FEDERAL COURT OF AUSTRALIA

SZHBP v Minister for Immigration and Citizenship

[2007] FCA 1226

MIGRATION – protection visa – where appellant found to have been persecuted for past political activity and to have fled to Australia to escape persecution – where appellant has not since being persecuted expressed an interest in pursuing further political activity – where decision to refuse visa has been affirmed on ground that appellant will not engage in further political activity – whether tribunal erred by failing to ask why appellant had ceased to pursue or be interested in further political activity – whether tribunal erred by failing to ask whether the appellant's cessation of and disinterest in further political activity was a consequence of the persecution it had found him to have suffered – whether tribunal erred by failing to consider whether the appellant had a well-founded fear of persecution in circumstances where it was necessary for him to be inactive politically in order to avoid persecution – Held: tribunal erred

Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473 followed
Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 distinguished
Minister for Immigration and Multicultural and Indigenous Affairs v SZANS (2005) 141 FCR 586 distinguished
NAEU of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 259 distinguished
NBKT v Minister for Immigration and Multicultural Affairs (2006) 156 FCR 419 discussed
Win v Minister for Immigration and Multicultural Affairs [2001] FCA 132 referred to

SZHBP v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL
NSD 792 OF 2007

RARES J
15 AUGUST 2007
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 792 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZHBP** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**RARES J**
DATE OF ORDER:	**15 AUGUST 2007**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders of the Federal Magistrates Court made on 20 April 2007 be set aside and in lieu thereof the following orders be made:

   (a) order in the nature of an order absolute in the first instance for a writ of certiorari to quash the decision of the second respondent made on 27 November 2006 to affirm the decision of the first respondent not to grant to the applicant a protection visa;

   (b) order in the nature of a writ of mandamus directing the second respondent to hear and determine the application for review according to law.

3. Argument on the form of costs orders on the appeal and in the Federal Magistrates Court stand over to 30 August 2007 at 9.30am.

4. Liberty be granted to any party to apply as to the form of costs orders on two days' notice.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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JUDGE:	**RARES J**
DATE:	**15 AUGUST 2007**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 The appellant is a citizen of the People's Republic of China. The Refugee Review Tribunal accepted his claims concerning the circumstances in which he had fled from China to Australia in June 2004.

2 Despite its acceptance of those claims, the tribunal then found that there was a remote chance that the Chinese authorities or anyone else would seek to harm the appellant in the reasonably foreseeable future for political reasons. This was because, it said, he had not engaged in political activity since his arrest in October 2003 and he had not expressed an interest in pursuing further political activities in the reasonably foreseeable future.

3 But the tribunal never asked the appellant, or itself, about why, during and after his detention, the appellant's interest in political matters had ceased. In particular, the tribunal did not consider whether the appellant modified his conduct due to the threat of further harm were he to persist in expressing his political opinions. If it should have enquired about these matters, the tribunal's failure to do so was a jurisdictional error.

4 In short, the appellant's claims, which the tribunal accepted, were as follows. During 2003 the appellant organised protest activities in China after a friend, injured in a motor vehicle accident, had been denied compensation. The person who had caused the accident used connections in government to avoid both punishment and paying compensation. After taking a number of other steps to seek redress for his friend, on 10 October 2003 the appellant organised a large demonstration in which over 100 persons participated to protest about his friend's treatment. Later that day he was detained by the police who held him until 31 December 2003. During that detention he was severely mistreated. The appellant was released only after he signed a confession admitting that he had been involved in political activities against the government. Following his release, the appellant was monitored and questioned by the authorities at least 25 times before he fled to Taiwan. There he bought another person's passport and used it to enter Australia in June 2004.

5 The Federal Magistrates Court dismissed the appellant's application for constitutional writ relief. The trial judge held that the tribunal had addressed the risk of the appellant suffering continuing persecution by reason of his past political activities. He held that the tribunal did not assume that the appellant would modify his future conduct in the face of a threat of political persecution: *SZHBP v Minister for Immigration* [2007] FMCA 511 at [16]. Rather, his Honour found that the tribunal had made a factual assessment that the appellant had engaged in a brief episode of political activism but that he had no interest in pursuing further political activities in the reasonably foreseeable future ([2007] FMCA 511 at [17]).

ISSUES

6 The appellant argued two grounds on appeal as to why the tribunal committed a jurisdictional error. Each is related. The first is that the tribunal failed to ask whether the appellant's cessation of his political activities, and his failure to express interest in further involvement in them, was a consequence of the persecutory treatment which the tribunal found he had suffered. This ground is based on the decision in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

7 The second ground is that the tribunal failed to consider whether the appellant had a well-founded fear of persecution, having regard to his individual circumstances,

characteristics and history, because it was necessary for him to be inactive politically in China in order to avoid persecution.

THE FACTUAL CONTEXT AND THE APPELLANT'S CLAIMS

8 In essence, the tribunal accepted all the appellant's claims of what had happened to him as being truthful. The trial judge found that no evidence was ever given to the tribunal corroborating any part of the appellant's original claims (*SZHBP* [2007] FMCA 511 at [5]). However, his Honour was incorrect. The tribunal found that at the hearing the appellant '… essentially repeated the claims he provided to the Department'. Those claims had been made in a statutory declaration which accompanied the appellant's claim for a protection visa. It is necessary to set out the claims in a little more detail than the summary I have already given. Since the tribunal accepted them, I have treated the claims as facts found by it.

9 The appellant was a self-employed truck driver engaged in transportation jobs in China. He had given one of his friends a job of transporting some building materials. In the course of executing that job the friend's small truck fell into a ravine when he was overtaken illegally by another truck. The appellant's friend survived the accident but was paralysed permanently. The friend was married with a small child and aged parents. Following the accident the friend was no longer able to support his family. The driver at fault did not have a driver's licence but his father was a senior and powerful government official in one of the Chinese provinces. The official used his position in government to protect his son from punishment and from having any obligation to pay compensation to the appellant's friend.

10 The appellant said that he could not keep silent about this state of affairs because he felt a sense of responsibility, having transferred the job to his friend. Between July to October 2003, the appellant engaged in a number of activities to seek redress for his friend. First, the appellant approached lawyers for legal assistance, but none wished to help him bring a case against a prominent government official's family. Secondly, the appellant contacted the local court seeking to sue the driver at fault together with his father. But the court refused to accept the application on the basis that the appellant was not qualified to bring it. The third action the appellant took was to gather a petition with some self-employed drivers, including his friend's relatives and friends. He sent the petition to the local, and then provincial, governments. The governmental response to the petition was to say that the

public security bureau (PSB) had already made a fair decision not to take any action against the driver at fault.

11 Fourthly, at the end of September 2003 the appellant organised a sit-in protest of about 50 self-employed drivers in front of the provincial government's offices. They distributed copies of the petition to the public in the meantime. The government authorities did not respond directly. However, armed policemen in front of the government building threatened the protesters that they would have trouble and would be subjected to serious punishment if they continued their sit-in because the Chinese national day, 1 October, was approaching.

12 In his claim for a protection visa the appellant introduced what he did next as follows:

> *'However, I really could not give up, and I have to strive for our basic human rights; otherwise, we would* [be] *dead.'*

He said that on 10 October 2003 he organised more than 100 people, including self-employed drivers and their relatives, to hold a big protest at a key intersection of the highway between substantial cities. The appellant and the drivers distributed propaganda material which encouraged readers to unite together to strive for their basic human rights. He called on the self-employed drivers to establish their own union to protect their human rights. Hundreds of people gathered around them and many other self-employed drivers stopped their vehicles and stood together with the protesters. The appellant did not expect the demonstration he organised to be so successful.

13 However, on the evening of the demonstration, the PSB arrested the appellant and kept him in detention until 31 December 2003. During his detention he was questioned many times and was physically tortured. His interrogators sought to force him to admit that he had organised an anti-government political demonstration. The appellant said that he refused to make that admission because he wanted respect and protection of self-employed drivers' basic human rights. He claimed the police later beat him and subjected him to further treatment until, as he claimed:

> *'I had to give up eventually, otherwise, I would be persecuted to death. On 31st December 2003, I was eventually released after I signed … a confession in which I admitted my so-called anti-government activities.*

Since then, I have been regarded as a person who has organized anti-government demonstration.'

14 After his release he was subjected continually to unfair treatment by the PSB and local government authorities. The police often came to his home or took him to the PSB offices, questioning him about his daily activities or requiring him to submit an 'ideological report'. The tribunal found this form of harassment occurred at least 25 times in six months. The appellant said that it was impossible for him to have a normal life. He could not get work because the PSB had told everyone he was a troublemaker with an anti-government ideology. He said that to escape from this unfair persecution permanently he had to leave his country and that he could not return there '… because I have already become the victim of political persecution. I therefore have to seek protection in Australia'.

THE TRIBUNAL'S REASONS

15 The tribunal identified that the appellant claimed that if he were to return to China he would be targeted by the authorities, arrested and mistreated, because of his past activities as an organiser of protest activities against the government in 2003. During the hearing, the appellant told the tribunal that he had not been involved in any political activities since 2003. The tribunal also asked the appellant if he had been involved in any political activities in Australia or if he had attempted to publicise the plight of his friend after he had arrived here. He responded that he was not involved in political activities. The tribunal asked him why he thought the authorities in China would be interested in him in the future if he had not been involved in any political activities for almost 3 years. He responded they would seek to harass and arrest him for what he had done in 2003.

16 The appellant also told the tribunal that early in 2006 his mother had received a visit from the police who had sought to speak to him. The tribunal asked the appellant how he knew that the visit had any connection with his political activities in 2003 and the appellant said, in response, there was no other possible reason for the visit. The tribunal accepted that the authorities in China had visited the appellant's mother and that they had indicated that they wanted to speak to him. But, it did not accept that the visit demonstrated ongoing interest in the appellant by the authorities regarding his political opinion.

17 The tribunal found that there was compelling evidence from country information to indicate that persons such as the appellant, '… that is persons who were politically active but have ceased to be politically active against the government, do not attract the ongoing adverse interest of the authorities in China'. Consequently, the tribunal found that the appellant's claims that the authorities would still be pursuing him in China because of his 2003 political activities, or that they would still be seeking him in 2006 for expressing his political opinion in 2003, were mere speculation.

18 Next, the tribunal considered the appellant's claim that in the six months following his release from prison he was unable to obtain employment because the Chinese authorities had told employers that he was a troublemaker. The tribunal accepted that he had suffered employment difficulties after being released from prison but said:

> *'However, the Tribunal has already found that the authorities will no longer be interested in pursuing the* [appellant] *for events which took place in 2003 and for which he has already been punished. The Tribunal is satisfied that the* [appellant] *will no longer be a person of interest to the authorities in China for reasons of political opinion and they will not seek to harm him or interfere with his employment opportunities for political activities and opinions he expressed in 2003.'*

19 The tribunal also found that the appellant was no longer implicated in political activities against the government of China or involved in any activity which might give rise to a suspicion of such involvement. It concluded that it was satisfied the appellant would not be prevented from obtaining employment by the authorities in China because of his protest activities in 2003. Ultimately, the tribunal made the following finding:

> *'In summary, the Tribunal has formed the view after considering information from external sources, discussed with the* [appellant] *at the hearing and summarised above, that only PRC citizens who actively and persistently express views against the government of China are at risk of harm by the PRC authorities. The Tribunal finds that as the* [appellant] *has not been implicated in any activities of a political nature since 2003, or expressed an interest in further political activities in the reasonably foreseeable future …* [t]*he Tribunal is satisfied that the chance that the PRC authorities or anyone else will seek to harm the* [appellant] *in the reasonably foreseeable future, for political reasons, is remote.*
>
> *The Tribunal finds that the* [appellant] *does not have a well-founded fear of persecution in China for reasons of political opinion or any other Convention reason.'*

20 Accordingly, the tribunal concluded that on the evidence as a whole it was not satisfied the appellant was a person to whom Australia had protection obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 and that, therefore, he did not satisfy the criterion for a protection visa set out in s 36(2)(a) of the *Migration Act 1958* (Cth).

Issue 1: Should the tribunal have asked itself why after his mistreatment in 2003, the appellant no longer had any interest in expressing his political opinion?

21 The Minister argued that the tribunal correctly addressed the fundamental question: namely, whether the appellant had a well founded fear of persecution for a Convention reason. He said that the principle in *Appellant S395* 216 CLR 473 was that the tribunal's function was to make that fact-specific inquiry in respect of the appellant's articulated claims, relying on *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 216 ALR 1 at 39 [162] per Hayne and Heydon JJ; see also 3-4 [8]-[11] per Gleeson CJ, 8-10 [27]-[31] per McHugh J, 16 [55] per Kirby J. He argued that once the tribunal addressed that inquiry it did not need to go further.

22 The Minister also argued that the tribunal's reasons exhaustively considered the appellant's actual claims. He said that the tribunal was not required to consider whether the persecutory conduct it found may have induced the appellant to drop his protest or to give up a wish to involve himself in political activity. Rather, the Minister submitted, the tribunal properly addressed all the claims which the appellant had actually made.

23 The Minister argued that the tribunal had found that the Chinese authorities were only interested in individuals who were politically active or suspected of being so. In *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 575, Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ said that a determination whether there was a real chance that something would occur required an estimation of the likelihood that one or more events would give rise to the occurrence of that thing. They said that in many, if not most cases, determining what was likely to occur in the future would require findings as to what had occurred in the past because what had occurred in the past was likely to be the most reliable guide as to what would happen in the future. And, they said that without making

findings about the policies of the Chinese government's authorities, in that case, and the past relationship of Mr Guo with those authorities, '… the tribunal would have had no rational basis from which it could assess whether there was a real chance that he might be persecuted for a Convention reason if he were returned to the PRC'.

24 Of course, in *Guo* 191 CLR 557 at 568-569 the tribunal had found that a considerable number of the applicant's claims were not credible and only accepted one of them, on the basis of which it made its assessments. There the tribunal found that Mr Guo had not had any political profile attributed to him by the Chinese authorities, and accordingly he had no well-founded fear of persecution for a Convention reason (*Guo* 191 CLR at 569). In the present case, the tribunal made clear findings about what happened to the appellant, his actual political profile, and the conduct and the policies of the Chinese authorities.

25 In *Appellant S395* 216 CLR 473, the tribunal concluded that because the appellants had lived together in Bangladesh for over 4 years without experiencing any more than minor problems with anyone outside their own families, they had conducted themselves in a discrete manner. It found that there was no reason that they would not continue to do so if they were returned to Bangladesh. Accordingly, the tribunal concluded that the persecutory behaviour of Bangladeshi society towards homosexuals did not give rise to a well-founded fear of persecution because the applicants in that case would live there discretely.

26 The majority of the High Court held that this approach constituted a jurisdictional error. McHugh and Kirby JJ noted there that the applicants had not raised any issue of modifying their behaviour because they feared persecution. However, their Honours said (*Appellant S395* 216 CLR at 489 [39]):

> *' ... **it seems highly likely that they acted discreetly in the past because they feared they would suffer harm unless they did.** If it is an error of law to reject a Convention claim because the applicant can avoid harm by acting discreetly, the Tribunal not only erred in law but has failed to consider the real question that it had to decide - whether the appellants had a well-founded fear of persecution.'* (Emphasis added.)

Their Honours answered affirmatively the hypothesis they posed, concluding that the tribunal had erred in law. They said (*Appellant S395* 216 CLR at 490-491 [43]):

> *'The notion that it is reasonable for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality. This is particularly so where the actions of the persecutors have already caused the person affected to modify his or her conduct by hiding his or her religious beliefs, political opinions, racial origins, country of nationality or membership of a particular social group. In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the* **harm** *that will be inflicted. In many - perhaps the majority of - cases, however, the applicant has acted in the way that he or she did only because of the* **threat** *of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the* **threat** *of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly.'* (Their Honours' emphasis.)

27 I am of opinion that the tribunal's reasons disclose a jurisdictional error. The tribunal was required by s 425(1) of the Act to identify 'the issues arising in relation to the decision under review'. The Act assumes that issues can be identified as arising in relation to the review: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 231 ALR 592 at 600 [33]-[34], 601 [40] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ. The tribunal failed to enquire whether the appellant's lack of political involvement and interest after his release from detention in 2003 occurred as a consequence of the persecutory conduct he had suffered. (cf: *Appellant S395* 216 CLR at 493 [51] per McHugh and Kirby JJ).

28 The tribunal determined the issue of whether the appellant had a well-founded fear of persecution if he returned to China on the basis that he no longer wished to express political opinion. But in doing so it did not address why he no longer wished to exercise this fundamental right. Nor did it address whether the appellant's current position had been affected by the past conduct of the Chinese authorities towards him. Just as McHugh and Kirby JJ had held in *Appellant S395* 216 CLR at 489 [39], despite the fact that the appellant here did not raise explicitly any issue that he had modified his behaviour because of his fear of persecution, I am of opinion that it is highly likely that he did so.

29 The tribunal's findings of the harm which the appellant had suffered were that he had been jailed, tortured, made to sign a confession and he had then spent the next six months being harassed by the authorities until he had to flee here. The harassment continued to occur even when he had ceased expressing his opinions. The tribunal did not ask what effect that harm and the threat of its repetition in the future had on the appellant. In particular it did not consider why he had lost interest in expressing his political opinions. It is difficult to think that a person who had organised a sustained public campaign to achieve justice for his paralysed friend had lost all interest in the pursuit of that end independently of any connection to his arrest on the day of the final protest and his subjection to persecutory conduct for the next nine months.

30 The tribunal did not address whether the modification in the appellant's desire to pursue his political activity of seeking justice for his friend had been influenced by the actual harm that he had suffered and the threat of its continuation. Even in jail, for a time, he resisted making a confession until, as the tribunal found, he could no longer bear his mistreatment. That is not insignificant in the scheme of a proper consideration of whether his fear was well-founded. As McHugh and Kirby JJ said in *Appellant S395* 216 CLR at 489 [40]:

> *'… persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors.'*

31 Given that the tribunal had accepted the appellant's claims of mistreatment by the authorities directly caused by his political activity, the tribunal had to ask itself the question why, after experiencing that persecutory conduct, had he ceased to pursue or be interested in further political activity. Here, the tribunal should have asked the question why the appellant no longer wished to raise the political opinion which he had previously expressed. Gummow and Hayne JJ said in *Appellant S395* 216 CLR at 503 [88] that the tribunal there, as here, did not ask why the appellant would live 'discreetly'. Gummow and Hayne JJ said of the tribunal:

> *'It did not ask whether the appellants would live "discreetly" because that was the way in which they would hope to avoid persecution. That is, the Tribunal was diverted from addressing the fundamental question of whether there was a well-founded fear of persecution by considering whether the appellants were likely to live as a couple in a way that would not attract adverse attention.'*

32 Similarly here, the real question for the tribunal was what caused the appellant's change of heart. As McHugh and Kirby JJ had said, it is fallacious to assume that a person's conduct is uninfluenced by the conduct of the persecutor and that the only relevant persecutory conduct is actual harm that will be inflicted in the future. They emphasised that the threat of harm is relevant to the consideration of a claim such as the present (*Appellant S395* 216 CLR at 490 [43]).

33 The tribunal should have addressed whether the appellant had changed or modified his interest in seeking justice for his friend or protesting against the government's conduct because of the persecutory consequences which the tribunal had found the appellant had actually suffered. This was relevant to whether the threat of further persecution gave rise to a well-founded fear in the appellant that he would be persecuted for reasons of political opinion on his return to China if he felt himself free to or did express the opinions he had previously expressed.

34 The tribunal simply assumed that the appellant's apparent disinterest in continuing to express the opinion which led to his arrest and mistreatment would mean he would not be at risk of further harm for a Convention reason. In ordinary aspects of human life, where people suffer a severe consequence for particular conduct, they do not usually repeat the conduct. One of the matters which courts take into account in sentencing offenders is deterrence; that is, the effects which the sentence or punishment inflicted is likely to have on the offender's propensity to re-offend and on others who, seeing or learning of the sentence, may assess their chance of suffering a similar fate as condign punishment. The aphorism, 'once bitten twice shy' has an obvious application to an experience of the kind the tribunal found the appellant to have had.

35 The tribunal did not address whether the appellant had been silenced effectively by the threat of further harm were he again to express any political opinion. On the tribunal's

findings the appellant suffered further harm by reason of his previous conduct following his confession and release from custody. After such an experience not everyone in the appellant's situation would have the courage to continue the fight to express his or her political opinion or to have any interest in doing so. He organised the demonstration on 10 October 2003 because, as he said, 'I really could not give up'. But the appellant gave up his fight for justice for his friend after he had been persecuted. The tribunal did not address why, and thus failed to exercise its jurisdiction, because it did not ask itself the correct question or consider this relevant consideration.

Issue 2: Did the tribunal consider properly the appellant's individual circumstances?

36 The Minister argued that the tribunal's approach was consistent with that held to be correct in *NBKT v Minister for Immigration and Multicultural Affairs* (2006) 156 FCR 419 at 438-439 [75]. There Young J, (with whom Gyles and Stone JJ agreed) said that the factual inquiry which the tribunal had to undertake was to be done by reference to an applicant's individual circumstances. However, for the reasons that I have given, that is the error which the tribunal made in this case. It failed to look at the circumstances of the appellant's claim concerning his treatment in China, which it found had occurred. After making that finding, the tribunal needed to consider whether the appellant had a well-founded fear of persecution by reason of his political opinions and whether he would fear to express them, were he returned to China.

37 The Minister argued that in order to establish a jurisdictional error by the tribunal it was necessary for the appellant to have expressly raised a claim that if returned to China he would continue to express his political opinion. He argued that because the appellant had not made this claim before the tribunal, he was precluded from doing so here. The Minister relied on *NAEU of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 259 at [19]-[20] per Madgwick J, with whom Merkel and Conti JJ agreed. He argued that there had to be some evidence to establish that the appellant would seek to exercise his right to express political opinion if he were returned to China. Madgwick J identified the denial of a person's freedom to express his or her opinion, which the person aspires to express, as a serious affront to his or her human dignity were the person returned to his or her homeland, based on the test that he had earlier formulated in *Win v Minister for Immigration and Multicultural Affairs* [2001] FCA 132 at [20]. However, in *NAEU* [2002]

FCAFC 259 there was no evidence to suggest that the applicant for a protection visa would wish to assert his opposition to the conduct he claimed to be offensive were he returned to Sri Lanka, nor that his conscience would seriously be affronted if he felt unable to do so (*NAEU* [2002] FCAFC 259 at [20]).

38 In *Appellant S395* 216 CLR at 491-492 [48] McHugh and Kirby JJ described *Win* [2001] FCA 132 as recognising that it was no answer to a claim for refugee status that the applicant took steps to hide political opinions and activities where the applicant claimed he or she would be persecuted for those opinions and activities.

39 I am of opinion that the appellant's claim before the tribunal of a well-founded fear of persecution on the ground of political opinion sufficiently raised a claim of an affront to his human dignity to require the tribunal to consider why the appellant had lost interest in expressing his opinions. After all, the appellant had said in his claim for a protection visa, that only after he signed a confession that he organised an anti-government political demonstration was he released from detention, during which he previously had been subjected to torture. He had claimed that he refused to sign a confession for some time '… because what I wanted was just respect and protection for our self-employed drivers' basic human rights'.

40 The Minister argued that the tribunal had found as a fact that the appellant had not been implicated in any political activity since 2003 or expressed an interest in further political activities in the reasonably foreseeable future. But in coming to that finding, it failed to consider its other findings about the appellant's individual circumstances. By late 2003 he had suffered for having engaged in political activity. He had been forced by the Chinese authorities to confess that this was wrongful conduct by him. In that scenario, the tribunal was required to address the question why the appellant, with that history, no longer wished to express his political opinions.

41 The tribunal referred to country information concerning the treatment of persons who were once politically active against the Chinese government, but later ceased to be so. It found that once their political activities ceased, persons such as the appellant no longer attracted ongoing interest from Chinese authorities. The country information led the tribunal to conclude that because of his political inactivity since his release from detention and his

cessation of involvement, the appellant had no real chance of attracting the adverse interest of the Chinese authorities. The Minister argued that the tribunal had been entitled, for the reasons it gave, to decide that it was not satisfied in accordance with s 65(1) of the Act that the appellant had a well-founded fear of persecution for reason of political opinion.

42 But as McHugh and Kirby JJ emphasised in *Appellant S395* 216 CLR at 490-491 [43], to determine the issue of real chance without determining whether the applicant's modified conduct was influenced by the threat of harm '… is to fail to consider that issue properly'.

43 The Minister then argued that the appellant never put a claim to the tribunal that he wished to be active in the future but feared to do so. He argued that the tribunal was bound to consider only the claims raised by the appellant in the material before it. He said that a claim had to be a substantial, clearly articulated argument relying upon established facts: *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at 17-22 [55]-[68], especially at 22 [68] per Black CJ, French and Selway JJ. The Minister argued that the tribunal was not bound to consider an hypothesis that had not been raised by an applicant for review, citing *Minister for Immigration and Multicultural and Indigenous Affairs v SZANS* (2005) 141 FCR 586 at 593 [46]-[47] where Weinberg, Jacobson and Lander JJ applied *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at 457 [31]-[32] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ. The circumstances in *SZANS* 141 FCR at 593 [43]-[45] involved a situation in which the Full Court observed that it was difficult to see how the applicant there had raised before the tribunal the subjective fear of persecution on which he sought to rely in challenging the decision to refuse him a protection visa.

44 But here, the facts which the appellant claimed had occurred to him required the tribunal to consider what would occur in the future if he were to return to China. The tribunal erred because it limited its consideration of this question too narrowly. It failed to ask itself whether its findings as to what had happened to the appellant in China indicated that his lack of political activity, after he eventually signed his confession, was because he feared that expressing his opinions would subject him to further persecution. The tribunal's failure to enquire into this question was a constructive failure to exercise its jurisdiction: *Appellant*

S395 216 CLR at 493-494 [53] – [54] per McHugh and Kirby JJ, 503 [88] per Gummow and Hayne JJ.

45 Gummow and Hayne JJ said, in *Appellant S395* 216 CLR at 503 [88], that the tribunal there had been diverted from addressing the fundamental question of whether there was a well-founded fear of persecution because it had only considered whether the applicants were likely to live as a homosexual couple in a way that would not attract adverse attention. They held that the tribunal should have asked the fundamental question whether the applicants would live 'discreetly' '… because that was the way in which they would hope to avoid persecution'. They held that the tribunal there either did not apply correctly the law to the facts it found or its decision involved an incorrect interpretation of the law: *Appellant S395* 216 CLR at 503 [89]. Here, the fundamental question was whether the appellant had a well-founded fear of persecution in circumstances where the tribunal had found as a fact that he had been severely mistreated for Convention reasons. The tribunal needed to address, in light of its finding, whether he would have feared in the future to express his political opinions, or abstained from doing so, were he returned to China because in that way he would hope to avoid persecution.

46 As I have found, the original claim for a protection visa raised such a claim sufficiently for the purpose of requiring the tribunal to consider it. The appellant's disinterest in political expression after 2003 is highly likely to have arisen because of his well-founded fear of expressing any further political opinion based on his persecution in 2003, which the tribunal found he had suffered for having expressed it.

47 The tribunal was obliged to consider the appellant's claim for a protection visa by asking whether the appellant's disinterest in expressing his political opinion, since being forced to sign his confession in late 2003, was a way in which he hoped to avoid persecution. The tribunal committed a jurisdictional error by failing to do so.

CONCLUSION

48 For these reasons, I am of opinion that the appeal should be allowed.

49 When I granted leave to the appellant to rely on the amended notice of appeal, the

Minister did not oppose the amendment provided that the appellant were ordered to pay the costs thrown away by the amendment. That is appropriate. I am of the provisional opinion that the appellant is otherwise entitled to his costs of the appeal and that there should be no order as to the costs below. (But cf: *M175 of 2002 v Minister for Immigration and Citizenship* [2007] FCA 1212 at [64]-[66] per Gray J.) I will allow the parties seven days to make written submissions as to the precise costs orders I should make if either of them contends differently to my preliminary view. It would be desirable if they could agree on a fixed sum (even for any alternate contentions) which would save the need for any taxation or assessment. Alternatively, the parties can re-list the matter for brief oral argument.

I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 15 August 2007

Counsel for the Appellant:	JE Griffiths SC (pro bono pursuant to O 80 of the Federal Court Rules)
Counsel for the Respondent:	S Kaur-Bains
Solicitor for the Respondent:	Blake Dawson Waldron
Date of Hearing:	6 July 2007
Date of Judgment:	15 August 2007