FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZJRH v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 2037*

MIGRATION – RRT decision – matter previously remitted for apprehended bias – Tribunal required to conduct a new hearing – decision quashed.

Federal Court Rules (Cth), O.62
Federal Magistrates Court Rules 2001 (Cth), r.21.02(2)(c)
Migration Act 1958 (Cth), ss.424A(1), 425, 425(1)

Minister for Immigration & Multicultural & Indigenous Affairs v NBDS [2006] FCA 265
Minister for Immigration & Multicultural & Indigenous Affairs v SCAR (2003) 128 FCR 553
NAQS v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1137
NBDS v Minister for Immigration [2005] FMCA 368
NBKM v Minister for Immigration & Citizenship [2007] FCA 1413
NBKM & Ors v Minister for Immigration & Anor [2007] FMCA 179
Re Refugee Review Tribunal & Anor; Ex parte H (2001) 179 ALR 425
SZEPZ v Minister for Immigration & Multicultural Affairs (2006) 159 FCR 291, [2006] FCAFC 107
SZFAS v Minister for Immigration & Anor (2006) 201 FLR 312
SZGNY v Minister for Immigration & Citizenship [2007] FCA 384
SZGNY v Minister for Immigration & Anor [2006] FMCA 1142
SZHLM v Minister for Immigration & Citizenship [2007] FCA 1100
SZILQ v Minister for Immigration & Citizenship [2007] FCA 942
SZILQ v Minister for Immigration & Anor [2007] FMCA 483
SZIWY v Minister for Immigration & Anor [2007] FMCA 1641
SZJQN v Minister for Immigration & Anor [2007] FMCA 1550
SZJXH v Minister for Immigration & Citizenship [2007] FCA 1691

Applicant:	SZJRH
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1915 of 2007

Judgment of:	Smith FM
Hearing date:	15 November 2007
Delivered at:	Sydney
Delivered on:	14 December 2007

REPRESENTATION

Counsel for the Applicant:	Mr I Archibald
Solicitors for the Applicant:	Michaela Byers, Solicitor
Counsel for the First Respondent:	Mr T Reilly
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) A writ of certiorari issue directed to the second respondent, quashing the decision of the second respondent handed down on 5 June 2007 in matter 071147415.

(2) 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 dated 25 February 2002.

(3) The first respondent pay the applicant's costs as agreed or taxed under r.21.02(2)(c) and O.62 of the Federal Court Rules.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1915 of 2007

SZJRH
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The applicant came to Australia in 2001, and applied for a protection visa on the ground that she feared persecution if she returned to The People's Republic of China. In a detailed statement, she claimed that she started to practise Falun Gong in July 1997. Two days before it was declared illegal in 1999, her group of practitioners was detained, put in trucks and "dumped" in the "open wilderness". In early 2001, she attended a demonstration in Tiananmen Square, but was detained and returned under guard to her province, where she was held by the Public Security Bureau for 15 days. She was arrested again, and taken to a labour camp where she was detained for 40 days. She was required to report to her neighbourhood committee, and since she left China the police had been looking for her. If she returned to China, she would again be detained.

2. Her visa application was accompanied by a number of documents purporting to corroborate her history, and numerous other documents

and photographs were subsequently given to the Tribunal. These included statements of witnesses who had known the applicant in China, and as a participant in Falun Gong activities in Australia. Extensive country information, including Amnesty International reports, were also presented, with submissions from solicitors who assisted the applicant in the course of the Tribunal proceedings.

3. A delegate refused the visa application on 25 February 2002, and his or her decision was affirmed by the Tribunal in a decision handed down on 5 June 2007. Between those dates, there were three previous decisions of the Tribunal purporting to affirm the delegate's decision. These were set aside by judgments of the Federal Court and this Court which I shall explain below. The three members of the Tribunal who made its previous decisions (whom I shall identify as T1, T2, and T3), each held hearings which the applicant attended on 9 April 2003, 20 and 28 January 2004, and 14 August 2006.

4. In the 2007 decision which I am now asked to review, the new member (T4) extensively recited the evidence taken at each of the hearings held by the previous members. It is clear, in my opinion, that T4 regarded this material as relevant and admissible when conducting his own review of the delegate's decision. He also recited, and clearly regarded as very relevant and admissible, a written exchange between T3 and the applicant conducted under s.424A(1) shortly after the last hearing held by T3. It is implicit from his statement of reasons that T4 took into account all this material, when deciding not to invite the applicant to another hearing, and when deciding to affirm the delegate's decision.

5. T4 did not discuss whether the grounds for the remitter of the matter, as revealed in the courts' judgments and orders, left it open to him, or appropriate, not to invite the applicant to a hearing conducted by him. Indeed, he nowhere referred to, or considered, the reasons for the previous decisions being held invalid.

6. However, in his statement of reasons T4 did explain his opinion that he had power to take into consideration the earlier proceedings of the Tribunal, and of T3 in particular, and also that he was not bound to invite the applicant to a further hearing. He referred to *SZEPZ v Minister for Immigration & Multicultural Affairs* (2006) 159 FCR 291, [2006] FCAFC 107, as authority for the proposition: "*that upon*

remittal of a matter by a court for reconsideration, the Tribunal is obliged to continue and complete the particular review, not commence a new review. … The Full Court's view appears to suggest that previous compliance with other statutory procedures upon remittal of a matter may be sufficient for the purposes of a review". He also referred to a judgment of Scarlett FM in *NBKM & Ors v Minister for Immigration & Anor* [2007] FMCA 179. He then said:

> *The present Tribunal understands this to mean that if a previously constituted Tribunal complied with the obligation under s425 of the Migration Act, and at that hearing provided that applicant with a real opportunity to give evidence and submissions, then it may not need to invite the applicant to a second hearing. Thus unless an applicant's responses to for instance, the present Tribunal's s424A letter satisfy it is reasonably necessary, or the Tribunal believes it otherwise necessary to do so, the Tribunal as presently constituted may not offer the applicant a further hearing.*
>
> *In the present case a previous Tribunal had complied with the obligation under s425 of the Migration Act which requires it to 'invite the applicant to appear.' Based on the reasoning in* SZEPZ *and* NBKM & ORS *I am satisfied the Tribunal has complied with its obligation under* inter alia *s425 of the Migration Act. Further, after having read the applicant's responses, I am satisfied that I need not offer the applicant a further opportunity to appear and give evidence.*

7. The grounds of review now argued by the applicant's counsel include a contention that T4 was incorrect in his opinion that, in the circumstances of the remission of this particular matter to the Tribunal, the Tribunal was not bound to invite the applicant to attend a hearing conducted by T4 himself. The significant circumstance in this respect, was that T3's decision had been quashed on grounds of reasonable apprehension of bias on the part of T3 (as also had T1's decision, and there was some doubt about this in relation to T2's), and it was therefore not open to T4 to conclude that the previously constituted Tribunal had complied with its obligations under s.425. Rather, the Tribunal remained under an obligation to accord to the applicant a hearing before a Tribunal member whose proceedings were not affected by any apprehension of bias.

8. I have concluded that this ground should be upheld. In my opinion, the current state of authorities as to the jurisdictional obligations on the Tribunal under s.425 support a conclusion that T4 could not avoid inviting the applicant to a hearing for the reason which he gave.

9. It therefore is unnecessary for me to explore the factual and legal bases of other grounds which challenged the Tribunal's making of a decision without appointing a further hearing. These included contentions that there were breaches of obligations of procedural fairness, because the applicant's solicitor thought that an invitation would be sent, or because she was denied a sufficient opportunity to respond in writing to a request for comments on a draft decision which was sent to her. I also do not need to explore the substantive reasons given by the Tribunal for affirming the delegate's decision, nor the applicant's challenges to them on grounds of irrationality, false assumptions as to the applicant's mental capacities, and inadequate consideration of the corroborative evidence presented by the applicant.

10. Section 425 provides:

> ***SECT 425 Tribunal must invite applicant to appear***
>
> *(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.*
>
> *(2) Subsection (1) does not apply if:*
>
> *(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or*
>
> *(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or*
>
> *(c) subsection 424C(1) or (2) applies to the applicant.*
>
> *(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.*

11. In *SZIWY v Minister for Immigration & Anor* [2007] FMCA 1641 at [30], I referred to recent High Court judgments which give s.425 a very significant role:

> *Notwithstanding some doubt in the Federal Court whether this section raises merely a requirement to give a hearing invitation, recent judgments of the High Court locate within s.425(1) a significant right for an applicant to participate in a real and meaningful hearing, which in fact affords the opportunity described in s.425(1) (see* SZFDE v Minister for Immigration & Citizenship *[2007] HCA 35 at [30]-[35], [48]-[53], also* Applicant NAFF of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs *(2004) 221 CLR 1 at [27] and [32],* NAIS v Minister for Immigration & Multicultural & Indigenous Affairs *[2005] HCA 77 at [37], [164], and [171], and* SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs *[2006] HCA 63 at [26]-[29], and [32]-[37]).* SZFDE *confirms the opinion of a Full Court in* Minister for Immigration & Multicultural & Indigenous Affairs v SCAR *(2003) 128 FCR 553 at [37], that a breach of s.425 can occur as a result of circumstances unknown to the Tribunal and beyond its control. It also supports the Full Court's opinion at [38] as to the jurisdictional nature of the requirements implicit in s.425(1).*

12. When viewed in the light of these authorities, the opportunity required to be given to an applicant under s.425 to present himself or herself in person at a hearing held by a person constituting the Tribunal for the conduct of the review, includes a requirement that the hearing should be held by a person who is both actually unbiased and ostensibly unbiased, and who will bring an actually and ostensibly unbiased mind when making a genuine evaluation of the evidence given at the hearing (cf. *NAIS* (supra) at [37], [105], [131] and [172]).

13. The requirement that there should be no apprehension that the Tribunal might not bring an open mind to its review of the delegate's decision has been firmly established in general principle. In *Re Refugee Review Tribunal & Anor; Ex parte H* (2001) 179 ALR 425 at [27]-[32], the High Court held that the test of "*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"* was applicable to proceedings in the Refugee Review Tribunal, and suggested that, in view of its administrative and inquisitorial nature, the test might be formulated "*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 apprehension of bias"*.

14. In the present case, it has been judicially determined that the proceedings of neither T1 nor T3 met that standard, and there are reasonable doubts about this also in relation to T2.

15. The decision of T1 handed down on 6 May 2003 was set aside by Hill J on 21 October 2003. In a reserved judgment published as *NAQS v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1137, his Honour identified features of the hearing held by T1 which led him to arrive at the following conclusions:

> *62 The Tribunal member's attitude regarding this matter as in so many matters throughout the hearing would hardly inspire any applicant with the confidence that the Tribunal would approach the task of review with an open mind.*
>
> ***Was there a review?***
>
> *63 The Act confers upon the Tribunal the obligation on the application of an applicant to review decisions made by the respondent refusing a protection visa: s 414(1) and see s 411 of the Act.*
>
> *64 The Act does not contemplate that the Tribunal will merely engage in a pretence. It contemplates that the Tribunal will in accordance with the Act take account of any evidence of the applicant and submissions which the applicant may make: s 425.*
>
> *65 What happened in the present case is, in my view, so extreme that the only conclusion open to me is that the Tribunal did not conduct a review at all. It interrupted the applicant and did not permit the applicant to give explanations. It refused the applicant the opportunity of calling witnesses. In so far as the member appeared to be participating in a review at all she appears to have done so with a closed mind such that I would find she exercised bias in the sense used by the cases.*
>
> *66 The various matters, the subject of the individual submissions discussed when taken together with the transcript, leave me with only one conclusion and that is that the Tribunal member did not attempt a hearing which had the characteristics required by the Act, that is to say to be actually a review which is fair and in which the Tribunal reviews the decision refusing the applicant a protection visa*

acting according to substantial justice and the merits of the case.

67 In my view, the Tribunal's decision is vitiated with error such that it is no decision at all and must be set aside. …

16. The orders made by Hill J included a direction that the Registrar should forward a copy of his reasons to the principal Member of the Tribunal *"for his information"*.

17. The decision of T2 was handed down on 18 March 2004, and was quashed by order of Scarlett FM on 21 March 2005. His Honour published reasons in *NBDS v Minister for Immigration* [2005] FMCA 368 which identified defects in T2's reasons for a conclusion which did not accept that the applicant *"is a Falun Gong practitioner"*.

18. On an appeal by the Minister, Scarlett FM's order was upheld by Allsop J in *Minister for Immigration & Multicultural & Indigenous Affairs v NBDS* [2006] FCA 265. Allsop J accepted several grounds of appeal which argued that flaws in T2's assessment of evidence were not jurisdictional. Ultimately, he dismissed the appeal upon the ground that a breach of s.424A(1) was revealed by T2's reference to an omission by the applicant to mention a relevant piece of her claimed history when making her visa application. However, his judgment at several points expressed disquiet at the reasoning followed by T2, and contained a concluding observation which called into doubt the fairness of its proceedings:

27 The respondent in her notice of contention said that the question of her sur place *claim being a contrivance to strengthen her claim to refugee status was not put to her. So, it was claimed, she was denied procedural fairness. Considerable reference was made in submission by the respondent to the authorities concerned with* sur place *claims before the introduction of s 91R of the Migration Act. I do not see the relevance of it. It does not appear to be in issue that the Tribunal did not raise squarely with the respondent the issue that the Tribunal was preparing to find that the activities in Australia were undertaken with the express purpose of, in effect, contriving a claim not otherwise genuinely based. Leaving aside the operation of s 422B, I am of the view that this is a matter sufficiently close to an assertion of lack of* bona fides *or fraud as to*

> *require it to be raised with the respondent. Fairness required, in my view, the disclosure to the respondent of the fact that the Tribunal was considering a finding that the activity in Australia (which appears to have been accepted occurred) was undertaken as a contrivance in effect in a manner that lacked honesty. Because of the view that I have taken about s 424A, below, it is unnecessary for me to consider the impact of s 422B.*

19. T3 held a hearing which was attended by the applicant and her solicitor on 14 August 2006. A transcript is in evidence before me. It shows that the applicant was taken through her claimed history. The only concerns which were clearly raised by the Tribunal related to the applicant's evidence of a brief visit to Thailand in July 2001. However, four days after the hearing, the Tribunal sent to the applicant a s.424A(1) letter inviting her comments upon various inconsistencies which it identified from the applicant's evidence given to the Department of Immigration, to T1 and to T2. The letter concluded:

> *In view of the inconsistencies, detailed above, the Tribunal will conclude that you are not a witness of truth, you were not a Falun Gong practitioner in China and that you commenced to practise Falun Gong in Australia in order to obtain the visa sought.*
>
> *You are invited to comment on this information.* …

20. The decision of T3 was handed down on 17 October 2006. It "*rejected the applicant's claims of being a Falun Gong practitioner in China as I do not accept the applicant is a witness of truth, I am satisfied she has created her claims in order to obtain the visa sought"*.

21. On 15 January 2007, Cameron FM made an order quashing that decision. His order shows, on its face, that the order was made by consent, and has the annotation:

> *Note: The Court notes that the first respondent accepts that the application must be allowed on the basis of a reasonable apprehension of bias.*

22. In my opinion, it was not open, as a matter of law, to T4 to conclude in the face of the above history of judicial review, and particularly the basis upon which the decision of T3 was quashed, that *"a previously constituted Tribunal complied with the obligation under s.425"*. T4

then failed to comply with the Tribunal's obligation to afford the applicant an opportunity to appear at a hearing conducted by a person unaffected by an apprehension of bias, and this gives rise to jurisdictional error which requires T4's own decision to be quashed.

23. Counsel for the Minister accepted that there could be circumstances where a hearing conducted by the Tribunal as previously constituted would have been so flawed as not to be regarded as exhausting the Tribunal's obligations under s.425(1). He instanced the situations where a material mistranslation had occurred (cf. *SZJQN v Minister for Immigration & Anor* [2007] FMCA 1550), or where the applicant's impairment materially prevented his or her evidence or submissions being fairly elicited (cf. *SCAR* (supra) and *SZIWY* (supra)). However, he submitted that this had not occurred in relation to the hearing held by T3, because the Minister's concession in relation to apprehended bias was based only upon the improper expression of the paragraph in its s.424A(1) letter which I have quoted above.

24. I do not accept this submission for a number of reasons. Although the applicant did not contest that the Minister's consent to the quashing of T3's decision was given on the basis now asserted by his counsel, there is no evidence before me that T4 himself was aware of this. His apparent reliance upon T3's s.424A letter, and his opinion that it was proper to "adopt", "with certain amendments", "the previous Tribunal's decision", suggests otherwise (see page 28 of T4's reasons). The complete absence of any discussion by T4 of the significance of the notation on Cameron FM's order suggests that T4 gave no consideration to the propriety of relying upon the proceedings of T3, whether in relation to its hearing or its s.424A letter.

25. More significantly, even if the dogmatic framing of T3's s.424A letter was the clearest particular giving rise to a reasonable apprehension that T3 did not bring an open mind to deciding the matter, that apprehension must encompass T3's conduct of the hearing held four days earlier. Particularly where, as I have indicated above, significant matters raised in the s.424A letter had not been put to the applicant by T3 at the hearing. I therefore do not accept the Minister's submission that the effect of Cameron FM's order left open to T4 a conclusion that

T3's hearing had complied with obligations of ostensible impartiality which are implicit in s.425.

26. My conclusion of jurisdictional error which is explained above does not require me to choose between some differences in judgments of the Federal Court in relation to the power of the Tribunal to rely upon a previous Tribunal's conduct of a hearing under s.425 and upon evidence given at such a hearing. Until recently, the position identified by the present Tribunal had been taken in this Court, and was upheld in the Federal Court (see, for example, my decisions in *SZFAS v Minister for Immigration & Anor* (2006) 201 FLR 312 at [16]-[17], *SZGNY v Minister for Immigration & Anor* [2006] FMCA 1142 at [18]-[22], and *SZILQ v Minister for Immigration & Anor* [2007] FMCA 483 at [24]-[36]). Emmett J upheld my judgment in *SZGNY* (see *SZGNY v Minister for Immigration & Citizenship* [2007] FCA 384). Greenwood J in *SZJXH v Minister for Immigration & Citizenship* [2007] FCA 1691 at [25] said: *"I regard the legitimacy of recourse by the Tribunal to the earlier evidence given by the appellant to an earlier Tribunal, as an entirely settled matter"*.

27. In an appeal from my judgment in *SZILQ*, Buchanan J did not doubt my opinion that a hearing held by the Tribunal as previously constituted could satisfy the requirements of s.425. However, he held that new written evidence given to the Tribunal about the appellant's conduct in Australia had the effect that *"an additional element then emerged, in respect of which the appellant had not been given an opportunity to give evidence and present arguments at an oral hearing. In those circumstances the obligations under s 425(1) were not fully met"* (see *SZILQ v Minister for Immigration & Citizenship* [2007] FCA 942 at [32]-[33]). I note that an application by the Minister for special leave to appeal to the High Court from this decision has been filed.

28. In an appeal from Scarlett FM's judgment in *NBKM* (supra) which was cited by the present Tribunal, Siopis J accepted that a previous hearing might exhaust the obligations of s.425. However, he added a qualification. In *NBKM v Minister for Immigration & Citizenship* [2007] FCA 1413, he said:

> *25 The second but related issue is whether in the circumstances of this case, a second hearing was required. It does not*

follow that because there is no absolute right to a second hearing when a matter is remitted to the Tribunal for hearing according to the law, that there will never be circumstances when the Tribunal will be required to invite an applicant to a second hearing, in order to comply with s 425(1). Section 425(1) requires the Tribunal to invite an applicant to appear before a Tribunal to give evidence and present arguments relating to "the issues arising in relation to the decision under review".

26 Whether such requirement arises will depend upon what the "issues arising in relation to the decision under review" are, at the time the Tribunal makes the second decision. [citing Minister for Immigration & Multicultural Affairs v Wang (2003) 215 CLR 518, Abebe v Commonwealth (1999) 197 CLR 510, and SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs (2006) 231 ALR 592].

29. These cases do not address the situation where a new hearing is required, not because a new issue has been raised by an applicant or by the Tribunal, but because the previous hearing was a defective or incomplete satisfaction of the requirements of s.425 by reason of apprehension of bias. However, they illustrate that it is essential for the Tribunal, on remitter, to consider whether a new hearing is required and, where it is not, how to exercise the discretion to appoint a new hearing. In the present case, as I have found, the Tribunal incorrectly found that a new hearing was not required.

30. Had I found that the appointment of a new hearing was discretionary in this case, then it would have been necessary for me to consider whether the Tribunal properly considered relevant circumstances before deciding not to invite the applicant to a new hearing, including the previous judicial review history of the matter, and its exchanges with the applicant's solicitor.

31. I was referred to the opinion by Cowdroy J in *SZHLM v Minister for Immigration & Citizenship* [2007] FCA 1100 at [34] that *"the reconstituted Tribunal was required to carry out its statutory functions as if the first hearing had not taken place"*. This appears contrary to the weight of authority in the Federal Court which I have cited above, and does not address the reasoning of the Full Court in *SZEPZ* (supra). Perhaps Cowdroy J meant to refer to "first decision" rather than

"first hearing". However, in the present case I do not need to decide this, nor whether I should decline to follow his Honour's opinion.

32. For the above reasons, the decision of the Tribunal must be quashed, and the matter remitted for further consideration. This will be the Tribunal's fifth opportunity to comply with its jurisdictional obligations. I urge upon it the need carefully to consider how it should proceed in the light of the entire history of judicial review of its previous proceedings.

I certify that the preceding thirty-two (32) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 14 December 2007