FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZLSP & ANOR v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 950*

MIGRATION – Persecution – review of Refugee Review Tribunal decision – visa – protection visa – refusal – s.91R(3) is limited in its effect to the claims of the person who engaged in the relevant conduct – Tribunal is required to consider a claim emerging clearly from the materials before it even if it is not articulated as a claim by the applicant – identification of such a claim will not depend on constructive or creative activity by the Tribunal.

Migration Act 1958, ss.91R, 414, 424A

Htun v Minister for Immigration & Multicultural Affairs (2001) 194 ALR 244
NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No.2) (2004) 144 FCR 1
NAVK v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 1695

First Applicant:	SZLSP
Second Applicant:	SZLSQ
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 3744 of 2007
Judgment of:	Cameron FM
Hearing date:	1 July 2008
Date of Last Submission:	1 July 2008
Delivered at:	Sydney
Delivered on:	17 July 2008

REPRESENTATION

Counsel for the Applicants:	Mr B. Zipser
Counsel for the Respondents:	Mr D. Godwin
Solicitors for the Respondents:	DLA Phillips Fox

ORDERS

(1) The application be dismissed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3744 of 2007

SZLSP
First Applicant

SZLSQ
Second Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicants, who are husband and wife, are citizens of China. The first applicant claims that while in China he practised Falun Gong and was subsequently arrested, interrogated and beaten by the authorities. The second applicant submitted her own claim that she was persecuted by the Chinese government because she supported her husband in his practice of Falun Gong.

2. The applicants arrived in Australia on 7 April 2007.

3. After their arrival in Australia, the applicants each lodged an application for a protection visa. These applications were refused by the Minister's delegate on 9 July 2007. The applicants then applied to

the Refugee Review Tribunal ("Tribunal") for a review of the departmental decision. The applicants were unsuccessful before the Tribunal and have applied to this Court for judicial review of the Tribunal's decision.

4. For the reasons which follow, the application will be dismissed.

Background facts

5. The facts alleged in support of the applicants' claims for protection visas are set out on pages 4 – 15 of the Tribunal's decision (Court Book ("CB") pages 146 – 157). Relevantly, they are in summary:

Protection visa application

6. In his protection visa application, the first applicant made the following claims:

   a) he was introduced to Falun Gong by a friend and practised in a park from six to seven every morning with about twenty other people;

   b) in 1999 Falun Gong was banned and the group could no longer practise in the park. He organised a new location in the mountains and continued to practise there with seven or eight people until 2003;

   c) while on an overnight business trip in June 2003, the first applicant and three fellow staff members were caught by the police meditating. They were taken to the police station and interrogated;

   d) during his interrogation the first applicant was beaten with kicks and blows and with an electric rod. He admitted to being an organiser. After three days of torture the first applicant signed a letter of guarantee stating, amongst other things, that he would not practise Falun Gong any more. The police told the first applicant that if he did not sign the letter, they would not let his wife work and would not let his children go to school;

e) despite this incident the first applicant could not give up his belief in Falun Gong. He and other organisers secretly printed and distributed Falun Gong publicity material;

f) in September 2005 some Falun Gong members were arrested by the police and the first applicant went to the police station to argue on their behalf. The police claimed that the first applicant was unrepentant and arrested him again;

g) the police went to the first applicant's home and told his wife that she needed to divorce him. When the second applicant told the police that she did not have a problem with the first applicant's practice of Falun Gong, one of the policeman pushed her and she hit the corner of a table, fracturing her nose;

h) the second applicant was required to report to the police station every time there was a big event in China, such as National Day and the First of July (birthday of CPC);

i) the first applicant was fired from his work because of his practice of Falun Gong, while the second applicant was discharged because she refused to divorce her husband; and

j) after their arrival in Australia, the first applicant's sister-in-law received a call from an unknown person trying to discover the applicants' whereabouts. His sister-in-law was also visited by the police who had the following message for the first applicant: "If he has any action against the government, we will never let him off".

7. In her protection visa application, the second applicant provided a statement which reiterated and supported the claims made by the first applicant.

Tribunal hearing

8. At the Tribunal hearing on 5 October 2007, the first applicant made the following additional claims:

a) after he was arrested in 2003 the first applicant's work unit did not allow him to work. The second applicant, who worked for the same unit, was also disallowed from working;

b) he first came across Falun Gong in October 1996. He practised the five exercises and studied the theory every morning, having learnt this knowledge from *Zhuan Falun*. He practised in the park from five to six in the morning with seven other people;

c) the police held him for four days when he was arrested in June 2003;

d) he printed and distributed leaflets promoting Falun Gong once every three or four months;

e) after his arrest in September 2005 the officers went to his home. The police punched his wife in the face and broke her nose. They also beat her and pushed her onto the edge of table. She did not return to work after this incident and the police did not come near her nor did they expect her to go near them;

f) he did not have any other specific problems in China; and

g) he practised Falun Gong in Australia for a period of time at Campsie and Auburn.

9. At the Tribunal hearing, the second applicant made the following claims:

a) she was expelled from work in 2005;

b) the first applicant started practising Falun Gong in 1997. She later stated it was 1996 or 1997. During summer he practised from five to six in the morning; in winter the sun rose late and he practised from six to seven;

c) the first applicant was arrested in 2003 and was detained for four to five days. During this time the police came to her home but they did not say much and did not do anything to her. She later stated that she could not remember what happened in 2003 and that she did not have a job at this time;

d) after the events in 2003 the couple was not allowed to return to work, although they were not "expelled" from their employment;

e) she and the first applicant were expelled from the factory in 2005 after she was released from hospital. Nothing else happened;

f) she had to report to the police station once a week, sometimes once a month; and

g) the first applicant has been practising Falun Gong in Australia at Campsie and the city. She later confirmed it was Auburn.

10. In response to a number of concerns raised by the Tribunal at the hearing, the first applicant further submitted that:

a) when he was arrested in 2003 he was told verbally not to come back to work but in 2005 he was formally expelled; and

b) it was the first applicant and not his wife who had to report to the police. She did not practise Falun Gong and the police targeted him.

11. These claims were echoed in the applicants' written response to the Tribunal's s.424A notice.

The Tribunal's decision and reasons

12. After discussing the claims made by the applicants and the evidence before it, the Tribunal found that it was not satisfied that the applicants are persons to whom Australia has protection obligations under the *United Nations Convention relating to the Status of Refugees 1951*, amended by the *Protocol relating to the Status of Refugees 1967* ("Convention"). The Tribunal's decision was based on the following findings and reasons:

a) the applicants provided inconsistent evidence about when they lost their jobs and the Tribunal did not find it plausible that they would not have stated in their applications when they in fact ceased to work:

i) with respect to the first applicant, the Tribunal did not accept his explanation that in 2003 he was told verbally not to come back to work and in 2005 was given formal notice. The Tribunal considered the first applicant's s.424A response but concluded that it did not add anything to the explanation given at the hearing;

ii) with respect to the second applicant, the Tribunal considered her submission that after she was hit her memory deteriorated and that possibly she was irritated in her mind and upset so she did not hear the question. However, given that the Tribunal had found that the first applicant was not plausible on the same issue, the Tribunal did not accept her submission that she did not understand or did not hear the question;

b) the applicants gave inconsistent evidence about their reporting obligations. The Tribunal noted that:

i) in his written statement the first applicant claimed that after September 2005 the second applicant had to report to the police station every time there was a big event in China but at the hearing he stated that his wife was not expected to go near the police;

ii) at the hearing the second applicant stated that she had to report to the police once a week or once a month; and

iii) at the hearing the applicant later stated that it was him and not the second applicant who had to report to the police;

c) given these significant inconsistencies, the Tribunal did not accept that the applicants were credible or truthful in their evidence. Further, the Tribunal found that the applicants continued to change their answers regardless of the truth and misled the Tribunal;

d) the Tribunal did not accept that any of the purported events in China occurred, including the alleged events concerning the second applicant;

e) the Tribunal considered the photos submitted by the applicants which purported to show the second applicant's injuries, however, given its finding that the applicants had not been consistent and were not truthful, the Tribunal did not place any weight on those photos;

f) the Tribunal concluded that the first applicant did not practise Falun Gong in China and was not a genuine Falun Gong practitioner. The Tribunal was not satisfied that his Falun Gong activities in Australia were engaged in otherwise than for the purpose of strengthening his claim to be a refugee and the Tribunal accordingly disregarded such conduct pursuant to s.91R(1) of the Act;

g) the Tribunal therefore concluded that the first applicant did not have a well founded fear of persecution for a Convention reason; and

h) the Tribunal noted that the second applicant's claims largely relied upon the claims of the first applicant in that she was not a Falun Gong practitioner herself but supported her husband's practice of it. Given the Tribunal's finding that the first applicant was not a Falun Gong practitioner in China, the Tribunal did not accept that the second applicant suffered ill treatment as a result of the first applicant's alleged practice of Falun Gong or had a well founded fear of persecution for a Convention reason.

Proceedings in this Court

13. The grounds of the amended application were pleaded as follows:

(1) The Tribunal failed to consider the possibility that the applicant wife may suffer persecution in China because of the activities of the applicant husband in Australia.

(2) The Tribunal, as a basis for finding that the applicant husband made inconsistent claims, found that he stated in his protection visa application that in September 2005 he was fired by his employer. The applicant husband did not specify the date "September 2005" in his protection visa application. The Tribunal made a finding when there was no

evidence to support the finding, giving rise to jurisdictional error.

Sur place **claim**

14. This element of the application to the Court is raised solely by the second applicant. She alleges that the Tribunal failed to identify and deal with a *sur place* claim which she submits was available to her because of her husband's conduct in Australia. In this regard it is to be recalled that the second applicant's claim was substantially dependent upon her husband's claim as, although she was not a Falun Gong practitioner herself, she supported her husband in his Falun Gong practice and, as a result of that support, she claimed to have a well founded fear of persecution for a Convention reason.

15. The second applicant accepted that in these proceedings she could not disturb the Tribunal's adverse factual findings concerning events which the applicants alleged had occurred in China. Nevertheless, she submitted that such findings were not relevant to the consideration of the *sur place* claim which she said had not been identified and dealt with by the Tribunal.

16. In relation to the first applicant's Falun Gong practice in Australia the Tribunal had said this:

> *Although the applicant has stated that he has attended Falun Gong activities here, given its finding that the applicant did not practice* [sic] *Falun Gong in China and he is not a genuine Falun Gong practitioner, then the Tribunal is not satisfied that the applicant engaged in those activities in Australia otherwise than for the purpose of strengthening his claim to be a refugee. This means that pursuant to section 91R(3) the Tribunal disregards such conduct.* (CB 158)

The evidence upon which those comments were based were set out at CB 151:

> *The applicant stated he practiced* [sic] *in Australia for a period of time at Campsie and Auburn.*

and

The applicant wife stated the applicant had been practicing while in Australia at Campsie and the city. She stated she did not remember where else, she thought only the two. When it was put to her he said Auburn, she said yes.

17. The second applicant has submitted that although s.91R(3) of the *Migration Act 1958* ("Act") required such conduct to be disregarded as far as the first applicant was concerned, it ought not to have been disregarded when the Tribunal considered her claims. She submits that this is what, in effect, happened. It was suggested that the Tribunal may not have considered the first applicant's conduct in the context of the second applicant's claim as a result of an incorrect application of s.91R(3) in that it may have disregarded the first applicant's conduct not only in relation to his own claims but also in relation to his wife's.

18. Section 91R(3) provides:

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

19. I accept the second applicant's submission that, properly understood, s.91R(3) is limited in its effect to the claims of the person who engaged in the relevant conduct. That is to say, under s.91R(3) the first applicant's conduct ought to be disregarded only in respect of his own claim to fear persecution and not in respect of the second applicant's claim.

20. The Tribunal expressed its finding concerning the second applicant in the following terms:

> *The Tribunal notes that the applicant wife's claims largely relied upon the applicant's claim, that is, she herself was not a Falun Gong practitioner but supported the applicant's practice of it. The Tribunal has found that the applicant is not a genuine Falun Gong practitioner and that none of the claimed events in China arising from his claimed Falun Gong practice occurred. The Tribunal has found it does not accept the alleged events that happened to the applicant wife as a result of the applicant's alleged Falun Gong practice have occurred. The Tribunal also finds that because it is not satisfied that any of the claimed events in China arising from the applicant's claimed Falun Gong practice occurred, including the alleged events that have happened to the applicant wife (including that she was hit and her memory deteriorated) as well as the alleged police conversations with the applicant wife's sister. Given the Tribunal has found the applicant is not a Falun Gong practitioner, the Tribunal is not satisfied that there is a real chance that harm for a Convention reason based on her relationship with the applicant will befall the applicant wife in the reasonably foreseeable future. Therefore the Tribunal is not satisfied that she has a well founded fear of persecution for a Convention reason. She is not a refugee.* (CB 159)

21. The second applicant stressed that the Tribunal had stated that the first applicant was "not a Falun Gong practitioner" whereas, in reality, its finding had been that he was "not a genuine Falun Gong practitioner": see the passage quoted above at [16]. It was submitted that from the way the Tribunal expressed its decision concerning the second applicant, it could be concluded that it had not considered whether the first applicant's conduct in Australia might have had some impact on the second applicant's claim to fear persecution in China.

22. The second applicant submitted that if the Tribunal had given consideration to how her husband's conduct in Australia might have affected her fear of persecution in China, its considerations would have contained a discussion of what the conduct was and what independent country information disclosed would be its likely consequences. Consequently, it was submitted that the Tribunal had erred by failing to consider a separate question to which it ought to have addressed itself, namely whether the second applicant, as a result of the first applicant's activities in Australia, had a well founded fear of persecution.

23. In response, the first respondent submitted that the Tribunal had addressed the claims which had been made to it and that the *sur place* claim which the second applicant now agitates was not one which was raised on the materials before the Tribunal with the degree of clarity which would have required the Tribunal to consider it.

24. The Tribunal is required under s.414 of the Act to consider the claims of the applicant; to make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction: *Htun v Minister for Immigration & Multicultural Affairs* (2001) 194 ALR 244 at 259 [42]. But the Tribunal is not limited in its considerations to the claims articulated by the applicant if additional claims are raised "squarely" on the material available to the Tribunal: *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No.2)* (2004) 144 FCR 1 at 18-19 [58]. Even so, in *NABE's case* the Full Court of the Federal Court held that an unarticulated claim must emerge clearly from the materials for the Tribunal to be obliged to consider it (at 22 [68]) and a claim requiring such consideration will not depend for its exposure on constructive or creative activity by the Tribunal (at 19 [58]). As Allsop J said in *NAVK v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1695 at [15]:

> *Whatever adverb or adverbial phrase is used to describe the apparentness of the unarticulated claim, it must, it seems to me, either in fact be appreciated by the Tribunal or, if it is not, arise sufficiently from the material as to require a reasonably competent Tribunal in the circumstances to appreciate its existence. A practical and common sense approach to everyday decision-making requires the unarticulated claim to arise tolerably clearly from the material itself, since the statutory task of the Tribunal is to assess the claims by reference to all the material, not to undertake an independent analytical exercise of the material for the discovery of potential claims which might be made, but which have not been, and then subjecting them to further analysis to assess their legitimacy.*

25. In this case no *sur place* claim was made expressly by either of the applicants. Both their visa application forms relied, for the detailed substance of their claims, on the statements accompanying their visa application forms (CB 41–48, 49–52, 53–54). Neither of those statements makes any reference at all to the first applicant's Falun

Gong practice in Australia. Nor does the statement which the first applicant subsequently submitted to the Tribunal (CB 88–91). The only time when that practice was mentioned was during the course of the applicants' oral evidence to the Tribunal.

26. It is tolerably clear that the claims advanced by the applicants turned on the first applicant's adherence to and practice of Falun Gong in China and not upon any *sur place* element. The reference in the Tribunal's decision record to the evidence presented at its hearing suggests that the mention by the applicants of the first applicant's practice of Falun Gong in Australia was not to identify a separate basis upon which the couple might have well founded fears of persecution were they to return to China but was made to underline the genuineness of the first applicant's claimed adherence to Falun Gong. No details of the first applicant's Australian-based practice were provided other than the locations where he was said to have practised. He did not describe whether he practised in public or in private, whether he participated in protests or whether his practice in Australia was conducted in such a way as would have strengthened or created a well founded fear of persecution.

27. Consequently, the fact that the Tribunal did not identify the existence of such a claim does not amount to error on its part. To have concluded that the applicants were making such a claim would have required the Tribunal to undertake the constructive or creative activity which the Full Court of the Federal Court has said should not be the basis for the identification of such a claim.

28. For these reasons, I do not conclude that a *sur place* claim was made by the second applicant or that one should have been and was not identified by the Tribunal for consideration. Consequently, this asserted ground of review discloses no jurisdictional error on the part of the Tribunal.

No evidence

29. The first applicant submitted that the Tribunal's conclusion at CB 158 that the applicants had not been truthful in relation to their past experiences was unsupported by evidence. That conclusion was, in

part, based on the Tribunal's summary of the relevant evidence at CB 157:

> *In his written statement the applicant stated that in September 2005 he was fired by his employer… At hearing on 5 October 2007 the applicant stated he stopped working in 2003 after he was arrested. The Tribunal finds the two statements inconsistent…*

30. The first applicant points to the following passage on the final page of the first applicant's principal statement submitted with his protection visa application form:

> *Because I practices Falun Gong, I was fired by my employer. Meanwhile, my wife was discharged was well, for she persisted not divorcing me. We both were at home, out of work, and no one was responsible to us. We had no any guarantee. Under that desperate situation, we escaped from China.* (CB 44)

The first applicant submits that this passage does not identify his dismissal as having occurred in 2005 and thus any significant findings of fact based upon such an understanding would be unsupported by evidence and thus erroneous.

31. However, when seen in context it is open to conclude that the passage in question was indeed referring to the first applicant having been dismissed in 2005. One point of reference is that the quoted passage refers to the second applicant being sacked "for she persisted not divorcing me" which relates to a passage two paragraphs earlier in the statement which describes how in September 2005 the second applicant was injured by police who then said "You must get divorced with your husband." This characterisation of the relevant passage is reinforced by the second and third paragraphs of the second applicant's statement submitted in support of her application for a protection visa (CB 49). That statement also links the assault upon her and the demand that she separate from her husband with her husband's arrest in September 2005.

32. Moreover, in the Tribunal's s.424A(1) notice (CB 117–120) the Tribunal put to the first applicant the apparent inconsistency between his written statement submitted with his protection visa application, which it stated said that he had been dismissed in 2005, and his oral evidence at the Tribunal hearing, when he said that he stopped working

in 2003. In responding to the s.424A(1) notice the first applicant did not suggest that the Tribunal's characterisation and understanding of what he was saying in his written statement was incorrect. He conceded that he had not mentioned in his written statement that the couple stopped working in 2003 and sought to draw a distinction between that event and being dismissed in 2005. He did not submit that his statement was not referring to him being dismissed in 2005.

33. For these reasons, the Tribunal's understanding that the first applicant was saying in his written statement that he was dismissed in 2005 was one which was open to it on a contextual reading of the passage in question. That understanding being open to it, the allegation that the Tribunal had no evidence that the applicant said he was dismissed in 2005 is not made out and the second ground raised by the amended application is similarly not made out.

Conclusion

34. Jurisdictional error on the part of the Tribunal has not been demonstrated.

35. Consequently, the application will be dismissed.

I certify that the preceding thirty-five (35) paragraphs are a true copy of the reasons for judgment of Cameron FM

Associate:

Date: 17 July 2008