FEDERAL COURT OF AUSTRALIA

SZHVE v Minister for Immigration and Citizenship

[2007] FCA 685

SZHVE v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND ANOR
NSD 12 OF 2007

RARES J
2 MAY 2007
SYDNEY

NO QUESTION OF PRINCIPLE

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 12 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGE:	**RARES J**
DATE OF ORDER:	**2 MAY 2007**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The name of the first respondent be changed to 'Minister for Immigration and Citizenship'.

2. The appeal is allowed with costs.

3. The orders made by the Federal Magistrates Court on 20 December 2006 be set aside and in lieu thereof it be ordered that:

    (a) a writ of certiorari in the first instance issue to the second respondent quashing its decision made on 24 October 2005 and handed down on 15 November 2005;

    (b) an order in the nature of a writ of mandamus in the first instance issue to the second respondent requiring it to hear and determine the application for review made by the applicant on 29 July 2005 in accordance with law;

    (c) the first respondent pay the applicant's costs.

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

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JUDGE:	**RARES J**
DATE:	**2 MAY 2007**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

(REVISED FROM THE TRANSCRIPT)

1 This is an appeal from a decision of the Federal Magistrates Court (*SZHVE v Minister for Immigration* [2006] FMCA 1716) in which the appellant claimed constitutional writ relief against a decision of the Refugee Review Tribunal made on 24 October 2005 and handed down on 15 November 2005. In his notice of appeal in this Court the appellant has complained that his Honour's decision was wrong on the following bases:

1. The appellant had provided evidence that he practised his faith as a Christian in Australia regularly but the tribunal failed to take into account the genuineness of that conduct which was, in effect, a manifestation of his practise in China of the Christian faith in the Shouters Church. Accordingly the tribunal incorrectly applied s 91R of the *Migration Act 1958* (Cth).

2. Implicitly, the appellant also asserted that the tribunal erroneously concluded that he was not a genuine practitioner of the Christian faith in the Shouters Church in his home in China.

Before his Honour and before me the Minister has identified the possibility of two other arguments, namely:

3. A possible failure by the tribunal to give a notice under s 424A(1) of the Act in respect of two new claims first articulated in the appellant's oral evidence before the tribunal, namely:

   (a) the appellant had gone into hiding while in China as a result of his fear of persecution for religious reasons;

   (b) the Chinese authorities would know that he had falsified documents because the village head had been to his house and had ascertained that he had gone to Australia.

4. The way in which the tribunal dealt with the appellant's assertion that he had given false information in his passport which had been issued by the Chinese authorities.

2 The appellant had been represented by a migration agent when making his original claim for a protection visa and also in the proceedings before the tribunal. He had claimed to have been a member of the Shouters sect since he had been informally baptised at the age of about five or six in China and that he had thereafter practised regularly in the Shouters sect until he left China in 2005. The tribunal did not accept that the appellant's account of his involvement with the Shouters sect or the Christian religion in China was credible. During the course of giving its findings and reasons it said:

> *'The Tribunal is not satisfied that the Applicant was involved with the Shouters church while he was living in China for a number of reasons among which are the following.'*

3 The tribunal then set out over two closely typed pages of reasons. I raised with counsel for the Minister whether the elliptical expression 'a number of reasons among which' suggested that the tribunal had not discharged its statutory function under s 430(1)(b) or (c) of setting out in full its statement of the reasons for its decision or the findings on any material questions of fact.

4 While the form of expression which the tribunal used in the passage that I have quoted is unfortunate, I am not satisfied that what was set out in the following passages of the tribunal's findings and reasons was not a complete statement of the matters required by s 430(1)(b) and (c). In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 Brennan CJ, Toohey, McHugh and Gummow JJ said that the reasons for the decisions under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error. They noted that the reality is that reasons of an administrative decision-maker are meant to inform and are not to be scrutinised upon over zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons were expressed.

5 Although a reasonable reading of the tribunal's statement could lead to the inference that the tribunal had withheld a material part of its reasoning or fact finding I am not satisfied that that would be the fair or proper inference to draw in the circumstances of this case. I am of opinion that the tribunal did set out in its statement its reasons and material findings of fact for its ultimate conclusion that it was not satisfied that the appellant had been involved with the Shouters Church while he was living in China in the passage following that which I have quoted.

6 One of the difficult factual tasks which the Parliament has given to the tribunal is the assessment of the credibility or reliability of the claims made by applicants for review. Often these are difficult to determine. It is not the function of the Court to engage in any review of the merits of those claims. While some of the questions which the tribunal asked in the present case would not be ones which a judge would regard necessarily as being relevant or material to findings of credibility, the Parliament has left it to the tribunal to form its own view by the inquiry and investigation it undertakes in its own way.

7 The ultimate conclusion that the appellant was not involved in the Shouters Church in China was arrived at by the tribunal after a consideration of, I think from considering its statement, the whole of the material before it. Unless there be a jurisdictional error in the way in which it conducted the review, the Court is unable to grant relief to the appellant against the decision that the tribunal made to refuse him a protection visa. That makes it

necessary to examine the various possible ways in which his notice of appeal and the arguments fairly put by the Minister as being open to be raised on his behalf can be assessed.

THE NEW CLAIMS ARGUMENT

8 Two of the bases upon which the tribunal explained that it had not been satisfied on issues of the appellant's credibility were the two new claims he made in his oral evidence before the tribunal which I have set out in summary above. The tribunal recorded that the appellant had claimed to have defied warnings from persons in his village that he would be at risk if he continued to practise his religion. It pointed to the fact that by his own account he had never been interrogated, detained, arrested, charged, imprisoned, tortured or in any other way harmed by the authorities and that the only thing that had happened to him was that he had continued to receive repeated warnings which he apparently ignored repeatedly himself.

9 At the hearing the tribunal put to him, according to its statement, that persons who continued to defy warnings from authorities in China could reasonably expect to be arrested, to which the appellant had replied that he had been able to escape arrest by leaving the village and going into hiding a number of times. The tribunal said that it was not satisfied that that was a credible explanation for the fact that harm had never befallen the appellant and that his claim to have gone into hiding was one which he advanced for the first time at the hearing. It noted that he had made no mention whatever of having been forced to do so in his submission to the tribunal which he made shortly before the hearing.

10 The only way in which the tribunal could have been aware that the appellant advanced this claim for the first time before the hearing was by having regard to the whole of the material that had been put by the appellant both to the tribunal and anywhere else. No notice was given to the appellant under s 424A(1) of that fact. The tribunal said that it was not satisfied that if the appellant had been pursued by police for his involvement in church activities and then had gone into hiding for a time before returning to his village, he would have been left unmolested by the authorities.

11 The question then arises as to whether the tribunal's assertion that the claim that the appellant had gone into hiding was a new one which he had advanced for the first time at the

hearing amounted to information that the tribunal considered would be the reason or part of the reason for affirming the decision that was under review.

12 The Minister, in his written submissions, characterised the basis on which the tribunal rejected this claim as being one of recent fabrication. During the course of argument I raised with counsel for the Minister whether or not the correct characterisation of this reasoning process in the tribunal's statement was an expression of a lack of satisfaction with the appellant's account or a use of information which went beyond what was in the material that would clearly be within the exception in s 424A(3)(b) contained in the appellant's submission made shortly before the hearing in the tribunal on 10 October 2005.

13 Had the tribunal confined its reasoning process to a reliance on the omission in the 10 October 2005 submission of any reference to the appellant having gone into hiding, there would be no question of the engagement of s 424A because the tribunal would simply have been using that submission as one made by the appellant within s 424A(3)(b) in a way authorised by the Act. However, because the tribunal referred to the claim to have gone into hiding being a new one which was advanced for the first time at the hearing, I am satisfied that the tribunal must have had regard to other information than what was contained in the submission of 10 October 2005.

14 Indeed the tribunal earlier recorded in its statement that it had the departmental file before it which included the protection visa application, the delegate's decision record and the application for review. It said that it had had regard to the material referred to in the delegate's decision and other material available to it from a range of sources. In *SAAP v Minister for Immigration* (2005) 215 ALR 162, the majority of the High Court held that a failure to comply with s 424A(1) would, apart from circumstances not presently material, be sufficient to warrant the grant of constitutional writ relief against a decision of the tribunal. One of the purposes of the exhaustive statement of the natural justice hearing rule in s 422B of the Act (which identifies what is set out in Div 4 of Pt 7), was that the standard of review should be conducted in accordance with the strict requirements the Parliament had prescribed.

15 If the matter had been one in which the common law applied, it may have been possible to conclude that no injustice was done. But the tribunal had regard to material

outside the submission of 10 October 2005. It considered that what had been put by the appellant previously in all of the material that the tribunal had available to it. That information was not information which the tribunal had identified to the appellant in writing under s 424A(1).

16 A conclusion of fabrication or recent invention is substantively different from a simple finding that a tribunal is not satisfied as to a claim, for the reasons which I gave in *SZGGT v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 435 at [60]-[64] and the authorities there cited. Although this is a matter of some technicality, I am of opinion that the tribunal failed to give notice under s 424A(1) of its use of the information contained in the whole of the material available to it.

17 The trial judge read the tribunal's remark that the claim was raised for the first time as being a comment of no significance to the conclusion which was ultimately reached. He relied on *NAIH of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 124 FCR 223 at 232 [17] per Branson J. However, that decision was one which ante-dated the decision of the High Court in *SAAP* 215 ALR 162 and the construction which has now been given to the section. Moreover, I am not of the view that the remark has no significance to the conclusion which was reached. In my opinion, a step in a reasoning process that says a claim had never been made before is a different thing to saying the claim had not been made on one previous occasion. The characterisation in the Minister's written submission, that the rejection of the claim was on the basis of recent fabrication, is one that is certainly open on a fair reading of the tribunal's reasoning and, having regard to the way in which it expressed itself, a correct one.

18 In those circumstances, I am of opinion that his Honour was in error in coming to the conclusion that the statement was a passing comment of no significance. Rather, for the reasons I have given, it was a use of information; being, in effect, the implied representation in the previous statements by the appellant that he had given in each of them a full account of all material matters which would be of relevance in the assessment of his claims. Thus, the omission beforehand of the statement that he had gone into hiding was material.

OTHER ISSUES – SECOND NEW CLAIM

19 The second new claim which the Minister identified as raising the need to consider the s 424A requirement arose from the tribunal's questions to the appellant about how he came to leave China in March and April 2005. He first went on holiday and then left to come to Australia, without any difficulties from Chinese authorities at the airport. The tribunal asked the appellant why he believed the authorities would know of the falsification of his passport and he said that the village head had been to his house and knew he had gone to Australia. The tribunal said that assertion was not mentioned anywhere in the submission of 10 October 2005 and added no weight to his claimed fear that his identity documents would be found to be false.

20 In my opinion, the way in which the tribunal reasoned on that matter was unimpeachable and did not engage an obligation under s 424A(1) to give the appellant notice of any information. The tribunal relied upon the submission of 10 October 2005 in which, for the first time, the appellant had himself raised the fact that he had obtained his passport using false information in China as to his place of birth. The tribunal, to the extent that it used information in the submission of 10 October 2005, did so permissibly having regard to the provisions of s 424A(3)(b).

FALSE PASSPORT

21 As I have mentioned, the appellant first raised the issue of the genuineness of information in his passport in the submission he made on 10 October 2005. Earlier, the tribunal had invited him to the hearing on 13 October 2005. In the letter of invitation the tribunal said, 'if you have a passport you should bring it to the hearing'.

22 The tribunal recorded in its s 430(1) statement that the passport was 'submitted at the hearing'. It is unclear from the evidence as to whether or not the appellant volunteered the passport or the tribunal required its production to it. However, I would infer, having regard to the appellant's claim made in the submission of 10 October 2005, and in the absence of any evidence before his Honour or me to the contrary, that the appellant voluntarily provided the passport within the meaning of s 424A(3)(b) and that the tribunal was entitled to make such use of it as it did in its decision. I am not satisfied that there was any jurisdictional error in the way in which the tribunal used the information in the passport in its reasoning.

SECTION 91R(3)

23 The tribunal came to the view that it was not satisfied about the appellant's involvement in the Shouters Church in China. In that event, it was open to the tribunal on the evidence before it to conclude, as it did, that the appellant's involvement with the local church in Sydney after he arrived in Australia could be seen as having been undertaken for the purpose of strengthening his claim to be a refugee and, therefore, ought be disregarded by reason of s 91R(3) of the Act. Whether the tribunal on reconsideration of the matter when it is remitted would come to the same view, will be a matter for the tribunal having regard to all the evidence then before it.

CONCLUSION

24 In those circumstances, I am of opinion that it is appropriate to allow the appeal and to make orders quashing the decision of the tribunal and remitting the matter to be dealt with in accordance with law.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 8 May 2007

Appellant:	In person
Counsel for the Respondent:	RA Pepper
Solicitor for the Respondent:	Blake Dawson Waldron
Date of Hearing:	2 May 2007
Date of Judgment:	2 May 2007