FEDERAL COURT OF AUSTRALIA

SZNYF v Minister of Immigration and Citizenship [2010] FCA 839

Citation:	SZNYF v Minister of Immigration and Citizenship [2010] FCA 839
Appeal from:	SZNYF & Anor v Minister for Immigration & Citizenship & Anor [2010] FMCA 303
Parties:	**SZNYF and SZNYG v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL**
File number:	NSD 586 of 2010
Judge:	**COLLIER J**
Date of judgment:	10 August 2010
Legislation:	*Migration Act 1958* (Cth) ss 91R, 91S
Cases cited:	*Coulton v Holcombe* (1986) 162 CLR 1 cited *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 cited *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 cited *NAJT v Minister for Immigration & Multicultural and Indigenous Affairs* (2005) 147 FCR 5 cited *O'Brien v Komesaroff* (1982) 150 CLR 310 cited *Re Minister for Immigration and Multicultural Affairs; ex parte Durairajasingham* (2000) 168 ALR 407 cited *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749 cited *S157/2002 v Commonwealth* (2003) 211 CLR 476 cited
Date of hearing:	9 August 2010
Place:	Brisbane (Heard in Sydney)
Division:	GENERAL DIVISION
Category:	No Catchwords
Number of paragraphs:	31
Counsel for the First and Second Appellants:	The appellants appeared in person with the assistance of an interpreter

Counsel for the First and Second Respondents:	Mr MP Cleary
Solicitor for the First and Second Respondents:	Clayton Utz

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION **NSD 586 of 2010**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGE:	**COLLIER J**
DATE OF ORDER:	**10 AUGUST 2010**
WHERE MADE:	**BRISBANE (HEARD IN SYDNEY)**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The decision of the Federal Magistrate delivered on 6 May 2010 be set aside.
3. The decision of the Refugee Review Tribunal be quashed.
4. The decision be remitted back to a differently constituted Tribunal to be heard and decided again according to law.
5. The first respondent pay the appellant's costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION **NSD 586 of 2010**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGE:	**COLLIER J**
DATE:	**10 AUGUST 2010**
PLACE:	**BRISBANE (HEARD IN SYDNEY)**

REASONS FOR JUDGMENT

1 This is an appeal against the decision of Emmett FM delivered on 6 May 2010 dismissing an application for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") of 26 August 2009. The Tribunal had affirmed a decision of a delegate of the Minister for Immigration and Citizenship to refuse to grant a protection visa to the appellants.

BACKGROUND

2 The appellants, husband and wife, are citizens of China who arrived in Australia on 13 December 2008, and 22 November 2007, respectively. On 20 January 2009 the appellants lodged an application for a protection visa with the Department of Immigration and Citizenship. In that application the second appellant made no claims of his own, but relied on the claims of his wife ("the appellant") as part of the family unit. A delegate of the first respondent refused the application for a protection visa on 29 April 2009. On 27 May 2009 the appellant applied to the Tribunal for a review of that decision.

3 The appellant claimed that she feared persecution in China by reason of being a member of an unregistered Catholic church. She claimed that the congregation could only meet secretly, and that the police raided her home in October 2006. She claimed that the police took her details and threatened her, and that she was subject to harassment from them and in her workplace. She stated that she fears that she will be unable to practice her faith safely if she returns to China. She also claimed that she has attended church in Australia since arriving in December 2008.

4 The appellant further raised concerns about the effect on her and her family of China's family planning polices around the birth of her second son in 1991. In particular, she claimed that she was forced to have an operation to fit a birth control device and, when she fell pregnant with her second son, was taken to hospital to undergo an operation. She managed to escape and hid at a relative's place until her son's birth.

REFUGEE REVIEW TRIBUNAL

5 The Tribunal did not accept that the alleged police raid in October 2006 had in fact occurred. In this respect the Tribunal noted that: both appellants struggled to give meaningful and consistent information beyond the main integers of this claim; they were evasive about other aspects of the claim; they gave conflicting information as to where the raid had occurred; the appellant wrote notes before her husband gave evidence and attempted to show him those notes; and the husband's claim that he had learnt of the raid only several days after it occurred was dubious.

6 The Tribunal similarly rejected the other instances of past harm and threats referred to by the appellant on the basis that her conduct in China was inconsistent with that of a person who genuinely feared persecution or other harm, including the fact that her departure from China appeared planned and unhurried; there was a delay of nine months in applying for her Australian visa after the grant of her passport; and there was a delay in applying for a protection visa after arriving in Australia.

7 The Tribunal also did not accept that the appellant was a genuinely practicing Catholic in an unregistered Church in China. The Tribunal noted its previous finding regarding her credibility, as well as finding that: her knowledge of the Catholic faith was limited and confused; she was not able to provide location-specific information, such as her

alleged priest's name and his place of origin. The Tribunal observed that document fraud was prevalent in China, and that the baptism date of 2005 in her certificate was at odds with her claim to have converted in 1989. It accordingly found her purported baptism certificate to be unreliable. The Tribunal similarly placed little weight on the supporting statements of various people in China.

8 The Tribunal was also not satisfied, on the basis of her husband and son's evidence regarding their church attendance in Australia a year before her arrival, that the appellant had in fact practiced in China. The Tribunal thus disregarded her church attendance in Australia pursuant to s 91R(3) of the *Migration Act 1958* (Cth) ("the Act") because it was not satisfied that she had engaged in such conduct otherwise than for the purpose of strengthening her claim to be a refugee.

9 The Tribunal also:

- considered that the appellant's recent loss of employment was unexceptional given that she had failed to return to China;
- did not give weight to the summons provided by her because of country information referring to the prevalence of document fraud, the fact that the summons appears to have been issued prior to the appellant's departure, and its adverse view of her credibility;
- accepted that she may have suffered past harm in relation to China's family planning laws, but noted that she indicated that she did not fear prospective harm; and
- did not accept her claim that the Chinese authorities would presume that she had claimed protection and that she had a well-founded fear of persecution as a consequence.

10 On the basis of the above, the Tribunal found that the appellant did not satisfy the criteria set out in the Act for a protection visa, and affirmed the decision of the delegate.

FEDERAL MAGISTRATES COURT

11 On 23 September 2009 the appellant filed an application for judicial review of the Tribunal's decision. In an amended application filed on 15 March 2010 the appellant contended that:

> The Second Respondent failed to afford procedural fairness to the Applicants
>
> Particulars
>
> a) The Second Respondent discounted the Applicant wife's baptismal certificate as a forgery and this formed part of the reason for the Second Respondent rejecting the Applicant's claim that she had practised as a Catholic in China. The Applicant was not given any opportunity to comment on this potential finding. In the context of no doubts being raised previously by the First Respondent, this constituted a denial of procedural fairness.

12 The Federal Magistrate found that to the extent that the above alleged that the Tribunal "*discounted the Appellant wife's baptismal certificate as a forgery*", the transcript and the Tribunal's decision record made it clear that no such finding was in fact made. Further, it was clear that the Tribunal raised with the appellant its concern about the baptismal certificate, in light of the country information before it of the prevalence of document fraud in China. Further, the Tribunal was entitled to have regard to the country information about document fraud in China and to find that that information undermined the weight that the Tribunal may otherwise have given to the baptismal certificate. Moreover, in the context of what the Tribunal found to be the unsatisfactory nature of the appellant's evidence about her baptism and Catholic practices and the concerns it had on the face of the certificate, it was open to the Tribunal on the evidence and material before it, to place no weight on the baptismal certificate as corroborative evidence of the appellant's claim to have been a practising Catholic in an unregistered church in China.

13 Having found that the Tribunal decision was not affected by jurisdictional error, her Honour dismissed the application for review.

APPEAL TO THIS COURT

14 By Notice of Appeal filed on 26 May 2010, the appellant raised the following grounds of appeal against the decision of Emmett FM:

> 1. Refugee Review Tribunal had bias against us and did not make fair decision for our application.

2. We lodged application to the Federal Magistrate Court, but the Judge dismissed my application on 6 May 2010. It is not fair. We fear to go back to China as we will be put into jail.

3. We believe that out application was not considered reasonable by the Judge at the Federal Magistrates Court. RRT failed to consider our return to China.

[Errors in original]

SUBMISSIONS OF THE PARTIES

15 At the hearing of the appeal before me the appellants made no written submissions. However in oral submissions, through an interpreter, the appellants claimed that the Tribunal's consideration of their case was inadequate in so far as the reasons of the Tribunal addressed the summons of the appellant wife by a particular branch of the Public Security Bureau ("PSB"). I understood that this is a key part of the appellants' claim that the Tribunal did not act fairly towards them.

16 The Minister was represented by Counsel at the hearing before me, and had filed written submissions prior to the hearing.

FINDINGS

Grounds of Appeal

17 The grounds of appeal before me are vague and unparticularised. In particular, the claim that the Tribunal was biased against the appellants is a well-worn complaint by unsuccessful applicants before that body. Further, as has been previously observed, bias is a serious allegation involving personal fault on the part of the decision maker, and must be proved by admissible evidence: *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749 at 756. A finding against the appellant on the facts, or ascribing weight to the evidence which is not in the appellant's favour, is not bias from the perspective of the Tribunal – rather it is a legitimate exercise in decision-making by the Tribunal: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.

18 Before her Honour below, the only ground of review pressed was as follows:

The Second Respondent failed to afford procedural fairness to the Applicants

Particulars

> a) The Second Respondent discounted the Applicant wife's baptismal certificate as a forgery and this formed part of the reason for the Second Respondent rejecting the Applicant's claim that she had practised as a Catholic in China. The Applicant was not given any opportunity to comment on this potential finding. In the context of no doubts being raised previously by the First Respondent, this constituted a denial of procedural fairness.

19 I note that, as was clear from her Honour's judgment:

- the application was heard over two days by her Honour, in order to allow the appellants to instruct counsel to act on their behalf;
- the appellants were represented by counsel on the second day of the hearing before her Honour; and
- this ground of review was considered by her Honour in detail.

20 The issue raised before me at the hearing yesterday was not, apparently, specifically raised before her Honour. As a general proposition, if grounds raised by the appellant either are not referable to the decision of the learned Federal Magistrate, or raise issues which were not before the Federal Magistrate, they require the leave of the Court to be raised (*NAJT v Minister for Immigration & Multicultural and Indigenous Affairs* (2005) 147 FCR 5) and the appellant must demonstrate that it is expedient and in the interests of justice that new grounds of appeal be raised (*O'Brien v Komesaroff* (1982) 150 CLR 310 at 319, *Coulton v Holcombe* (1986) 162 CLR 1 at 7). Although the issue relating to the summons of the appellant wife by a particular branch of the PSB would in any event appear to fall within the appellants' claim that they had not received a fair hearing from the Tribunal, to the extent that it raises matters not previously considered by a Court, I consider that it is in the interests of justice that it be considered.

The Summons

21 In summary, the appellants contend that the Tribunal did not give proper consideration to a summons issued against the appellant wife in 2009. The summons, as well as an English translation, was in the material before the Tribunal. From the English translation of the summons, it appears:

1. To be addressed to the appellant wife.

2. To state that the appellant wife had been suspected of, *inter alia*, "spreading superstition".

3. To require the appellant wife to report to an office of the relevant bureau by a nominated time and date.

4. To be sealed by the official seal of the relevant PSB in China.

22 In its reasons for decision, the Tribunal stated:

> 92. The applicant also submitted a purported summons from the [PSB], dated [date supplied]. She told the Tribunal that the authorities were now pursuing her for her failure to return to China, and that they had had an altercation with her brother recently about this. The Tribunal examined this document in light of country information about widespread document fraud in China [para 75], which includes the insertion of false information in genuine official documents, as well as document forgery.
>
> 93. As discussed at the hearing, the contents of this document are highly problematic. The applicant understood, presumably from the advice of her mother and brother, that the officials were pursuing her because of her failure to return to China. She implied that her brother may have instigated some of this interest. While the Tribunal recognises that neither it nor the applicant can read the minds of officials, the applicant's claims do not make much sense and do not sit well with the purported summons.
>
> 94. *First*, the summons accuses the applicant of participating in illegal activities, based on evidence including her self-confession and confiscated materials. This means that the offences are alleged to have occurred before her departure from China, and at least some of the incriminating evidence (eg the self-confession) was before officials then. This suggests that officials had ample opportunity to prevent her travel if she had been suspected of any illegal activities, and most certainly if she had already made a confession.
>
> 95. *Second*, as the Tribunal put to her at the hearing, her continued employment right up to her departure from China – including her decision to stay on for an orderly handover, even after obtaining her Australian visa – casts doubt on her claim to have also been in hiding during this period.
>
> 96. *Finally*, while the concerns set out immediately above do not necessarily rule out official interest in the applicant – for reasons that may not be entirely logical or transparent – the Tribunal has decided on the basis of country information and its adverse view of the applicants' credibility generally to place no weight on the purported [public security] document as evidence that the … authorities are pursuing the applicant. The Tribunal cannot determine whether the document itself has been manufactured, or it is a genuine pro forma document that has been filled out on request, but it finds in either case that its contents are wholly unreliable.

Consideration

23 In the circumstances of this case I am not satisfied that the Tribunal has taken into account the question whether, in fact, the appellant wife has been summoned to appear before the PSB because of her religious beliefs, and to that extent that, therefore, she has well-founded fear of persecution for a Convention reason. I form this view for the following reasons.

24 First, in its reasons for decision the Tribunal has indicated that, because of the country information available to it, and its view of the appellants' credibility, it places no weight on the summons. However in para 96 of its reasons, the Tribunal appears to neatly side-step a final decision as to whether, in its view, the summons is a forgery or otherwise the product of document fraud. I consider that, while country information may indicate the existence of document fraud, the reasons of the Tribunal cast very little light on ***why, in this particular case***, the Tribunal has decided to place no weight on the document. The only explanation given is the prevalence of document fraud in China – which, in the circumstances, may or may not be relevant to this particular document – and the adverse view taken by the Tribunal of the appellants' credibility. It is not clear to me from the reasons given by the Tribunal that document fraud in the People's Republic of China extends to official summonses of the type before the Tribunal, and in the material before the Court.

25 Second, it is also not clear to me why, notwithstanding apparent inconsistencies in the evidence of the appellants identified by the Tribunal, such inconsistencies should lead the Tribunal to conclude that a document bearing the seal of the relevant PSB should be the subject of no weight by the Tribunal in its deliberations. One example given by the Tribunal in para 94 of its reasons is that the alleged offences of the appellant wife occurred before her departure from the People's Republic of China, and that "officials had ample opportunity to prevent her travel if she had been suspected of any illegal activities, and most certainly if she had already made a confession". While findings of fact are matters for the Tribunal, it is unclear to me why the relevant officials in China would have hastened to prevent travel by the appellant wife if she had been suspected of prohibited religious activities, or why the relevant officials would not eventually have sought to issue a summons against the appellant wife (as the appellant wife submitted actually occurred). Indeed the appellant wife, at the hearing before me, explained that she was required to report to the PSB periodically when she

was in China, and that the summons was sent to her at a time when she was expected to be back in China.

26 It is clear that findings of credibility are matters for the Tribunal: McHugh J in *Re Minister for Immigration and Multicultural Affairs; ex parte Durairajasingham* (2000) 168 ALR 407 at 423. However the key issue in my view is that, in this case, the link between the Tribunal's views of the appellants' credibility, and the veracity of a document which otherwise appears on its face to be a valid sealed document from a PSB of the People's Republic of China concerning the appellant wife, is not explained. It may be possible for evidence of an applicant before the Tribunal to result in adverse credit findings by the Tribunal, but nonetheless the applicant be the genuine recipient of a valid summons from a PSB in China.

CONCLUSION

27 Pursuant to Art 1A(2) of the Refugees Convention, to which Australia is a party, a refugee is any person who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

28 This definition is qualified in some respects by s 91R and s 91S of the Act.

29 In this case the appellants claim to have a well-founded fear of being persecuted for reasons of, *inter alia*, religion. Whether in fact the appellants satisfy the definition of "refugee" is a matter for the Tribunal. Furthermore a decision of the Tribunal to affirm the decision of the delegate of the Minister refusing a visa to the appellants is a privative clause decision for the purposes of s 474 of the Act and is not subject to appeal. However decisions of the Tribunal infected by jurisdictional error are liable to be set aside by the Court: *S157/2002 v Commonwealth* (2003) 211 CLR 476. A decision of the Tribunal, where a relevant consideration is not taken into account, is so infected: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 per Mason J.

30 If the summons in this case is genuine – a matter which the Tribunal does not conclusively decide – it would be a relevant factor for the Tribunal to take into consideration in deciding the appellants' claims. In this case I am not satisfied that the Tribunal in this case has considered the question whether the appellant wife has been the subject of a valid summons by a PSB in relation to her claimed activities, and the extent to which this impacts upon her claims to be entitled to protection under the Refugees Convention.

31 In my view the appeal should be allowed.

I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier.

Associate:

Dated: 10 August 2010