FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZJNU v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 586*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a Protection (Class XA) visa – claim of failure of the Tribunal to comply with s.424A of the *Migration Act 1958* (Cth) – application allowed – matter remitted to Refugee Review Tribunal.

Judiciary Act 1903 (Cth), s.39B
Migration Act 1958 (Cth), ss.91X, 424A, 476
Federal Magistrates Court Rules 2001 (Cth), rr.44.11, 44.12

Attorney General (NSW) v Quin (1990) 170 CLR 1
Minister for Immigration v Wu Shan Liang (1996) 185 CLR 259
Minister for Immigration v Yusuf (2001) 206 CLR 323
Al Shamry v Minister for Immigration [2000] FCA 1679
SZEEU v Minister for Immigration [2006] FCAFC 2

Applicant:	SZJNU
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	SYG3014 of 2006
Judgment of:	Lloyd-Jones FM
Hearing date:	2 March 2007
Delivered at:	Sydney
Delivered on:	20 April 2007

REPRESENTATION

Counsel for the Applicant:	Mr L Karp
Solicitors for the Applicant:	Ms J Kinslor of Christopher Levingston & Associates
Counsel for the Respondents:	Mr J Mitchell
Solicitors for the Respondents:	Ms L Buchanan of Australian Government Solicitor

ORDERS

(1) The name of the first respondent be amended to read 'Minister for Immigration and Citizenship'.

(2) The application filed on 18 October 2006 for judicial review of the Refugee Review Tribunal is upheld.

(3) A writ of certiorari issue quashing the decision of the Refugee Review Tribunal made on 22 September 2006.

(4) A writ of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent.

(5) The first respondent is to pay the applicant's costs and disbursements of and incidental to the application, including any reserved costs.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG3014 of 2006

SZJNU
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

The proceedings

1. These proceedings were commenced by an application under s.39B of the *Judiciary Act 1903* (Cth) invoking s.476 of the *Migration Act 1958* (Cth) ("the Act") filed in the Sydney Registry of the Federal Magistrates Court of Australia on 18 October 2006 for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal"). The Tribunal decision was made on 22 September 2006, affirming a decision of the delegate of the first respondent made on 2 June 2006, refusing to grant the applicant a Protection (Class XA) visa. The applicant seeks relief in the form of constitutional writs against the decision of the Tribunal.

2. The applicant in these proceedings is not to be identified pursuant to s.91X of the Act and has been given the pseudonym "SZJNU".

3. The applicant seeks an order that the respondents show cause why a remedy should not be granted in exercise of the Court's jurisdiction, under s.476 of the Act. Pursuant to r.44.11(c) of the *Federal Magistrates Court Rules 2001* (Cth) ("the Rules"), I dispensed with the hearing under r.44.12 and set the matter down for final hearing.

4. A Court Book ("CB") prepared by the first respondent's solicitors was filed on 21 December 2006. I have marked this as Exhibit "A" and the contents were read into evidence.

Background

5. The Tribunal decision of D Connolly, reference 060492674, provides the following background information:

> *The applicant, who claims to be a citizen of China (PRC) arrived in Australia on 17 April 2006 and applied to the Department of Immigration and Multicultural Affairs for a Protection (Class XA) visa on 24 April 2006. The delegate decided to refuse to grant the visa on 2 June 2006 and notified the applicant of the decision and his review rights by letter dated 2 June 2006 and posted on 2 June 2006.*
>
> *The delegate refused the visa application as the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.*
>
> *The applicant applied to the Tribunal on 6 June 2006 for review of the delegate's decision.*(CB 110)

The Applicant's claims

6. The Tribunal decision sets out the applicant's claims as contained in his original visa application under the heading 'Claims and Evidence':

> *He was born on 1 April 1974 in Fuquing City in Fujian Province. He travelled to Australia using a false Japanese passport under a different name arriving on 17 April 2006.*
>
> *The applicant's claim for protection is based upon having had to leave China because he fears suffering persecution for helping Falun Gong practitioners escape.*

From February 1992 until March 2003 the applicant worked as a construction labourer with his father who was injured in an accident in March 2003 in Fuqing and the family spent its savings on his recovery.

Early in 2004 the applicant took his father to the Wuyishan Mountains to meet a Mr Cai who was an expert in qigong, it was hoped he may be able to help his father. He agreed to help and his father remained there from January 2004 through to December 2005. The applicant used to visit him monthly and found out that Mr Cai was actually a Falun Gong practitioner. His father's health improved with the practice of Falun Gong. He became a practitioner and in January 2006 returned home.

On 1 March 2006 Mr You Xiong Cai and his brother You Lin Cai arrived at the family home and said that the police were searching for them because they were Falun Gong practitioners. To help with their escape the applicant accompanied them to Hei He City in Heilongjiang Province near the Russian border where the applicant had a good friend Mr Jia Ping Chen, whom he met three years earlier on construction projects. He knew that his friend could arrange their passage over the border.

The applicant used his contacts among the truck drivers to take the three of them from Fujian on 6 March 2006 to Shangrao City in In Jiangxi Province and then to Hei He by train on 20 March 2006. However, when they arrived, Mr Chen realised that they were Falun Gong and refused to help.

The applicant then found another friend in Darlian City, Liaoning Province, called Yan Chang Fa who was also involved in the sea food trade, and offered to take the two practitioners there but they decided to cross the border from Hei He City and didn't accompany the applicant to Darlian city. They were subsequently apprehended by the police.(CB 112-113)

Tribunal's findings and reasons

7. A summary of the Tribunal's reasons is contained in the first respondent's submissions prepared by Mr Mitchell and I adopt paragraph 3.2 of those submissions:

> *3.2 The RRT member made the following findings (CB 116-122):*
>
> *(a) He could not be certain of the Applicant's identity but gave him the benefit of the doubt.*

(b) He accepted that the Applicant:

(i) Was a resident of Fuquing City, Fujian Province.

(ii) Lived with his parents, his wife and two children.

(iii) Was in the construction industry from February 1992 until 2003.

(iv) Traveled to Australia on a counterfeit Japanese passport.

(v) Held, a Commonwealth Bank credit card in the same name as the Japanese passport.

(vi) Left Dalian City with a fraudulent Chinese passport that he later exchanged for a false Japanese passport.

(vii) Told the Mandarin speaking interpreter upon arrival in Australia that be was on a sightseeing holiday and did not claim refugee status.

(c) He was not prepared to give weight to the alleged certified copy of a summons issued by Fuquing City PSB.

(d) He did not accept the Applicant's claims:

(i) That he made a mistake in not claiming refugee status on arrival in Australia.

(ii) That two Falun Gong practitioners sought refuge in the Applicant's home or that the Applicant's father instructed the Applicant to assist the two persons in escaping China.

(iii) That the police were seeking him or that he was wanted by the authorities for any breach of China's laws or for assisting Falun Gong adherents to escape from China.

(e) He was not satisfied that the Applicant was a credible witness.

(f) He was not satisfied that, if the Applicant returns to China and is charged and sentenced for leaving China illegally and using false papers, that he would face

persecution. The laws relating to these charges are laws of general or "common" application.

(g) The Applicant did not have a well-founded fear of persecution upon return to the People's Republic of China now or in the reasonably foreseeable future for a Convention reason.

Application for review of the Tribunal's decision

8. On 18 October 2006, the applicant filed an application for review in this Court under s.39B of the Judiciary Act. At the directions hearing of 15 February 2007, the applicant filed an amended application which contained the following ground of review:

> *1. The Tribunal committed jurisdictional error by failing to disclose to the applicant, in the manner required by s 424A Migration Act, information that was a part of the reason for affirming the decision under review.*
>
> *Particulars*
>
> *(a) That the applicant had been unable to produce any documents verifying his identity upon arrival in Australia (as had been noted at folio 46 of the Departmental file) – which was inconsistent with his having produced to the Tribunal a photocopy of a Chinese identification card giving his personal details.*

Submissions and reasons

9. Mr Karp, for the applicant, stated that the amended application pleads one alleged error of law that arises under s.424A of the Act. The applicant was detained at Sydney International Airport carrying false documents: a false Japanese passport, a false credit card and an airline ticket suspected of being procured illegally. The applicant did not make any refugee claims at the airport, but did so one week later when held at Villawood Immigration Detention Centre.(CB 116) This claim was made after he obtained the assistance of a migration agent, who was also a lawyer. Attached to his application is a statement addressed to the Department.(CB 11-13) Mr Karp submits that the statement provides a history of his father's injury from the industrial accident

which was only cured after he saw Mr Cai, a Falun Gong practitioner. Some time after, Mr Cai sought the applicant's father's assistance to leave the country because he was being chased by Chinese authorities. The applicant's father asked the applicant to take Mr Cai and his brother to the Chinese-Russian border and cross it with the assistance of a third party. This person refused and the applicant feared that he would get into trouble for assisting a Falun Gong practitioner. The applicant also sought to flee the PRC. Initially, he went to Japan where he procured false documents, which he then used to try and enter Australia.

10. The Department rejected his protection visa application on 2 June 2006.(CB 56-65) The applicant then applied to the Tribunal on 6 June 2006 for review of that decision. The Tribunal wrote to the applicant's migration agent seeking clarification or confirmation of certain details:

> *The Tribunal requests that you clarify or confirm the following details in this first point. Information on the DIMA file, most notably your arrival interview (attached) indicates that you travelled to Australia on a counterfeit Japanese passport in the name of Iwai Ryohji, a Japanese citizen and that you arrived on flight JL771 from Narita airport in Japan. The initial ticketing was Dalian – Kuala Lumpur – Narita – Sydney. The Tribunal also notes that your Commonwealth Bank credit card was also counterfeit and that you may have left Dalian city with a fraudulent Chinese passport which you later exchanged for a false Japanese passport in Narita.*
>
> *The Tribunal also note that the information indicates that upon your arrival in Australia you had access to a Mandarin speaking interpreter and gave your explanation for travel as "sightseeing holiday". At no stage of your interview did you claim refugee status.*
>
> *You arrived in Australia on 17 April 2006 and went into immediate custody and did not apply for a protection visa until 24 April 2006.*(CB 92-93)

The applicant's migration agent, Priscilla Yu, responded to the Tribunal on 29 August 2006.(CB 104-106)

11. Mr Karp referred the Court to the Tribunal decision and, in particular, to questions and answers during its hearing where the Tribunal referred

to a Public Security Bureau ("PSB") summons produced by the applicant. It also referred to document forgery in China.(CB 114-115) After the applicant said that the summons was genuine, the Tribunal member asked:

> *Q: Why didn't you bring your original ID card to Australia?*
>
> *A: I gave it to the immigration officer called "Mary Ahken" at Villawood.*(CB 115)

The Tribunal decision outlines the s.424A letter sent to the applicant.(CB 116) It then states under the heading 'Findings and Reasons':

> *There were a number of issues which detracted significantly from the applicant's claims. The Tribunal's responses to the applicant's claims are as follows.*(CB 117)

Mr Karp submits that the Tribunal was combining all the issues adverse to the applicant into one set of points. Mr Karp then went through the points to indicate that the vast majority were matters adverse to the applicant. They were either matters of opinion or of fact.

12. Mr Karp submits that the Tribunal advised the applicant that there were significant problems with his claims and then proceeded to respond to the claims in general. It did so firstly by stating:

> *The Tribunal accepts that the applicant was a resident of Fuqing City in Fujian Province, that he lived with his parents and wife and two children. It was noted in the DIMIA File at Folio 46 that upon arrival in Australia, the applicant was unable to produce any ID documentation.* ***Yet*** *he claimed before the Tribunal that it was taken by a Departmental officer upon arrival. Subsequently he produced a Photostat copy of a Chinese ID card in his name which contained details of his home address etc, but was unable to produce the original.*(CB 117.4, emphasis added)

Mr Karp submits that what was raised by the Tribunal was used adversely against the applicant by identifying a contrast and using the word "yet" for emphasis. Its use of the word "yet" was to show an inconsistency between what the applicant said at the hearing and what he said at an earlier stage, which is information the reason or part of the reason for the decision under review.

13. Mr Karp relied on *SZEEU v Minister for Immigration* [2006] FCAFC 2 at [163] per Weinberg J:

> *…The strict view that the courts have taken in relation to breaches of the rules of natural justice can, in my view, inform the application of the expression "a part of the reason" in s 424A. The cases suggest that this expression should be read benevolently, in favour of an applicant for review. If there is any doubt as to whether information that is adverse to an applicant did form a part of the reason for decision, that doubt should generally be resolved in favour of the applicant.*

14. Mr Karp contends that a finding of inconsistency is a conclusion that must necessarily depend on two or more conflicting pieces of information. Information of that description that is subject to s.424A. Mr Karp then referred to *SZEEU* at [221] and [225] per Allsop J:

> *221. I do not regard the operation of s 424A(1) as limited to circumstances where the information imports some positive factual finding. To the extent that cases such as* MZWPK v Minister for Immigration and Multicultural and Indigenous Affairs *[2005] FCA 1256 at [14] and* SZEKY v Minister for Immigration and Multicultural and Indigenous Affairs *[2005] FCA 1138 [19]-[23] say as much, in my respectful view, they limit too narrowly the operation of the section. That, of course, is one way that the information is a part of the reason. Another would be the inconsistency between the information and what was now being said. If the Tribunal considers that inconsistency relevant to the assessment of the claims, it may be that the information would be part of the reason. If a Tribunal says that it does not believe an applicant for reasons that can be seen to include the fact that one thing was said in the prior statement and another at the hearing, or the fact that if what is now being asserted at the hearing is true it would have been in the prior statement in that form, the information would be part of the reason. The information is the knowledge imparted to the Tribunal of a prior statement in a particular form. The significance given to it by considering it in the light of evidence is the product of mental processes. This significance and those mental processes are not information, but rather, are why the information is relevant for s 424A(1)(b)…*
>
> *225. If the Tribunal finds as relevant to its reasoning some inconsistency or incompatibility between earlier information and evidence to it as relevant to its reasoning that may well*

> *engage s 424A if such inconsistency or incompatibility can be seen to have been a part of the reason for affirming the decision.*

15. Mr Mitchell argues that what Mr Karp relies on in respect of the first point in the Tribunal's response (CB 117.4) is not that there was an adverse piece of information relied upon, but rather that there were two pieces of information which were inconsistent and that it was that finding of inconsistency that allegedly formed part of its reason. Mr Mitchell contends that the information in this sentence was not adverse to the applicant:

> …*It was noted in the DIMIA File at Folio 46 that upon arrival in Australia, the applicant was unable to produce any ID documentation*…(CB 117)

It was merely "observably inconsistent**"** with the other piece of information.

16. Mr Mitchell submits that if Mr Karp is to succeed on this point, he has to discharge the onus of establishing the factual foundation for that perception, which is a two-step process. First, that there is a piece of adverse information, that is, that there is a perceived inconsistency. Secondly, if the perceived inconsistency exists and there is any doubt, then I must find in favour of the applicant. Mr Mitchell submits that Mr Karp is unable to discharge the onus of demonstrating the doubt.

17. Mr Karp submits that the Tribunal responded to the significant problems in the applicant's claims by listing them as follows:

a) The Tribunal accepted that the applicant was a resident of Fuquing City in Fujian Province, where he lived with his wife and two children. It then noted:

> *It was noted in the DIMIA file at Folio 46 that upon arrival in Australia, the applicant was unable to produce any ID documentation.*

The use of the word "yet" shows a contrast:

> *Yet he claimed before the Tribunal that it was taken by a Departmental officer upon arrival.*

The above sentence contrasts with the one below:

Subsequently he produced a Photostat copy of a Chinese ID card in his name which contained details of his home address etc., but was unable to produce the original.

Mr Karp submits that the above matters were considered to be adverse to the applicant's claims.(CB 117, point 1)

b) The Tribunal accepted that he had been in the construction industry but had told officials on his arrival in Australia that he was in the seafood trade in China and was self-employed.(CB 117, point 2)

c) That he travelled to Australia from Japan on a counterfeit Japanese passport. Mr Karp submits that this was adverse to the applicant and was cited in the s.424A letter.(CB 117, point 3)

d) He held a counterfeit Commonwealth Bank credit card, which was also treated as adverse and noted in the s.424A letter.(CB 117, point 4)

e) That he left Dalian City, China with a fraudulent Chinese passport, which was later exchanged for a false Japanese passport. This was adverse to the applicant as indicated in the s.424A letter.(CB 117, point 5)

f) Because of the high level of document fraud in China, the Tribunal was not prepared to accept that the certified copy of the summons allegedly issued by the Fuquing City PSB.(CB 117, point 6)

g) The Tribunal accepted that the applicant said on arrival in Australia that he was on a sight seeing holiday and did not claim refugee status. This was adverse to the applicant and referred to in the s.424A letter.(CB 118, point 7)

18. Mr Karp submits that the Tribunal also did not accept as credible the following claims of the applicant:

a) That his father instructed him to help the Falun Gong practitioners.(CB 118, point 9)

b) That he would leave his wife and family to travel with strangers who could not be contacted by telephone and had not been seen for over three years.(CB 118, point 10)

c) That the applicant's friend in Hei He City refused to help the Falun Gong practitioners cross the border into Russia.(CB 118, point 11)

The Tribunal finally concluded:

> *The Tribunal is not satisfied that the applicant is a credible witness. The applicant initially told the Tribunal that that he left the PRC legally, when this is clearly not the case which he later confirmed. It accepted that the applicant left China through Dalian City and is satisfied that he travelled using an in-valid Chinese passport in another name…*(CB 118-119)

19. Mr Karp submits that the Tribunal rejected the claim that the applicant made in his protection visa application on the basis of credibility. Part of the credibility finding was the Tribunal's perception of the inconsistency between information given upon arrival in Australia and information given to the Tribunal later. The applicant said on arrival that he was unable to produce any identification. In contrast, he claimed before the Tribunal that his identity card was given to a Departmental officer on arrival and he subsequently produced a photocopy of the identity card.

20. Mr Karp submits that the information given prior to the Tribunal application, which was the reason or part of the reason for affirming the decision under review, is subject to a disclosure requirement under s.424A: *Al Shamry v Minister for Immigration* [2000] FCA 1679; 110 FCR 27. The Tribunal not giving that information to the applicant in writing as required by s.424A resulted in jurisdictional error.

21. Mr Mitchell submits that Mr Karp contends that the Court should infer that certain information formed part of a "perceived inconsistency" which in turn formed part of an adverse credibility finding, which again in turn formed part of the Tribunal's reasons for decision. This "perceived inconsistency" allegedly arose from the Department's record which shows that the applicant did not have a Chinese identity card at the time of arrival in Australia, but then submitted a photocopy

of one to the Tribunal. He claims he gave the original card to a Departmental officer on arrival.(CB 115) Mr Karp alleges that because the material was inconsistent, the Tribunal member must have perceived it as such and the "perceived inconsistency" must have affected his decision.

22. Mr Mitchell submits that the Tribunal made no express finding that the information was inconsistent, or set out any "perceptions" of the inconsistency. Instead, it accepted the applicant's evidence of his identity from the photocopy and found:

> *The Tribunal accepts that the applicant was a resident of Fuquing City in Fujian Province, that he lived with his parents and wife and two children.*(CB 117)

This suggests that the Tribunal did not perceive any inconsistency as material because it preferred the applicant's claim. It saw no need to make a finding of inconsistency.

23. Mr Mitchell submits that the other possible inference from the relevant paragraph of the decision is that the Tribunal perceived the need to outline the evidence or set out the background to the finding. As the Tribunal gave written reasons for adverse credibility findings (CB 118-119), the alternative inferences are as compelling, if not more compelling, than those contended by the applicant. It is submitted that if the "perceived inconsistency" formed part of the reason for affirming the decision, it is curious that the Tribunal did not articulate that along with the other reasons for the adverse credibility finding.

24. Mr Mitchell submits that the Court should not speculate on the Tribunal member's unarticulated perceptions. It is submitted that the Court should not trawl through possible unarticulated perceptions in search of an error: *Minister for Immigration v Wu Shan Liang* (1996) 185 CLR 259 at 272. Unarticulated perceptions do not form part of the reasons for decision as they are not material to a decision, see *Minister for Immigration v Yusuf* (2001) 206 CLR 323 at [5] per Gleeson CJ:

> *…If it does not set out a finding on some question of fact, that will indicate that it made no finding on that matter; and that, in turn, may indicate that the Tribunal did not consider the matter to be material…*

25. Similar sentiments were shared by other members of the High Court: *Yusuf* at [35] and [37] per Gaudron J, at [68] – [69] per McHugh, Gummow and Hayne JJ. Mr Mitchell submits that it is manifestly unsafe and improper for the Court to draw inferences on the subjective state of mind of the Tribunal member and his unarticulated perceptions. To do so would be to give them greater materiality than the Tribunal's written reasons, which impermissibly strays into a consideration of the merits of the decision: *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 35 to 36.

26. Mr Mitchell submits that there had been no breach of s.424A(1) as alleged. The Tribunal made findings on the applicant's place of residence based on information given to it by him for the purposes of his application for review.

Conclusion

27. The Tribunal decision indicates that the applicant appeared before it on 28 July 2006 to give evidence and present arguments. During that hearing, the applicant provided a photocopy of a Chinese identity card allegedly bearing his own name. He was questioned about the original identity card, which he claimed he provided to an officer called "Mary Ahken" at Villawood.(CB 115) The s.424A letter sent to his agent and dated 23 August 2006 made no reference to either an original or photocopied identity card. It sought no explanation as to his inability to produce the original.

28. Significantly, the Tribunal identified, as one of the issues which detracted from the applicant's claim, that the Department file noted that the applicant was unable to produce any identification document other than the false passport he was travelling on when he arrived in Australia. The Tribunal expressly noted the inconsistency of the applicant's claim to have provided the original identity card to an immigration officer and the subsequent production of the photocopy. This was clearly not raised in the s.424A letter. Consequently, I accept the submission of Mr Karp that s.424A was not complied with and that the application should succeed.

29. I am satisfied that an order for costs should be made in this matter. I order that the first respondent is to pay the applicant's costs and disbursements of and incidental to the application, including any reserved costs.

I certify that the preceding twenty-nine (29) paragraphs are a true copy of the reasons for judgment of Lloyd-Jones FM.

Associate:

Date: 18 April 2007