case the Applicant was a party to the fraud. The fraudulent actions began before the migration agent was involved. The Applicant left China under a different name on a Chinese passport. In Indonesia

[17] [2004] FCAFC 199 at [10] – [14].

he obtained a false Indonesian passport in another name. He entered Australia on a false passport with a false identity and completed his arrival card in that false identity.

101. What the migration agent has done is carry on that fraud with the knowledge and complicity of the Applicant. From the Applicant's own evidence he agreed with the migration agent that an application should be made for a protection visa using his false identity and nationality. It followed that there had to be a concocted story to justify a well-founded fear of persecution for a Convention reason because an Indonesian national could not claim for refugee status on the basis he feared persecution in China for reason of his religion. The Applicant knew and was party to the fraud on the Minister's delegate.

102. As to the fraud on the Tribunal; the Applicant knew there was to be an application to the Refugee Review Tribunal using his bogus Indonesian identity. He knew that the migration agent had said that his real story was irrelevant because he was claiming to be Indonesian.

103. The Applicant, from his own evidence, knew there was to be a Tribunal hearing. Whilst the migration agent may have told him not to attend the hearing because her involvement in the deception may be found out, the Applicant knew that if he went to the Tribunal hearing his own deception would be found out. He could not speak Indonesian and could not pretend that he was Indonesian.

104. It was the Applicant who obtained the medical certificate in his false identity in order to avoid attending the Tribunal hearing. He knew why he was seeking the medical certificate. It was to manufacture an excuse to avoid the hearing and avoid being found out.

105. I agree with Mr Johnson's submission that it cannot be that an Applicant's own fraud or a fraud to which he is a party would result in the Tribunal's decision being set aside. It would be absurd if all knowingly false claims were incapable of being the subject of a valid refusal. (*NAWZ* at [118]; *SZHTW v Minister for Immigration &*

Multicultural & Indigenous Affairs[18]; *SZGJO v Minister for Immigration & Multicultural & Indigenous Affairs*[19]).

106. I am also of the view that I should refuse relief on discretionary grounds. The Applicant was a party to the fraud on the Tribunal. He knew that the application for review was in his false identity. It would be contrary to the public interest for the Applicant to gain, as a result of his deliberate deception of the Minister and the Refugee Review Tribunal.

107. I am also of the view that the Applicant's delay in seeking relief is sufficient to justify a refusal of relief on discretionary grounds. The Applicant was aware that the Tribunal had affirmed the delegate's decision even if he had not received a copy of the Tribunal decision because he made his first application for Ministerial intervention under s.417 of the Act on 11th February 1999. In his own evidence he said that the migration agent advised him to do so and charged him $200.00 for her assistance.

108. The Applicant did nothing further until he was taken into immigration detention on 18th May 2006. He then made a further application for Ministerial intervention on 15th June 2006. These proceedings were not commenced until 12th September 2007 when the Department was making arrangements to remove the Applicant from Australia.

109. Delay in seeking relief is a reason for discretionary refusal if the delay is lengthy and not satisfactorily explained. The delay in this case is unconscionably lengthy because the Applicant knew that he had been unsuccessful in his application to the Tribunal by at least February 1999. These proceedings were not commenced until September 2007.

110. The Applicant's explanation for the delay is not satisfactory. True it is that he was unable to speak English but he was also fearful of "exposing his legal status to anyone having no knowledge of the Australian legal system and the rights it accords him."[20] In other words; the Applicant knew that he was in Australia unlawfully and he did not want to get caught by immigration officers. An unlawful non-

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[18] [2006] FCA 1086 at [26]
[19] [2006] FCA 393 at [12]
[20] Outline of submissions for the applicant paragraph 40.

citizen cannot rely on his fear of being apprehended by immigration officers as a reasonable explanation for his delay in commencing proceedings.

111. I am not satisfied that the Applicant has established an entitlement to relief. He cannot rely on his own fraud and his knowledge of and complicity in the fraud of his migration agent to establish that the Tribunal is invalid.

112. Even if the Applicant was otherwise able to establish jurisdictional error, I am of the view that relief should be refused on discretionary grounds because of:

a) The Applicant's deception on both the Minister and the Tribunal by making a bogus claim and a false identity.

b) The Applicant's unconscionable delay in commencing proceedings.

113. The application will be dismissed with costs.

I certify that the preceding one hundred and thirteen (113) paragraphs are a true copy of the reasons for judgment Scarlett FM

Associate: Virginia Lee

Date: 20 March 2008