FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZMJJ v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 1115*

MIGRATION – Review of decision by Refugee Review Tribunal – whether Refugee Review Tribunal's decision affected by jurisdictional error – whether the applicant was properly notified of the Delegate's decision – whether any jurisdictional error arises in circumstances where an applicant did not receive notification from the Department of the decision of its Delegate – whether the Refugee Review Tribunal gave information to the applicant in accordance with s.424AA of the Act.

Judiciary Act 1903 (Cth), s.39B
Migration Act 1958 (Cth), ss.5(1); 36(2); 65(1); 66(1); 66(2); 66(4); 91R; 91R(3); 91S; 424AA; 424AA(a); 424AA(b); 424A; 424A(3)(a); 424A(3)(b); 474; 494B; 494D; pt.8 div.2

Zubair v Minister for Immigration & Multicultural and Indigenous Affairs (2004) 211 ALR 561
VJAF v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 178
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294
SZMHL v Minister for Immigration & Anor [2008] FMCA 1160
Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Ors (1996) 185 CLR 259
Abebe v Commonwealth of Australia (1999) 162 ALR 1
Minister for Aboriginal Affairs & Another v Peko-Wallsend Ltd & Others (1985) 162 CLR 24

Applicant:	SZMJJ
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	SYG 1477 of 2008
Judgment of:	Emmett FM

Hearing date:	5 August 2008
Date of last submission:	5 August 2008
Delivered at:	Sydney
Delivered on:	21 August 2008

REPRESENTATION

Applicant appeared on her own behalf assisted by a Mandarin interpreter

Counsel for the Respondent:	Mr M. Cleary
Solicitors for the Respondent:	Ms P. Nandagopal, DLA Phillips Fox

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1477 of 2008

SZMJJ
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application pursuant to s.39B of the *Judiciary Act 1903* (Cth) and Part 8 Division 2 of the *Migration Act 1958* (Cth) ("**the Act**") for judicial review of a decision of the Refugee Review Tribunal ("**the Tribunal**") dated 4 May 2008 and handed down on 13 May 2008.

2. The applicant claims to be a citizen of the Peoples Republic of China ("**the PRC**") ("**the Applicant**").

3. The Applicant arrived in Australia on 22 October 2007 having departed legally from the PRC on a passport issued in her own name and a visitor's visa.

4. On 2 November 2007, the Applicant lodged an application for a protection (Class XA) visa with the Department of Immigration and Multicultural Affairs ("**the Department**") under the Act.

5. On 29 January 2008, a delegate of the First Respondent ("**the Delegate**") refused the Applicant's application for a protection visa.

6. On 22 February 2008, the Applicant lodged an application for review of the Delegate's decision by the Tribunal.

7. On 13 May 2008, the Tribunal affirmed the decision of the Delegate not to grant a protection visa.

8. On 10 June 2008, the Applicant filed an application in this Court seeking judicial review of the Tribunal's decision.

Legislative framework

9. Section 65(1) of the Act authorises the decision-maker to grant a visa if satisfied that the prescribed criteria have been met. However, if the decision-maker is not so satisfied then the visa application is to be refused.

10. Section 36(2) of the Act relevantly provides that a criterion for a protection visa is that an applicant is a non-citizen in Australia to whom the Minister is satisfied that Australia has a protection obligation under the Refugees Convention as amended by the Refugees Protocol. Section 5(1) of the Act defines "Refugees Convention" and "Refugees Protocol" as meaning the 1951 Convention relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees.

11. Australia has protection obligations to a refugee on Australian territory.

12. Article 1A(2) of the Convention relevantly defines a refugee as a 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."*

13. Section 91R and s.91S of the Act refer to persecution and membership of a particular social group when considering Article 1A(2) of the Convention.

The Applicants application for a protection visa

14. In her protection visa application, the Applicant claimed that she feared persecution because she is a Falun Gong practitioner. The Applicant claimed that her husband was killed in 2002 for being a Falun Gong practitioner. The Applicant claimed that in the PRC there is no religious freedom and that she was persecuted due to her Falun Gong beliefs. The Applicant further claimed that if she were to return to the PRC she would be sent to prison or institutionalised in a mental hospital for being a Falun Gong practitioner.

15. In addition to her protection visa application, the Applicant forwarded to the Department an additional statement on 28 November 2007. In her statement, the Applicant said that since her marriage in 1997 she had lived in Changchun, the hometown of Li Hongzhi, the founder of Falun Gong. The Applicant stated that her aunt had known Li Hongzhi for many years and had run a Falun Gong *"counselling station"* in the Kaihe District. The Applicant stated that her husband had been one of her aunt's followers and that after practising the exercises for a period of time his *"lumbar muscle strain"* condition had improved. The Applicant stated that the practitioners continued to practice in secret in a garage after Falun Gong had been declared illegal and that sometimes she would join them. The Applicant stated that on 15 September 2001 police arrested her husband, aunt and two other people for illegally practising Falun Gong. The Applicant further stated that her husband was then detained for a year and had suffered injuries whilst in detention requiring hospitalisation. The Applicant stated that four days after her husband's release from hospital he was killed by a police truck on his way to practice Falun Gong.

16. The Applicant stated that, after her husband's death, she appealed to the authorities for help, however, received no answer. The Applicant stated that police then warned her that she would be sent to prison if she continued to appeal to the authorities because she was *"interrupting*

social order". The Applicant further stated that there were no human rights or freedom in the PRC.

The Delegate's decision

17. On 29 January 2008, a delegate of the First Respondent ("**the Delegate**") refused the Applicant's application for a protection visa on the basis that the Applicant is not a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol ("**the Convention**")**.**

18. The Delegate found that the Applicant's further information, provided by her at an interview with the Department in relation to her husband's practice of Falun Gong and her discovery of his arrest, was "*unconvincing*". The Delegate found the Applicant's claims of pursuit for justice for her husband to be "*superficial and lacking in detail*". The Delegate found that, based on country information before it, it was unlikely that the Applicant would have been able to leave the PRC without incident on a passport issued in her own name if she was of adverse interest to the PRC authorities. The Delegate found the Applicant's knowledge of Falun Gong to be "*basic at best*" and limited to performing some of the exercises.

19. On 22 February 2008, the Applicant lodged an application for review of the Delegate's decision by the Tribunal. The Applicant provided no further material in support of the review application. On 13 May 2008, the Tribunal affirmed the decision of the Delegate not to grant a protection visa.

The Tribunal's review and decision

20. On 6 March 2008, the Tribunal wrote to the Applicant informing her that the Tribunal had considered the material before it but was unable to make a favourable decision on that material alone. The letter invited the Applicant to attend a hearing on 16 April 2008 to give oral evidence and present arguments. The Applicant attended that hearing and gave oral evidence.

21. On 16 April 2008, the Applicant gave evidence at the hearing before the Tribunal in which the Applicant expanded upon her written claims.

22. The Tribunal noted that it had before it the Department's file.

23. The decision of the Tribunal is accurately summarised by the First Respondent in his written submissions as follows:

> ***"Tribunal's Decision***
>
> *9. In coming to its decision to affirm the decision of the delegate the Tribunal reviewed at length the claims and evidence. Firstly, it reviewed the applicable law in unobjectionable terms. It then set out the applicant's claims and evidence. Finally, it set out its findings and reasons.*
>
> *10. The Tribunal did not accept the applicant had a genuine desire to practise Falun Gong and therefore did not accept she would be persecuted by being prevented from practising Falun Gong if she returned to China*[1]*.*
>
> *11. The Tribunal accepted that the applicant had engaged in Falun Gong activities in Australia. However, it was not satisfied that she had engaged in that conduct in Australia otherwise than for the purpose of strengthening her refugee claim*[2]*. Accordingly, the Tribunal disregarded the applicant's conduct in Australia pursuant to s.91R(3) of the Act.*
>
> *12. The Tribunal accepted the applicant's husband was a Falun Gong practitioner. However, the Tribunal did not accept that the husband's death had anything to do with Falun Gong, because the death certificate indicated he had died in a car accident*[3]*. The Tribunal did not accept the applicant's claims she wrote complaint letters to the police and to have subsequently been harassed by the police*[4]*.*
>
> *13. The Tribunal did not accept that before the applicant left China she was being constantly harassed by he police because she had written appeal letters and they had been warning her not to do this, and also because they suspected that she was practising Falun Gong and wanted to check she was not*[5]*.*

[1] GB 111 at [60].
[2] GB 111 at [61].
[3] GB 111 at [62].
[4] GB 111 at [62].
[5] GB 111 at [63]-[64].

14. The Tribunal did not accept that if the applicant returned to China she would practise Falun Gong, nor did she accept that she had written letters of complaint about her husband's death, or would do so in the future[6].

15. Finally, the Tribunal rejected the applicant's claim to have been shunned by people because they knew her husband was a Falun Gong practitioner[7].

16. The Tribunal was not satisfied the applicant faced a real chance of Convention based persecution.

17. The Tribunal found the applicant was not a person to whom Australia owed protection under the Act."

The proceeding before this Court

24. The Applicant was unrepresented before this Court although had the assistance of a Mandarin interpreter. The Applicant has participated in the NSW RRT Legal Advice Scheme.

25. The Applicant confirmed that she relied on the grounds contained in an application filed on 10 June 2008.

26. The grounds of the application are expressed to be as follows:

> *"1. Jurisdictional error has been made. I did not get refusal letter from DIAC.*
>
> *2. Procedural Fairness has been denied. RRT did not use favourable cases to my application."*

27. Each of the grounds was interpreted for the assistance of the Applicant and the Applicant was invited to make submissions in support of each of the grounds and in support of her application generally. The Applicant confirmed that she had filed no evidence or submissions in support of her application. She made no meaningful oral submissions in support of her application for judicial review, other than to reiterate her claims.

[6] GB 111 at [64].
[7] GB 111 at [65].

Ground 1 – *"Jurisdictional error has been made. I did not get refusal letter from DIAC."*

28. Ground 1 is a complaint by the Applicant that she did not receive notification of the Delegate's decision.

29. Section 66(1) of the Act provides that the refusal to grant a visa by the Minister must be notified to an applicant in the prescribed way. Section 66(2) provides that certain information that must be provided in any such notification. Section 494B of the Act sets out the ways in which such a notification may be given to an applicant. Section 494D provides that if a person appoints an authorised recipient, then the Minister must give any documents to that person, rather than the visa applicant. In this case, the Applicant appointed an authorised recipient.

30. Notification of the Delegate's decision was sent to the Applicant's authorised recipient at the address identified by the Applicant in the form nominating the authorised recipient. A copy of the letter of notification is in the Court Book, marked Exhibit 1R. On the face of that letter it was sent, by registered mail to the Applicant's authorised recipient. The letter contained the relevant statutory information required by s.66(2) of the Act.

31. In any event, s.66(4) provides that failure to give notification of a decision does not affect the validity of a decision and the Tribunal still has power to review the Delegate's decision (*Zubair v Minister for Immigration & Multicultural and Indigenous Affairs* (2004) 211 ALR 561 at [32]).

32. In the circumstances, the Applicant was notified of the Delegate's decision in accordance with the statutory regime and is, therefore, deemed to have been notified of the Delegate's decision.

33. Accordingly, ground 1 is not made out.

Ground 2 – *"Procedural Fairness has been denied. RRT did not use favourable cases to my application."*

34. Ground 2 is not supported by particulars or submissions. The Applicant had nothing further to say in support of ground 2.

35. A fair reading of the Tribunal's decision makes clear that the Tribunal had regard to the Applicant's written claims and oral evidence. The Tribunal explored the Applicant's claims with her at the hearing and put to the Applicant matters of concern that the Tribunal had arising from her evidence.

36. A fair reading of the Tribunal's decision makes clear that the Tribunal put to the Applicant country information before it that suggested that a person who had come to the adverse attention of the PRC authorities would experience difficulty in obtaining a legal passport.

37. The Tribunal did not accept that the Applicant has a genuine desire to practice Falun Gong and therefore was not satisfied that she would suffer persecution by being prevented from practicing Falun Gong if she were to return to the PRC.

38. The Tribunal considered the Applicant's claims of practicing Falun Gong in Australia, however, was not satisfied that the Applicant engaged in such conduct other than for the purposes of strengthening her claim to be a refugee. The Tribunal noted that, in the circumstances, pursuant to s.91R(3) of the Act it was required to disregard the conduct of the Applicant in Australia as evidence in support of her review application.

39. The Tribunal rejected the Applicant's claims of being harassed by police in the PRC because she had written "*appeal letters*" in respect of her husband's death. The Tribunal rejected the Applicant's evidence that her husband's death had anything to do with his practice of Falun Gong. The Tribunal did not accept that there is a real chance the Applicant would be denied the capacity to earn a living or otherwise be persecuted by reason of her association with her husband or his family in circumstances where her husband was a Falun Gong practitioner.

40. At the heart of the Tribunal's affirming of the decision under review was its adverse credibility findings in respect of: the Applicant's commitment to Falun Gong; her claims of persecution in the PRC by reason of letters of complaint that she allegedly wrote to the police following her husband's death; and, the Tribunal's failure to accept the Applicant's claim that her husband's death had anything to do with Falun Gong. In addition, the Tribunal had regard to country

information before it that it found suggested that if the Applicant had come to the attention of authorities and had a police record *"this was precisely the sort of information which the authorities would have been concerned about in granting the applicant to go overseas."*

41. There was no information relied upon by the Tribunal in affirming the decision under review that enlivened the obligations of s.424A(1) of the Act. The country information to which the Tribunal had regard and which formed part of the Tribunal's reasons for affirming the decision under review was information that was specifically excluded from the obligations of s.424A(1) of the Act by reason of s.424A(3)(b) of the Act (*VJAF v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 178 at [12]-[18]).

42. It is unclear from reading the Tribunal's decision record whether or not the Tribunal told the Applicant that it would give her information which it considered to be part of the reason for affirming the decision under review pursuant to s.424AAof the Act. It is possible to draw such an inference where the Tribunal stated the following:

> *"I indicated to the applicant that I was going to give her some information which I considered would be the reason, or a part of the reason, for affirming the decision under review. I indicated that I would explain the information to her so that she understood why it was relevant to the review and that I would also explain the consequences of the information being relied upon in affirming the decision under review. I indicated that I would ask her to comment on or to respond to the information. I indicated that if she wanted additional time to comment on or respond to the information she could tell me and I would then consider whether to adjourn the review to give her additional time."* (CB:107)

43. However, if the Tribunal's words above were intended to be in compliance with s.424AA(b) of the Act, it is my view that s.424AA(b) of the Act requires specific compliance in respect of each piece of information intended to be given by the Tribunal to an applicant pursuant to s.424AA of the Act. Section 424AA(a) of the Act states that the Tribunal may orally give to an applicant "*clear particulars of any information*" that the Tribunal considers would be the reason or part of the reason for affirming the decision under review. To my mind, if the Tribunal is intending to engage s.424AA of the Act, it must give "*clear*

particulars" of each piece of information which it is giving to the applicant and to do so in accordance with s.424AA(b) of the Act in respect of each of the particulars. To refer in an unspecific sense, as the Tribunal has in the passage quoted above, to the requirements of s.424AA of the Act cannot, to my mind, be compliance with s.424AA of the Act.

44. In any event, after the Tribunal made the generic statement referred to above, it went on to identify aspects of the Applicant's claims that were part of the reason for affirming the decision under review. Even if the Tribunal was intending to give such information to the Applicant pursuant to s.424AA of the Act, s.424AA of the Act does not impose any standard mandatory obligation on the Tribunal, unlike s.424A(1) of the Act (*SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 [77]). Therefore, a failure by the Tribunal to give information in strict accordance with s.424AA is not a failure that goes to the heart of the decision making process (*SZMHL v Minister for Immigration & Anor* [2008] FMCA 1160 at [46] – [47]).

45. In the circumstances, s.424A of the Act applies in respect of all information which formed part of the Tribunal's reasons for affirming the decision under review. However, the information to which the Tribunal had regard was either information given by the Applicant to the Tribunal for the purposes of her review application or was information that was not specifically about the Applicant and was just about a class of persons of which the Applicant was a member. Sections 424A(3)(a) and 424A(3)(b) of the Act excludes such information from the obligations of s.424A of the Act.

46. A fair reading of the Tribunal's decision record and its review makes clear that there was no denial of procedural fairness by the Tribunal. The Tribunal complied with the statutory regime in the making of its decision, including the conduct of its review. The findings made by the Tribunal were open to it on the evidence and material before it and for the reasons it gave. The Tribunal applied the correct law to its findings in concluding that it was not satisfied that the Applicant has a well-founded fear of persecution for a Convention-related reason if she were to return to the PRC now or in the reasonably foreseeable future.

47. Ground 2 is otherwise no more than a disagreement with the findings and conclusions of the Tribunal. Such a complaint invites merits review which this Court cannot undertake (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Ors* (1996) 185 CLR 259 at 272; *Abebe v Commonwealth of Australia* (1999) 162 ALR 1; *Minister for Aboriginal Affairs & Another v Peko-Wallsend Ltd & Others* (1985) 162 CLR 24 at 41per Mason J).

48. Accordingly, ground 2 is not made out.

Conclusion

49. The Tribunal's decision is not affected by jurisdictional error and is therefore a privative clause decision. Accordingly, pursuant to s.474 of the Act, this Court has no jurisdiction to interfere.

50. The proceeding before this Court is dismissed with costs.

I certify that the preceding fifty (50) paragraphs are a true copy of the reasons for judgment of Emmett FM

Associate: S. Kwong

Date: 20 August 2008