FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZMKN v MINISTER FOR IMMIGRATION & ANOR *[2009] FMCA 954*

MIGRATION – Visa – Protection (Class XA) visa – review of Refugee Review Tribunal decision – citizen of China (PRC) claiming well founded fear of persecution for reason of being a practitioner of Falun Dafa – Falun Gong – credibility – whether the Tribunal had no evidence upon which to base a critical finding of fact – *sur place* claim – whether Tribunal failed to consider the applicant's *sur place* claim – whether Tribunal failed to take into account relevant material – whether the Tribunal failed to make enquiries of the third party witnesses about critical relevant matters – bias – whether reasonable apprehension of bias – whether unreasonable failure to inquire – *Wednesbury* unreasonableness – where Tribunal issued a corrigendum after the date of decision – Tribunal was *functus officio* – certiorari and mandamus.

Migration Act 1958 (Cth), ss.91R, 414A, 417, 425, 430, 474, 476

SZEPZ v Minister for Immigration & Multicultural Affairs [2006] FCAFC 107
WAIJ v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 80 ALD 568; [2004] FCAFC 74
Htun v Minister for Immigration and Multicultural Affairs [2001] FCA 1802
W396/01 v Minister for immigration and Multicultural Affairs [2002] FCAFC 103; FCA 455
WAIJ v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 74
Minister for Immigration and Citizenship v Le (2007) 164 FCR 151; [2007] FCA 1318
SZIAI v Minister for Immigration and Citizenship (2008) 104 ALD 22; [2008] FCA 1372
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152; 231 ALR 592; 81 ALJR 515; [2006] HCA 63
Re Refugee Review Tribunal; Ex parte H (2001) 179 ALR 425; 75 ALJR 982; [2001] HCA 28
VFAB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 872
Minister for Immigration & Multicultural Affairs v Bhardwaj (2002) 209 CLR 597; 187 ALR 117; 76 ALJR 598; [2002] HCA 11
Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476; 195 ALR 24; 77 ALJR 454; [2003] HCA 2
Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559; 144 ALR 567; 71 ALJR 743; [1997] HCA 22
Randhawa v Minister for Immigration, Local Government and Ethnic Affairs

(1994) 52 FCR 437; 124 ALR 265; [1994] FCA 1253
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259; [1996] HCA 6
Selvadurai v Minister for Immigration and Ethnic Affairs (1994) 34 ALD 347; [1994] FCA 1105
Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155; [1985] FCA 47
WAJS v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 139
NAVK v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 124
Lee v Minister for Immigration and Multicultural Affairs [2008] FCA 464
Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223
Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham (2000) 168 ALR 407; 74 ALJR 405; [2000] HCA 1
NACB v Minister for Immigration and Multicultural Affairs [2003] FCAFC 235
NATC v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 52
Minister for Immigration and Citizenship v SZIAI [2009] HCA 39

Applicant:	SZMKN
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 680 of 2009
Judgment of:	Scarlett FM
Hearing date:	16 June 2009
Date of Last Submission:	16 June 2009
Delivered at:	Sydney
Delivered on:	8 October 2009

REPRESENTATION

Counsel for the Applicant:	Ms Seward
Solicitors for the Applicant:	Michaela Byers
Counsel for the Respondents:	Mr Markus
Solicitors for the Respondents:	Australian Government Solicitor

ORDERS

(1) An order in the nature of certiorari is to issue to quash the decision of the Second Respondent Refugee Review Tribunal dated 19 February 2009.

(2) An order in the nature of mandamus is to issue requiring the Second Respondent Refugee Review Tribunal to determine the application of the Applicant for a Protection (Class XA) visa according to law.

(3) The First Respondent is to pay the Applicant's costs fixed in the sum of $5,865.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 680 of 2009

SZMKN
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Application

1. The Applicant is a citizen of the People's Republic of China who is seeking review of decision of the Second Respondent, the Refugee Review Tribunal, made on 19th February 2009. The Tribunal affirmed the decision of a delegate of the Minister for Immigration and Citizenship, the First Respondent, not to grant the Applicant a Protection (Class XA) visa.

2. The Applicant seeks these orders:

    a) An order that the decision of the Refugee Review Tribunal made on 20th (19) February 2009 to uphold the decision of a delegate of the First Respondent not to grant a protection visa to the Applicant be declared void;

    b) An order that the application for review of the decision of the delegate of the Respondent be remitted to the Refugee Review

Tribunal, differently constituted, for further consideration according to law; and

c) Costs.

3. As a preliminary point, I would point out that the Full Court of the Federal Court has expressed doubt that the Federal Magistrates Court has power or jurisdiction to direct that the Tribunal be constituted differently for the purpose of reconsidering an applicant's application for review of a delegate's decision. The constitution of the Tribunal is a matter for the Principal Member (*SZEPZ v Minister for Immigration & Multicultural Affairs*[1] per Emmett, Siopis & Rares JJ at [30]).

Background

4. The Applicant arrived in Australia on 18th November 2004 and applied for a Protection (Class XA) visa on 10th April 2007. He claimed to fear persecution as a follower of Falun Dafa, also known as Falun Gong, in China. A delegate of the Minister refused his application for a visa on 12th June 2007.

Application to the Refugee Review Tribunal

5. The Applicant applied to the Refugee Review Tribunal for review of the delegate's decision. On 8th May 2008 the Tribunal affirmed the decision not to grant the Applicant a protection visa.[2]

6. The Applicant sought judicial review of the Tribunal decision. On 17th October 2008 I made orders by consent, issuing writs of certiorari and mandamus.[3]

7. The application was remitted to the Tribunal, which invited the Applicant to attend another hearing on 11th February 2009.[4] The Applicant attended the hearing in the company of his solicitor and two witnesses.[5] The Applicant gave evidence, as did his two witnesses.

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[1] [2006] FCAFC 107
[2] Court Book at page 357
[3] Court Book 386
[4] Court Book 389
[5] Court Book 402-403

The Refugee Review Tribunal Decision

8. The Tribunal made its decision on 19th February 2009, affirming the decision not to grant the Applicant a protection visa.

9. In its Findings and Reasons, the Tribunal made it clear that it did not accept that the Applicant was a witness of truth, saying:

> *I am satisfied the applicant was prepared to embellish, if not entirely fabricate his material claims, where he believed it would enhance his prospects of being determined to invoke refugee protection obligations in Australia. I am sufficiently satisfied the present applicant is not a witness of truth such that I am satisfied there are reasonable grounds to reject all his material claims. Therefore, to the extent I have not expressly rejected his material claims elsewhere, given I am sufficiently satisfied he is not a witness of truth, I find that none of the applicant's material claims to invoke refugee protection obligations in Australia are true.*[6]

10. The Tribunal devoted some considerable space to a discussion of the Applicant's claim to have been arrested on 16th January 2004 either at his home or his father's home in Jilin because he was a Falun Gong practitioner. The Tribunal discussed with the Applicant its doubts that he was a high profile practitioner because he had not been placed on reporting conditions when he was previously released from detention in 1999. The Tribunal expressed the view that it was not plausible that the authorities had an ongoing adverse interest in him.[7]

11. The Tribunal did not accept that it was plausible that the Applicant was detained in Jilin City on 16 January 2004 and stated:

> *The Tribunal is satisfied the claim to have been arrested in January 2004, is at least an embellishment, if not a complete fabrication, submitted for the sole purpose of enhancing his claim to be owed refugee protection obligations in Australia. This is a further finding that ultimately satisfied the Tribunal the applicant was not a witness of truth.*[8]

12. The Tribunal noted that the two witnesses who gave evidence in support of the Applicant's case had each referred to the Applicant's participation in Falun Gong activities and were both of the opinion that

[6] Court Book 425 at paragraph [45]
[7] Court Book 427 at [56]-[59]
[8] Court Book 428 at [61]-[62]

he was a genuine, sincere Falun Gong practitioner. The Tribunal acknowledged that the evidence of both witnesses was supportive of the Applicant's case but said:

> *However, given the significance of the adverse credibility findings made herein, the Tribunal has decided to give the witness evidence no weight.*[9]

13. The Tribunal considered the evidence of the Applicant's participation in Falun Gong activities in Australia and came to this conclusion:

> *In the present case, the applicant's apparently detailed knowledge of the practise of Falun Gong may be due to his sincere convictions; or (for instance), it may be due to his desire to merely invoke refugee protection obligation obligations in Australia. In the present case, as I have found the applicant is not a generally credible witness, I have decided not to give the applicant the benefit of the doubt about this matter. That is, based on the evidence available to it and its findings herein, the Tribunal is not satisfied the applicant's continued engagement in Falun Gong in Australia is for any other reason than to invoke refugee protection obligations; and (presumably) to establish a social network for himself in Australia.*
>
> *Therefore, the Tribunal is not satisfied the applicant has engaged in Falun Gong practise in Australia otherwise than for the purpose of strengthening the applicant's claim to be a refugee. As it is required to do by the Act, the Tribunal has therefore disregarded the applicant's conduct in Australia for the purposes of assessing whether he invokes refugee protection obligations in Australia.*[10]

14. The Tribunal then considered the fact that the Applicant had attended numerous public protests in support of Falun Gong and found it possible that his attendance at such demonstrations may have brought him to the adverse attention of the authorities in China, so that he may be treated harshly on his return. Accordingly, the Tribunal stated its intention to refer the matter to the Department of Immigration and Citizenship *"for consideration for referral to the Minister under his discretionary powers"*.[11]

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[9] *ibid* at [67]
[10] Court Book 431 at [82]-[83]
[11] *Ibid* at [85] (the "discretionary powers" referred to are those under s 417 of the Migration Act).

15. The Tribunal was not satisfied that the Applicant was a person to whom Australia has protection obligations under the Refugees Convention and affirmed the decision not to grant him a Protection (Class XA) visa.[12]

Corrigendum

16. The Tribunal issued a Corrigendum to the decision on 20th February 2009. That Corrigendum modified paragraph 82 of the decision by removing these words from the final sentence:

> *and (presumably) to establish a social network for himself in Australia.*[13]

17. The final sentence, as it appears in the Corrigendum, now reads:

> *That is, based on the evidence available to it and its findings herein, the Tribunal is not satisfied the applicant's continued engagement in Falun Gong in Australia is for any other reason than to invoke refugee protection obligations.*[14]

Application to the Federal Magistrates Court

18. The Applicant filed an amended application on 1st June 2009. The amended application contains five grounds of review:

    a) Ground 1 claims that the Tribunal had no evidence on which to base the critical finding of fact that a Falun Gong practitioner who did not have a "high profile" in the circumstances of the Applicant in November 1999 would not have been of adverse interest to the PRC authorities in January 2004. Therefore the Tribunal erred in finding that it was not satisfied that the Applicant was of continuing adverse interest to the PRC authorities such that they would have detained him as a known Falun Gong practitioner in January 2004 and fell into jurisdictional error.

[12] Court Book 432 at [87]-[88]
[13] Court Book 431 at [82]
[14] Court Book 436

b) Ground 2 claims that the Tribunal fell into jurisdictional error by not considering each integer of the Applicant's claims and thereby failed to consider the *sur place* claim of the possibility that participation in demonstrations in Australia may have brought the Applicant to the adverse attention of the PRC authorities, such that he may be treated harshly on return due to his imputed political opinion.

c) Ground 3 claims that the Tribunal erred in not having regard to evidence which was objectively independent of the Applicant and which supported the Applicant's assertion that he had practised Falun Gong in China thereby failing to take into account relevant material. This was a jurisdictional error.

d) Ground 4 claims that the Tribunal failed at the hearing to enquire of the third party witnesses during questioning as to critical matters which were relevant to the central issue of the Applicant's credit and the Applicant's material claims. This failure was manifestly unreasonable and resulted in jurisdictional error.

e) Ground 5 claims that the Tribunal failed to afford the Applicant a decision making process under the Act without any reasonable apprehension of bias on the part of the Tribunal and thereby fell into jurisdictional error.

19. The Applicant also relied on a transcript of the Tribunal hearing, which was annexed to an affidavit by his solicitor, Ms Byers.

The Applicant's Submissions

20. Counsel for the Applicant, Ms Seward, submitted in relation to Ground 1 that the Tribunal decision does not refer to any evidence, whether from the Applicant or by way of country information, to establish a factual basis for a distinction to be made between a "high profile" and a "low profile" Falun Gong practitioner. The Court would ordinarily assume that the Tribunal understood and carried out its obligations under s.430(1)(d) of the Act to prepare written reasons that refer to the evidence on which its findings of fact were based (see *WAIJ v Minister*

for Immigration and Multicultural and Indigenous Affairs[15] at [24]). The finding that the Applicant's account of his detention in January 2004 was not plausible is the central finding in the Tribunal decision; the failure to make a finding of fact based on evidence is, it is submitted, a jurisdictional error.

21. In relation to Ground 2, failure to consider the claim on the basis of an imputed political opinion, counsel for the Applicant submitted that the Tribunal distinguished between his principal claim as a Falun Gong practitioner and a claim arising from his attendance at a protest relating to quitting the Communist Party, leading to an imputed political opinion. The Applicant told the Tribunal that he had no overt political reason for attending such a demonstration because, as a Falun Gong practitioner, he did not get involved in politics. Although the Applicant did not put his claim on that basis, the Tribunal observed that this was a possibility which might lead to his being harshly on his return to China.[16]

22. It is submitted that, notwithstanding those observations, that led to the Tribunal to state that the matter would be referred to the Department for consideration of a referral for s.417 discretion, the Tribunal failed to consider the issue of imputed political opinion and the possibility of resulting harsh treatment on return to China. This was a failure to consider the real question and therefore a failure to exercise jurisdiction (see *Htun v Minister for Immigration and Multicultural Affairs*[17] at [13]; *W396/01 v Minister for Immigration and Multicultural Affairs*[18] at [33]-[35]).

23. The submission is that the Tribunal did not make a finding that the Applicant's reason for attending the "mass quitting" protests was for the purpose of strengthening his refugee claim[19] so s.91R(3) did not require that this conduct be disregarded for the purpose of assessing that aspect of his claim.

24. In relation to Ground 3, failure to take into account relevant material by attributing no weight to the witnesses' evidence, counsel for the

[15] (2004) 80 ALD 568; [2004] FCAFC 74
[16] Court Book 431 at [84]; see also transcript page 22
[17] [2001] FCA 1802
[18] [2002] FCAFC 103; FCA 455
[19] Court Book 431 at [84]

Applicant submitted that this evidence was capable of corroborating the Applicant's claim to have been a low profile Falun Gong practitioner. The Tribunal gave no weight to this evidence as a consequence of two adverse credit findings but this was done without considering the witnesses' evidence as to the Applicant's credit or other aspects of his claim. It was also done before the Tribunal dismissed all the Applicant's material claims and before deciding whether or not to give him "the benefit of the doubt" with respect to his conduct in Australia.

25. The basis of the Tribunal's adverse credit finding about the Applicant's account of his detention in January 2004 was implausibility, *i.e.* that it was improbable the events had occurred. The submission is that it was not open to the Tribunal to disregard relevant evidence that was not clearly negated by the adverse credit findings without considering that evidence first (see *WAIJ v Minister for Immigration & Multicultural & Indigenous Affairs*[20] at [27]).

26. The Applicant's Ground 4 alleges a failure to ask the Applicant's second witness questions on critical matters. The Tribunal decided to give that witness's evidence no weight. It is submitted that the Tribunal could have asked the witness questions about:

    a) The witness's experience or expertise in assessing the Applicant's knowledge of the practice of Falun Gong in March or April 2005; and

    b) The level of the Applicant's expertise in performing exercises in March 2005 compared with what might be expected of a person who had only practised Falun Gong privately since November 2004 and in public since January 2005.

27. The submission is that, to the extent that the Tribunal's decision failed to attribute any weight to the evidence of that witness as a result of weighing up that evidence against the adverse credibility findings, the failure to inquire was unreasonable in the sense that no reasonable decision maker in the circumstances would have proceeded to make the decision as it did without having made that inquiry at the hearing (see

[20] [2004] FCAFC 74

Minister for Immigration and Citizenship v Le[21] at [63]; *SZIAI v Minister for Immigration and Citizenship*[22]). It was further submitted that this failure to inquire involves a failure to comply with s.425(1) of the Act, being a failure to afford a proper opportunity to provide evidence on the issues the Tribunal considered were arising from the review (*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*[23]).

28. The Applicant's Ground 5 is a claim of a reasonable apprehension that the Tribunal did not bring an impartial mind to the decision making process. Counsel for the Applicant submitted that the Tribunal raised at the hearing that it was operating under significant time constraints and, while discussing an apparently difficult issue of fact suggested a global solution to the difficulty for the Tribunal was to make such significant adverse credit findings that all the Applicant's evidence was impugned.[24] That, it is submitted, is exactly what the Tribunal did in its decision.

29. Whilst on its own a global adverse credit finding in the circumstances might not give rise to an apprehension of bias, the submission is that the Tribunal decision shows further matters which, taken with the Tribunal's comments at the hearing, result in the possibility that the hypothetical fair-minded lay person would reasonably apprehend that the Tribunal might not have brought to the hearing and the making of the decision a mind capable of being persuaded that the Applicant's account was not a fabrication (see *Re Refugee Review; Ex parte H*[25]*; VFAB v Minister for Immigration & Multicultural & Indigenous Affairs*[26] at [24]-[27]).

30. The further matters to which counsel for the Applicant referred are:

    a) The distinction made between a high profile and a low profile Falun Gong practitioner with no evidentiary basis;

[21] (2007) 164 FCR 151; [2007] FCA 1318
[22] (2008) ALD 22; [2008] FCA 1372
[23] (2006) 228 CLR 152; 231 ALR 592; 81 ALJR 515; [2006] HCA 63
[24] Transcript page 33
[25] (2001) 179 ALR 425; 75 ALJR 982; [2001] HCA 28
[26] [2003] FCA 872

b) The Tribunal's failure to inquire from the second witness as to the witness's expertise or basis for assessing the Applicant's competence at Falun Gong and the subsequent observation that there was no evidence of this;

c) The decision to give no weight to evidence that was supportive of the Applicant's case when the implausibility of the Applicant's account of his detention in 2004 could not vitiate the plausibility of third party evidence of the Applicant's expertise at Falun Gong practice;

d) The issue of the corrigendum to the decision removing a finding of fact from paragraph 82 of the decision. The submission is that:

> *A reasonable lay observer properly informed might consider that the Tribunal's aim was to preserve a Decision from which the Tribunal could not be swayed to minimise any risk that the Decision might be found to be void (*see Minister for Immigration & Multicultural Affairs v Bhardwaj *[2002] HCA 11*[27] *at [52].*[28]*; and*

e) The Tribunal's failure to consider a claim arising from an imputed political opinion after advising it would probably do so at the hearing[29]

31. The Applicant submits that the Tribunal's jurisdictional errors whether taken individually or cumulatively result in the decision not being a privative clause decision within the meaning of s.474(2) of the Act (*Plaintiff S157/2002 v Commonwealth*[30]).

The First Respondent's submissions

32. Mr Markus, who appeared for the First Respondent, the Minister for Immigration and Citizenship, submitted that the Tribunal's decision was based on a comprehensive rejection of the Applicant's claims on credibility grounds and the Applicant's grounds of review are, in substance, an attempt to cavil with the merits of the Tribunal decision.

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[27] Also cited as (2002) 209 CLR 597; 187 ALR 117; 76 ALJR 598
[28] Outline of Applicant's Submissions filed 3 June 2009 at [46(d)]
[29] Transcript page 23
[30] (2003) 211 CLR 476; 195 ALR 2477 ALJR 454; [2003] HCA 2

33. Mr Markus submitted that it is for the Applicant to satisfy the Tribunal that all of the statutory elements have been made out (*Minister for Immigration and Ethnic Affairs v Guo*[31] at 596). Whilst a liberal attitude on the part of the decision-maker is called for (*Randhawa v Minister for Immigration, Local Government and Ethnic Affairs*[32]):

a) The merits of a case are for the Tribunal to determine (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[33] at 272, 291-292);

b) The Tribunal does not have to possess rebutting evidence before holding that a particular assertion is not made out (*Selvadurai v Minister for Immigration and Ethnic Affairs*[34] at 348); and

c) The Tribunal is not required to accept uncritically all claims made by an applicant (*Randhawa v Minister for Immigration, Local Government and Ethnic Affairs*[35] at 451; *Minister for immigration and Ethnic Affairs v Guo*[36] at 596; *Prasad v Minister for Immigration and Ethnic Affairs*[37] at 169-170).

34. As to Ground 1 (no evidence to support principal adverse credit finding), Mr Markus submitted that the Tribunal did not have to possess rebutting evidence before finding that it was not satisfied as to the plausibility and truth of the Applicant's claim to have been detained in 2004 (*Selvadurai v Minister for Immigration and Ethnic Affairs*[38] at 348). The Tribunal's finding was not a finding of fact for which positive evidence was required (*WAJS v Minister for Immigration and Multicultural and Indigenous Affairs*[39] at [11]-[12]; *NAVK v Minister for Immigration and Multicultural and Indigenous Affairs*[40] at [32]-[33]).

35. It was submitted that the basis of the Tribunal's reasoning was that the Applicant's claimed low profile in 1999, plus his evidence that he was

[31] (1997) 191 CLR 559; 144 ALR 567; 71 ALJR 743; [1997] HCA 22
[32] (1994) 52 FCR 437; 124 ALR 265; [1994] FCA 1253
[33] (1996) 185 CLR 259; [1996] HCA 6
[34] (1994) 34 ALD 347; [1994] FCA 1105
[35] *supra*
[36] *supra*
[37] (1985) 6 FCR 155; [1985] FCA 47
[38] *supra*
[39] [2004] FCAFC 139
[40] [2005] FCAFC 124

not subject to reporting conditions after his release from detention, did not suggest that the authorities would have been motivated to arrest him when he returned to Jilin in 2004. It was on the basis of the Applicant's own evidence it was open to the Tribunal to conclude that it was not satisfied that the Applicant was of such continuing interest to the authorities that he would have been detained in 2004.

36. As to Ground 2 (failure to consider a claim on the basis of imputed political opinion), Mr Markus submitted that the Tribunal clearly considered the possibility that the Applicant's attendance at protests in Australia relating to the Chinese Communist Party could potentially give rise to an imputed political opinion. However, the Tribunal was not required to consider a *sur place* claim based on this attendance, because:

a) The Applicant said that his attendance at protests was not for political reasons but related only to his Falun Gong beliefs and the Tribunal accepted this claim;[41]

b) The Tribunal was not satisfied that the Applicant's engagement in Falun Gong activities was for any other reasons than to invoke refugee protection obligations;[42] this conduct was disregarded following s.91R(3);

c) The Tribunal did not accept that the Applicant's attendance was for a reason other than to enhance his claims for a protection visa;

d) The Tribunal was required to disregard this attendance under s.91R(3), which included disregarding his attendance at protests.

37. As to Ground 3 (failure to take into account relevant material by attributing no weight to the witnesses' evidence), Mr Markus submitted that the Tribunal did not disregard that evidence but clearly did consider it[43]. It decided to give the evidence no weight, partly because of the nature of the relevant part of the witnesses' evidence and partly because of significant adverse credibility findings against the Applicant.

[41] Court Book 430 at [75], [77]
[42] Court Book 437 ("Corrigendum")
[43] Court Book 428 at [63]-[67]

38. It is a matter for the Tribunal to determine the weight to be given to particular pieces of evidence (*Wu Shan Liang*[44] at 272, 291-292; *Lee v Minister for Immigration and Multicultural Affairs*[45] at [27]). It was submitted that it was reasonably open to the Tribunal to decide not give weight to the evidence of the two witnesses where:

a) The relevant part of the evidence was opinion evidence from lay persons; and

b) The Tribunal had made comprehensive findings about the Applicant's credibility, concluding that he was not a witness of truth and had fabricated his claims[46].

39. Mr Markus submitted that there was nothing irrational in the Tribunal's decision not to put any weight on the relevant part of the witnesses' evidence given its view of the credibility of the Applicant's evidence.

40. As to Ground 4 (failure to ask the witness questions on critical matters at hearing), Mr Markus submitted that the ground was fundamentally misconceived. As to the claim of unreasonableness in the process of decision-making, he submitted that the relevant test would require unreasonableness to be "something so absurd that no sensible person could ever dream that it lay within the powers of the authority" (*Associated Provincial Picture Houses v Wednesbury Corporation*[47] at 229).

41. It was submitted that the value of the opinion of the Applicant's second witness as to the relative experience of the Applicant was clearly questionable. Her expertise was not a real issue for the Tribunal, let alone a central issue. The witness was giving opinion evidence and the weight that was ultimately to be given to this evidence was always a matter for the Tribunal to assess. Further, the expertise or experience of the witnesses was not a dispositive issue for the purposes of s.425; the dispositive issue was whether the Applicant was a genuine Falun Gong practitioner, which was clearly put to him during the hearing.

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[44] *supra*
[45] [2008] FCA 464
[46] Court Book 426 at [51]; 428 at [62]
[47] [1948] 1 KB 223

42. As to Ground 5 (reasonable apprehension that the Tribunal did not bring an impartial mind to the decision making process), Mr Markus submitted that an allegation of a reasonable of bias is a serious allegation that ought not to be lightly made. The particulars provided in support of the allegation did not raise any proper basis for it:

a) The provision of a written decision within 8 days is no indication that the Tribunal came to its decision in an improper manner, simply an indication that the Tribunal was conscious of its obligations under s.414A(1) of the Act;

b) That the Tribunal referred to the possibility of a significant adverse credit finding towards the conclusion is no indication of a closed mind and could hardly give rise to a reasonable apprehension that the Tribunal could not be persuaded that the Applicant's account was not a fabrication in circumstances where during the hearing the Tribunal:

i) Questioned the applicant about the inconsistencies in his protection visa application and his claims about what happened in China;

ii) Specifically told the Applicant on a number of occasions that it had not reached a final view in relation to the critical issues; and

iii) Asked the Applicant's agent what further questions it could ask the Applicant to determine whether he was a genuine Falun Gong practitioner and questioned the Applicant in detail about whether he was a genuine practitioner in Australia.

c) The factors set out in the Applicant's particulars (iii)-(v) in the Amended application (failure to inquire of third party witnesses; findings as to the plausibility of the Applicant's account in relation to his claim of detention in January 2004; the statement in paragraph 65 of the Decision Record: *"The Tribunal has no evidence as to the expertise of the second witness to comment on an applicant's Falun Gong competence"*) do not give rise to an apprehension that the Tribunal had a closed mind; and

d) The fact that the Tribunal issued a corrigendum one day after its original decision may be an indication of the Tribunal wishing to ensure that the decision correctly reflects its reasons but is no reasonable or proper basis for any apprehension that it approached its statutory task with other than an open mind.

43. For those reasons it was submitted on behalf of the Minister that the Tribunal decision is not affected by jurisdictional error.

Conclusions

44. The Applicant's first ground claims that there was no evidence to support the Tribunal's adverse credit finding, which was that the Tribunal did not accept that it was plausible that the Applicant was detained in Jilin City on 16th January 2004. The Tribunal said that it was satisfied that the claim was at least an "embellishment", if not "a complete fabrication".[48]

45. The Tribunal gave its reasons for that finding, that the Applicant was not a high profile Falun Gong practitioner and had not even been subject to reporting conditions since he was released from his previous detention in 1999.

46. It is well established that a finding on credibility is the function of the primary decision-maker, the Tribunal, and not normally a matter for the Court (*Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham*[49] per McHugh J at [67]). It is not for the Court to reconsider the evidence upon which the Tribunal that decision.

47. In any event, the Tribunal's overall finding on the Applicant's credibility was made on a number of bases. The Tribunal made it clear to the Applicant at the hearing that his credibility was in issue.[50] The Tribunal's disbelief of the Applicant's claim to have been detained in January 2004 was only one of the reasons.

48. The other reasons that the Tribunal gave for its satisfaction that the Applicant was not a witness of truth were:

[48] Court Book 428 at [61]-[62]
[49] (2000) 168 ALR 407; 74 ALJR 405; [2000] HCA 1
[50] Court Book 425 at [45]

a) Inconsistencies in the Applicant's written evidence;[51] and

b) The Applicant's activities after he arrived in Australia.[52]

49. In the Decision Record, the Tribunal sets out its account of the evidence of the Applicant's two witnesses at paragraphs 63 to 68 as part of the reasons for its finding that the Applicant was not a witness of truth.[53]

50. However, it is clear from the Tribunal's reasons that it accepted that the evidence of the two witnesses supported the Applicant's claims:

> *That said, the Tribunal understands the evidence of both witnesses was supportive of the applicant's case. However, given the significance of the adverse credibility findings made herein, the Tribunal has decided to give the witness evidence no weight.*[54]

51. The Tribunal has said that it has given no weight to the evidence of the two witnesses because of its adverse credibility finding about the Applicant. However, it cannot say that because it has given no weight to the witnesses' evidence that is one of the reasons why it has made an adverse credibility finding against the Applicant. That is a circular argument.

52. Whilst it is doubtful that irrationality and illogicality can constitute jurisdictional error (*NACB v Minister for Immigration and Multicultural Affairs*[55] at [30]; *NATC v Minister for Immigration and Multicultural and Indigenous Affairs*[56] at [25]), it is not open to the Tribunal to rely on a circular argument as evidence to support a factual finding.

53. That said, I am satisfied that the Tribunal had evidence upon which it was able to make its credibility finding and the Applicant's Ground 1 does not disclose a jurisdictional error.

54. The Applicant's second ground claims that the Tribunal fell into error by failing to consider a claim on the basis of an imputed political

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[51] Court book 425 at [46]-[51]
[52] Court Book 429-430 at [69]-[77]
[53] Court Book 428
[54] *Ibid* at [67]
[55] [2003] FCAFC 235
[56] [2004] FCAFC 52

opinion. The Tribunal's reasoning on this issue is problematic. It accepted that he *"engaged in numerous demonstrations/protests and events (principally in support of Falun Gong) since he arrived in Australia."*[57]

55. However, it did not accept that the Applicant had a well-founded fear of persecution for that reason. It said it would disregard the Applicant's conduct in Australia for the purposes of assessing whether he invoked refugee protection obligations in Australia.[58]

56. However, in the very next paragraph, under the heading *Humanitarian referral*, the Tribunal stated:

> *Without wishing to pre-empt any decision on the matter and irrespective of the applicant's motives, there is extensive evidence on the files and in his claims that he attended numerous public protests in support of Falun Gong. These protests occurred (amongst other places), in front of Parliament House and the PRC Consulate in Canberra. He also attended the 'mass [CCP] party quitting' protests (amongst other things). It is possible that such attendance at demonstrations in Australia may have brought him to the adverse attention of the PRC authorities, such that he may be treated harshly on return.*[59]

57. This finding was made for the purpose of a recommendation that the Minister exercise his discretionary powers under s.417. It is curious, to say the least, that the Tribunal would use conduct engaged in by the Applicant in Australia, which it has just disregarded under s.91R(3), for the purpose of making a finding that is tantamount to a finding of a fear of persecution for imputed political opinion, as a basis for a recommendation for a referral for the exercise of Ministerial discretion.

58. I would ordinarily not be satisfied that this represents a breach of s.91R(3) or a failure to consider a *sur place* claim, because the Tribunal disregarded the evidence of the Applicant's conduct in Australia because s.91R(3) required it to for the purpose of determining whether the Applicant had a well founded fear of persecution. However, the Tribunal was still able to refer to that conduct for another purpose, namely a recommendation for the exercise of s.417 discretion.

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[57] Court Book 430 at [75]
[58] Court Book 431 at [83].
[59] *Ibid* at [84]

59. That said, there is another concern about the Tribunal's finding under s.91R(3) which will be referred to later in these reasons. That other concern leads to a conclusion that the Tribunal's finding was erroneous.

60. The Applicant's Ground 3 claims that the Tribunal attributed no weight to the evidence of the Applicant's two witnesses and that this was a failure to take relevant material into account. I agree with the submission by Mr Markus for the Minister that the Tribunal did consider the witnesses' evidence, at paragraphs [63]-[67] of the decision. Whilst I have referred at [51] and [52] above to the Tribunal's circular reasoning in saying on the one hand that the evidence of the two witnesses was one of the reasons for making an adverse credibility finding against the Applicant and then on the other saying that it found their evidence supportive of the Applicant's case but gave it no weight because of its adverse finding about the Applicant's credibility, that it not a ground for finding that the Tribunal fell into error by not having regard to the witnesses' evidence.

61. Ground 3 has not been made out.

62. The Applicants' Ground 4 claims that the Tribunal fell into error by failing to ask further questions of the Applicant's witnesses. The Applicant submitted that the Tribunal's failure to inquire was unreasonable in the sense that no reasonable decision maker in the circumstances would have proceeded to make the decision without having made inquiry of the witnesses as to:

    a) The experience or expertise of the witnesses in assessing the Applicant's degree of knowledge of the practice of Falun gong in March or April 2005; and

    b) The level of the Applicant's expertise in performing exercises in March 2005 compared with what might be expected of a person who had only practised Falun Gong privately since November 2004 and in public since January 2005.[60]

[60] See outline of Applicant's Submissions at [40]-[41]

63. Counsel for the Applicant relied on *Minister for Immigration and Citizenship v Le*[61] and *SZIAI v Minister for Immigration and Citizenship*[62].

64. Since then, however, the High court has handed down its decision in *Minister for Immigration and Citizenship*[63]. The High Court allowed the appeal. In the decision on this point, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said at [25] and [26]:

> *Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a "duty to inquire", that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction.*[64] *It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case. There are two reasons for that.*
>
> *The first reason is that there was nothing on the record to indicate that any further inquiry by the Tribunal, directed to the authenticity of the certificates, could have yielded a useful result…*[65]

65. It would appear that there was little to be gained in making any further inquiries from these witnesses, who were lay witnesses who had given supportive evidence of the Applicant. Further inquiries as to their expertise or experience or a further discussion of the Applicant's expertise in performing exercises, especially compared to a hypothetical Falun Gong practitioner, would have yielded little if any further beneficial information.

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[61] *supra*
[62] *supra*
[63] [2009] HCA 39
[64] Footnote omitted.
[65] [2009] HCA 39 at [25]-[26]

66. There was no unreasonable failure to inquire and the Tribunal did not fall into jurisdictional error in that regard.

67. The Applicant's fifth ground refers to a reasonable apprehension that the Tribunal did not bring an impartial mind to the decision making process. This is an allegation of a reasonable apprehension of bias.

68. The Applicant relies on, essentially, the other grounds combined with some remarks made by the Tribunal at the hearing to do with time constraints. The submission is:

> *The Tribunal's decision was given 8 days after the hearing on 11 February 2009. The Tribunal raised at the hearing that it was operating under significant time constraints and while discussing an apparently difficult issue of fact arising from authorities considering the meaning of section 91R(3) of the Act suggested a global solution to that difficulty for the Tribunal was to make such significant adverse credit findings that all the Applicant's evidence was impugned: TS 33.2-33.6*
>
> *As it turned out this is exactly the approach taken by the Tribunal in its Decision. The Tribunal used the single adverse finding on credit relating to the January 2004 detention to then impugn all the evidence given on behalf of the Applicant or give that evidence no weight.*[66]

69. The test is set out in *Re Refugee Review Tribunal; Ex parte H*[67] at [27]-[28]:

> *The test for apprehended bias in relation to curial proceedings is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question to be decided. That formulation owes much to the fact that court proceedings are held in public. There is some incongruity in formulating a test in terms of a "fair-minded lay observer" when, as is the case with the tribunal, proceedings are held in private.*
>
> *Perhaps it would be better, in the case of administrative proceedings held in private, to formulate the test for apprehended bias by reference to a hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an*

[66] Outline of Applicant's Submissions at [42]-[44]
[67] *supra*

> *apprehension of bias. Whether or not that be the appropriate formulation, there is, in our view, no reason to depart from the objective test of possibility, as distinct from probability, as to what will be done or what might have been done…*[68]

70. The Tribunal Member at the hearing certainly referred to the pressure of time in writing the decision:

> *I have targets to reach and this one is already over target, so I am obliged to write this as soon as I can. So I'll probably be finalizing my decision within the next 24 to 48 hours depending on what problems that may arise during the time that I'm drafting it. So I'll probably finalise my decision on Friday if I can. If there's a problem it may take longer.*[69]

71. The Tribunal Member went on to say:

> *I'm obliged to finish these cases within a time limit, I'm over the time limit, and I've got to push this one through as fast as I can legitimately do given procedural fairness obligations amongst other things. I can say I won't finalise it before close of business Thursday, but I don't know, I'm just sort of putting feelers out just in case you want to say something about that?*[70]

72. There followed a discussion with the Applicant's migration agent about evidentiary matters, in which the Tribunal Member conceded several points raised by the migration agent. The Tribunal then asked the Applicant a number of further questions as a result of a submission raised by the agent.[71]

73. What the Member then did was ask the Applicant's agent whether there was anything further he should ask:

> *Miss Byers, I want to ask you this. I know this is not common. Are there other questions that you think I could ask because I'm not getting much more than what I would read in any blurb in any pamphlet that existed.*[72]

74. These comments do not sound as if the Tribunal Member had not brought to the hearing a mind capable of being persuaded that the

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[68] (2001) 179 ALR [27]-[28]
[69] Transcript page 32
[70] Transcript page 33
[71] Transcript pages 34-35
[72] Transcript 35

Applicant's account was not a fabrication. Indeed, it seemed that he was seeking further information from the Applicant about his practice of Falun Gong in order to assess whether his claim to be a Falun Gong practitioner was genuine or not.

75. The references to the "targets" the Tribunal had to meet were, to my mind, no more than a reference to the time constraints imposed on the Refugee Review Tribunal by s.414A(1) of the Migration Act.

76. I am not satisfied that the Applicant has made out a claim of a reasonable apprehension of bias.

The Corrigendum

77. The Tribunal made its decision on 19th February 2009 and forwarded a copy of that decision to the Applicant's agent under cover of a letter also dated 19th February 2009.

78. The following day it issued a document entitled "Corrigendum" and forwarded a copy of that decision to the Applicant's agent that same day. The covering letter said, relevantly:

> *I enclose a copy of a corrigendum to the Tribunal's decision of 19 February 2009. A copy of the corrigendum has also been sent to the Department of Immigration and Citizenship.*
>
> *A corrigendum is a correction to the text of the decision. It does not change the reasons or outcome of the Tribunal's decision.*[73]

79. The corrigendum, dated 20th February 2009, said:

> *Paragraph 82 should read as follows:*
>
> *In the present case, the applicant's apparently detailed knowledge of the practise of Falun Gong may be due to his sincere convictions; or (for instance), it may be due to his desire to merely invoke refugee protection obligations in Australia. In the present case, as I have found the applicant is not a generally credible witness, I have decided not to give the applicant the benefit of the doubt about this matter. That is, based on the evidence available to it and its findings herein, the Tribunal is not satisfied the applicant's continued engagement in Falun Gong in*

[73] Court Book 435

> *Australia is for any other reason than to invoke refugee protection obligations.*[74]

80. What was done in the corrigendum was to delete the final clause of the last sentence in paragraph 82, which originally read;

> *That is, based on the evidence available to it and its findings herein, the Tribunal is not satisfied the applicant's continued engagement in Falun Gong in Australia is for any other reason that*[75] *to invoke refugee protection obligations;* ***and (presumably) to establish a social network in Australia*** (emphasis added).[76]

81. This is not the sort of task for a corrigendum. It is, in my view, a change to the reasons because it withdraws a finding of fact, which is outside the scope of a corrigendum, which is meant to correct clerical errors and similar errors.

82. Because it purports to withdraw a finding of fact, the corrigendum is void and of no effect. It was issued on 20th February 2009, whereas the decision was dated 19th February 2009. A decision on a review (other than an oral decision) is taken to have been made on the date of the written decision (s.430(2)).

83. Thus, when it purported to issue a corrigendum, the Tribunal was already *functus officio.* The decision had been made the day before and it was too late to withdraw a finding of fact.

84. The effect of this is significant, because in the original paragraph 82, the Tribunal had found that the Applicant had engaged in the conduct in Australia not only for the purpose of strengthening his claim to be a refugee but also for another purpose, to establish a social network for himself in Australia.

85. Therefore, s.91R(3) was not engaged and the Tribunal should not have disregarded the Applicant's conduct in Australia. Thus, the Tribunal should have considered the Applicant's *sur place* claim.

86. In my view, the Tribunal fell into jurisdictional error and the decision is not, therefore, a privative clause decision.

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[74] Court Book 437
[75] *sic*
[76] Court Book 421 at [82]

87. Orders in the nature of certiorari and mandamus will issue.

88. I will hear submissions as to costs.

I certify that the preceding eighty-eight (88) paragraphs are a true copy of the reasons for judgment of Scarlett FM

Associate: V. Lee

Date: 25 September 2009