FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZKGF v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 2153

MIGRATION – Visa – protection visa – Refugee Review Tribunal – application for review of RRT decision affirming decision of a delegate of the Minister refusing to grant a protection visa – applicant is a citizen of the People's Republic of China claiming fear of persecution for reasons of his religion and political opinion – allegation of bias – no evidence of bias – whether Tribunal failed to comply with *Migration Act 1958* (Cth) s 424A – no breach of s 424A – clerical error by Tribunal – no reviewable error.

Migration Act 1958 (Cth), ss.65, 424A, 424A(1), 425, 425A, 474(2)

SZJSP v Minister for Immigration & Citizenship [2007] FCA 1925 followed
SZIBR v Minister for Immigration & Anor [2006] FMCA 1490
NATC v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 52
M153/2004 & Ors v Minister for Immigration [2006] FMCA 42
NACB v Minister for Immigration & Multicultural Affairs [2003] FCAFC 235
Re: Minister for Immigration & Multicultural & Indigenous Affairs; ex parte Applicant S20 of 2002 (2003) 198 ALR 59
SZEEO v Minister for Immigration [2005] FMCA 1177
S635/2003 v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 1162
SBBS v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 361
SBBF v Minister for Immigration & Multicultural Affairs [2002] FCAFC 358
Giretti v Deputy Commissions of Taxation (1996) 70 FCR 151

Applicant:	SZKGF
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 613 of 2007
Judgment of:	Scarlett FM

Hearing date:	18 December 2007
Date of Last Submission:	18 December 2007
Delivered at:	Sydney
Delivered on:	18 December 2007

REPRESENTATION

The Applicant:	Appeared in person
Solicitors for the Applicant:	Nil
Counsel for the Respondents:	Mr Cleary
Solicitors for the Respondents:	Clayton Utz

ORDERS

(1) The application is dismissed.

(2) The applicant is to pay the first respondent's costs fixed in the sum of $5,300.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 613 of 2007

SZKGF
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(Revised from transcript)

Application

1. The applicant is a citizen of the People's Republic of China. He asks the Court to set aside a decision of the Refugee Review Tribunal that was handed down on 25th January 2007. He asks the Court to make an order in the nature of certiorari quashing or setting aside the Tribunal decision and asks the Court for orders in the nature of a writ of mandamus remitting his application to the Tribunal for reconsideration and compelling the Tribunal to consider his application according to law. He also seeks an order for costs.

2. The applicant arrived in Australia on 12th December 2004. He applied for a protection (Class XA) visa on 20 January 2005. His application

for a visa was refused on 26th February 2005. The applicant then sought a review of that decision from the Refugee Review Tribunal. The Tribunal affirmed the delegate's decision on 4th August 2005. The applicant then sought judicial review of that decision from the Federal Magistrates Court and on 24th February 2006 the Federal Magistrates Court dismissed that application. However, the applicant appealed and on 8th August 2006 Giles J exercising jurisdiction of the Full Court of the Federal Court made orders by consent allowing the appeal and issuing writs of certiorari and mandamus. The application was remitted to the Refugee Review Tribunal and the Tribunal wrote to the applicant inviting him to attend a further hearing.

3. That hearing was scheduled for 20th November 2006. The applicant attended that hearing and gave evidence on oath with the assistance of an interpreter in the Mandarin language. After the hearing, on 28th November 2006, the Tribunal wrote to the applicant under the provisions of s.424A of the Migration Act. In that letter, which was headed "Invitation To Comment On Information", the Tribunal told the applicant that it had information that would, subject to any comments he made, be the reason or part of the reason for deciding that he was not entitled to a protection visa. The Tribunal then set out that information in two pages[1]. The information related to answers given by the applicant in his application for protection visa and the applicant's evidence to the Tribunal at the two hearings on 17th June 2005 and 20th November 2006. The Tribunal referred to vague and inconsistent information given by the applicant about his involvement with church or the religious organisation of which he claimed to be a member and associated political discussion. The letter then set out why the Tribunal considered that information relevant. The Tribunal also referred to a statement by the applicant that he left China legally and the fact that he had provided a copy of his passport to the Department of Immigration and Citizenship showing that the applicant not only left China legally but also using a passport issued in his own name.

4. The Tribunal's letter invited the applicant to comment on that information in writing in English by 21st December 2006.

[1] See Court Book pages 137 and 138

The applicant replied to that letter on the same day that it was sent, on 28th November 2006. In a brief reply he said:

> *What I mentioned at my initial application is correct. The reason why I could get my passport to leave China because I had paid large sum of money with special method to obtain my passport. I worry about my safety on my return to China. I hope to have protection from the Chinese government*[2].

5. The Tribunal signed its decision on what appears to be 4th January 2007, even though there is an obvious typographical error on the decision record, and handed that decision down on 25th January 2007. In that decision the Tribunal considered under the heading "Claims and Evidence" the material in the applicant's departmental file, his application for review, his evidence given at the earlier Tribunal hearing on 17th June 2005 and his evidence given at the later Tribunal hearing on 20th November 2006. The Tribunal also considered the letter forwarded to the applicant on 28th November 2006 and the applicant's reply.

6. The Tribunal's findings and reasons are set out on pages 155 to 157 of the Court Book. The Tribunal accepted that the applicant was a national of China and noted that the applicant had travelled to Australia on a Chinese passport. However, the Tribunal referred to the inconsistencies between the applicant's answer to question 40 on his application for a protection visa and his evidence to the Tribunal hearings on 17th June 2005 and 20th November 2006. The Tribunal noted that the applicant was only able to give limited details about his religion, about what was involved in practising this religion and about any political discussions that took place. The Tribunal described the applicant's description as being detained as "vague and lacking in detail".

7. The Tribunal made adverse comments about what it perceived as the applicant's lack of knowledge about his religion and being a member of an underground church, saying:

> *The Tribunal finds the applicant's lack of knowledge of what was involved in practicing his religion or being a member of an underground –*

[2] See Court Book page 139

I presume the word "church" has been inadvertently omitted –

> *to be highly inconsistent with his claim to have been involved for a significant period*[3].

8. The Tribunal took into account the applicant's claim that he had a low level of education, but even so was sceptical of his evidence because of the lack of detail provided either about religious matters or political matters. The Tribunal did not accept the applicant was detained for being a member of an underground church or for expressing political opinions. The Tribunal did not accept that the applicant had or was perceived to have had any association with an underground church or a religious organisation or had suffered serious harm in China as a result. The Tribunal did not accept that there was a real chance that the applicant would suffer any persecution in the reasonably foreseeable future and was not satisfied that he had a well-founded fear of persecution for a Convention reason if he were to return to China.

9. Accordingly, the Tribunal affirmed the decision not to grant the applicant a protection (Class XA) visa.

10. In his amended application the applicant sets out two grounds for seeking relief:

> *(1) The Tribunal's satisfaction that I am not a refugee was not based on a rational and logical foundation. There is not evidence and materials to support the decision. The decision was biased.*
>
> *(2) The Tribunal committed jurisdictional error by failing to give the applicant in accordance with S424A of the Migration Act 1958 (the "Act") notice in writing of particulars of information that formed part of the reasons for affirming the decision of the delegate.*

11. The application then refers to particulars provided on the following two pages. Those particulars relate entirely to a claim that the Tribunal failed to comply with the provisions of s.424A of the Migration Act. The two-page particulars are no more than a set of particulars that have been circulating for several years and come attached to many applications which find their way to this Court. They appear to have been adopted without any consideration of their suitability or

[3] See Court Book page 155

applicability and the same grammatical errors and factual errors in titles, dates and citations of cases have been faithfully reproduced. The two-page set of particulars in the amended application goes no further than to set out a summary of the matters provided in s.424A(1) of the Migration Act.

12. The applicant did not file any written outline of submissions, but I asked him a number of questions. He was asked why he made the claim in ground 1 that the Tribunal decision was biased, and his sole reply was that he personally felt so. He provided no clarification or explanation for that belief. He was asked about his claim that the Tribunal had failed to comply with s.424A of the Migration Act and I pointed out to him that the Court Book showed that the Tribunal had in fact written to him on 28th November and that he had replied. The applicant said that he did not recall receiving a copy of the letter.

13. For the respondent Minister, Mr Cleary of counsel, relied on the written outline of submissions and also drew the Court's attention to the decision of Madgwick J in *SZJSP v Minister for Immigration & Citizenship*[4]. The significance of that decision can be seen by reference to [28]-[30] where his Honour dealt with a default by the Tribunal in sending certain notification to the applicant that was described by his Honour as:

> *patently one of a mere clerical oversight rather than a studied misapplication of the law.*

14. In *SZJSP* Madgwick J found that the applicant had had adequate and due notice of the hearing and an unmistakably clear and adequate opportunity to attend before the Tribunal and to put his case and, as his Honour said, the applicant took up those opportunities.

15. Dealing with the applicant's claims, the first part of ground 1 relates to the claim that the Tribunal's satisfaction that he was not a refugee was not based on a rational and logical foundation. The question of irrationality and illogicality has been dealt with at length by the courts

[4] [2007] FCA 1925

and I set out a brief summary in *SZIBR v Minister for Immigration & Anor*[5]:

> *[41] The Full Court of the Federal Court has held that want of logic does not of itself constitute an error of law (NATC v Minister for Immigration & Multicultural & Indigenous Affairs*[6]*; see also M153/2004 & Ors v Minister for Immigration*[7]*).*
>
> *[42] In NACB v Minister for Immigration & Multicultural Affairs*[8]*the Full Court of the Federal Court held that there is nothing in the remarks of the High Court in S20 of 2002 that would warrant a departure from the earlier line of decisions in the Federal Court, that a logical reasoning does not in itself constitute an error of law or jurisdictional error (see also SZEEO v Minister for Immigration*[9]*; S635/2003 v Minister for Immigration & Multicultural & Indigenous Affairs*[10]*).*

16. Even if irrationality and illogicality were grounds for finding judicial review – and I am not satisfied that is the case – there is no evidence before me that the Tribunal decision was either irrational or illogical. The Tribunal did not accept the applicant's account based on the inadequacy of his explanation, the inconsistency of his evidence with his earlier claims and the vagueness and lack of detail in parts of his evidence. In my mind, it was open to the Tribunal to make those findings on the evidence before it.

17. The applicant also claims in ground 1 of his amended application that there was no evidence or material to support the Tribunal decision. This claim represents a misconception because there is no requirement on the Tribunal to provide evidence to disprove an applicant's claim for a visa. Quite the reverse is true. Under s.65 of the Act if the Tribunal standing in the shoes of the Minister is satisfied that the applicant meets the requirements for a visa, then the applicant must be awarded a visa. If, however, the Tribunal is not so satisfied, then the application will not be successful.

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[5] [2006] FMCA 1490 at [41]-[42]
[6] [2004] FCAFC 52
[7] [2006] FMCA 42
[8] [2003] FCAFC 235 at [29]-[30]
[9] [2005] FMCA 1177 at [13]-[14]
[10] [2004] FCA 1162 at [53]

18. In this case the evidence was not sufficient for the Tribunal to find itself satisfied. The applicant has also claimed that the Tribunal decision was biased. He provides no details in support of that assertion, let alone any evidence. He relies on nothing more than his statement that he personally felt so. There is nothing that I can discern in the Tribunal decision that would indicate any evidence of bias, either actual or apprehended. It is well-established that bias is a serious allegation which must be strictly alleged and proved (see S*BBS v Minister for Immigration & Multicultural & Indigenous Affairs* and *SBBS v Minister for Immigration & Multicultural Affairs*).

19. There is just no evidence of any bias whatsoever. The applicant's first ground fails.

20. The applicant's second ground alleges a breach of jurisdictional error by failing to comply with s.424A of the Migration Act. The fact is that the Tribunal did comply with s.424A in its letter of 28th November 2006 to which the applicant replied. The Tribunal considered in its decision both the letter and the reply. In my view, the Tribunal complied with s.424A of the Act. Nevertheless, I am mindful of the fact that the applicant is not legally represented. The Court must make an examination of the materials in order to satisfy itself that there is no arguable case for jurisdictional error. Quite properly, counsel for the Minister has drawn the Court's attention to certain discrepancies in the Tribunal's clerical procedures in writing to the applicant. First of all, the applicant on 13th September notified the Tribunal of a new address and despite acknowledging that change of address that same day, the Tribunal the following day wrote to the applicant at his old address. That letter was returned unclaimed about 21st September 2006.

21. In the meantime the Tribunal had received another notification of change of address with a new mailing address. The Tribunal wrote to the applicant at that address but left out a part of the number which was clearly the number of a mail receipt service in Elizabeth Street, Surry Hills, and had erroneously put an incorrect postcode, being postcode 2000, which is the postcode for Sydney, rather than 2010, which is the postcode for Surry Hills. That letter was returned unclaimed.

22. Proving that when something goes wrong in a matter that matters continue to go wrong, the Tribunal then wrote to the applicant again at

his old address in Pitt Street, Sydney. Not surprisingly, that letter was returned unclaimed. The applicant then submitted another change of address form, again advising a new address at a letterbox drop in Elizabeth Street, Surry Hills with the correct postcode. The Tribunal did better this time by noting the new address correctly, except for the postcode, which remained at 2000, the postcode for Sydney, rather than 2010, the postcode for Surry Hills. The Tribunal then on 28th September sent the applicant an invitation to a hearing at the new address in Surry Hills with the wrong postcode. The Tribunal on 4th October 2006 notified the applicant of a new hearing time and date and invited the applicant to the hearing on 20th November 2006 at the correct address with the wrong postcode.

23. However, it appears that Australia Post was able to rectify the Tribunal's error because the applicant replied on or about 6th October 2006 with a response to hearing invitation form. Even better, on 20th November 2006 the applicant attended the hearing and gave evidence. However, things did not go right with the Tribunal's system of notification. The s.424A letter of 28th November was also sent to the right address but the wrong postcode. Fortunately, however, the applicant responded by return of post and it appears that the applicant had replied by fax.

24. The Tribunal's history in this case of sending letters to the applicant's wrong address or an incorrect version of the applicant's correct address makes a sorry tale. As Mr Potts of counsel put in his submission, with a tone of exasperation which creeps in:

> *Even when the Tribunal got the substantive part of the address right, it continued to use the wrong postcode, using 2000 instead of 2010.*

25. Nevertheless, perhaps despite the Tribunal's efforts rather than because of them, it is quite clear that the applicant received the invitation to hearing because (a) he speedily sent a response to hearing invitation form and (b) attended the hearing and gave evidence. Whilst the s.424A letter suffered from a defect in the postcode, it appears, thanks no doubt to Australia Post, to have been correctly delivered because the applicant replied to it. It is submitted on behalf of the Minister that the Tribunal's errors in sending correspondence to the wrong addresses

were not jurisdictional errors as they ultimately had no effect on the Tribunal discharging substantive obligations, including complying with s.42A, s.425 and s.425A.

26. That submission, to my mind, is clearly correct both in law and at commonsense. The decision of Madgwick J in *SZJSP v Minister for Immigration & Citizenship*[11] clearly takes a similar approach in [28]-[30]. In that case where there is a somewhat similar error his Honour said at [29]:

> *To set aside the Tribunal's decision and require reconsideration of the appellant's claims de novo would be, in my opinion, to allow the triumph of mere technicality over substance and would be, as Lindgren J observed in Giretti 70 FCR at 165, to put the appellant in a better position than if the technical error had not occurred.*

27. In my view, this decision in *SZJSP* is clearly binding upon this Court. It is an appeal from a decision of a Federal Magistrate and it is clearly on point. In my view, having conducted my own independent investigation, the Tribunal has complied with s.425 and s.425A of the Migration Act. It has complied with s.424A. I am unable to discern any jurisdictional error. Accordingly, as there is no jurisdictional error, the Tribunal decision is a privative clause decision as defined by sub-s.474(2) of the Migration Act. As a privative clause decision it is final and conclusive, but is not subject to the orders in the nature of certiorari or mandamus that the applicant seeks. It follows, therefore, that the application must be dismissed.

28. The applicant has been unsuccessful in his claim. It is an appropriate matter for an order for costs to be made in favour of the Minister because the Minister has been successful. The Minister has been legally represented and has incurred legal costs in defending the applicant's claim. I propose to make an order that the applicant is to pay the first respondent's costs. The amount sought is $5,300.00. That amount is higher, but only slightly higher, than the amount set out in the Court scale. The explanation given by Mr Cleary of counsel and which is supported by the court record is that this matter has had more than the usual number of directions hearings. The application was

[11] [2007] FCA 1925

originally before a Registrar on 29th March 2007 and again before a Registrar on 29th June. It then came before me on 4th September 2007 and after some difficulties in obtaining an appropriate hearing date due to heavy court commitments, the application has been heard to finality today.

29. What can be said in respect of the matter is that despite the greater number of directions hearings, it has been filed, heard and completed within the calendar year. In my view, the sum of $5,300.00 is an appropriate figure for costs.

I certify that the preceding twenty-nine (29) paragraphs are a true copy of the reasons for judgment of Scarlett FM

Associate: S.Polley

Date: 18 January 2008