FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZKSQ v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 420

MIGRATION – Review of decision of Refugee Review Tribunal – whether jurisdictional error – merits review not the function of judicial review – credibility – whether Tribunal considered psychological state of applicant and her husband in assessing claims – whether applicant's claims considered independently of her husband – whether applicant properly served with s.424A letter – procedural fairness – whether obligation on Tribunal to investigate claims.

Judiciary Act 1903 (Cth) s.39B
Migration Act 1958 (Cth) ss.5, 36, 65, 91R, 424A, 441A

Re Minister for Immigration & Multicultural Affairs; ex parte Durairajasingham [2000] 168 ALR 407
NADR v Minister of Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 167
Minister for Immigration &Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 at 272
Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
NAHI v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 10
Kopalapillai v Minister for Immigration and Multicultural Affairs (1998) 86 FCR 547
Abebe v Commonwealth of Australia (1998) 197 CLR 510 at 560
Attorney General (NSW) v Quin (1990) 170 CLR 1
SZBYR v Minister for Immigration and Citizenship [2007] HCA 26; (2007) 235 ALR 609
Randhawa v the Minister of Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437
Selvadurai v Minister of Immigration and Ethnic Affairs and J Good (Member of the Refugee Review Tribunal) [1994] FCA 1105
Minister for Immigration & Multicultural & Indigenous Affairs v VSAF of 2003 [2005] FCAFC 73
Minister for Immigration and Multicultural and Indigenous Affairs v SGLB [2004] HCA 32; (2004) 207 ALR 12
Minister for Immigration and Ethnic Affairs v Singh (1997) 74 FCR 553
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63
SBBA v Minister for Immigration and Multicultural and Indigenous Affairs

[2003] FCAFC 90
Prasad v Minister for Immigration & Ethnic Affairs (1985) 6 FCR 155
SJSB v Minister for Immigration & Multicultural & & Indigenous Affairs [2004] FCAFC 225
Re Ruddock; Ex parte Applicant S154/2002 (2003) 201 ALR 437
WAKK v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 225
Minister for Immigration & Multicultural Affairs v Lay Lat [2006] FCAFC 6
Abebe v Commonwealth (1999) 197 CLR 510

Applicant:	SZKSQ
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1752 of 2007
Judgment of:	Orchiston FM
Hearing date:	4 March 2008
Date of Last Submission:	4 March 2008
Delivered at:	Sydney
Delivered on:	2 April 2008

REPRESENTATION

Counsel for the Applicant:	In person
Counsel for the Respondent:	Mr G Kennett
Solicitors for the Respondent:	Clayton Utz

ORDERS

(1) The application filed on 4 June 2007 is dismissed.

(2) The Applicant pay the First Respondent's costs fixed in the sum of $5,000 payable within five (5) months of the date of these Orders.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1752 of 2007

SZKSQ
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

The Application

1. This is an application pursuant to s.39B of the *Judiciary Act 1903* (Cth) and Part 8 Division 2 of the *Migration Act 1958* (Cth), as amended, (the Act) seeking review of the decision of the Refugee Review Tribunal (the Tribunal) handed down on 17 August 2006 which affirmed the decision of the delegate of the respondent Minister (the delegate) to refuse to grant a protection visa to the applicant.

Background

2. The applicant was born on 6 January 1983 and was aged 22 years at the time of her application for a protection visa.

3. The applicant claims to be a national of China.

4. The applicant and her defacto husband (the applicant's husband) arrived in Australia on 14 December and applied to the Department of Immigration and Multicultural Affairs (the Department) for Protection (Class XA) visas on 22 December 2005 (Court Book (CB) 1).

5. The applicant completed the protection visa application form as a member of her husband's family unit, relying on his claims to be a refugee (CB 38).

6. A joint statement submitted in support of the protection visa application claimed that the applicant's husband had been a Falun Gong practitioner since 1998 and had been imprisoned as a result in 2000 for 7 days following a special demonstration and was brainwashed, beaten and after his release, lost his job. It further claimed that in 2003, he was imprisoned for 40 days and after his release, was kept under surveillance (CB 12-18).

7. On 13 February 2006 the delegate refused to grant protection visas to the applicant and her husband on the basis that they were not persons to whom Australia had protection obligations under the Refugees Convention (see **Legislative framework)**.

Legislative framework

8. Section 65(1) of the Act authorises the decision-maker to grant a visa if satisfied that the prescribed criteria have been met. However, if the decision maker is not so satisfied then the visa application is to be refused.

9. Section 36(2) of the Act relevantly provides that a criterion for a protection visa is that an applicant is a non-citizen in Australia to whom the Minister is satisfied that Australia has a protection obligation under the Refugees Convention as amended by the Refugees Protocol. Section 5(1) of the Act defines "Refugees Convention" and "Refugees Protocol" as meaning the 1951 Convention relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees (the Convention).

10. Australia has protection obligations to a refugee on Australian territory.

11. Article 1A(2) of the Convention relevantly defines a refugee as a person who:

> *owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or particular opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.*

12. Section 91R and s.91S of the Act refer to the persecution and membership of a particular social group when considering Article 1A(2) of the Convention.

The Tribunal proceedings

13. The applicant and her husband lodged a joint application with the Tribunal for review of the delegate's decision on 21 March 2006 (CB 58-61)

14. The application requested that all correspondence be sent to an adviser (named in Section C of the application (CB 59-60)). The applicant signed a declaration authorising the Tribunal to communicate with her husband or the adviser about the application (Section F of the application (CB 61)).

15. The Tribunal sent a letter to the adviser inviting the applicant and her husband to give evidence at a hearing on 18 May 2006 (the first hearing). Only the applicant's husband attended and gave evidence at the first hearing (CB 115-118).

16. Due to the Tribunal's concern as to whether the applicant had been properly informed about the first hearing (CB 115), the Tribunal sent a letter directly to her and her husband inviting them to attend a further hearing on 16 June 2006 (the second hearing). Both the applicant and her husband gave evidence at the second hearing (CB 120-122).

17. On 22 June 2006, the Tribunal sent a letter directly to the applicant and her husband pursuant to s.424A of the Act (CB 96-99). On 19 July 2006, the Tribunal received a response to the s.424A letter from the applicant's

husband. He indicated in his response that he and the applicant had separated and requested that the applicant's application be cancelled (CB 100-104). The Tribunal did not receive any response from the applicant.

The Tribunal's findings and reasons (CB 124-132)

18. The Tribunal was not satisfied that either the applicant or her husband were "*truthful or credible*" witnesses. It found that they were both "*evasive*", with many of their responses being "*nonsensical, or expressed in the vaguest of terms after long hesitations"*; that they "*simply did not want to commit to evidence which might be different to that given by the other*"; and that there were "*major inconsistencies on central issues in their evidence*" demonstrating their "*overall lack of credibility*". The Tribunal did not accept the explanations put forth by the applicants for these inconsistencies.

19. Although the applicant did not put forward any independent claims of her own to refugee status in her protection visa application, the Tribunal considered whether she may have some claims arising out of the circumstances of alleged sterilisation following the birth of her daughter. It found the evidence on this matter to be in many ways "*unsatisfactory*"; that "*even the nature of the operation undergone … is unclear*" (CB 131).

20. The Tribunal summarised its findings as follows (CB 131):

- *the applicant husband is not a genuine or committed Falun Gong practitioner;*
- *he does not currently practise Falun Gong and would not seek to do so if he returned to the PRC;*
- *the applicant husband is not at risk of persecution, as a Falun Gong practitioner, or for any other Convention reason apparent from the evidence, on return to the PRC*
- *the applicant husband was not detained or otherwise persecuted as a Falun Gong practitioner prior to his departure from the PRC*
- *the applicant wife is not at risk of persecution because of an association with a Falun Gong practitioner*

- *the applicant wife does not have a well-founded fear of persecution in connection with any birth control procedure which she may have undergone previously, as the credible evidence does not establish that such a procedure was performed, or that such procedure was carried out for any Convention reason, and it therefore does not constitute persecution within the terms of the Refugees Convention definition of a refugee. The Tribunal did not accept that any such procedure had taken place.*

The proceedings before this Court

21. The applicant filed an application in this Court on 4 June 2007 setting out 3 grounds of review of the Tribunal's decision, with an affidavit in support filed the same date (the first affidavit).

22. The applicant filed a further affidavit on 4 July 2007 (the second affidavit).

23. The applicant appeared in person before the Court on 4 March 2008 with the assistance of a Mandarin interpreter. Mr Kennett of counsel appeared for the first respondent.

Grounds of application

24. The grounds of the application are:

    1. *The Tribunal (RRT) Officer serious doubts on the credibility of my claim and evidence. Therefore the Tribunal affirms the decision not to grant the my a Protection (Class XA) visa.*

    2. *I am a citizen of China. if I go back to my country I will be risk of suffering persecution within the meaning of the 1951 convention relation to the status of Refugees as amended by the 1967 Protocol relating to status of Refugees.*

    3. *The Tribunal doubts my claim without any proper grounds and detail investigate.*

Ground 1 of the application.

25. In her second affidavit, the applicant stated that the Tribunal, (in determining that neither herself nor her husband were truthful or credible witnesses on the basis of inconsistencies between their written and oral claims on various matters, particularly whether the husband was detained when they returned to China from the Mariana Islands in November 2005), did not consider their claims that they were "*psychologically sick for being detained several times and can't remember everything properly*." The applicant contends that this was an important matter that was not considered by the Tribunal and that the Tribunal thereby failed to accord her natural justice.

26. I consider that the Tribunal, in its **Findings and Reasons** (CB 124-133) thoroughly reviewed all the evidence provided by the applicant and her husband. The Tribunal set out in detail the many inconsistencies upon which it determined that neither the applicant nor her husband were truthful or credible witnesses. In so doing, the Tribunal directly addressed issues related to the psychological state and memory of the applicant and her husband. For instance (CB 125):

> *The applicant husband also sought to explain away the problems with his evidence by claiming that he is in poor health and has memory problems. The applicant wife also claimed that she was dizzy and suffering from memory problems. In my view, however, much of their behaviour was feigned. The applicant's wife, in particular, only began to complain in an exaggerated manner of headaches and memory problems when her evidence came to be tested and inconsistencies were pointed out to her.*
>
> *Both were evasive in their responses, particularly when questioned about matters about which they thought the other would have given evidence. Many of their responses were nonsensical, or expressed in the vaguest of terms after long hesitations. I formed the view that they simply did not want to commit to evidence which might be different to that given by the other.*

27. The Tribunal's adverse findings as to the credibility of the applicant and her husband, including its assessment of their psychological state and memory, were findings of fact par excellence, not open to review by this Court. As relevantly observed in *Re Minister for Immigration*

& Multicultural Affairs; ex parte Durairajasingham [2000] 168 ALR 407 at [67]).

> *If the primary decision maker has stated that he or she does not believe a particular witness, no detailed reasons need to be given as to why that particular witness was not believed. The Tribunal must give the reasons for its decision, not the sub-set of reasons why it accepted or rejected individual pieces of evidence.*

28. Also, as the Full Federal Court observed in *NADR v Minister of Immigration & Multicultural &Indigenous Affairs* [2003] FCAFC 167 at [9]:

> *The finding of facts, including the making of findings of credibility, was uniquely within the jurisdiction of the Tribunal and not within the jurisdiction of the Court. It would have been in contravention of Minister for Immigration &Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 at 272 for the Court to have engaged in merits review.*

29. Merely because the applicant disagrees with the Tribunal's factual conclusions and its ultimate conclusion does not amount to an error of law and it is not part of the function of this Court to engage in fact finding concerning the merits of an applicant's case: *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272; *NAHI v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 10 at [10]; *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 at [558]. Furthermore there is no error of law, let alone jurisdictional error, in the Tribunal making a wrong finding of fact: *Abebe v Commonwealth of Australia* (1998) 197 CLR 510 at 560 [137].

30. The requirements of procedural fairness deal with the process of decision-making, not the merits of the decision. As indicated by the High Court in *SZBEL* [at 25]:

> *what is required by procedural fairness is a fair hearing, not a fair outcome….. It is, therefore, not to the point to ask whether the Tribunal's factual conclusions were right. The relevant question is about the Tribunal's processes, not its actual decision.*

31. The question of the fairness of the Tribunal's findings in relation to the applicant's claims are matters of fact for it and the fairness of its

findings should not be reviewed by the Court: *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 35-37,

32. I consider that a fair reading of the Tribunal's decision record makes it clear that the Tribunal understood the nature of the claims made by the applicant and her husband; explored those claims with the applicant's husband at two hearings and with the applicant at the second hearing; identified the determinative issues and gave them sufficient opportunity to give evidence and make submissions on those issues at the hearings; gave to them in writing all concerns it had that may be the reason or part of the reason for affirming the decision under review and had regard to the material provided in response by the applicant's husband (see ground 2 below); then made findings based on all the evidence and material before it.

33. I consider that its findings of fact were open to it on all the evidence and material before it; that it provided well-articulated and sufficient reasons for its decision; and reached its conclusions based on those findings. In these circumstances, I am satisfied that the Tribunal accorded the applicant procedural fairness in compliance with the statutory regime in reaching its decision and that it performed the task required of it in accordance with law.

34. Accordingly, ground 1 of the application is rejected.

Ground 2 of the application.

35. Ground 2 states that the applicant will be at risk of suffering persecution for a Convention reason if she returns to China. The letter enclosed with the first affidavit, sets out the reasons why the applicant claims she cannot go back to China because of her husband's detention for his practice of Falun Gong and that she and her husband had flown to Australia "*because his and my life was in danger in China. Every body knew that he is my de facto … so my life was in danger too*" and that they had applied for protection visas because "*we can not live safely in the PRC because my husband is a Falun Gong practitioner"*.

36. The applicant also sets out in the first affidavit the reason why she wishes to fight "*my case myself*":

> *Now I left him [the applicant's husband] because I love someone else, I hate [the applicant husband] because of his practice of Falun Gong has brought so many problems to him and me. I do not care about him any more. But I am scared to go back to china because I am his wife and they know about it.*
>
> *For the above reasons I am afraid to go back to China and want to fight my own case by myself.*

37. The Court has considered in this context whether the Tribunal properly considered the applicant's claims in her own right in concluding that she was not a person at risk of suffering persecution for a Convention reason if she returned to China, and whether there was any procedural unfairness in the Tribunal proceeding to give its decision without a response having been received from the applicant to the s.424A letter.

38. In the original protection visa application, the applicant completed the form for a member of the family unit who did not have her own claims, but was reliant on her husband's claims to be a refugee. The applicant and her husband then lodged a joint application for review by the Tribunal. At the first hearing, apart from the applicant's husband giving evidence about his Falun Gong activities and his being detained for his practice of Falun Gong, he told the Tribunal about the applicant undergoing a birth control operation in China.

39. When the applicant did not attend the first Tribunal hearing, the Tribunal gave the applicant a further opportunity to attend at the second hearing, given its concerns that the applicant had not been properly notified in her own right. It stated in this regard that:

> *The applicant husband told me that he had not informed the applicant wife of her right to attend the hearing, as his adviser had told him it was not necessary for her to do so because only the applicant husband was a Falun Gong practitioner. He stated that his wife was not a Falun Gong practitioner. However he also mentioned that she had been sterilised. I decided that it was necessary to explore this issue further with the applicant wife herself. I also wanted to seek corroboration from the applicant wife of some of the applicant husband's claims.*
>
> *When I checked the letter from the Tribunal which had invited the applicant husband to the hearing, it was clear that the applicant wife had not been properly notified in that letter of her right to attend a hearing. Accordingly, another letter was sent to the*

> *applicant husband and the applicant wife inviting them to attend a further hearing …* (CB 115-116).

40. The applicant's oral evidence at the second hearing mainly concerned her husband's situation. She gave evidence that she was not herself a Falun Gong practitioner and that she had been forcibly sterilised in China, however she did not indicate that she feared future persecution for herself:

> *The applicant wife said that if they return to China they could not survive, they would be arrested because her husband practised Falun Gong. I asked whether she thought that she would be persecuted and she said that she did not know because she did not practise Falun Gong but maybe her husband would be threatened* (CB 120).

41. Subsequent to the hearing, the Tribunal sent the s.424A letter jointly to the applicant and her husband. It dealt with issues of the applicant and her husband's credibility over perceived material inconsistencies in their evidence between their claims in their protection visa application and their oral evidence at the hearing, as well as the perceived attempt by the applicant to provide written prompts to her husband during the course of his oral evidence to the Tribunal.

42. Included in the response from the applicant's husband was the statement that he and the applicant had separated and a request that the applicant's application be cancelled (CB 100-104). No response was received from the applicant. The Tribunal handed down its decision without taking any further steps to contact the applicant.

43. In this regard, the applicant and her husband, in their joint application to the Tribunal, had authorised the Tribunal to communicate directly with their adviser. The applicant had also signed the declaration (in Section F of that form) authorising the Tribunal to communicate with the husband or his authorised recipient "*unless I advise the Tribunal otherwise*" (CB 61).

44. On 18 May 2006, the applicant's husband lodged a *Change of Contact Details* form (CB 69) in substitution for the address details in the joint application form. On 19 May 2006, the Tribunal sent a letter to this address, inviting the applicant and her husband to attend a second

hearing, which they both did. The Tribunal further sent the s.424A letter to the applicant and her husband at this same address.

45. I consider that the Tribunal was entitled to send correspondence to the applicant at this authorised address for service, (being the address in the *Change of Contact Details* form), until such time as it was lawfully notified otherwise by her. It was open to the applicant, at any time before or after she separated from her husband, to withdraw the direction in the *Change of Contact Details* form and to complete and lodge with the Tribunal a substitute *Change of Contact Details* form for herself. She did not do so.

46. The s.424A letter was dated 22 June 2006; it was correctly addressed to both the applicant and her husband; it was sent "BY POST" within 3 working days of the date of the document (the handwritten notation on the document states: "mailed 22/6") to the last address for service provided to the Tribunal in the Change of Contact Details form: s.441A(4)(c)(i). I am satisfied therefore that the s.424A letter was properly served on the applicant in accordance with the requirements of ss.424A and 441A of the Act.

47. In these circumstances, the Tribunal was under no obligation to delay the handing down of its decision simply upon notification by the husband that he and the applicant had separated, (and where no extension of time for response to the s.424A letter had been received from the applicant and where the applicant had provided the Tribunal with no telephone contact details). It was not for the Tribunal to investigate the current status of the applicant's address. The Tribunal was entitled to proceed to hand down its decision, as it did.

48. In any event, I accept the written submissions by the first respondent that the Tribunal was not legally obliged in this case to send a s.424A letter to the applicant and her husband, given that the "*information*" over which it expressed its concerns and from which it might, subject to their response, draw an adverse conclusion, went only to issues of credibility of the applicant and her husband.

49. I accept that the Tribunal's concerns over matters going to the credibility of the applicant and her husband and inconsistencies in their evidence do not constitute "*information*" for the purposes of s.424A of the Act. It is

clear that the word "*information*" in s.424A, upon a proper construction, does not extend to the Tribunal's subjective appraisals and thought processes, including its disbelief of the applicant's evidence. As observed by the High Court in *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; (2007) 235 ALR 609 at [18]:

> *…if the reason why the Tribunal affirmed the decision under review was the Tribunal's disbelief of the appellants' evidence arising from inconsistencies therein, it is difficult to see how such disbelief could be characterised as constituting "information" within the meaning of par (a) of s.424A(1). Again, if the Tribunal affirmed the decision because even the best view of the appellants' evidence failed to disclose a Convention nexus, it is hard to see how such a failure can constitute "information". Finn and Stone JJ correctly observed in VAF v Minister for Immigration and Multicultural and Indigenous Affairs that the word "information"*
>
> > *does not encompass the Tribunal's subjective appraisals, thought processes or determinations ... nor does it extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the tribunal in weighing up the evidence by reference to those gaps, etc.*
>
> *If the contrary were true, s.424A would in effect oblige the Tribunal to give advance written notice not merely of its reasons but of each step in its prospective reasoning process. However broadly "information" be defined, its meaning in this context is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence. The appellants were thus correct to concede that the relevant "information" was not to be found in inconsistencies or disbelief, as opposed to the text of the statutory declaration itself.*

In the present case, the credibility of the applicant's and her husband's evidence was equally at the forefront of the Tribunal's thought processes.

50. I am therefore satisfied that there has been no breach of s.424A of the Act. Overall, I detect no irregularity or unfairness in the procedure adopted by the Tribunal in its review of the applicant's case. I consider that the Tribunal accorded the applicant procedural fairness in accordance with the statutory framework.

51. As to whether the Tribunal properly considered the applicant's claims in her own right and independently of her husband, it is clear that the Tribunal went to considerable lengths to set out the applicant's and her husband's evidence separately: (at CB 118-120; and 115-118, 120-122; respectively).

52. The Tribunal, in its **Findings and Reasons** expressly stated that it had treated the applicant's case on its own merits:

> *Having considered whether the applicant wife might have her own claims to refugee status based on the oral evidence, I concluded that she is not a person to whom Australia has protection obligations under the refugees Convention, and that she does not satisfy the criterion set out in s.36(2) for a protection visa* (CB 132).

53. In this regard, the Tribunal specifically rejected the applicant's claims on two grounds (CB 131):

- *the applicant wife is not at risk of persecution because of an association with a Falun Gong practitioner; and*

- *the applicant wife does not have a well founded fear of persecution in connection with any birth control procedure which she may have undergone previously, as the credible evidence does not establish that such a procedure was performed, or that such a procedure was carried out for any Convention reason, and it therefore does not constitute persecution within the terms of the Refugee Convention definition of a refugee.*

54. I consider that both these findings were open to the Tribunal on the evidence of the applicant and her husband. For instance, the Tribunal referred to their evidence concerning the applicant's alleged birth control operation and concluded that:

> *I cannot be satisfied about the nature of the procedure, if any, which was performed on the applicant wife after the birth of their child; nor can I be satisfied that it was carried out against her will. Moreover, in view of the unsatisfactory evidence of both applicants, I cannot be satisfied as to the reasons why any medical procedure was carried out* (CB 131).

55. As a further indication that the Tribunal sought to consider the applicant's case in its own right was the fact that it expressly

considered whether the applicant could have sought to jeopardise her husband's claims (given their apparent separation) by deliberately misleading the Tribunal in providing inconsistent evidence to his. In this regard, it stated that:

> *I do not accept that the applicant wife sought to harm her husband's case by deliberately misleading the Tribunal; rather, I am satisfied that the inconsistencies between the evidence of the applicants is due to the fact that the claims put forward are not true and based on events which did not take place. Moreover, in my view, the actions of the applicant wife in attempting to prompt the applicant husband's evidence further undermines the credibility of both parties* (CB 125).

56. I therefore consider that the Tribunal comprehensively considered the applicant's case, both jointly with her husband and equally in its own right, before concluding that the applicant would not be at risk of suffering persecution for a Convention reason if she returned to China.

57. Accordingly, for the reasons set out above, ground 2 of the application is rejected.

Ground 3 of the application.

58. Ground 3 states, in effect, that the Tribunal disbelieved the applicant's claims "*without proper grounds and detail investigate*".

59. As already dealt with under ground 2 above, I consider that the Tribunal very carefully considered the applicant's claims, both jointly with her husband, and in their own right. The Tribunal gave detailed reasons for its rejection of each of them as witnesses of truth, including setting out the numerous inconsistencies in their evidence. As stated under ground 1 above, merely because the applicant does not agree with the Tribunal's findings as to her (and her husband's) credibility, does not constitute an error of law and it is not the function of this Court to engage in impermissible merits review (and see further under ground 1).

60. The Tribunal is not required to uncritically accept any or all of the allegations made by the applicant (or her husband): *Randhawa v the Minister of Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 451-2. As Heerey J observed in *Selvadurai v Minister*

of Immigration and Ethnic Affairs and J Good (Member of the Refugee Review Tribunal) [1994] FCA 1105 at [7]:

> *A decision-maker does not have to have rebutting evidence available before he or she can lawfully hold that a particular factual assertion by an applicant is not made out.*

61. Furthermore, the applicant has not provided any particulars as to how she says the Tribunal should have further investigated her claims. To the extent that the applicant is asserting that the Tribunal had a positive or proactive duty to investigate the applicant's claims, the applicant has not indicated precisely what inquiries she says the Tribunal has been deficient in embarking upon in regard to her application.

62. Whilst the Tribunal has the power under s.424 of the Act to "*get any information that it considers relevant*" and to "*invite a person to give additional information*", these powers are permissive not prescriptive. As recognised by the Full Federal Court in *Minister for Immigration & Multicultural & Indigenous Affairs v VSAF of 2003* [2005] FCAFC 73 at [20]:

> *If his Honour meant that the Tribunal should have sought information from other sources available to it under s.424, the existence of such an obligation is denied by a substantial body of authority. See Minister for Immigration and Multicultural and Indigenous Affairs v SGLB [2004] HCA 32; (2004) 207 ALR 12 at [43] per Gummow and Hayne JJ (with whom Gleeson CJ agreed) and at [124] per Callinan J; Minister for Immigration and Ethnic Affairs v Singh (1997) 74 FCR 553 at 561 and SBBA v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 90 at [8]; SJSB at [16].*

63. Whilst the Tribunal may choose to exercise this information-gathering power, as well as its other investigative and information-gathering powers under ss.426 and 427 of the Act, it has no obligation to do so. It is well-settled that a decision-maker is not required to make the applicant's case for him or her*: Prasad v Minister for Immigration & Ethnic Affairs* (1985) 6 FCR 155 at 169-70; *SZBEL* at [40]; *Re Ruddock; Ex parte Applicant S154/2002* (2003) 201 ALR 437 at [57] and [1]; *WAKK v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 225 at [73].

64. Indeed, an applicant will have to supply the relevant facts of his or her case in as much detail as is necessary to enable the Tribunal to establish the relevant facts. As stated by the Full Federal Court in *Minister for Immigration & Multicultural Affairs v Lay Lat* [2006] FCAFC 61 at [76]:

> *In an inquisitorial process, it was for the respondent to put whatever evidence or argument he wished to the decision-maker to enable her to reach the requisite state of satisfaction.*

65. As further observed by the High Court in *Abebe v Commonwealth* (1999) 197 CLR 510 at [187]:

> *It is for the applicant to advance whatever evidence or argument she wishes to advance in support of her contention that she has a well-founded fear of persecution for a Convention reason. The Tribunal must then decide whether that claim is made out.*

66. Having properly considered the evidence before it, the Tribunal in this case was thus under no obligation to conduct any further investigation before concluding that the applicant did not have a well-founded fear for a Convention reason. I therefore detect no jurisdictional error on this basis.

67. Accordingly, ground 3 of the application is rejected.

Conclusion

68. The Court finds that the Tribunal's decision is not affected by jurisdictional error and is therefore a privative clause decision. Accordingly, pursuant to s.474 of the Act this Court has no jurisdiction to interfere.

69. The application before this Court is dismissed.

I certify that the preceding sixty-nine (69) paragraphs are a true copy of the reasons for judgment of Orchiston FM

Associate: Duncan Maconachie

Date: 2 April 2008