FEDERAL COURT OF AUSTRALIA

SZIYG v Minister for Immigration and Citizenship [2008] FCA 1143

Migration Act 1958 (Cth) ss 91R and 424A

SZJGV v Minister for Immigration and Citizenship [2008] FCAFC 105

SZIYG v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
NSD 1843 OF 2007

TRACEY J
5 AUGUST 2008
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1843 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZIYG**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **TRACEY J**

DATE OF ORDER: **5 AUGUST 2008**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1843 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZIYG** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**TRACEY J**
DATE:	**5 AUGUST 2008**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 This is an appeal against a judgment of a Federal Magistrate delivered on 22 August 2007 dismissing an application for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") handed down on 18 May 2006: see *SZIYG v Minister for Immigration and Multicultural Affairs* [2007] FMCA 1516. The Tribunal had affirmed a decision of a delegate of the Minister to refuse to grant a protection visa to the appellant.

BACKGROUND

2 The appellant is a citizen of the People's Republic of China who arrived in Australia on 4 October 2005. On 11 November 2005 the appellant lodged an application for a protection visa with the Department of Immigration and Multicultural and Indigenous Affairs, as it was then known. A delegate of the Minister refused the application for a protection visa on 10 February 2006. On 14 March 2006 the appellant applied to the Tribunal for a review of that decision.

3 The appellant claimed to fear persecution in China because of his religious beliefs.

4 The appellant claimed that he had been a Christian his entire life and that he belonged to an underground Church in Fujian, China. In 2003, when he was engaged in religious activities at his home, he was taken away by police. He was held for two days and investigated. He claimed that the police suspected that he had connections with an overseas organisation threatening the safety of China. In 2004, whilst engaged in a group activity in Fuzhou, the police accused him and other members of the group of participating in activities of "Shouters". He was taken to the police station and investigated and was persecuted because of his religious beliefs. He was only released after he payed a bribe. In 2005, his religious activities were again discovered by local police and he was in danger of being accused of attending activities of "Shouters". He was concerned for his safety and fled to Australia. The appellant had attended Church in Australia on five or six occasions.

REFUGEE REVIEW TRIBUNAL

5 The Tribunal found that the appellant displayed little knowledge of Christian beliefs. The appellant's responses to the Tribunal's questions about what he believed, as a Christian, were "hesitant, vague and lacking in detail." The Tribunal found that the appellant attended church in Australia "for the sole purpose of strengthening his claim to be a refugee". The Tribunal therefore disregarded this conduct in accordance with s 91R of the *Migration Act 1958* (Cth) ("the Act").

6 The Tribunal was not satisfied that the appellant was a Christian when he lived in China and did not accept that he was arrested or came to the attention of the authorities in China. It was not satisfied that he would suffer any harm in China for his real or imputed religious beliefs. The Tribunal found that the appellant did not have a well-founded fear of persecution for a Convention reason in China and affirmed the decision not to grant the appellant a protection visa.

THE FEDERAL MAGISTRATES COURT

7 On 16 June 2006 the appellant filed an application for review in the Federal Magistrates Court but relied on an amended application filed on 24 October 2006. The appellant claimed that the Tribunal had breached ss 424A and 91R of the Act and that he was not given a proper opportunity to explain his application.

8 The Federal Magistrate found that no breach of s 424A was established. The Federal Magistrate found that, to the extent there were any inconsistencies between the information in the appellant's protection visa application and the appellant's oral evidence at the hearing, it was "clear from the Tribunal's reasons for decision that such inconsistencies did not form a reason or part of the reasons for its decision." Accordingly, it was not necessary for the Court to consider further the extent to which such inconsistencies would give rise to a breach of s 424A, or would constitute information within s 424A(1). The appellant claimed that the Tribunal relied on out of date or hearsay country information which was irrelevant material. The information related to the treatment of Christians in the appellant's province in China. The Federal Magistrate found that, as the Tribunal did not accept that the appellant was a Christian, it was unnecessary for it to make a finding on that issue. No jurisdictional error had been established.

9 The Federal Magistrate found that no jurisdictional error was apparent in the manner in which the Tribunal applied s 91R(3) of the Act and determined that the appellant's conduct in Australia should be disregarded.

10 During the hearing, the appellant claimed that, although the Tribunal hearing was to start at 8:30 am, the hearing did not start until 11:00 am, and his mind was "messy". The Federal Magistrate found that the delay did not itself establish jurisdictional error and that there was no evidence before the Court which indicated that the Tribunal fell into error in some way relating to the appellant's 'messy' frame of mind. The Federal Magistrate concluded that no jurisdictional error had been established and dismissed the application.

APPEAL TO THIS COURT

11 The notice of appeal to this court was filed on 11 September 2007. The notice of appeal contained two grounds. The first ground reads as follows: "I was not given an opportunity to explain my application. The Tribunal had bias (sic) and did not believe my claims on the bias against me."

12 I understand this ground to raise an allegation of actual bias.

13 The second ground reads: "The Tribunal failed to carry out its statutory duty. The Tribunal was required to provide particular (sic) of the information that was the reason or part of the reasons for affirming the decision. The application was not considered in accordance with s424A of the Migration Act 1958."

14 The appellant appeared in person at the hearing of the appeal. He had the assistance of an interpreter.

15 The bias ground was not squarely raised or argued before the Federal Magistrate. When invited to identify those aspects of the Tribunal's conduct which it was said supported the allegation of bias the appellant responded that he had attended the Tribunal offices at the appointed time of 8:30 am in the morning. The hearing did not start until after 11:00 am. In the meantime no explanation was provided to him about why the hearing was not proceeding. He said that the Tribunal did not "treat him as a person". He also complained about a finding, which he attributed to the Tribunal, that he only went to Church casually. He asserted: "I am really a Christian."

16 Counsel for the Minister directed my attention to the Tribunal's hearing record. It confirms that the hearing was scheduled for 8:30 am but did not commence until 11:05 am. The reason that this delay occurred was that the interpreter who had been engaged to assist the appellant did not attend until 11:00 am. One can well understand the appellant's anxiety at having to wait for over two and a half hours for the hearing to commence. In the absence of the interpreter, however, there appears that there was little that the Tribunal staff could do to explain the situation to the appellant. The Tribunal's failure to explain the situation to the appellant is not indicative of bias. Nor is its conclusion that the appellant was not a Christian.

17 The ground lacks merit. It really amounts to a complaint that the Tribunal did not accept the appellant's reasons for claiming to be a refugee.

18 When asked to identify the particulars which it was said should have been provided by the Tribunal in accordance with s 424A of the Act the appellant told the Court that he should have been advised of the reasons which had led the Tribunal to make an adverse decision on his application. He accepted that he had received the Tribunal's reasons for decision and had them translated for him. He understood those reasons sufficiently to pursue

judicial review proceedings in the Federal Magistrates Court. Section 424A of the Act does not require the Tribunal to provide its reasons for decision to an applicant before delivering them in order to provide the applicant with an opportunity to make additional submissions or to challenge the findings made.

19 There is no substance in the second ground.

20 On reading the Tribunal's reasons I was, initially, concerned that the Tribunal may have contravened s 91R of the Act by taking into account certain conduct of the appellant while in Australia. The relevant passages in the Tribunal's reasons read as follows:

> "The Tribunal finds that the applicant only attended the five or six services at a church in Guildford for no reason other than to gain some information about the Christian religion, to assist his application for protection. He gave a very vague and general description of the Church services he had attended. As the service by bilingual, the Tribunal would expect that the applicant would be able to provide greater detail of the Church service, than [that] the children went to the front and were asked questions and we sang songs. The Tribunal finds that the applicant engaged in this conduct of attending Church in Australia, for the sole purpose of strengthening his claim to be a refugee. The Tribunal therefore disregards this conduct (Section 91R).
>
> The Tribunal is not satisfied that the applicant was a Christian when he lived in China. It follows from this finding that the Tribunal does not accept the applicant was ever arrested or came to the attention of the authorities in China. The applicant's lack of knowledge regarding his alleged Christian beliefs and his lack of knowledge regarding the Christian activities he allegedly participated in whilst in China lead the Tribunal to find that he has never engaged in any religious activities in China that brought him to the attention of the authorities. The Tribunal is not satisfied that the applicant would suffer any harm if returned to China because of his real or imputed religious beliefs. *Having found that the applicant attended Church services in Australia only for the purposes of enhancing his claims for protection*, the Tribunal finds that, were he to return to China, the applicant would not be motivated to join an underground church or practice (sic) Christianity." (Emphasis added).

21 The Federal Magistrate's decision was handed down before the decision of the Full Court of this Court in *SZJGV v Minister for Immigration and Citizenship* [2008] FCAFC 105 was made. The Full Court, in that case, held that s 91R of the Act required decision-makers to disregard any conduct by applicants in Australia unless the decision-maker is satisfied that the conduct was engaged in for purposes other than strengthening the applicant's claim to be

a refugee. My concern was that the Tribunal may have relied on the appellant's occasional Church attendance in Australia to support its conclusion that he was not a refugee.

22 On reflection, I do not consider that the Tribunal reasoned in this way. Before the Tribunal made the italicised observation it had already concluded that the appellant had not been a practising Christian in China. That being so it was hardly likely that he would join an underground Church or practise Christianity upon return to that country. At best for the appellant the Tribunal's reference to his Church attendance in Australia constituted an additional reason to support the conclusion to which the Tribunal had already come. It may be, however, that the Tribunal was doing no more than restating its earlier conclusion that the appellant had attended Church in Australia in an effort to enhance his claim for protection.

23 I have, therefore, concluded that there is no additional ground on which the appellant might have succeeded.

24 The appeal should be dismissed with costs.

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

Associate:

Dated: 5 August 2008

	The applicant was self represented
Counsel for the Respondents:	Mr D Godwin
Solicitor for the Respondents:	DLA Phillips Fox
Date of Hearing:	5 August 2008
Date of Judgment:	5 August 2008