

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZNYA v MINISTER FOR IMMIGRATION & ANOR [2009] FMCA 1283

MIGRATION – Visa – protection visa – Refugee Review Tribunal – application for review of RRT decision affirming decision of a delegate of the Minister not to grant a protection visa – applicant is a citizen of China claiming fear of persecution for reason of religion – credibility – no reviewable error.

Migration Act 1958 (Cth) ss.424A, 425

SZMFJ v Minister for Immigration and Citizenship (No.2) [2009] FCA 95
Erduran v Minister for Immigration and Multicultural Affairs [2002] FCA 814

Applicant:	SZNYA
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	SYG 2320 of 2009
Judgment of:	Scarlett FM
Hearing date:	24 November 2009
Date of last submission:	24 November 2009
Delivered at:	Sydney
Delivered on:	24 November 2009

REPRESENTATION

Applicant: In person
Counsel for the Respondent: Ms. Sirtes
Solicitors for the Respondent: DLA Phillips Fox

ORDERS

- (1) The Application is dismissed.
- (2) The Applicant is to pay the First Respondent's costs fixed in the sum of \$5,865.00.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 2320 of 2009

SZNYA
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Application

1. The Applicant is a young man who is a citizen of China. He applies to the Court for review of a decision of the Refugee Review Tribunal that was made on 31st August 2009. The Tribunal affirmed the decision of a delegate of the Minister for Immigration and Citizenship not to grant him a Protection (Class XA) visa.
2. In his application the Applicant asks the Court to set aside or quash the decision of the Refugee Review Tribunal and to make an order remitting his application back to the Tribunal. He sets out one ground in his application, which says as follows:

People who are the subject of a complaint to the PRC authorities, and who lack the ability to effectively respond to the applicant's involvement in pro democracy movement in China.

3. The Minister has filed a Response asking that the application be dismissed and claiming that there is no jurisdictional error.

Background

4. The background to this matter is that the Applicant arrived in Australia on 15th February 2008. He originally came into Australia on a student visa, but that visa was cancelled on 11th March 2009. He applied to the Migration Review Tribunal on 19th March 2009 for the review of the Delegate's decision to cancel his Subclass 571 School Sector visa. He attended the hearing, but on 7th April 2009 the Migration Review Tribunal affirmed the decision to cancel his Subclass 571 School Sector visa. The Applicant then, on 16th April 2009, applied for a Protection (Class XA) visa.

5. He had the assistance of a migration agent for that purpose. In his application the Applicant set out that he had been living and working at Scone, New South Wales, from September 2008 until March 2009. Since then he had been an inmate at the Immigration Detention Centre at Villawood. In his application, when asked why he left China, he said:

I'm a Catholic and my family was denied the right to practise our religion openly and fully. We experienced problems because of our religion and I fear I will face more serious problems if I have to return. I will provide a complete statement shortly.¹

6. The Department of Immigration and Citizenship wrote to the Applicant on 5th May 2009 inviting him to attend an interview with a Departmental officer, to take place within the grounds of the Detention Centre on 13th May 2009. His migration agent forwarded a letter to the Department on 7th May 2009 enclosing a statutory declaration setting out in some detail the Applicant's claims.

7. In that statement the Applicant claimed that his parents were members of the Catholic Church, and he and his mother began to attend religious meetings with them in 2003. They did not go to the government church, but to an unregistered private church which consisted of about 10 or 12 people.

¹ See Court Book at page 19.

8. The applicant claimed in his statutory declaration that until 2007 they managed to avoid serious problems, but in May of that year the police visited the house but the Applicant and his friends were tipped off and so they pretended to be playing cards. They continued to meet secretly and the Applicant's father, who had been living in South Africa from 2003 until late 2007 or early 2008, returned to China and began to attend religious gatherings. The Applicant claimed that in February 2008 he left China to come and study in Australia. After he had left China an incident occurred, which the Applicant described in his statement:

In March 2008 the group was meeting in someone else's house. On this occasion the police rushed in while they were still holding a service and people were holding Bibles. There were 6 people at the meeting, including my mother. My father was absent. All 6 of the people were arrested and taken to the local police station. They were interrogated and a report of their activities was taken.²

9. The Applicant claimed in his statement that after he arrived in Australia he was busy settling in and studying and for the first two months he did not attend church. He claimed:

At the time I arrived I was afraid of returning to China, but only 17 years old and I was not aware of the possibility of applying for protection.³

10. In September 2008 the Applicant went to Scone to work and he stated that in November of that year he began to attend the local Catholic Church. The Applicant was detained by immigration officers in March 2009 and said in his statement:

At the time I was detained and brought to Villawood I was asked why I did not want to go back to China. At the time my health was very bad and I was concerned that I would not receive proper care and this was my main concern at the time, so I did not mention my fears relating to religion.

I believe that in China today everyone has to do two years military service when they turn 18 year. I believe that I will be forced to go into the army and that I will not be able to practise my religion at all when I am doing military service.

² See Court Book at page 47.

³ Ibid.

*I fear that if I return to China I will be denied the right to practise my Catholic religion and that if I become involved in any form of religious practice as a Catholic I will be detained and face other serious problems as a result.*⁴

11. The Applicant attended the interview with a delegate of the Minister on 13th May 2009. On 26th May 2009 his application for a protection visa was refused. The delegate was sceptical about the Applicant's claims in respect of his religious practice and said:

*Whilst at interview the applicant displayed some knowledge about the Catholic belief, I am not satisfied that he was an active participant in religious worships nor was he an attentive worshipper during the Mass.*⁵

12. The delegate then went on to describe a number of matters relating to the Applicant's knowledge of the Catholic faith, or lack of it, and went on to say:

*As a whole, the applicant appears to be unaware of the basic precepts of Catholic doctrine. Whilst he tended to state generalised Christian beliefs (power of God, love of God, Jesus, etc), he appeared not knowledgeable about the distinct Catholic beliefs. I find the applicant's lack of knowledge of basic Catholic beliefs as indicative of his lack of credibility when he claims he is a practising Catholic.*⁶

13. The delegate also considered the fact that the Applicant had left China legally, on his own passport, and formed the view that as the Applicant had no problem in departing from China, that indicated that he was not of interest to the authorities when he left. The delegate went on to find:

I do not consider the applicant to be in danger, being affected by this action of the authorities. There is no credible report that the authorities in Fujian have abandoned their traditional liberal attitude towards Christians. There is also no evidence that the applicant has done something in Australia which would have attracted the adverse attention of the authorities in China. I am therefore not satisfied that the applicant will attract the adverse

⁴ See Court Book at pages 47 – 48.

⁵ See Court Book at page 64.

⁶ See Court Book at page 65.

*attention of the authorities should be he return to China. I am not satisfied that his fear of religious persecution is well founded.*⁷

Application to the Refugee Review Tribunal

14. After his application for a protection visa was refused the Applicant applied to the Refugee Review Tribunal on 1st June 2009 for a review of the delegate's decision. That application was completed with the assistance of his migration agent.
15. The Tribunal wrote to the Applicant on 3rd June 2009, inviting him to attend a hearing of the Tribunal on 1st July at 12:30pm. The Applicant's migration agent forwarded a Response to the hearing invitation to the Tribunal indicating that the Applicant did wish to attend and would require the services of an interpreter in the Mandarin language.
16. The migration agent also forwarded a submission in respect of the Applicant's claims, responding to the matters referred to in the delegate's decision. That document is set out at pages 97 and 98 of the Court Book.
17. The Applicant attended the hearing on 1st July 2009 and gave evidence, with the assistance of an interpreter in the Mandarin language. After the hearing, on 9th July 2009, the Tribunal wrote to the Applicant in a letter headed "*Invitation to Comment or Respond to Information.*" That letter, from its wording, was intended to comply with the requirements of s.424A of the Migration Act.
18. The letter put certain items of information to the Applicant for his comments and the particulars of that information, briefly, were:
 - a) the fact that the Applicant had arrived in Australia on 15th February 2008 on a visa which ceased on 19th May 2008 but was granted a further student visa on 15th February 2008 which was cancelled on 11th March 2009 and that he lodged an application for a Protection visa on 23rd April 2009.

⁷ See Court Book at pages 65 – 66.

- b) The information included the fact that the Applicant was interviewed by the Department and attended a hearing of the Migration Review Tribunal in respect of his student visa but:

*You did not tell the department or the MRT that you feared returning to China because of your religion.*⁸

19. The letter also referred to information given by the Applicant to the Department in the interview of 13th May 2009 and aspects of the Applicant's evidence to the Tribunal at the hearing on 1st July 2009. The letter invited the Applicant to provide written comments or response by 16th July 2009. His migration agent replied with a letter dated 20th July 2009, replying briefly to some of the points made in the Tribunal's s.424A letter, and providing copies of documents written in Chinese and translated into English.⁹

The Tribunal's Decision

20. The Tribunal signed its decision on 31st August 2009. The Tribunal affirmed the decision not to grant the Applicant a Protection (Class XA) visa.
21. In the decision the Tribunal set out the Applicant's claims and evidence from his Protection visa application, and his evidence at the Departmental interview. The decision considered the Applicant's submission of 22nd June 2009, responding to the delegate's decision, and considered his evidence to the Tribunal at the hearing on 1st July 2009. The Tribunal also referred to what it called its post-hearing letter on 9th July 2009, and the Applicant's response.
22. The Tribunal also considered independent information about military service and conscription in China.

The Tribunal's Findings and Reasons

23. In its findings and reasons the Tribunal accepted that the Applicant was a citizen of the People's Republic of China. It noted his claims that if he returns to China he would be persecuted because he was an

⁸ See Court Book at page 106.

⁹ See Court Book at pages 111 – 117.

underground Catholic, and his fear that if he were to return to China he would be forced to go into the army and thereby not be allowed to practise his religion in doing his military service. The Tribunal made this finding, at [72] of the decision:

The Tribunal is not satisfied that the applicant left China because of his fear of persecution, as described in his application and evidence before the Tribunal. For the following reasons, the Tribunal does not accept the applicant's claims that he was an underground Catholic in China and the Tribunal does not find the applicant to be credible on some key aspects of his claims, as outlined below.¹⁰

24. The Tribunal then set out its reasons as to why it did not accept the Applicant's claims to be credible in respect of his Catholic religion, either in China or in Australia. The Tribunal noted that the Applicant had been attending Mass while he has been at the Villawood Detention Centre, but made this finding:

The Tribunal is of the view that following the cancellation of his student visa and his location while unlawfully living and working in Australia, the applicant has only attended religious services in Villawood and learned about Christianity to strengthen his claim to be a refugee. The Tribunal is not satisfied that the applicant has participated in Catholic related activities in Villawood in Australia otherwise than for the purposes of strengthening his claims. Therefore, under section 91R(3) of the Migration Act, that conduct must be disregarded by the tribunal in determining whether the applicant has a well-founded fear of being persecuted for a Convention reason in China. The Tribunal has therefore disregarded the applicant's religious activities in Villawood, Australia.¹¹

25. The Tribunal then went on to consider the Applicant's claim to feared persecution in China on the basis that he may be required to undertake military service. The Tribunal considered that enforcement of a generally applicable order does not ordinarily constitute persecution for the purpose of the Convention, and expressed doubts that the Applicant would be conscripted. As to the Applicant's claim that if he were to be conscripted he would not be able to practise his religion, the Tribunal found that the Applicant was not a Catholic in China, and therefore did

¹⁰ See Court Book at page 137.

¹¹ See Court Book at page 139 at [80].

not accept that conscription would prevent him from practising his religion

26. The Tribunal considered the Applicant's claim that he might have to pay a fine to avoid conscription and accepted that, but was satisfied that the conscription law in China, including penalties for not undertaking military service, is a law of general application, and that the law would not be enforced selectively against the Applicant for a Convention reason. The Tribunal also considered the Applicant's claim that he did not want to return to China because he had been injured in Australia. Indeed the Applicant was injured when he lived in Scone, and quite severely, but the Tribunal did not accept that the injury or health-care costs arising from it, or any difficulty in obtaining employment were Convention-related, or would be for a Convention reason.
27. The Tribunal did not accept that the Applicant had ever been a practising Christian of the Catholic denomination in China, and therefore did not accept that he would practise as a Christian or a Catholic in China upon his return, thus it found that there was not a real chance that he would be persecuted for reasons of his religion if he were to return to China, and it was not satisfied that he held any genuine or well-founded fear of any harm for reason of his religion or any other contention reason should he return to China.

Application for Judicial Review

28. The Applicant commenced proceedings in this Court for review of the Tribunal decision. He did so by filing an application and an affidavit in support on 22nd September 2009.
29. He was still an inmate of the Immigration Detention Centre at Villawood at that time. He has since been released into the community. His application relies on the one ground which I've mentioned previously, but says:

People who are the subject of a complaint from the PRC authorities and who lack the ability to effectively respond to the applicant's involvement in pro-democracy movement in China.

30. The Applicant has attended Court today and was informed that the Court would only have the power to make the orders that he sought if the Court were satisfied that the decision was affected by jurisdictional error. The Court gave the Applicant a brief and simple explanation of jurisdictional error, but the Applicant was not in a position to make any submissions in support of his case.
31. Counsel for the Minister for Immigration and Citizenship, Ms Sirtes, has drafted a written outline of submissions which was filed at the Court on 18th November 2009. In her submissions to the Court, she largely relied on the written submissions, although took the Court to the decision of *SZMFJ v Minister for Immigration and Citizenship (No.2)*¹², and submitted that the decision in *SZMFJ* should be distinguished from the matter under review on the facts.
32. In her submission, Ms Sirtes described the Applicant's grounds set out in the application as incomprehensible and at best, a statement relating to the substance of the Applicant's claims, and thus an attempt at merits review. She submitted that the Tribunal's decision is without jurisdictional error, and noted that to the extent that the Tribunal considered the Applicant's additional claim regarding military service, it should be noted that:
- a) at no time did the Applicant claim that his reticence to undertake military service was based on a political or religious belief; and
 - b) the basis upon which he did not wish to undertake military service was a concern that it would interfere with his ability to practise Catholicism.
33. Her submission was that the Tribunal had dealt with the Applicant's claims as they were articulate before it, and there was no requirement, she submitted, on the part of the Tribunal to undertake the multi-stage assessment expanded in *Erduran v Minister for Immigration and Multicultural Affairs*¹³ or *SZMFJ (No.2)*, to which I have previously referred.

¹² [2009] FCA 95 in particular [6] through to [10]

¹³ [2002] FCA 814

34. The ground in the application does not set out any ground of jurisdictional error. The reference to people who lack the ability to respond to the Applicant's involvement in the pro-democracy movement in China, does not bear any relation, even to the factual aspects of the Applicant's claim.
35. He did not at any time claim to have been involved in the pro-democracy movement in China. He arrived in Australia on a student visa which was subsequently cancelled. He claimed in his application for a protection visa that he and his family were members of an unregistered Catholic church, which had, on two occasions, been raided by the police. The second occasion he claimed, occurred about a month after he left China for Australia, and on that occasion participants in the church meeting, including this Applicant, had been arrested and detained by the authorities.
36. The Tribunal considered the Applicant's claim to fear persecution on the basis of his religious belief. It rejected that claim on the basis of its credibility. The Tribunal was not satisfied that the Applicant was a Catholic. The Tribunal did consider the Applicant's claim that if he were conscripted into the armed forces on his return to China, he would not be able to practise his Catholic faith. As the Tribunal was not satisfied that the Applicant was a Catholic and a participant in an underground Catholic church, it was therefore not satisfied that the Applicant would suffer persecution by not being able to practise his religion if he were conscripted into the army or such other part of the armed forces of China as may be the subject of conscription.
37. In any event, as Mrs Sirtes submitted, this is not a case where the Applicant claims to be a conscientious objector to military service. The Applicant has not made out any ground of jurisdictional error. He is, however, not legally represented. He has been in detention and he is still only a young man. He is only 19 years of age. The Court, in my view, is under some obligation to consider the Tribunal's decision and the supporting evidence independently of any submissions that the Applicant or the Respondent may make in order to ascertain whether there is an arguable case for a jurisdictional error.
38. In my view there is no breach of s.424A of the Migration Act. The Tribunal wrote to the Applicant under the provisions of s.424A after the

hearing and put certain matters to him for his comments or response. His migration agent replied in writing on his behalf and the Tribunal considered those replies.

39. It may well be said that some of the information put to the Applicant relates to information that he gave either at the Tribunal hearing, or in connection with his application, and some of it comes from Independent Country Information which would not attract an obligation under s.424A of the Act.
40. However, in my view, it is not a matter for criticism of the Tribunal if it takes a cautious approach and applies the procedures set out in s.424A in circumstances where it may not be strictly necessary.
41. In this case the Tribunal applied the s.424A procedure and did so without error. The Court should also consider whether there is a breach of s.425 of the Migration Act. The Tribunal invited the Applicant to attend a hearing, mindful of the fact that he was in immigration detention. The Applicant attended the hearing and was provided with the services of an interpreter in the Mandarin language at his request.
42. The matters discussed by the Tribunal with the Applicant at the hearing were, to a large extent, matters that formed the subject of the Departmental interview and the Delegate's decision. The Delegate's decision specifically referred to the Applicant's claim to the fear of persecution on the basis of his religious belief and that was a matter dealt with by the Delegate and by the Tribunal. The claim relating to the Applicant's military service also had a connection with the Applicant's claim to be a Catholic who would be denied the opportunity to practise his religion if he were to engage in military service.
43. This was not a matter that was dealt with at the Departmental interview, but it was a matter that was raised by the Applicant for the purpose of the Tribunal hearing, and effectively dealt with by the Tribunal.
44. I'm not of the view that there is any breach of s.425 of the Migration Act. I'm of the belief that the Tribunal correctly applied the provision of sub-section 91R(3) of the Migration Act in respect of the Applicant's

attendance at mass while still in detention at Villawood. In my view, no error appears there.

Conclusion

45. The fact is I am unable to discern any jurisdictional error. Unless the decision is affected by jurisdictional error, the Tribunal's decision would be a privative clause decision, and in my view, as there is no jurisdictional error, this decision is, in fact, a privative clause decision as defined by sub-section 474(2) of the Migration Act. The orders that the Applicant seeks in his application are orders in the nature of certiorari or mandamus, even though not expressed in those words. Besides this, s.474 of the Migration Act provides that privative clause decisions are final and conclusive and are not subject to orders in the nature of certiorari or mandamus in any court.
46. It follows, therefore, that the Applicant has not made out his case. The application will be dismissed.
47. There is an application for costs on behalf of the First Respondent Minister. The Applicant has been unsuccessful in his claim and as the Minister has been represented by solicitor and counsel, in my view it is appropriate to make a costs order in favour of the Minister. The amount sought is \$5,865.00, which is an amount provided by the scale. My view is that this is an appropriate amount and I will order that the Applicant is to pay the First Respondent's costs, fixed in the sum of \$5,865.00.

I certify that the preceding forty-seven (47) paragraphs are a true copy of the reasons for judgment of Scarlett FM.

Associate: V. Lee

Date: 22 December 2009