FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZGYT v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 883*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming persecution in China as a Falun Gong practitioner – whether the Tribunal overlooked relevant material considered – statutory declarations attesting that the applicant was a genuine Falun Gong practitioner – Tribunal finding that the applicant only commenced Falung Gong practice in Australia to support his protection visa claims – Tribunal failing to consider whether applicant was a genuine practitioner at the time of the declarations – jurisdictional error found.

WORDS AND PHRASES – "Engaged in".

Migration Act 1958 (Cth), ss.91R, 424A

NAJT v Minister for Immigration [2005] FCAFC 134

Applicant:	SZGYT
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG475 of 2007
Judgment of:	Driver FM
Hearing date:	6 June 2007
Delivered at:	Sydney
Delivered on:	6 June 2007

REPRESENTATION

Counsel for the Applicant:	Mr B Zipser
Counsel for the Respondents:	Ms V McWilliam
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) A writ of certiorari issue quashing the decision of the Refugee Review Tribunal signed on 21 December 2006 and handed down on 16 January 2007.

(2) A writ of mandamus issue requiring the Refugee Review Tribunal to redetermine the review application before it according to law.

(3) The first respondent is to pay the applicant's costs and disbursements of and incidental to the application, fixed in the sum of $2,500.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG475 of 2007

SZGYT
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. This is an application to review a decision of the Refugee Review Tribunal ("the Tribunal"). The decision was signed on 21 December 2006 and was handed down on 16 January 2007. 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 persecution based upon his practice of Falun Gong. The background to the applicant's arrival in Australia, his protection visa claims, his review application, the material before the Tribunal and the Tribunal's decision is set out in the written submissions filed on behalf of the parties. I adopt as background for this judgment paragraphs 2 through to 15 of the applicant's submissions filed on 4 June 2007 and paragraphs 2 through to 7 of the Minister's submissions filed on 4 June 2007 and I make the necessary amendments to those paragraphs for incorporation in the judgment:

The applicant is a citizen of the People's Republic of China ('China'), who arrived in Australia on 7 August 2002. (court book (CB) 114.2)

On 9 August 2002 the applicant lodged an application for a protection visa. (CB 1-41), claiming to fear harm from the Chinese authorities, by reason of his belief in Falun Gong.

On 27 August 2002 the Department received from the applicant (by his migration agent) a three page statement by the applicant dated 15 August 2002 setting out his claims. (CB 45-47)

In summary, the applicant claimed to fear that the Chinese authorities will take away everything from his family and business, and that he would be imprisoned, if he did not give up Falun Gong. He claimed that in January 1999, he had been detained and beaten by police for his practice and support of Falun Gong (CB 46), that following that episode the 'people who put [him] into prison' frequently requested food and money and that the local police and business administration authority issued an order to confiscate his business (CB 47).

On 27 August 2002 a delegate of the Minister made a decision refusing to grant the applicant a protection visa. (CB 48-56)

In September 2002 the applicant applied to the Tribunal for review of the delegate's decision. (CB 57-60)

On 1 October 2003 the applicant attended a hearing before the Tribunal. (CB 118.8)

On 2 October 2003 the Tribunal made a decision affirming the delegate's decision refusing to grant the applicant a protection visa. (CB 114.3)

The applicant applied to the Federal Magistrates Court for judicial review of the Tribunal's decision and on 21 September 2006 the Federal Magistrates Court set aside the decision and remitted the matter to the Tribunal to redetermine according to law. (CB 114.4)

In November 2006 the Tribunal wrote to the applicant and invited him to a hearing on 6 December 2006. (CB 54)

On 23 November 2006 the applicant attended a hearing before the Tribunal (differently constituted). (CB 81, 118.9)

On 27 November 2006 the Tribunal sent the applicant a s.424A letter. (CB 83-86)

On 20 December 2006 (CB 123.9) the Tribunal received in response to the s.424A letter:

a) a statutory declaration from the applicant (CB 96-99);

b) a statutory declaration from Ke Wei Liu (CB 100);

c) a statutory declaration from Kai Lu (CB 101);

d) a statutory declaration from Chang Gui Ma (CB 102)

e) a statutory declaration from Wen Jie Jing (CB 103);

f) a statutory declaration from Shu Ling Wang (CB 104);

g) a statutory declaration from Zhang Ji Chong (CB 105);

h) a statutory declaration from Gang Chen (CB 106); and

i) a statutory declaration from Yu Qun An (CB 107).

Each witness other than the applicant declared that:

a) based on their observations, the applicant is "a diligent Falun Gong practitioner" and "lives his life towards the three principles of Falun Dafa …";

b) based on their observations and opinions, the applicant is "a genuine Falun Gong practitioner"; and

c) in their opinion, the applicant will "be subjected to persecution on his return to China".

On 21 December 2006 the Tribunal made a decision (handed down in January 2007) affirming the delegate's decision not to grant the applicant a protection visa. (CB 113-131)

Tribunal's statement of reasons

The Tribunal did not accept that the applicant had given a truthful account of his reasons for leaving China, on the basis of: first, inconsistencies between the information contained in the application for a protection visa, his statement to the Department and his oral evidence to the Tribunal; and secondly, the Tribunal's view that the further evidence provided by the applicant in response to a letter sent pursuant to s.424A of the *Migration Act 1958* (Cth) ("the Migration Act"), raising the inconsistencies, was untruthful (CB 125.8).

> The Tribunal found that the applicant's oral evidence lacked credibility, stating that 'the highly inconsistent and problematic evidence leads the Tribunal to conclude that the applicant was not a Falun Gong practitioner in China and did not [practise] Falun Gong or provide financial support to other Falun Gong practitioners as he has claimed' (CB 128.5).
>
> The Tribunal accepted that the applicant practised Falun Gong in some form in Australia (CB 129.4) However, under s.91R(3) of the Act, the Tribunal was not satisfied that the applicant had not engaged in the conduct for the sole purpose of strengthening his claims to be a refugee, and disregarded the evidence accordingly.
>
> Accordingly, as the Tribunal did not accept that the applicant had suffered persecution in China, nor that there was a real chance that the applicant would suffer persecution in the reasonably foreseeable future, the Tribunal was not satisfied that the applicant had a well-founded fear of persecution (CB 130.8).

2. These proceedings began with a show cause application filed on 13 February 2007. In that application the applicant asserted actual notification of the Tribunal decision on 16 January 2007. I find that the application was filed within time.

3. The evidence I have before me is limited to the court book filed on 26 March 2007.

4. The applicant now relies upon an amended application filed in court by leave today. That application raises only one issue and that is whether the Tribunal overlooked relevant material. The applicant asserts that the Tribunal failed to have proper regard to statutory declarations appearing at pages 100 to 107 of the court book. The Tribunal had before it nine statutory declarations including one by the applicant. One witness (Mr Liu) also made a declaration. The court book discloses that two witnesses, Mr Wang and a Mr Liu attended the hearing conducted by the Tribunal and gave evidence. It is obvious from what the Tribunal says on pages 129 and 130 of the court book that the Tribunal had credibility concerns not only about the applicant's evidence but also about the evidence of those two witnesses. That evidence, however, is not the currently material issue; it is the other statutory declarations provided after the hearing and reproduced on pages 101 to 107 of the court book.

5. Those declarations are all relevantly in the same terms. The declarants state how long they have known the applicant, they offer the opinion that the applicant is a diligent Falun Gong practitioner who lives his life in accordance with three principles of Falun Dafa and that they have many times witnessed him practising Falun Gong at Darling Harbour and at Campsie and witnessed him studying Falun Dafa at Campsie. The declarants also referred to independent country information about the persecution of Falun Gong practitioners in China and venture the opinion that, given the current situation in China, a genuine Falun Gong practitioner like the applicant must be subject to persecution should he return there. The declarants also strongly support the applicant's protection visa application.

6. Counsel for the applicant contends that the Tribunal did not deal with these declarations. He concedes that the Tribunal referred to the declarations in its reasons. Indeed, they are specifically referred to at page 125 of the court book in the second paragraph. However, counsel for the applicant contends that the declarations were not dealt with in the Findings and Reasons of the Tribunal and that the failure to grapple with the corroborative evidence in the declarations points to jurisdictional error in accordance with the decision of the Federal Court in *NAJT v Minister for Immigration* [2005] FCAFC 134. The applicant contends that, in accordance with the Federal Court's observations in that case at [213], the Tribunal was required to have regard to the statutory declarations and, further, in accordance with the Federal Court's observations at [212], that real consideration had to be given to them. The applicant contends that the declarations were of high probative value specifically in relation to the question of whether the applicant was a genuine Falun Gong practitioner.

7. The Minister submits that the applicant's contentions can be dealt with simply. The Minister contends that the Tribunal did in fact deal with the declarations in its reasons on page 129 of the court book from about point 3. There the Tribunal, after referring to the applicant's claims about his practice of Falun Gong in Australia, stated:

> *The Tribunal considers that the applicant has acquired some knowledge of Falun Gong since arriving in Australia and accepts that he has taken part in Falun Gong activities in Australia including those referred to in the previous paragraph. The*

> *Tribunal also accepts that the applicant took part in a demonstration and has provided a photograph of himself in the Epoch Times and that he has provided statements from persons who attest to his practice of Falun Gong in Australia.*
>
> *The Tribunal also accepts that the applicant practises Falun Gong in some form in Australia. However, in determining whether actions taken in Australia are relevant in considering the well-foundedness of an applicant's claims to fear persecution regard must be had to the provisions of section 91R(3) of the Migration Act 1958.*
>
> *Section 91R(3) provides that in determining whether a person has a well-founded fear of being persecuted for one or more of the Convention reasons any conduct engaged in by the person in Australia must be disregarded unless the person satisfies the Tribunal that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee. The Tribunal is not satisfied for the purposes of section 91R(3) of the Act that the applicant engaged in this conduct otherwise than for the sole purpose of strengthening his claims to be a refugee.*

8. The Tribunal's reasons for that finding follow. I accept from the above paragraphs that the Tribunal had at least passing regard to the statutory declarations in issue in reaching its finding that the applicant had not persuaded the Tribunal that he had engaged in his Falun Gong practice in Australia otherwise than for the purpose of strengthening his claim to be a refugee. At first glance it might be thought that that is the end of the issue. However, it is not. It is necessary to consider how the Tribunal dealt with the s.91R(3) issue in order to determine whether the Tribunal gave meaningful consideration to the corroborative evidence.

9. The applicant had claimed to be a Falun Gong practitioner in China and that claim was totally rejected. The applicant had also claimed to be a Falun Gong practitioner in Australia but, while that claim was in effect accepted, the applicant's conduct was disregarded purportedly in accordance with s.91R(3). The critical reasoning appears on page 130 of the court book. The Tribunal said:

> *The Tribunal has found above that the applicant has fabricated evidence in relation to his experiences in China. The Tribunal also considers that the applicant has shown a willingness to continue to do so in relation to his practice of Falun Gong in Australia. The Tribunal does not accept that there is any credible*

evidence before it as to why the applicant would, having never practised Falun Gong in China, ***commence that practice*** *in Australia. In all the circumstances the Tribunal is not satisfied that the applicant has practised Falun Gong for any other reason than to strengthen his claim to be a refugee. Accordingly, the Tribunal is not satisfied for the purposes of section 91R(3) of the Act that the applicant has engaged in conduct in Australia in relation to this practice of Falun Gong and the demonstration against the Chinese Government otherwise than for the sole purpose of strengthening his claim to be a refugee. Accordingly, the Tribunal disregards the applicant's conduct in practising Falun Gong and taking part in Falun Gong and other associated activities in Australia and in assessing whether he has a well-founded fear of persecution for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as mentioned by the Refugees Protocol.* (emphasis added)

10. Despite some initial doubt, it is common ground that the statutory declarations in issue were not rejected by the Tribunal as fabrications. The reference to fabricated evidence is taken to be a reference to the evidence of the applicant and his witnesses Mr Liu and Mr Wang. It would have made little sense if the Tribunal had rejected the statutory declarations in issue as fabrications because, as I have already found, the Tribunal accepted and relied upon them in finding that the applicant had engaged in the practice of Falun Gong in Australia. In my view, in order to determine whether the Tribunal gave meaningful consideration to the statutory declarations in issue in deciding whether the applicant was a genuine Falun Gong practitioner in Australia, it is necessary to turn to the words of s.91R(3). Relevantly, the section provides:

> *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 of 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.*

11. The question in my mind is what is meant by the words "engaged in by the person in Australia". Does it mean "commenced" or does it mean "carried on"? On reading the reasons of the Tribunal on page 130 of the court book it is apparent that the Tribunal considered that the words meant "commenced". The critical sentence is that which reads:

> *The Tribunal does not accept that there is any credible evidence before it as to why the applicant would, having never practised Falun Gong in China, would commence that practice in Australia.*

12. In other words, the Tribunal considered that, regardless of whether the applicant was practising Falun Gong in Australia, and it accepted that he was, he did not commence that practice because he was a genuine Falun Gong believer but to enhance his protection visa claims. I prefer the interpretation of the words "engaged in" in s.91R(3) as meaning "carried on" rather than "commenced". There is logic in that interpretation. A person may commence a course of conduct in Australia for the purpose of enhancing their protection visa claims but nevertheless carry on that conduct for other reasons. In the case of religion they may over time become a genuine adherent. If a person commences engaging in a religious practice to support their protection visa claims but over time becomes a genuine adherent, in my view, s.91R(3) does not require that the conduct to be disregarded. The Tribunal remains able to consider whether, on a forward looking assessment, the person would suffer a real risk of harm in their country of origin.

13. In my view, by concentrating on the commencement of the applicant's conduct in Australia rather than in considering the entire period of that conduct the Tribunal overlooked the significance of the statutory declarations which attest to the genuineness of the applicant's belief and practice of Falun Gong **at the time of the declarations**. The Tribunal needed to consider whether, taken as a whole, the applicant's conduct in Australia was merely to support his protection visa claims or whether he had become a genuine practitioner whose risk of harm in China therefore needed to be considered. The statutory declarations all supported the proposition that, whatever the applicant's original motives may have been, he was, at the time of the declarations, a genuine practitioner.

14. There was no real consideration by the Tribunal of that issue and that establishes to my satisfaction that the Tribunal fell into jurisdictional error. As the Tribunal committed jurisdictional error the decision of the Tribunal is not a privative clause decision and the applicant should receive relief in the form of the constitutional writs of mandamus and certiorari.

15. I will order that a writ of certiorari issue quashing the decision of the Tribunal signed on 21 December 2006 and handed down on 16 January 2007, and that a writ of mandamus issue requiring the Tribunal to redetermine the review application before it according to law.

16. The applicant was represented today by counsel on a direct access brief. Counsel has prepared an amended application and written submissions and attended Court today to present oral submissions. The applicant, through his counsel, seeks costs in the sum of $2,500. Counsel for the Minister did not wish to be heard on costs. I will order that the first respondent pay the applicant's costs and disbursements of and incidental to the application, fixed in the sum of $2,500.

I certify that the preceding sixteen (16) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 13 June 2007