FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZMJQ v MINISTER FOR IMMIGRATION & ANOR *[2009] FMCA 1068*

MIGRATION – Review of decision of RRT – where applicant identifies translation error in matter which constituted a ground for Tribunal's credibility finding – whether decision in *Applicant P119/2002* constituted dicta followed by Federal Court – whether *SZJQN* was a decision that was clearly wrong – whether admitted error in translation was material – whether other claims of "want of logic" or "lack of evidence" were sustainable.

Migration Act 1958 (Cth), ss.424, 425, 477

Perera v Minister for Immigration (1999) 92 FCR 6
Mazhar v Minister for Immigration (2001) 183 ALR 188
Appellant P119/2002 v Minister for Immigration [2003] FCAFC 230
WALN v Minister for Immigration [2006] FCAFC 131
SZJZE v Minister for Immigration [2007] FCA 1653
SZJZS v Minister for Immigration [2008] FCA 789
SZNCW v Minister for Immigration [2009] FCA 818
SZHEW v Minister for Immigration [2009] FCA 783
SZGSI v Minister for Immigration (2009) 107 ALD 414
SZJQN v Minister for Immigration [2007] FMCA 1550
VWFY v Minister for Immigration [2005] FCA 1723
VWST v Minister for Immigration [2004] FCAFC 286
MIMA v W306/01A [2003] FCAFC 208
Kopalapillai v Minister for Immigration (1998) 86 FCR 547

Applicant:	SZMJQ
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 883 of 2009
Judgment of:	Raphael FM
Hearing date:	22 October 2009

Date of Last Submission:	22 October 2009
Delivered at:	Sydney
Delivered on:	30 October 2009

REPRESENTATION

Counsel for the Applicant:	Mr P Reynolds
Solicitors for the Applicant:	Fragomen
Counsel for the First Respondent:	Mr G Kennett
Solicitors for the First Respondent:	Australian Government Solicitor

ORDERS

(1) A writ of certiorari issue directed to the Refugee Review Tribunal removing into this Court to be quashed the decision of the Tribunal made on 8 June 2007.

(2) A writ of mandamus be directed to the Second Respondent directing it to reconsider and determine the matter according to law.

(3) First Respondent to pay the Applicant's costs assessed in the sum of $5,850.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 883 of 2009

SZMJQ
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The applicant is a citizen of China who arrived in Australia on 1 October 2006 and applied to the Department of Immigration & Citizenship for a protection (Class XA) visa on 10 April 2007. On 8 May 2007 a delegate of the Minister declined to grant the applicant a protection visa and on 11 May 2007 he applied for review of that decision from the Refugee Review Tribunal. On 21 May 2007 the Tribunal wrote to the applicant a letter pursuant to s.424A of the *Migration Act 1958* (the "Act") providing him with details of information that would, subject to any comments he might make, be the reason or part of the reason for deciding that he was not entitled to a protection visa. The Tribunal's letter was responded to by the solicitor for the applicant on 25 May 2007. The applicant then attended a hearing before the Tribunal which, on 8 June 2007, determined to affirm the decision not to grant a protection visa.

2. The Convention ground upon which the applicant claimed to be a person to whom Australia owed protection obligations was that of religion. The applicant claimed to be a Catholic who was worshipping at an unofficial church. He told the Tribunal that his maternal grandmother was a Catholic and she had lived with his family until 1973. He did not see her much thereafter until she died in 1991. In 2006 the applicant met a lady described as Aunty "B" from his old neighbourhood. She told the applicant that she had known his grandmother and that she was a Catholic. She told the applicant some things about the Christian faith and invited him to her house which was being used as a family church. There were only four members of the church at that time. The applicant became interested in Christianity and "joined". He brought in two new members. On 8 August 2006 the house was raided and the police took away religious pictures, bibles and some videos. All six were taken to the local police station where they were locked up in separate underground cells. The applicant was questioned the next day and asked why he did not attend a registered church. He gave the answer that in those churches the attendees worshipped the Communist Party. The policeman became angry and hit him. He was taken to an infirmary where he received stitches and then returned to the police station. The applicant was sentenced to 10 days administrative detention and fined RMB 1000 Yuan. He was threatened with criminal detention. In the detention centre he was told to sign a piece of paper agreeing not to practice his religion. He was beaten and so he signed. When the applicant returned home he was still suffering from the effects of the beatings. He discovered that the other people arrested with him were only detained for one day. He believed he was singled out. He was being followed and his house was searched at the end of August and at the beginning of September. In mid September he left his home and went to stay with a friend who helped him arrange travel to Australia.

3. In the s.424A letter the Tribunal makes reference to the procedures operating in China for obtaining passports and departing the country. The letter also makes reference to a document entitled "*Penalty Notice*" which the applicant had submitted to it as corroborative evidence of his 10 day detention. In the letter the Tribunal noted that:

> *"The penalty notice which you provided to Immigration states that you organised an illegal activity and disturbed the social order.*
>
> *The penalty notice does not state what illegal activity you have been accused of having organised or how you disturbed the social order."*

In its response the applicant's solicitors wrote:

> *"Regarding the applicant's ability to leave China in 2006, as stated in his submission, his passport was obtained prior to his detention in China and he agrees that he was not of interest to the Chinese authorities at that time. Arrangements for his travel to Australia were made through an agent. The evidence cited in the invitation to comment indicates that the Chinese authorities sometimes prevent underground church members and others from obtaining passports and travelling outside the country, but does not suggest that this is always the case. The applicant was not a major Church leader and at the time of his departure from China had completed the 10 days administrative detention which had been imposed as a penalty for attending illegal church activities and his offence may not have been considered serious enough to warrant inclusion on the national databases preventing travel abroad."* [CB 67]

4. On of the matters which concerned the Tribunal and upon which the applicant was questioned related to what was described as a "*regret letter*". Reference to this letter first appears at [CB 28] in the applicant's statement attached to the PVA. He says:

> *"[A]fter a while I was sent to the Chenhai District Detention Centre. I was held in a room with 10-20 people. I was never allowed to leave the room apart from when I was taken for questioning. I was questioned about my religion and told to sign a paper saying I would stop practising my religion, but I was beaten on my arms and legs with a baton, so I signed."*

In the transcript of the Tribunal interview attached to the affidavit of Jane Sun at [T12] the applicant says:

> "Before that they asked me to sign on the detainee paper. Because I found an ad on the paper they said they were going to detain me for 10 days. And I asked for what you detained me for 10 days because I did not commit any crime. They say do you want to sign or not? If not we will bring you for sentence. At that time I was helpless., I had to sign on the paper."

At [T15] the Tribunal Member asks the applicant what happened after he was released from detention. The applicant then states:

> "A: I was beaten up at the detention centre and they asked me to write a regret letter. And then they told me that after you are released you have to behave

yourself. I did not sign the paper. They beat me up and I did not want to of course get all these people, all our neighbours, I did not want to sign, they beat me up. They say do you think that you can go on this way? We can bring you to sentence again.

T: Did you sign it then?

A: No I did not sign. Although the police may say that please sign, will you sign, we done our job.

T: So why were you released if you did not sign this document?

"A: What do you mean?

T: Sorry, you said they told you if you did not sign that they could charge you again or sentence you again, so why didn't, why haven't they done that if you haven't signed?

A: I don't know, I really don't know.

T: So what happened after you were released from detention?

A: I went home."

5. In the second exhibit to Ms Sun's affidavit there is a transcript including the Mandarin spoken by the applicant and its translation into spoken English by the interpreter. This appears at [T2-3]. In the exhibit the Member's question is set out and then in the Chinese script are the words said by the applicant. Those words are then translated. After that translation appeared there are the words that the interpreter said in English;

T: Tell me what happened after you were released from detention?

A: At the detention centre (I) was also beaten by them, also forced by them, (they) wrote a letter, what the so called "repent letter".

They said to me: you, in the future, while outside, after you got out (from detention, you) must not mess around any more, you (must) disband all those people.

Therefore, I, in the end, was forced by them, I refused to sign, I, at the time I refused to sign. **But after being beaten by them, there was nothing I could do about it, (I) signed.** I said why telling us that we have to disband? We, ohm… they also told me, inside (the detention centre they had) also told me: (that) never in the future are (you) allowed, including at home, to organize such disruptive (activities) again. [emphasis added]

Therefore I did not agree I said I was not willing to sign, I was not willing to sign, so they beat me. After the beating they said: you …, they also said: do you reckon you could leave just like that? Even now we could make you, (we could also make people, (we could) change you(r), (we could) sentence you to imprisonment, (they said) like that.

I: I was beaten up at the detention centre and they asked me to write a regret letter. And then they told me that after you are released you have to behave yourself. I did not sign the paper. They beat me up and I did not want (… missing part of the answer…) of course get all these people, all our neighbours, I did not want to sign, they beat me up. They say do you think you can go on this way? We can bring you to sentence again.

M: Did you sign it then?

A: After that, there was nothing I could do, (so I) signed.

One of them, one of the policemen said: don't you, don't be tough; if you signed it would make our jobs easier.

I: No, I did not sign. Although the police may say that please sign, will you sign, we done our job.

M: So why were you released if you did not sign this document?"

It will be seen from the above, and is accepted by the respondent, that there was an error in translation in that the applicant, consistent with his previous assertions, told the Tribunal that he had signed the regret letter.

6. In its findings and reasons the Tribunal explained why it found that the applicant was not credible in his evidence with respect to the events in China. Five reasons are given, of which the two relevant for the purposes of these proceedings are:

"The applicant stated that while in detention he was asked to sign a 'regret letter' and was threatened with further sentencing if he did not sign. He stated that he refused to sign but he was unable to explain why he was not sentenced further or why he was released from detention after ten days.

The applicant has not been able to explain to the satisfaction of the Tribunal how he was able to depart the country holding a passport in his own name if he was of any interest to the authorities as such information appears contrary to the available country information cited above. The Tribunal does not accept it as plausible that this was because the applicant travelled on the national day. The applicant's representative submitted that the applicant was not a major church leader and his

> *offence was not serious. The Tribunal accepts this and finds that the applicant was of no interest to the authorities at the time of his departure from China."*

The Tribunal also made reference to the detention notice:

> *"The Tribunal acknowledges the detention notice presented by the applicant, however, it refers to the applicant organising an illegal activity and disturbing the social order. There is no indication of the activities in which the applicant was involved, nor any support for the applicant's claim that it relates to his participation in the religious activities. As noted in the Tribunal's s 424A letter to the applicant, the detention notice appears to rely on an article of the law which may not have applied to the applicant if he was detained for his participation in religious activities. While that in itself is not of significant concern to the Tribunal, the Tribunal is of the view that for the reasons stated above, the notice does not constitute probative evidence to support the applicant's claims. The Tribunal gives this notice little weight."* [CB 106]

7. The Tribunal rejected the applicant's claim of religious involvement in China and his commitment to Christianity. It found that he would not engage in religious activities in an unregistered church or in the dissemination of religious information if he returned to China now or in the reasonably foreseeable future. It did not think that the applicant would suffer harm if he were returned to China now or in the reasonably foreseeable future for reason of his practise of Christianity or due to his future involvement in an unregistered church or religious group in China or for any activity associated with such church or group.

8. On 2 October 2009 the applicant filed an amended application. This contained three grounds that were found in the original application and one additional ground. In the event, the additional ground was not proceeded with. To the extent it is of interest I would point out that the applicant had made an original application to this Court on 12 June 2008. That application was discontinued because the old s.477 of the Act applied to that proceeding. The applicant then applied to the High Court on 26 November 2008. This application was discontinued by the applicant with leave on 14 April 2009 as a result of the changes effected to s.477 by the *Migration Legislation Amendment Act (No.1) 2009.* The further application made to this Court on 16 April 2009 was accepted as being a valid application by the respondent.

9. The three original grounds of application will be dealt with in turn.

Ground 1

"The Decision is affected by jurisdictional error, being a breach by the Tribunal of section 425 of the Act, or a failure to consider or correctly construe the Applicant's claims.

Particulars

a) In its Decision, the Tribunal adversely relied upon the Applicant having stated at the hearing before it that, while he was in detention, he refused to sign a 'regret' letter that he was asked to sign.

b) However, the Applicant in fact stated that he did sign the said letter and the translator provided by the Tribunal mistranslated the Applicant's evidence in this regard.

c) In the circumstances, the level of interpretation was inadequate and, therefore, the Applicant had not been given a meaningful hearing as contemplated by section 425.

d) Further and in the alternative, in the circumstances the Tribunal failed to consider or correctly construe the Applicant's claims – namely the claim that he did in fact sign the 'regret' letter that he was asked to sign."

10. The respondent accepts that the interpretation error referred to in ground 1 occurred. It also accepts that one of the grounds upon which the Tribunal found that the applicant was not a credible witness with respect to events in China was predicated upon the incorrect translation. But it argues that the Tribunal's follow up question, "*so why were you released if you did not sign this document?"*, gave the applicant an opportunity quickly to correct any misunderstanding by the Tribunal and suggests that it was the vagueness of his answer to that question rather than the wrong information which weighed against him in the Tribunal's reasoning. The applicant says that it is clear from the transcript extracts that by the time the Tribunal got to the follow up question the applicant was completely confused. He had stated all along that he had signed the document and now the Tribunal was asking him a question predicated on his not signing it. The response, "*I don't know, I don't know*", could apply equally to a vague and expansive answer or to an expression indicating that the applicant did not understand why he was being asked that question. Given the applicant's consistency of evidence about the signing of this document I think the better view to adopt is that his response indicated confusion and not vagueness.

11. There is no dispute that a Tribunal will fail to comply with s.425 if, through the lack of a competent interpreter, an applicant is prevented from giving his evidence or presenting his case. In *Perera v Minister for Immigration* (1999) 92 FCR 6 ("*Perera*") at [45] Kenny J said:

> "It is not every departure from the standard of interpretation that prevents an applicant for refugee status from giving evidence before the Tribunal. The departure must relate to a matter of significance for the applicant's claim or the Tribunal's decision: cf Yi Gui Stone v Minister for Immigration and Ethnic Affairs (unreported, Federal Court, Hill J, 28 June 1996). Similarly, in Tran, the Court held (at 991), that in order to succeed, the accused had to show that: "the lapse in interpretation which occurred was in respect of the proceedings themselves, thereby involving the vital interests of the accused, and was not merely in respect of some collateral or extrinsic matter, such as an administrative issue relating to scheduling."

She also noted that at [49]:

> "A witness whose answers appear to be unresponsive, incoherent or inconsistent may well appear to lack candour even though the unresponsiveness, incoherence or inconsistencies are due to incompetent interpretation."

Perera was approved in *Mazhar v Minister for Immigration* (2001) 183 ALR 188 where Goldberg J said at [26]:

> "The applicant's submission in relation to the standard of interpreting invites the inquiry whether the material before the Court is sufficient to make out a case that the interpretation before the Tribunal was so incompetent that the applicant was prevented from giving her evidence, and that the departure from the required standard of interpretation related to a matter of significance for the applicant's claim or the Tribunal's decision: *Perera v Minister for Immigration and Multicultural Affairs* (supra) at 22, 23."

At [39] his Honour, after extracting a number of incidents of claimed unsatisfactory interpretation, found that he could not be satisfied that those passages were significant having regard to the applicant's claims or were critical.

12. Standard of translation was considered by a Full Court, Mansfield, Emmet and Selway JJ in *Appellant P119/2002 v Minister for Immigration* [2003] FCAFC 230 ("*P119/*2002") where, at [17], the Court, after referring to other cases in which the matter had been considered including *Perera,* said:

> "In its written submissions the respondent, after referring to these cases, submitted that in order for the appellant to succeed in an argument that the Tribunal had failed to comply with s 425 of the Act by reason of inadequate translation services the appellant would need to establish that:
>
> (a) the standard of interpretation at the Tribunal hearing was so inadequate that the appellant was effectively prevented from giving evidence at the Tribunal; or
>
> (b) errors made by the interpreter at the Tribunal hearing were material to the conclusions of the Tribunal adverse to the appellant.
>
> The respondent's acknowledgment in those terms seems to reflect the views of the Court in Singh (at 6[27]) and in Perera (at 22[38]-[41]) as to the first proposition and in Soltanyzand v Minister for Immigration and Multicultural Affairs [2001] FCA 1168 at [18] as to the second. The appellant did not contend that a more stringent obligation lay upon the Tribunal. It is therefore not necessary to determine whether the existing authorities go so far as the respondent acknowledged."

The majority, Mansfield and Selway JJ, found that there was one error in translation but concluded that the Tribunal had not attached any significance to that issue and had not even mentioned it.

13. The integers of jurisdictional error arising out of mistranslation as articulated in *P119/2002*, as extracted, appeared to have been accepted in a number of Federal Court decisions; *WALN v Minister for Immigration* [2006] FCAFC 131 per Ryan J (with whom Tamberlin and Middleton JJ agreed at [29]); *SZJZE v Minister for Immigration* [2007] FCA 1653 per Middleton J and *SZJZS v Minister for Immigration* [2008] FCA 789 per Flick J. In this year alone, three Judges of the Federal Court, hearing matters on appeal from this Court, have made direct reference and set out with approval the two criteria referred to in *P119/2002*. *SZNCW v Minister for Immigration* [2009] FCA 818 per Barker J; *SZHEW v Minister for Immigration* [2009] FCA 783 per Jagot J, where her Honour said at [49];

> This approach reflects the reasoning of Kenny J in Perera v Minister for Immigration and Multicultural Affairs (1999) 92 FCR 6; [1999] FCA 507."

and in *SZGSI v Minister for Immigration* (2009) 107 ALD 414 per McKerracher J. In this Court, Smith FM dealt with an application in which the first ground of review argued that a critical mistranslation occurred in relation to one point. In *SZJQN v Minister for Immigration* [2007] FMCA 1550. At [14] his Honour said:

> "I find that, in fact, the applicant always maintained that Mr M only told the callers that an unnamed cameraman was responsible for the footage which had been aired. This error of translation resulted in an apparent contradiction by the applicant of himself within half a page of the transcript, and also resulted in the Tribunal incorrectly concluding that the applicant had initially given an implausible account of how the attackers obtained his name."

At [17] his Honour commences to describe the consequences of the error:

> "The significance of the particular translation error which I have emphasised above is shown in the reasoning of the Tribunal. Under the heading "Findings and Reasons", the Tribunal accepted the applicant's claim to have been attacked and injured on his way home. It accepted that he had provided the broadcast footage of the madrassa linked to the overseas atrocity. However, the Tribunal said that it had "serious reservations that the attack on the applicant … related to his filming of the madrassa". It noted, and apparently did not reject, circumstantial evidence supporting his linking the attack with his filming. It did not find it necessary to explore what other reasons there might have been for the applicant to have been attacked on his way home from work. Rather, its reasons for rejecting this claim relied upon particular adverse findings in relation to the applicant's evidence at the hearing, as translated to it. It identified two matters explaining a general conclusion:
>
> *[here is extracted the Tribunal's reasoning]*.
>
> In my opinion, its reasons show that it gave very significant weight to a finding that the applicant had given "improbable" evidence that "the reporter involved in covering the event had told [the organisation] when he was threatened that the applicant was the cameraman". The Tribunal has therefore treated as pivotal to its reasoning, the mistranslation of the applicant's actual evidence which I have identified above."

Having made the finding at [18], his Honour says at [23]:

> "In the present case, upon my above findings, I have concluded that the reasoning followed by the Tribunal was materially influenced by incorrectly translated evidence of the applicant, and that this error satisfies the tests of a failure under s.425 which the Federal Court has identified in these cases. I therefore uphold the first ground of appeal."

14. Smith FM finds support for his conclusions from the *dicta* of Kenny J in *Perera* and noted that in *VWFY v Minister for Immigration* [2005] FCA 1723:

> "Finkelstein J concluded that generally the standard of interpretation at the Tribunal hearing had been of poor quality so that the applicant had not been able to have his evidence properly communicated to the Tribunal. His Honour also envisaged that the

> test suggested by Kenny J might be met by a failure of translation in relation to a critical piece of evidence given at the hearing."

15. In the instant case, the respondent argues that any failure of translation must be absolutely central to the Tribunal's reasoning rather than just being "*material to the conclusion*s". The Minister also argues that the *P119/2002* criteria were not *dicta.* They proceeded from a concession made which the Court was prepared to accept without confirming its correctness. The Minister argues that in the other cases the principle that had just been cited for the purposes of indicating that the test had not been met and that the only case where a positive finding in favour of an applicant was made was that in *SZJQN.* My own view is that the principles outlined in *P119/2002* are uncontroversial. But if they are heterodox they have now been translated into orthodoxy (at least so far as this Court is concerned) by their apparent acceptance in the series of cases which I have cited. The other concern that I have is that I find it difficult to say that Smith FM was clearly wrong in his decision and thus I am bound by judicial comity to follow it. I propose, therefore, to proceed in my decision in the instant case on the basis that the second of the two criteria set out in *P119/2002* is a correct statement of the law and to consider whether it has been met here. That statement does not confine itself to failures which are "absolutely central" to the Tribunal's reasoning. I think it is straining the judicial function to have courts fillet an administrative decision in such a way.

16. The Tribunal commences its findings and reasons as follows:

> *"The applicant stated that he travelled to Australia on a valid Chinese passport and claims to be a national of China. The Tribunal accepts that the applicant is a national of China and has assessed his claims against China as his country of nationality.*
>
> *For the reasons that follow, the Tribunal finds that the applicant was not credible in his evidence with respect to the events in China."*

Seven paragraphs then follow. Five of them deal with the applicant's inability to explain matters to the Tribunal's satisfaction and two relate to the applicant's failure to attend religious activities after coming to Australia. There is then a substantial paragraph dealing with what the Tribunal describes as "*the applicant's unwillingness to apply for a protection visa before his detention"*. The Tribunal does not place any

differential weighting on the reasons so I have taken them as all having equal weight. This being the case, I take the view that the error was material to the conclusions of the Tribunal adverse to the applicant. The Court is not required to make a finding that the Tribunal's decision would have been different had the interpretation error not existed. Given the nature of the proceedings before the Tribunal, applicants should always be given the benefit of the doubt where an error of this type occurs.

Ground 2

"Further and in the alternative, the Tribunal committed jurisdictional error by making findings in the absence of evidence and/or taking account of evidence before it contrary to its findings.

Particulars

a) There was no evidence before the Tribunal to support its finding that only major church leaders were of interest to the Chinese authorities. Further and in the alternative, in making this finding, the Tribunal failed to take into account country information before it that indicated that ordinary members may face persecution.

b) There was no evidence before the Tribunal to support its finding that all persons of interest to the Chinese authorities would not be able to depart China. Further and in the alternative, in making this finding the Tribunal failed to take into account country information before it indicating that only some persons of interest to the Chinese authorities would be prohibited from departing China.

c) There was no evidence before the Tribunal that supported its finding that laws relating to organizing illegal activities and disturbing social order were not used in China to suppress religious activities."

17. The extract from the Tribunal's reasons where the matters raised in this ground were considered is at [CB 104]:

> *"The applicant has not been able to explain to the satisfaction of the Tribunal how he was able to depart the country holding a passport in his own name if he was of any interest to the authorities as such information appears contrary to the available country information cited above. The Tribunal does not accept it as plausible that this was because the applicant travelled on the national day. The applicant's representative submitted that the applicant was not a major church leader and his*

offence was not serious. The Tribunal accepts this and finds that the applicant was of no interest to the authorities at the time of his departure from China."

The applicant's ability to leave China was the subject of information contained in the s.424A letter dated 21 May 2007 [CB 64]:

"The Tribunal has information that would, subject to any comments you make, be the reason, or part of the reason, for deciding that you are not entitled to a protection visa.

The information is as follows:

- *You departed China in October 2006 on a valid passport and a further travel document was subsequently issued to you*

- *When applying for the visa, you stated that you departed China legally and that you had difficulties obtaining a travel document.*

- *With respect to exit procedures operating in China, the available sources indicate that freedom to travel overseas is generally the case, although passports are difficult to obtain for certain classes of dissident. The UK Home Office's 2005 China Country Report provides the following montage of information from various sources on passports in China:*

  As noted by [USSD Report 2005], "Members of underground churches, Falun Gong members and other politically sensitive individuals sometimes were refused passports and other necessary travel documents … As reported by the Canadian IRB on 25 October 2005, "The Frontier Defense Inspection Bureau (FDIB) is in charge of the inspection barriers, and FDIB officers examine the passports and immigration departure cards of Chinese travellers. The officers also verify the identity of the person through a "computerised record system". Chinese travellers do not need to present their resident identity card during the inspection." (Based on information supplied by a representative of the Canadian Embassy in Beijing)

Following the defection in May 2005 of a political affairs counsellor at the Chinese Consulate in Sydney and his applying for asylum in Australia, the media reported that China's rules for issuing and renewing passports was becoming more stringent. An article in June 2005 reports that such a move by the Chinese government indicates:

… a dramatic shift in policy and comes amid signs that the ruling Communist Party is tightening its grip on many sectors of society and daily life as greater economic freedoms have eroded the power of the Government over its people. An initial application for a passport in China has been simplified as the country has opened up to the outside world in recent years and passport

renewal has become virtually automatic. However, the new rules apply even to officials wanting only to renew a passport.

This information is relevant because it may cause the Tribunal to find that you were of no interest to the Chinese authorities both when your passport was issued and at the time of your departure from China. It may also cause the Tribunal to question your credibility and the authenticity of your claims.

- *You were granted a Visitor visa on 22 September 2006 and you arrived in Australia on 1 October 2006.*

- *You have not applied for the Protection visa until 10 April 2007. You had not requested Protection visa application assistance until 27 March 2007, after you were detained.*

This information is relevant because it may indicate that you did not have a genuine fear of persecution when you arrived in Australia or thereafter. It may cause the Tribunal to find that your decision to apply for the Protection visa was a result of your detention. It may cause the Tribunal to question your credibility and the authenticity of your claims."

18. The applicant's migration advisor responded to that letter on 25 May 2007 [CB 67]:

"Mr L was not a major Church leader and at the time of his departure from China had completed the 10 days administrative detention which had been imposed as a penalty for attending illegal church activities and his offence may not have been considered serious enough to warrant inclusion on national data bases preventing travel abroad. Furthermore, the day Mr L left China was a national holiday in China and he believes that scrutiny of departures may have been less stringent as a result of this."

Other independent country information that may have been referred to by the Tribunal was that contained in the delegate's decision [CB 46- 47] which suggests that individuals who have obtained Chinese passports would not be on any wanted lists if they were to return to China and information that:

"While no departure detection system is perfect, the fact that a citizen of China exits lawfully from China provides a strong foundation for confidence that they are not of adverse interest to the authorities."

I do not think it can be said that the only reason that the Tribunal came to the conclusion that the applicant was of no interest was because he was not a major church leader. The Tribunal has referred to the independent country information and it can be assumed that it took this

into account as well. That information is clearly evidence that the Tribunal could rely on to come the conclusion which it did that the applicant was "*of no interest to the authorities at the time of his departure.*" The applicant in his submissions says that the only independent country information is that referred to at [CB 102-103] but that is an assumption I am not prepared to accept given the information contained in the delegate's decision which would have been known to the applicant.

19. The second particular of ground 2 creates an assumption in the mind of the Tribunal that I am not prepared to accept existed. The country information which I have cited contained in the delegate's decision makes it quite clear that the system is not perfect but, as a general rule, persons of interest would not be able to leave. I think that the highest the applicant's case can be put on this point is there is a certain element of illogicality in tying the Tribunal's finding that he was not of particular interest to the authorities and thus would not be prevented from leaving, to his credibility, given the applicant's agent's concessions. Want of logic is not an available ground of review; *VWST v Minister for Immigration* [2004] FCAFC 286 where the Full Bench said at [22];

> "The appellant submitted that a different and wider view of what amounts to a want of logic is to be derived from the reasons of Lee J in *Thevendram v Minister for Immigration & Multicultural Affairs* [2000] FCA 1910. We do not agree. His Honour does not suggest that a finding unsupported by evidence amounts to an illogical finding."

In *MIMA v W306/01A* [2003] FCAFC 208 the majority, French and Hill JJ said at [46]:

> "It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons. It may be that some evidence is irrelevant to the criteria and some contentions misconceived. Moreover, there is a distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact (cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [87]-[97]) and a failure by the Tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason. The Tribunal is not a court. It is an administrative body operating in an environment which requires the expeditious determination of a high volume of applications. Each of the applications it decides is, of course, of great importance. Some of its decisions

> may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a court and its reasons are not to be scrutinised `with an eye keenly attuned to error. Nor is it necessarily required to provide reasons of the kind that might be expected of a court of law.'"

I am not satisfied that this particular provides a ground for a finding of jurisdictional error.

20. The third particular of ground 2 is a reference to the finding at [CB 106] where the Tribunal says:

> *"The Tribunal acknowledges the detention notice presented by the applicant, however, it refers to the applicant organising an illegal activity and disturbing the social order. There is no indication of the activities in which the applicant was involved, nor any support for the applicant's claim that it relates to his participation in the religious activities. As noted in the Tribunal's s 424A letter to the applicant, the detention notice appears to rely on an article of the law which may not have applied to the applicant if he was detained for his participation in religious activities. While that in itself is not of significant concern to the Tribunal, the Tribunal is of the view that for the reasons stated above, the notice does not constitute probative evidence to support the applicant's claims. The Tribunal gives this notice little weight."*

I am not at all sure that the Tribunal made a finding that laws relating to organising illegal activities and disturbing social order were not used in China to suppress religious activities as suggested by the applicant. What the Tribunal did do was to point out that the detention notice that was provided did not specify the type of conduct that the applicant said he had been detained for. The words used in the detention notice may well have applied to a number of other administrative offences. One that immediately comes to mind would be organising a Falun Gong exercise class. The Tribunal did not reject the detention notice, it did not suggest that the applicant had not been detained, it merely indicated that it did not give much weight to the document as corroborating that his detention (if it had occurred) was for the reasons that he gave. I think these are logical conclusions which the Tribunal was entitled to arrive at given the evidence before it.

Ground 3

> "Further and in the alternative, the Tribunal committed jurisdictional error by making an adverse credibility finding that was:

a) Not open on the material before it;

b) Further and in the alternative, made with reference to matters that were not logically probative of the relevant issues;

c) Further and in the alternative, not reasoned.

Particulars

i) In addition to there being no evidence in respect of a number of matters relied upon in making its credibility finding (referred above), the Applicant's inability to explain why a third party (his neighbour) would talk to him and/or why a third party (the police) did not sentence him and/or why a third party (custom officials) would permit him to depart the country is not logically probative of the Applicant's credibility."

It makes reference to the following finding by the Tribunal at [CB 104]:

> *"The applicant could not provide a plausible explanation as to why his neighbour, who had not seen him for more than twenty years and did not know the applicant well, would talk to him about religion and invite him to a house church other than to refer to the neighbour's contact with the applicant's grandmother. The Tribunal does not consider it plausible that such contact would have allowed the neighbour to speak to the applicant about religion when she knew little or nothing about the applicant."*

The respondent says that in this and the succeeding and preceding paragraphs the Tribunal is lining up elements which detract from the applicant's plausibility and the applicant's inability to respond to the questions was an indication that his story was not plausible. All the Tribunal had done was to ask him why that story might be plausible. In other words, the Tribunal was not asking the applicant to give evidence of the mind of a third party but testing with him whether or not the presumption the Tribunal had made about the existence of this conversation was sustainable. Looked at in this way, which I believe is the correct way, I cannot see that the Tribunal has failed to make its credibility finding on matters that are logically probative of the relevant issues; *Kopalapillai v Minister for Immigration* (1998) 86 FCR 547 at [559]. I am not satisfied that the Tribunal fell into jurisdictional error in the manner described.

21. It has not been suggested to me that this is one of those cases where the Court should exercise its discretion not to refer a matter back to the Tribunal when a jurisdictional error has been found. I would therefore grant the applicant the constitutional writs sought on the basis of the error identified in ground 1 of the application. I order that the First Respondent pay the Applicant's costs which I assess in the sum of $5,850.00.

I certify that the preceding twenty-one (21) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate:

Date: 30 October 2009