FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZONC & ANOR v MINISTER FOR IMMIGRATON & ANOR *[2010] FMCA 723*

MIGRATION – Application to grant extension of time – 4 month delay between Tribunal decision and application to the Court – where applicant claimed as reasons for delay fraud by migration agent and difficulties caused by his detention – real prospect of success – whether Tribunal applied a barrier in assessing applicants' adherence to Christianity.

Migration Act 1958 (Cth), ss.417, 424A, 476, 477

Minister for Immigration v SZLSP [2010] FCAFC 108
SZOCT v Minister for Immigration [2010] FMCA 425
SZOIW v Minister for Immigration [2010] FMCA 568
Wang v Minister for Immigration [2000] FCA 1599
WALT v Minister for Immigration [2007] FCAFC 2

First Applicant:	SZONC
Second Applicant:	SZOND
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1477 of 2010
Judgment of:	Raphael FM
Hearing date:	10 September 2010
Date of Last Submission:	10 September 2010
Delivered at:	Sydney
Delivered on:	10 September 2010

REPRESENTATION

Counsel for the Applicants: Mr P Bodisco

Counsel for the Respondents: Mr D Hughes

Solicitors for the Respondents: Clayton Utz

ORDERS

(1) Application dismissed.

(2) Applicants to pay the First Respondent's costs assessed in the sum of $5,250.00.

FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY

SYG 1477 of 2010

SZONC
First Applicant

SZOND
Second Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. Section 477 of the *Migration Act 1958* (Cth) (the "Act") requires an application to this Court for a remedy to be granted in the exercise of the Court's original jurisdiction under s.476 of the Act to be made to the Court within 35 days of the migration decision. In this case, the migration decision, being a decision of the Refugee Review Tribunal, was made on 10 March 2009 and handed down on the same day. The application to this Court was made on 5 July 2010. The Court does have the discretion to extend the 35-day period provided that there is an application for such an order made in writing and there is an explanation given as to the reason for the delay and the Court is satisfied that it is necessary in the interests of the administration of justice to make the order. There are two major matters to be considered by a Court in these circumstances. The first is the explanation as to why the delay occurred and, secondly, with regard to the interests of

justice, the possible strength of the applicant's claim. Clearly, there is little point in hearing a claim which has very limited prospects of success.

2. In this case, there are two applicants; a husband and wife. The first applicant, the husband, is in immigration detention but the wife is not. I have been provided with an affidavit of the husband. It is in form probably hearsay but I have accepted it. It is a statement in the Mandarin language, which has been translated. The story told in the statement is that the parties arrived in Australia on 18 February 2008, deserted their tourist group and immediately sought the assistance of a migration agent to process their application for a protection visa. The applicant tells that the person they met demanded $2,500.00 from them and arranged another meeting. In July 2008, this agent told the applicants that the application had been made, but did not tell them that an interview had been arranged with the delegate and so they did not attend. Although it is not entirely clear from the statement, it would seem that after the rejection by the delegate, this agent told the applicants that she could make another application, presumably to the Refugee Review Tribunal, and they accepted this. The applicant says that he received notification of the Tribunal hearing and attended, but felt that some supplementary materials were required for which they were asked to provide a further $2,000.00. It would seem that the further documents were provided because the Tribunal had issued a s.424A letter and it was responded to in some detail [CB 105-110]. It is clear that this document could not have been written by the applicants themselves, given their lack of English and education.

3. The applicant acknowledges that he received the letter from the RRT in March 2009, advising that the application had been rejected. He says that he tried to call Ms Wang (the agent) but was told that her telephone number was disconnected. He then makes a suggestion about Ms Wang's bona fides as a migration agent. No contemporaneous evidence is provided as to whether Ms Wang is or is not, was or was not, a migration agent and whilst I am reluctant to buy into any speculation about that matter, if I was to be asked, I would have to say that the letter written by Ms Wang in the pages that I have referred to has all the hallmarks of a professional.

4. The applicant continues in his affidavit in a rather confusing manner. Remembering that the letter of rejection only came in March, he makes reference to giving a migration agent, apparently an Afghani, materials relating to his application for refugee status on 20 February 2009. This is before the decision from the Tribunal. It refers to making a request of this migration agent to "*lodge our application promptly*." It is said that the response was:

> "Don't worry, the immigration people will get upset if they receive successive applications without a break. Wait for some time before you lodge your application again." That is why there was a delay, we did not lodge our application until October 2009."

5. The Court does not have any evidence of what the application was that was lodged in October 2009, nor does it have any evidence of the person who lodged it, but Mr Bodisco, who appears for the applicants, suggests that it is a s.417 application and I think that is probably likely. However, I would have expected to have seen both the application itself and the response from the Minister, which allegedly came in March 2010. That is quite a long time. In my experience, s.417 matters are dealt with rather more speedily than six months, but I am not prepared to make any findings as to when the letter of refusal may have arrived.

6. It would appear that this second migration agent told the applicants that if they wanted to lodge an application with the Federal Court, it would cost them $5,000.00 and if they could not pay he couldn't help them any further. The applicant does not explain how he came to lodge the application to this Court on 5 July 2010, a further four months after the rejection by the Minister.

7. Mr Bodisco has submitted that the delay is explainable by the fact that the applicant husband was in detention and that it was difficult for him to obtain information or be provided with assistance. In making those comments, I believe he refers more to my concern about the lack of documentary evidence to support the statement rather than the time which it took to make the application.

8. In my view, the explanation for the delay is not particularly satisfactory. I accept that many people who come to this country in the situation of the applicants have significant disadvantages. I am also

aware, because I have made comments about this from the bench, that members of the Chinese community particularly are prey to persons who claim to be migration agents but who are not. It is a matter of considerable concern to me that a community as large and as influential as the Chinese community has not been able, even after so many years, to police this abuse. But these applicants, by their own admission, found assistance through the church and apparently have attended a church regularly ever since their arrival. Perhaps it would not have been difficult for them to have sought advice from those brothers and sisters who are within the church at an earlier stage than they apparently did.

9. I would not have let my concern about the adequacy of the explanation prevent my exercising my discretion to hear the matter if I had felt that there was a real prospect of success in the proceedings, but I do not. And I do not for two reasons; the first is that put forward by Mr Hughes on behalf of the respondent. Mr Hughes points to excerpts from the Tribunal decision, which come before the Tribunal's discussion about the applicant's knowledge of Christianity that is being impugned by the applicants in their application. The Tribunal makes findings about the credibility of the applicant and his wife. It states:

> *"[55] The Tribunal finds that the evidence of the applicant and the applicant wife gave as to when the applicant wife found out the applicant was a Christian and when she became a Christian is inconsistent. After the hearing, the applicant stated that what the applicant wife meant was that she began to get in touch with Christianity since 2003 and that starting from 2003, he often discussed with her stories of Jesus and Christian matters before sleeping at night. If that were the case, then the Tribunal expects that the applicant would have stated that at hearing, rather than what she did state, which was what the applicant wife knew about his faith in 2006/2007 and started to believe in 2007…*
>
> *[56] The Tribunal also finds the applicant wife's answers as to when she became a Christian at hearing are different to her application form received by the Department on 22 July 2008, in which she answered "no" to a question asking her if she had a religion.*
>
> *[57] At the Tribunal hearing on 19 December 2008, the applicant stated he lost his job in December 2007. The Tribunal finds that the applicant's statement at hearing that he lost his job in December 2007 is inconsistent with the answer in his application form that he worked from 1998 to 2008 and in his statement when he stated that he was warned he may lose his job. When this inconsistency was put to the applicant in hearing, he stated maybe losing his job was missed from the*

> *application. The Tribunal does not accept that submission. That is because the applicant's employment details also appear in the application form and the applicant also stated at hearing that the student who helped him write down his answers did so as the applicant dictated them. In these circumstances, the Tribunal does not accept that details such as loss of job could be incorrect twice.*
>
> *[58] The Tribunal finds that the inconsistencies in the documentary evidence and the evidence at hearing and the inconsistencies in the oral evidence between the applicant and the applicant wife are indicative of people who are not credible. This leads the Tribunal to find that the applicant and the applicant wife are not witnesses of truth and the applicant and the applicant wife did not follow Christianity as claimed in China and the applicant did not lose his job, nor suffer any other harm because of his alleged Christianity."* [CB 134–135]

10. Those findings are not challenged in the amended application that was filed in Court this morning. It seems to me that it does contain an entirely separate and independent reason for coming to the conclusion that the Tribunal should affirm the decision to the views expressed by the Tribunal about the applicant's knowledge of Christianity. However, I should say something about those as well.

11. There have been a number of cases recently in which concern has been expressed about the manner in which the Tribunal assesses a person's religious adherence. Three that come immediately to mind are the decision of Kenny J in *Minister for Immigration v SZLSP* [2010] FCAFC 108 at [39]; the decision of Driver FM in *SZOCT v Minister for Immigration* [2010] FMCA 425; and my own decision in *SZOIW v Minister for Immigration* [2010] FMCA 568. Those cases all involve criticism of Tribunal decisions where it was alleged that what the Tribunal was attempting to do was to set out some barrier or minimum level of knowledge that an adherent ought to have in order to be accepted as such an adherent. It is clear from earlier authorities, such as the views expressed by Gray J in *Wang v Minister for Immigration* [2000] FCA 1599 and *WALT v Minister for Immigration* [2007] FCAFC 2 that it is not appropriate for the Tribunal to act in this manner. However, the Court should recognise those cases in which this course of action is undertaken by the Tribunals as rare and should not rush to so minutely examine every case in which religious knowledge is questioned in order to attempt to find such error. In the instant case, there was questioning of the applicant and the applicant's wife about their religious knowledge, but I am unable to see that it is

sufficiently arguable that it comes within that narrow range of cases, where the questioning turns itself into some form of barrier or hurdle that an applicant must jump before his adherence is accepted. What the Tribunal concluded in this particular case was not that the applicant had no sufficient knowledge of Christianity at the time he was in China to count him amongst that religion's followers, but rather that:

> *"…[the applicant's] answers at hearing about his activities in China are not consistent with his claimed Bible-reading activity in China since 2002. The Tribunal also finds that it is not satisfied that his level of knowledge displayed at hearing is consistent with someone who preached about the Bible to others in China or who had gatherings or spread the gospel, or who was in fact a committed Christian in China."* [59] [CB 135]

Perhaps the reference to "*a committed Christian*" could arguably be a bridge too far, but the balance of the commentary tends, in my view, to indicate not a hurdle, but merely an assessment.

12. In those circumstances, I do not think that it would be in the interests of justice for this matter to proceed to a full hearing. I am grateful to Mr Bodisco who came into this matter at the last moment and has provided the Court with a clear and well-argued application and written submissions. His clients should also be grateful to him for the way in which he has addressed their case, but as strong and as heartfelt as his representations were, I am afraid they cannot move me to the extent necessary. The application is dismissed. The applicants shall pay the first respondent's costs which I assess in the sum of $5,250.00.

I certify that the preceding twelve (12) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate:

Date: 17 September 2010