FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZNTU v MINISTER FOR IMMIGRATION & ANOR *[2009] FMCA 1045*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – interlocutory dismissal of show cause application – no arguable case.

Federal Magistrates Court Rules 2001 (Cth)
Migration Act 1958 (Cth), ss.91R(3), 425

SZIAI v Minister for Immigration [2009] HCA 39
SZJGV v Minister for Immigration [2008] FCAFC 105
SZJGV v Minister for Immigration [2009] HCA 40

Applicant:	SZNTU
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG1771 of 2009
Judgment of:	Driver FM
Hearing date:	26 October 2009
Delivered at:	Sydney
Delivered on:	26 October 2009

REPRESENTATION

The Applicant appeared in person

Solicitors for the Respondents:	Mr G Johnson DLA Phillips Fox

INTERLOCUTORY ORDERS

(1) The application is dismissed, pursuant to rule 44.12(1)(a) of the *Federal Magistrates Court Rules 2001* (Cth).

(2) The applicant is to pay the first respondent's costs and disbursements of and incidental to the application, fixed in the sum of $2,900.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1771 of 2009

SZNTU
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. This is an application to review a decision of the Refugee Review Tribunal ("the Tribunal"). The decision was made on 29 June 2009. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa. The applicant is from China and had made claims of persecution based upon her practise of Falun Gong. She arrived in Australia on 20 September 2008. On 8 December 2008 she applied to the Minister's Department for a protection visa. The Minister's delegate refused that application on 27 February 2009. The applicant was notified on 2 March 2009. The applicant applied to the Tribunal for review of that decision on 23 March 2009.

2. The Tribunal was unable to make a favourable decision on the papers and invited the applicant to a hearing. The applicant accepted that invitation and attended a hearing on 15 May 2009 to give evidence and present arguments. She was assisted by a Mandarin interpreter and a friend. The friend also gave evidence in support of the application.

3. It is apparent from the Tribunal's recitation of what occurred at the hearing that the Tribunal entertained serious doubts about the applicant's claims. Those doubts were put to the applicant at the hearing. Additional material was provided by the applicant to the Tribunal after the hearing on 27 May 2009. That material was taken into account by the Tribunal. The Tribunal also referred in its decision to country information. The Tribunal did not find the applicant to be a truthful or credible witness on some aspects of the claims. In particular, the Tribunal did not accept that the applicant was a Falun Gong practitioner in China and did not accept that the applicant had been encouraged by her cousin to become a practitioner[1]. The key aspect of the applicant's claims related to harm she said she suffered when she travelled to Mayi Island in May 2006. The Tribunal found that although the applicant did travel to the island at that time, the difficulties she encountered were not related to her practise of Falun Gong, but to a commercial issue related to gathering sea cucumbers.

4. The Tribunal took into account the applicant's asserted practise of Falun Gong in Australia and her participation in demonstrations in support of Falun Gong practitioners. The Tribunal did not accept that the applicant engaged in that conduct for any reason other than to strengthen her refugee claims. On the basis of the Tribunal's understanding of section 91R(3) of the *Migration Act 1958* (Cth) ("the Migration Act"), the Tribunal thereupon disregarded that conduct in Australia in assessing those claims.

5. These proceedings began with a show clause application filed on 24 July 2009. The application contains six grounds which I incorporate in this judgment:

    1. *The Tribunal failed to act judicially and afford procedural fairness*

    2. *The Tribunal failed to investigate the applicant's genuine claims;*

    3. *The Tribunal misunderstood and failed to apply the correct test in order to be satisfied as to wether the Applicant had a well-founded fear of persecution for a Convention reason on the grounds of religion.*

[1] court book, page 204, paragraph 93 of the Tribunal's reasons

4. *The Tribunal did not take into account certain relevant considerations or integers central to the applicant's claims;*

5. *The Tribunal failed to comply with s.91R(3) of the Act*

6. *The Tribunal did not investigate thoroughly about the applicant's claim as a Falun Gong practitioner.*

6. The applicant has not taken up the opportunity I afforded her on 17 August 2009 to amend that application. The applicant also relies upon an affidavit filed with the application. I received paragraph 1 of the affidavit as evidence and paragraph 2 as a submission. I also have before me as evidence the court book filed on 28 August 2009.

7. In addition, the applicant sought to tender in evidence a document apparently prepared by her cousin which, on its face, corroborates the applicant's claims in relation to being introduced to the practice of Falun Gong by her cousin. The statement purportedly by the applicant's cousin is dated 4 August 2009 and was written in the Chinese language. An English language translation is dated 22 October 2009. I declined to receive those documents as evidence on the basis that they both post-dated the Tribunal decision. While they may have some impact on a consideration of the applicant's protection visa claims, they did not assist me in considering arguments relating to the validity of the Tribunal decision. I returned those documents to the applicant.

8. In my view, there is no arguable case of jurisdictional error by the Tribunal arising from the application before the Court or otherwise. In ground 1, the applicant asserts that the Tribunal failed to act judicially or afford procedural fairness. There is no evidence of any bias by the Tribunal, whether actual or apprehended. Neither does there appear to be any arguable case of a breach of the Tribunal's procedural code. In particular, the applicant was invited to a hearing pursuant to s.425 of the Migration Act and attended. The hearing opportunity was a real one. The applicant was put on notice at the hearing of the significant issues upon which the review was likely to turn. She also had the opportunity to submit further material after the Tribunal hearing which the Tribunal took into account. In grounds 2 and 6, the applicant asserts that the Tribunal failed to investigate her claims. The Tribunal is not subject to a general duty to investigate claims. This was

confirmed recently by the High Court in *SZIAI v Minister for Immigration* [2009] HCA 39. There is nothing in this case that points to any arguable case of jurisdictional error based upon a failure to investigate any aspect of the applicant's claims.

9. In ground 3 the applicant asserts that the Tribunal misunderstood and failed to apply the correct test concerning a well-founded fear of persecution under the Convention. There is no substance to that assertion. The Tribunal not only understood the four aspects of dealing with a claim of persecution under the Convention, but it applied them. Those included a forward looking assessment of any risk of harm the applicant might face should she be required to return to China.

10. In ground 4 the applicant asserts a failure by the Tribunal to take into account certain relevant considerations or integers central to her claims. No particulars are provided. The applicant did not take up the opportunity I afforded her to make oral submissions in relation to the grounds of review she advanced. It does not appear to me that there is any arguable case that the Tribunal overlooked any integers or elements of the applicant's claims.

11. Finally, the applicant asserts that the Tribunal failed to comply with s.91R(3) of the Migration Act. The Tribunal decision was made before, and obviously without the benefit of, the decision of the High Court in *SZJGV v Minister for Immigration* [2009] HCA 40. The Tribunal[2] disregarded the applicant's conduct in Australia, as it thought it was obliged to do, based upon the prior decision of the Full Federal Court in *SZJGV v Minister for Immigration* [2008] FCAFC 105. The High Court by majority, has now established that an applicant's conduct in Australia may be taken into account for certain purposes, notwithstanding an assessment by the Tribunal that that conduct was engaged in solely for the purpose of strengthening protection visa claims. In particular, the conduct may be taken into account if it does not, in fact, achieve its intended purpose[3]

12. However, in my view, even by reference to the High Court decision, the Tribunal did not fall into error as it was not obliged to rely upon

[2] court book, page 206, paragraph 104 of the Tribunal's reasons
[3] *SZJGV* at [64]

that conduct in Australia in order to support the adverse credibility assessment that the Tribunal had already made. Even if such an error were arguable, in my view, the outcome would necessarily have been the same if the information had been taken into account. That would support a conclusion that relief should be refused in the exercise of discretion, even if a jurisdictional error had been established.

13. I conclude that the application should be dismissed pursuant to rule 44.12(1)(a) of the *Federal Magistrates Court Rules 2001* (Cth). I so order.

14. Costs should follow the event in this case. The Minister seeks an order for costs fixed in the amount of $2,900. The applicant referred to her impecuniosity, but that is not a reason for the Court to refrain from making a costs order. I will order that the applicant is to pay the first respondent's costs and disbursements of and incidental to the application, fixed in the sum of $2,900.

I certify that the preceding fourteen (14) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 29 October 2009