FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZMBS v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 847*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming religious persecution in China – applicant not believed – whether Tribunal misstated evidence, showed apprehended bias or breached s.424A of the *Migration Act 1958* (Cth) considered – whether the Tribunal breached the code of procedure in s.424 considered.

Federal Magistrates Court Rules 2001 (Cth)
Migration Act 1958 (Cth), ss.91R, 420, 424, 424A, 424B, 424C, 425, 426, 427, 429A

SZBYR v Minister for Immigration & Citizenship (2007) 235 ALR 609
SZGBI v Minister for Immigration & Citizenship [2008] FCA 599
SZKCQ v Minister for Immigration [2008] FCAFC 119
SZKTI v Minister for Immigration & Citizenship [2008] FCAFC 83

Applicant:	SZMBS
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 680 of 2008
Judgment of:	Driver FM
Hearing date:	23 June 2008
Delivered at:	Sydney
Delivered on:	4 July 2008

REPRESENTATION

The Applicant appeared in person

Counsel for the Respondents: Mr G Kennett

Solicitors for the Respondents: DLA Phillips Fox

ORDERS

(1) The application is dismissed.

(2) The applicant is to pay the first respondent's costs and disbursements of and incidental to the application in the sum of $5,000 in accordance with rule 44.15(1) and item 1(c) of part 2 of schedule 1 to the *Federal Magistrates Court Rules 2001* (Cth).

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 680 of 2008

SZMBS
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. This is an application to review a decision of the Refugee Review Tribunal ("the Tribunal") handed down on 21 February 2008. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa. The applicant is from China and had made claims of religious persecution. The following statement of background facts is derived from the written submissions of the Minister filed on 17 June 2008.

2. The applicant is a citizen of the Peoples Republic of China who arrived in Australia on 9 August 2007 and applied for a protection visa on 21 September 2007. On 7 December 2007 a delegate of the Minister decided to refuse the visa, and on 4 January 2008 the applicant applied for review of the delegate's decision by the Tribunal.[1]

[1] See Court Book (CB) 91

3. The applicant claimed that she had fled China to escape harassment by the PSB which occurred because of her membership of a local Christian church. In her protection visa application she described how she and her family were converted to Christianity in 2006, her detention and harassment by the PSB, and her departure from China with the help of her husband and other Christians.[2]

4. The Tribunal wrote to the applicant on 17 January 2008[3] seeking her comment on several items of information which it thought might be part of the reason for rejecting her claims. These were:

   a) the contents of a note on the applicant's file relating to the grant to her of a visitor visa to come to Australia,[4] which noted that she claimed to be employed, had a son studying in Australia on a student visa, and had provided evidence of funds in the form of a 300,000RMB deposit (this seemed inconsistent with her claim to come from a poor family and to be involved in farm work);

   b) the date of issue of her passport (February 2007) which, viewed with the time she claimed to have come to the attention of the authorities (April 2007), undermined her claim to have had difficulty obtaining a passport;

   c) the applicant's delay of more than a month between obtaining a visitor visa and coming to Australia, and the further delay before applying for protection; and

   d) country information indicating that a person who was of interest to the authorities would have difficulty leaving China on her own passport (as the applicant did).

5. The applicant responded to these points in a statutory declaration dated 31 January 2008.[5]

6. The applicant attended a hearing on 6 February 2008,[6] at which she tendered her passport[7] and a document signed by Brothers Poh and Chen

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2 See CB 93-95
3 CB 62
4 CB 38-39
5 CB 68
6 CB 72
7 CB 75

of "The Local Church in Sydney".[8] The latter document confirmed that she had been attending the church regularly since August 2007.

7. During the hearing the Tribunal asked the applicant questions about her church attendance in Sydney.[9] She consented to the Tribunal calling Brother Poh.[10] The Tribunal did this, evidently during the course of the hearing, and took evidence from Brother Poh. He gave some evidence about the Church's activities and the applicant's participation, which is summarised in the Tribunal's reasons.[11]

8. The Tribunal did not find the applicant a credible witness.[12] It described her answers as often unresponsive and vague, and considered that she had memorised her statement. It set out a series of more specific problems with her evidence, which related to:

   a) her attempts to explain how she had obtained the sum of RMB300,000, deposited in a bank to support her and her son's applications (which the Tribunal found inconsistent and implausible);[13] and

   b) the striking lack of detail in her descriptions of church gatherings, prayers and knowledge of the Bible.[14]

9. The Tribunal therefore rejected the applicant's entire account of the events which had led her to leave China.[15] It accepted that she had been attending church in Australia but was not satisfied that she had engaged in these activities for purposes other than strengthening a claim to be a refugee, and accordingly disregarded this conduct under s.91R(3) of the *Migration Act 1958* (Cth) ("the Migration Act").[16] It did not accept that the applicant would be involved in religious activities if she were to return to China in the foreseeable future, and thus concluded that she did not face a real chance of persecution due to her religion.[17]

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8 CB 71
9 CB 101
10 CB 102
11 CB 102
12 CB 106
13 CB 106
14 CB 107
15 CB 107-108
16 CB 108
17 CB 108

The application

10. These proceedings began with a show cause application filed on 20 March 2008. The applicant continues to rely on that application. The grounds in that application are:

> *1. The Tribunal made its finding made incorrect information; and my evidence has significantly been misstated by the Tribunal; and the Tribunal incorrectly assess my credibility; and the Tribunal's decision has included a reasonable apprehension of bias.*
>
> *Particulars*
>
> *Firstly, my written evidence submitted to the Tribunal on 31 January 2008 are as follows:*
>
> 1. My departure from China, including my passport and my visiting visa, were arranged by my husband through some Christians in the Local Church. Although I did not know too many details about my visiting visa application, I am sure that the evidence or information in relation to the visiting visa application must be incorrect; and that they were arranged by my husband through some Christians in the Local Church. Therefore,
>
> – I did not provide evidence that I had been employed for three years and I did not provide an employment letter issued by my employer; and they were arranged by my husband through some Christians in the Local Church.
>
> – I was just a housewife and without any employment in China;
>
> – I did not provide evidence of funds (RMB 3000,000 deposit); and I did not provide evidence of significant funds at the time when my son applied for his Student visa; and they were arranged by my husband through some Christians in the Local Church.
>
> *Obviously, what I have said in my written material is that …* I did not provide evidence of funds (RMB 300,000 deposit) *… in relation to* my visit visa *application. At the Tribunal's hearing, what I had said was that I had borrowed money*

from friends and the church people and that the sum of RMB 300,000 was for my son's student visa. *If the Tribunal had made a genuine attempt to consider my evidences properly and carefully, then it would have found that my evidences are definitely not inconsistent with each other.*

Secondly, it is my personal intention to send my child to study in the overseas based on my own miserable experience in my childhood. But, I did not have sufficient money for doing so; and thus I had to borrow money from my friends and church people. I have never ever stated that …the church would deposit RMB 300,000 to assist with my application*… It is definitely not the case. How am I able to make* a meaningful explanation*?*

Based on evidence mentioned above, I have to say that the Tribunal made its finding made incorrect information; and my evidence has significantly been misstated by the Tribunal; and the Tribunal incorrectly assess my credibility; and the Tribunal's decision has included a reasonable apprehension of bias.

2. *The Tribunal's finding has included reasonable apprehension of bias.*

Particulars

Firstly, simply based on its unwarranted assumption and without any evidences to support, the Tribunal made a finding that my …primary motivation in coming to Australia is to repay the debt.

Is that logical that I borrowed the money simply for the purpose to repay it? If it is the case, why would I borrow it?

Secondly, regarding my involvement in the Local church both in China and in Australia, the Tribunal failed to make a genuine and independent attempt to look at my evidences as well as the evidence from Mr William Poh. The Tribunal has, in fact, made its finding with a bias that the applicant has engaged in religious activities in Australia otherwise than for the purpose of strengthening her claims to be refugee…

With such a strong bias, the Tribunal failed to consider that the interpreter was unable to properly and accurately interpret those particular religious terms and that huge pressure was put to me at the Tribunal's hearing, which

made it very difficult for me to demonstrate my religious knowledge in that particular difficult circumstance.

3. *The Tribunal failed to comply with its obligation under s.424A(1) of the Act.*

Particulars

In deciding my review application, the Tribunal has considered some of information, such as the one in relation to RMB 300,000 or the one in relation to my involvement in the Local Church both in China and in Australia. As I have said, those pieces of information have been misstated or misunderstood by the Tribunal; and thus they are actually NOT the information which I have submitted to it. Therefore, the Tribunal is obligated to provide me particulars of the information; and the Tribunal is obligated to ensure me to understand the information; and the Tribunal is obligated to invite me to comment on the information.

Unfortunately, the Tribunal, before making its decision, failed to provided me particulars of the information mentioned above; and failed to inform me or ensure me, clearly and properly, that those pieces of information would be directly in relation to his final decision; and failed, honestly and fairly, invited me to comment on them. Therefore, the Tribunal has, apparently, failed to comply with his obligation under s.424A(1) of the Act.

11. I received as evidence the applicant's affidavit filed in support of the application on 20 March 2008 and the court book filed on 16 April 2008.

Submissions

12. The applicant did not comply with an order made by consent on 10 April 2008 for the filing of written submissions. She was emotionally upset at the trial of the matter on 23 June 2008 and had difficulty making oral submissions. She was also dissatisfied with the assistance provided by a Mandarin speaking interpreter and stated that she would have preferred an interpreter fluent in the Fuqing dialect. I note that in her application to the Court the applicant identified her language as Mandarin and in an information sheet completed by her at court on 10 April 2008 she also identified her language as Mandarin

(with the addition in parentheses of a reference to the Fujian dialect, which is a different dialect from the Fuqing dialect which the applicant now says she speaks). I note that at the hearing conducted by the Tribunal the applicant was assisted by a Fuqing dialect speaking interpreter[18]. The applicant told me that she understood Mandarin Chinese but sometimes had difficulty in speaking it. Nevertheless, she confirmed that she and the interpreter understood one another and she agreed to continue with the hearing with the Mandarin interpreter. She relied upon a handwritten document in Chinese which the interpreter read. That document restates the applicant's protection visa claims and takes issue with the adverse credibility findings made by the Tribunal. The applicant accuses the Tribunal of "strong bias". The submissions also reassert the grounds of review in the application.

13. The Minister submits that the assertion of bias is not supported by the available material and that the assertion that the Tribunal misunderstood the applicant's evidence and incorrectly assessed her credibility could, at most, amount to a factual error within jurisdiction. The Minister also notes the assertion of interpretation problems at the hearing conducted by the Tribunal and further notes that the claim is not supported by any particulars.

14. In relation to ground 3, the Minister submits that the "information" which the Tribunal is said to have failed to canvas with the applicant is the Tribunal's alleged misconstructions of the applicant's evidence. The Minister submits that this was not "information" for the purposes of s.424A.

15. The Minister has, as a model litigant, also raised for consideration the impact of the recent decision of the Full Federal Court in *SZKTI v Minister for Immigration & Citizenship*[19]. The Minister makes the following submissions in relation to that decision:

> *The Court may also wish to consider, in the light of* SZKTI v Minister for Immigration and Citizenship, *whether the Tribunal had power to obtain information from Brother Poh in the manner that it did. The present case is clearly distinguishable from* SZKTI, *in that here the information was obtained (albeit by*

[18] CB 73
[19] [2008] FCAFC 83

telephone) as evidence in the hearing conducted under s.425, and with the Applicant's consent.

In SZKTI *information had been obtained by telephone some time after the hearing, and without the applicant's knowledge until after the event,*[20] *which could only have been done under s.424. However the Tribunal is expressly empowered by s.427(1)(d) to take evidence on oath or affirmation; and the material before the Court (which simply says that the Tribunal "took evidence from Brother Poh")*[21] *does not support a finding that this was done otherwise than on oath. That power is not limited to witnesses nominated by an applicant, and in any event the Applicant at least consented to the evidence being taken. Further, there is a more general power, at least implicit in ss.425 and 426, to take evidence from a witness; and the Tribunal is "not bound by technicalities, legal forms or rules of evidence" (s.420(2)(a)).*

Alternatively, the Minister would formally submit that SZKTI *was wrongly decided and should not be followed.*[22]

Reasoning

16. I reject ground 1 in the application. In my view, the assertions in this ground do not rise above a contest over the merits over the Tribunal decision. Relevantly, the Tribunal found:[23]

> *The Tribunal found the applicant not to be a credible witness. The applicant was often non-responsive and vague in her answers and the Tribunal cannot attribute this to the applicant's claimed illiteracy as she answered some of the Tribunal's questions without difficulty. She appears to have memorised her statement and repeatedly provided the information from the statement irrespective of the question*[s] *posed by the Tribunal. The Tribunal's concerns are addressed below.*
>
> - *When asked about the evidence of funds in the visitor visa application and her son's student visa application, the applicant stated in oral evidence that she borrowed money from friends and the church people and that the sum of RMB 300,000 was deposited in the bank. This is inconsistent with the applicant's explanation provided in her submission of 31 January 2008 in which she stated that she did not provide*

[20] [2008] FCAFC 83 at [20]-[27]
[21] CB 102
[22] The decision was recently confirmed by another Full Court in *SZKCQ v Minister for Immigration* [2008] FCAFC 119
[23] CB 106-107

such evidence. When such inconsistency was pointed out to the applicant, she said that she did not know as her husband had organised everything.

- *The applicant has not been able to provide a meaningful explanation as to why the church would deposit RMB 300,000 to assist with her application and also why the church would assist with her son's application. She stated that she did not have a good life and the church was aware of that and wanted to help. The Tribunal considers it utterly implausible that the church would be investing large sums of money for those who did not have a good life.*

- *The Tribunal finds that the applicant has not been truthful in her evidence to the* [T]*ribunal regarding the source of funds evidenced in her visitor visa application and the son's student visa application and that the applicant had deliberately misled the Tribunal. The Tribunal is also concerned about the applicant's comments regarding the need for her son to work to repay the debt, even if such employment is contrary to his visa conditions. The Tribunal is of the view that the applicant may have borrowed some or all of the funds relating to her visitor visa application and her son's student visa application from friends or relatives and that her primary motivation in coming to Australia is to repay the debt.*

- *The Tribunal repeatedly asked the applicant to describe the gatherings which she claimed she attended daily at the Local Church in China. The applicant was unable to do so. Only after much prompting by the Tribunal she stated that prayers were said at the gatherings and that she also prayed. The Tribunal is of the view that if the applicant attended the gatherings of the Local Church daily for a period exceeding six months, she may have been able to describe in considerably more detail such gatherings, despite her illiteracy.*

- *The applicant was unable to state the manner in which the prayers are said at the Local Church or the special way in which they are said, which is one of the distinguishing features of the Local or Shouter Church. She seemed unaware of the reason why the church was called the Shouter Church and she was also unable to explain any of the distinctions between the Local Church and the mainstream Christianity. These matters cause the Tribunal to question the applicant's claim that she attended the gatherings of the*

Shouter church, because if she did, the special way in which the prayers are said would have been apparent to the applicant and the applicant may also have been cognisant of at least some of the unique features of the Local Church.

- *The applicant stated that she learned the bible while attending the gatherings. When asked to describe what she learned, she said that she was illiterate. When it was pointed out that she may still have learned the bible by listening to others despite her illiteracy, she stated that she only learned the Mathews Gospel and she could only state one verse from John. The Tribunal is of the view that if the applicant attended the gatherings of the Local Church daily for a period exceeding six months, she would have a significantly greater level of knowledge of the Bible, despite her illiteracy.*

For these reasons the Tribunal finds that the applicant has been untruthful in her evidence and her description of events in China and the Tribunal rejects the applicant's evidence. The Tribunal rejects that the applicant has been involved with the Local Church in China, that she regularly attended the gatherings of the Local church, that she associated with others at the Local Church or that she introduced God or the Local church to others or otherwise assisted in spreading the Gospel. The Tribunal rejects that the applicant had been baptised in the Local Church in china. The Tribunal rejects the applicant's claim that she came to the attention of the authorities as a result of her association with the Church and that she was detained for almost a month or that she spoke in support of the Local church or against the government policies during her detention. The Tribunal does not accept the claim that the applicant's husband paid a bribe for her release from detention. The Tribunal rejects the claim that the applicant was required to report following her release from detention or that she was otherwise monitored or harassed by the authorities. The Tribunal rejects the claim that the applicant departed China in order to avoid persecution or that she had to bribe an official from the airport to depart the country. The Tribunal does not accept that church attendees had been arrested by the authorities following the applicant's departure and spoke of the applicant's association with the church or that the applicant is of any interest to the authorities due to this confession or her involvement with the church. The Tribunal has made these findings while acknowledging that the applicant started attending the Local Church in Sydney shortly after her arrival in Australia.

17. On the basis of the material in the court book I do not accept that the Tribunal based its decision upon incorrect information or that it misstated the applicant's evidence. There is no evidentiary support to the assertion of a reasonable apprehension of bias. In my view, the findings made and conclusions reached by the Tribunal were available to it on the material before it.

18. I likewise reject ground 2 in the application. There is no evidentiary support for the assertion of a reasonable apprehension of bias. Neither is there any evidentiary support for the asserted problems of interpretation, or even any particulars of these problems. Again, the applicant simply takes issue with the Tribunal's reasoning. She also asserts a failure to "make a genuine and independent attempt to look at my evidences as well as the evidence from Mr William Poh". This relates to the applicant's religious practice in Australia. The Tribunal dealt with that issue in the following terms[24]:

> *The Tribunal will now consider the applicant's conduct in Australia. The applicant has presented a statement from the Local church in Sydney and the Tribunal took evidence from William Poh from the Church. On the basis of this evidence, as well as the applicant's oral evidence, the Tribunal accepts that the applicant has been attending the Local Church in Sydney since August 2007. Given the Tribunal's findings about the applicant's lack of religious involvement in China, the Tribunal is of the view that any religious knowledge the applicant displayed in oral evidence was acquired as a result of her attendance in Australia. In light of the Tribunal's findings about the applicant's religious involvement in China and the applicant's overall credibility, as well as the Tribunal's concerns about the applicant's motivation in entering Australia, noted above, the Tribunal is not satisfied that the applicant has engaged in religious activities in Australia otherwise than for the purpose of strengthening her claims to be a refugee. The Tribunal disregard such conduct in accordance with s 91R(3).*

19. The evidence taken from Brother Poh[25] confirmed the applicant's attendance at Church in Australia but threw no further light on her religious adherence in China or the genuineness of her religious practice in Australia. I see no jurisdictional error in the decision by the Tribunal to

[24] CB 108
[25] CB 102

disregard the applicant's conduct in Australia once the Tribunal had concluded it was not satisfied that that conduct was engaged in otherwise than for the purpose of strengthening her claims to be a refugee.

20. The third ground in the application is an assertion that the Tribunal failed to comply with its obligations under s.424A(1) of the Migration Act in relation to the alleged loan of RMB300,000 and the applicant's religious involvement both in China and Australia. The Tribunal decision is, in substance, based upon inconsistencies and implausibilities in the applicant's own evidence. Such inconsistencies, implausibilities and gaps are not "information" for the purposes of s.424A[26]. In any event, the evidence given by the applicant to the Tribunal falls within the exception to the general obligation of disclosure in s.424A(3)(b). Further, the Tribunal put to the applicant in a s.424A invitation dated 17 January 2008[27] adverse information derived from the applicant's protection visa application, which the Tribunal considered may be a reason or part of the reason for affirming the decision of the delegate.

21. In my view, the evidence given by Brother Poh at the Tribunal hearing was, to the extent that it was relied upon by the Tribunal in its decision, favourable to the applicant. The evidence of Brother Poh supported the applicant's claim of religious adherence in Australia and the Tribunal accepted her factual claim about her church attendance here. Brother Poh was unable to comment on what might have happened to the applicant in China because he had no knowledge and he did not express any opinion on the genuineness of the applicant's Christian faith. In my view, there was nothing in the evidence given by Brother Poh which, in its terms was, a "rejection, denial or undermining" of the applicant's claims to be a person to whom Australia owed protection obligations[28]. In any event, I note that at the hearing the Tribunal orally notified the applicant of the implications of s.91R(3). The Tribunal records that discussion as follows[29]:

> *The Tribunal told the applicant that it had to consider whether the applicant had been attending the church and engaged in religious activities in Australia for the purpose of strengthening her claim to be a refugee. She said that it was not for the purpose of the*

[26] *SZBYR v Minister for Immigration & Citizenship* (2007) 235 ALR 609 at [18]
[27] CB 62-64
[28] *SZBYR* at [17]
[29] CB 102

> *application. She wants to go to the Church because in china she had no religious freedom and she has freedom here. Jesus had saved her and helped her family and of course she would attend the church. The Tribunal noted that unless it was satisfied that the applicant engaged in this conduct otherwise than for the purpose of strengthening her claim to be a refugee, it must disregard her conduct in Australia. She said that she did not know what would have happened to her family if there was no God to help her.*

22. If there had been an obligation of disclosure pursuant to s.424A in relation to the evidence of Brother Poh, it was open to the Tribunal to make that disclosure orally pursuant to s.424A(2A). In the absence of a transcript of the Tribunal hearing[30] I am unwilling to conclude that there was no oral disclosure for the purposes of subsection (2A).

23. This leaves the question of the impact of the decision of the Full Federal Court in *SZKTI*. In that case the Court dealt with an issue concerning the Tribunal obtaining information orally from a person nominated by the applicant after the Tribunal hearing and its use of that information. The Court found that in obtaining that information by telephone, the Tribunal was not acting under its powers under s.427(3)(a) since it did not summon the person to give evidence[31]. The Court found that the Tribunal was acting pursuant to s.424 of the Migration Act and found that the Tribunal was obliged to obtain such information in accordance with a code of procedure set out in the section. The Court said at [43]:

> *In our opinion in its natural and ordinary meaning s 424(2) provides a means by which a person may be "invited" to give additional information to the tribunal, that is, information which that person has not already provided to the tribunal or which the tribunal has not obtained in another way, such as pursuant to the use of its powers under s 427(3) to summons a person to give evidence. The introductory words to s 424(2), namely "without limiting subsection (1)", identify one of the means available under s 424(1) which the tribunal may employ to get information, but then s 424(2) prescribes the mode and limitations governing how it may invite a person to give it additional information. The Parliament provided a code in ss 424, 424A, 424B and 424C which made extensive provision for the tribunal to obtain*

[30] The parties consented to the production of a transcript of the Tribunal hearing by order 3 made by me on 10 April 2008 in the event of any party wishing to rely on evidence of what occurred at the hearing but no transcript was provided.
[31] *SZKTI* at [41]

> *information including by means of an invitation to a person to provide it. Those provisions specified the means by which the information was to be sought, and the consequences for its non-provision. We are of opinion that the Parliament did not authorise the tribunal to get additional information from a person pursuant to its general power under s 424(1) without complying with the code of procedure set out in ss 424(2) and (3).*

24. This case has some distinguishing features from *SZKTI*. In this case, evidence was taken from Brother Poh orally at the Tribunal hearing and with the prior consent of the applicant[32]. I am prepared to infer from the Tribunal's reference to taking "evidence" from Brother Poh that, notwithstanding that he provided evidence by telephone, a formal procedure was followed and the Tribunal administered an oath or affirmation. The Tribunal is empowered by s.427(1)(a) to take evidence on oath or affirmation and is empowered to administer such an oath or affirmation to a person "appearing" at a hearing[33]. I do not regard the reference to "appearing" as requiring a personal attendance[34]. In *SZGBI v Minister for Immigration & Citizenship*[35] his Honour Middleton J dealt with an oral request by applicants to take evidence from a particular person[36]. The Tribunal received written evidence after the hearing[37]. The Court found that in those circumstances s.424(2) was not engaged[38]. The Court found that the Tribunal was entitled to act as it did either pursuant to s.426 of the Migration Act or pursuant to its general powers where there was an informal request to receive evidence. At [32] and [33] his Honour said:

> *The obtaining of evidence by the Tribunal can occur at any stage of the review, although where the applicant requests the Tribunal to obtain evidence, pursuant to s 426, this will necessarily occur after the applicant is invited to appear before the Tribunal. As I have indicated, the power of the Tribunal to coercively obtain evidence from a person comes from s 427(3), but there can be no doubt that the Tribunal by virtue of its general powers of procedure could obtain and receive evidence without coercive force if a person is willing to give evidence.*

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[32] CB 102
[33] s.427(3)(d)
[34] see s.429A
[35] [2008] FCA 599
[36] *SZGBI* at [6]
[37] *SZGBI* at [7]
[38] *SZGBI* at [26]

> *In my view, there is a distinction to be drawn between the Tribunal on its own initiative inviting a person to give additional information and the Tribunal obtaining evidence at the request of an applicant. In this case, the position is clear that the appellants did in fact request that the three witnesses give evidence, and that the Tribunal made no 'invitation' to any person to actually give additional information pursuant to s 424(2). This conclusion follows in the circumstances of this case whether or not the requirements of s 426 were adhered to by the appellants, or even possibly waived by the appellants.*

25. The Full Court in *SZKTI* did not find the decision in *SZGBI* of assistance[39]. The Full Court distinguished *SZGBI* on its facts but did not disapprove it. In my view, the circumstances in this case are closer to those of *SZGBI* than those in *SZKTI*. In my view, s.424 was not engaged and the Tribunal obtained oral evidence from Brother Poh at the Tribunal hearing with the concurrence of both the applicant and Brother Poh. In my view, the Tribunal was proceeding pursuant to its general powers and, to the extent necessary, pursuant to s.427 and 429A which authorises the giving of evidence by telephone. In the circumstances, I find that there was no breach of the Migration Act in relation to the manner in which evidence was obtained from Brother Poh and hence no jurisdictional error.

26. I find that the decision of the Tribunal is a privative clause decision. It follows that the application must be dismissed. I will so order.

27. As to costs, I see no reason to depart from the scale of costs prescribed in the *Federal Magistrates Court Rules 2001* (Cth) ("the Federal Magistrates Court Rules"). I will order that the applicant pay the first respondent's costs and disbursements of and incidental to the application in the sum of $5,000 in accordance with rule 44.15(1) and item 1(c) of part 2 of schedule 1 to the Federal Magistrates Court Rules.

I certify that the preceding twenty-seven (27) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 4 July 2008

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[39] *SZKTI* at[51]