FEDERAL COURT OF AUSTRALIA

SZLJB v Minister for Immigration & Citizenship [2008] FCA 1233

SZLJB v MINISTER FOR IMMIGRATION & CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL
NSD 814 OF 2008

JACOBSON J
11 AUGUST 2008
SYDNEY

NO CATCHWORDS

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 814 OF 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZLJB**
Appellant

AND: **MINISTER FOR IMMIGRATION & CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **JACOBSON J**

DATE OF ORDER: **11 AUGUST 2008**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the first respondent's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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DATE: **11 AUGUST 2008**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

Introduction

1 This is an appeal from orders made by Orchiston FM dismissing an application for review of a decision of the Refugee Review Tribunal dated 31 July 2007. The Tribunal affirmed a decision of a delegate of the Minister not to grant the appellant a protection visa.

2 The appellant is a citizen of the People's Republic of China who arrived in Australia on 28 February 2007. He applied for a protection visa in March 2007. A delegate decided to refuse to grant the visa on 12 April 2007 and the appellant applied to the Tribunal for a review of the decision of the delegate.

3 The appellant claimed to have a well-founded fear of persecution on the Convention grounds of religion and membership of a particular social group by reason of his claim to have practised Falun Gong. The appellant claimed that he had practised Falun Gong in China since 1999. He said that he started practising Falun Gong at that time with his uncle who was

a high-ranking Falun Gong practitioner. He said that he continued to practise Falun Gong after that date, that he was forced to do labouring as a result of his practice of Falun Gong and that he was fined and forced to attend re-education classes.

Decision of the Refugee Review Tribunal

4 The Tribunal found that the appellant's lack of knowledge of the basic principles of Falun Gong raised strong concerns about his credibility. The Tribunal considered that a number of overseas trips taken by the appellant, which were followed by his return to China on several occasions from 2004 to 2006, showed that he had no subjective fear of persecution in China at those times. The appellant claimed before the Tribunal that he had visited Australia for a week in June 2006 and therefore had returned to China. He told the Tribunal that he had travelled to Australia to attend a Falun Gong meeting and that he had attended meetings in Campsie and in the Sydney CBD.

5 However, the Tribunal rejected the appellant's claim that he attended Falun Gong meetings in Sydney as he had claimed in his evidence. The substance of the Tribunal's reasons on this issue are to be found in the following passage from its reasons:

> *The applicant gave vague and evasive answers when he was asked about his Falun Gong practice and connections in Australia. The Tribunal finds that he has not had any involvement with Falun Gong practitioners or the Falun Gong movement in Australia. This together with all factors discussed above leads the Tribunal to find that the applicant is not a Falun Gong practitioner, nor will he be perceived as such.*

6 The following passage records the Tribunal's other reasons for rejecting the whole of the claim:

> *In sum, the Tribunal considered the evidence cumulatively and finds the applicant's lack of knowledge and lack of confidence when discussing Falun Gong, his description of his practice and experiences in China, and his description of his practice in Australia shows he is not a Fulun Gong practitioner. The Tribunal does not accept that the applicant is a Falun Gong practitioner, or has any association with the movement. The Tribunal does not accept that the applicant will be perceived as a Falun Gong practitioner by anyone. The Tribunal does not accept that the Chinese authorities are interested in him because he is a Falun Gong practitioner or for any other Convention reason. The Tribunal finds that the applicant has fabricated this claim to establish a basis for refugee status.*

7 The Tribunal's conclusions record that it comprehensively rejected the various claims made of the applicant's involvement in Falun Gong in China.

Decision of the Federal Magistrate

8 The appellant essentially raised four grounds of review on his application before the Federal Magistrate. He claimed that the Tribunal was biased against him and that it failed to assess the chance of his persecution on return to China. He also relied upon a breach of s 424A of the *Migration Act 1968* (Cth). In addition, he claimed that the Tribunal failed to carry out its statutory duty in various ways particularized and repeated at [41] of the reasons of the Federal Magistrate.

9 The Federal Magistrate referred to the relevant authorities on the question of actual bias and also on the question of apprehended bias. It is unnecessary to repeat what her Honour said but she came to the view as fully set out at [53]ff and following that the claims of actual and apprehended bias were not made out.

10 Her Honour was also of the view that the claim based on s 424A of the Act could not succeed. She referred to the decision of the High Court in *SZBYR v Minister for Immigration & Citizenship* (2007) 235 ALR 609 at [18] and observed that the section does not extend to the Tribunal's subjective thought processes or appraisals of the evidence before it. Her Honour was of the view that none of the other alleged grounds of jurisdictional error were made out.

The Notice of Appeal

11 The Notice of Appeal is in similar terms to the claims made in the application in the Federal Magistrates Court. The appellant asserts in his grounds of appeal that the Tribunal failed to consider his claims and that it was biased against him. He also asserts that the Tribunal failed to comply with s 424A of the Act and that the decision was not "supported by materials."

12 The appellant appeared this afternoon without legal representation. He was assisted by a Mandarin interpreter. He repeated the claim of bias and also referred to the factual

matters which he had relied upon in support of his claim. In particular, he said that he had followed his uncle to practice Falun Gong and that his uncle was sent to prison for three years as a result of this. In addition he said he had been mistreated in China by reason of his adherence to the practice of Falun Gong.

13 I am satisfied that each of the grounds of appeal set out in the Notice of Appeal cannot be supported. It is unnecessary to refer to the principles stated by the learned Federal Magistrate on the question of actual and apprehended bias. It is sufficient to say that, in my view, the Federal Magistrate correctly applied the principles stated by the High Court in the authorities to which he referred. As von Doussa J said in *SCAA v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 668 at [38], it is a rare and exceptional case where actual bias is demonstrated solely from the published reasons for the decision Moreover, there was nothing on the face of the Tribunal decision record to suggest actual or apprehended bias within the principles stated in the authorities.

14 As to the ground of appeal that the Tribunal did not consider the appellant's claims, this is unsupported by the terms of the Tribunal's decision record. It is plain that the Tribunal considered the appellant's claims, found them unconvincing and rejected them. It was entitled to do so and it was not required to refer to any other "materials" in doing so.

15 Nor can the ground of appeal based on s 424A succeed. As the learned Federal Magistrate observed, the High Court in *SZBYR* at [18] stated that the section does not encompass the Tribunal's subjective appraisals, thought processes or determinations. In the present case the appellant's claim rises no higher than a complaint that the Tribunal ought to have notified him of its subjective thought processes before rejecting his application.

Section 91R(3) of the *Migration Act*

16 Counsel for the Minister, Mr Kennett, has fairly raised another aspect of the matter which was not referred to by the Federal Magistrate. Mr Kennett has referred me to the provisions of s 91R(3) of the Act. It is unnecessary to repeat the section. It is sufficient to say that in determining whether a person has a well-founded fear of persecution, the Tribunal is bound by that subsection to disregard any conduct engaged in by the person in Australia,

unless the person satisfies the Minister that he or she engaged in the conduct "otherwise than for the purpose of strengthening that person's claim to be a refugee."

17 In *SZJGV v Minister for Immigration & Citizenship* [2008] FCAFC 105, a Full Court considered the proper construction of s 91R(3). Their Honours observed that the subsection can only be applied once primary findings of fact have been made. They said at [22] that the Tribunal must first decide whether or not conduct has been engaged in in Australia which causes the person to fear persecution if returned to his or her country of origin. If the conduct has not occurred, then there will be nothing to disregard.

18 In the present case, the appellant did claim before the Tribunal that he had engaged in conduct in Australia by attending Falun Gong meetings in Campsie and in the City of Sydney. He apparently made those claims in support of his claimed fear of persecution if he returned to China. However, the Tribunal found that the appellant had not attended those meetings with Falu.n Gong practitioners in Australia. It seems to me that, having found that the conduct relied upon did not occur, there was nothing for the Tribunal to disregard. That is what the Full Court said at [22] in *SZJGV*.

19 It is true that the Full Court said in *SZJGV* in the last sentence of [22] that inaction can constitute conduct within the meaning of s 91R(3). It might therefore be said that what was taken into account by the Tribunal was the appellant's failure to engage in particular activities that may have strengthened his claim for a protection visa. However, even if that is so, the Tribunal's finding that he did not attend the meetings cannot be said to have been conduct that could have been engaged in for the purpose of *strengthening* his claim to be a refugee.

20 It follows that on any view s 91R(3) was not enlivened and I accept the Minister's submission that the section did not require the conduct to be disregarded. Accordingly, there was no jurisdictional error on that basis.

Conclusion and Orders

21 In my view it follows that the appeal must be dismissed and I will so order. I order the appellant to pay the costs of appeal.

I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jacobson.

Associate:

Dated: 19 August 2008

The Appellant was self-represented.

Counsel for the Respondent:	G R Kennett
Solicitor for the Respondent:	DLA Phillips Fox
Date of Hearing:	11 August 2008
Date of Judgment:	11 August 2008