FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZLFX v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 451*

MIGRATION – Review of RRT decision – whether failure to provide applicant with particulars of information under s.424A *Migration Act 1958* (Cth) – whether information capable of being seen as undermining the applicant's claims – whether it could be inferred that the information was not considered by the Tribunal – whether Tribunal's determination of what a "committed Falun Gong practitioner" would do amounted to apprehended bias.

Migration Act 1958 (Cth), ss.422B, 424A, 430(1), 438

SZBYR v Minister for Immigration [2007] 235 ALR 609
NARI v Minister for Immigration [2005] FCA 186
Minister for Immigration v Yusuf (2001) 206 CLR 323
VEAL of 2002 v Minister for Immigration (2005) 225 CLR 88
Kioa v West (1985) 62 ALR 321
SZHXK v Minister for Immigration [2007] FCA 759
Gama v Qantas Airways Ltd (No 2) [2006] FMCA 1767
NADH of 2001 v Minister for Immigration [2004] FCAFC 328

Applicant:	SZLFX
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	SYG 2652 of 2007
Judgment of:	Raphael FM
Hearing date:	26 March 2008
Date of last submission:	26 March 2008
Delivered at:	Sydney
Delivered on:	11 April 2008

REPRESENTATION

Solicitors for the Applicant:	Christopher Levingston & Associates
Counsel for the Respondent:	Mr R Foreman
Solicitors for the Respondent:	Sparke Helmore

ORDERS

THE COURT DECLARES THAT

(1) The decision made by the Refugee Review Tribunal is void and of no effect.

THE COURT ORDERS THAT

(2) A writ of certiorari be directed to the Second Respondent removing its decision into this Court to be quashed.

(3) A writ of mandamus be directed to the Second Respondent to hear and determine the Applicant's application for review according to law.

(4) The First Respondent to pay the Applicant's costs assessed in the sum of $5,000.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2652 of 2007

SZLFX
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. In this application for a review of a decision of the Refugee Review Tribunal made on 30 July 2007 and handed down on 31 July 2007, the applicant's ground for considering he was a person to whom Australia owed protection obligations arose out of his adherence to the philosophy of Falun Gong. The applicant is a young man who came to Australia to study in 2002. In 2004 he was studying at UTS. His studies were not going well. His relationship with his girlfriend ended. He began to spend time in the Lidcombe library and he found a book on Falun Dafa which he read. He was living in Lidcombe at the time. He found that there was no group in Lidcombe so in early January 2005 he moved to Surry Hills, where he found a group practising in Belmore Park and joined them:

> *"Every morning I went to Belmore Park and practiced Falun Gong. The leader of the group was called Mr Li. The number of people varied. We did [not] give each other our complete names because most of us were from China and did not want to cause trouble for our families. We did not have contact outside of the time we practiced Falun Gong."* Para 9, applicant's statutory declaration [CB25].

The applicant's father came to visit him in early 2005. By that time he had failed two semesters of his university subjects. His father discovered that he was practising Falun Gong and forbade him to continue. His father told the applicant that if he kept practising Falun Gong he would not allow him to study in Australia or abroad any longer. The applicant quit practising Falun Gong, which he did during his third semester commencing in March 2005. He failed all his subjects at the end of that semester. He found that he was being ostracised by his fellow students because he was known as a Falun Gong practitioner. He resumed his practice in mid-2005. His father kept his word, and cut his son off financially. In August 2006 the applicant ran out of money, and began living rough in Belmore Park. In March 2007 he was discovered by the police living rough in Belmore Park and referred to the Immigration Department where he was placed into detention at Villawood. He practised Falun Gong at Belmore Park until he was taken into detention and claimed that he continued to practise in detention.

2. The Tribunal made findings about the applicant's personal circumstances [CB80-81]:

> *"The Tribunal accepts that the applicant's relationship with his girlfriend broke down in August 2004. The Tribunal accepts that after the applicant failed his university studies, that he had a lot of free time when he stopped attending university, and that as a result he spent much of that time in the library when it was open during the day. The Tribunal accepts that the applicant's father travelled to Australia for about 2 months at the beginning of 2005 when his father learned that the applicant was not coping with studies. The Tribunal accepts that the applicant's relationship with his family has come under strain because the applicant has not performed at university. The Tribunal accepts that from August 2006 until the time he was detained in March 2007, the applicant was living in Belmore Park."*

The Tribunal then went on to make its findings about the applicant's practice and belief in Falun Gong [CB81]:

> *"The applicant demonstrated that he knew about the significant events in the history of Falun Gong. He was also able to tell the tribunal about the guiding principles, the exercises, and explain what the* falun *is. On the basis of the knowledge he demonstrated at hearing, the Tribunal accepts that the applicant has read the* Zhuan Falun *and that he has made enquiries about and therefore attained knowledge about Falun Gong.*

Despite the applicant's theoretical knowledge about Falun Gong, the Tribunal is not satisfied that the applicant has practised Falun Gong as claimed or that he is a committed practitioner as claimed for the reasons set out below."

The Tribunal concluded that the applicant's evidence about his practice of Falun Gong was not consistent and it shifted. The Tribunal pointed out an inconsistency in the applicant's evidence when he told it first that he commenced practising Falun Gong in August 2004 and then had said that he commenced at the end of 2004. It then stated [CB81]:

"He also gave evidence that he stopped practising after his father found his material related to Falun Gong in January or February 2005, and that he did not resume his practice until August 2005. The applicant spoke about his practise from August 2006 when he started living in Belmore Park, and about his practice in detention, but he did not mention having practised between August 2005 and August 2006."

This statement may be correct in so far as the interview was concerned, but it seems to be at odds with paragraphs 14-15 of the applicant's statutory declaration at [CB25] where he says:

"I felt very stressed, and I couldn't make my heart quieten down. At the end of the semester I failed my exams. After that I went back to practicing Falun Gong in Belmore Park. I continued to practice Falun Gong there until I came to Villawood in March 2007.

In June 2005 my father found out that I had failed at the third semester. He rang and asked me whether I was learning Falun Gong. I did not deny it, because the first principle of Falun Gong is to tell the truth. I tried to explain to him, but he did not listen. He was very angry and our relationship was broken from that time. After that my father stopped supporting my study. I only had a little money left, so I applied for a leave of absence from UTS and continued to learn Falun Gong. "

The Tribunal gave other examples of the alleged shifting in the applicant's evidence and made conclusions about what a committed Falun Gong practitioner would have done. In particular, the Tribunal concluded that a committed Falun Gong practitioner in the applicant's position would not have stopped practising Falun Gong after his father left Australia and he was not living with any family or friends. The Tribunal went on to make certain findings concerning the applicant's knowledge of materials that his father had found, which he claimed to be photocopies of new lectures that Master Li had given. The Tribunal did not find it plausible that the applicant would not be able to recall anything about these lectures. The Tribunal then went on to make

certain findings about the applicant's practice of Falun Gong in detention and about a document that he had produced, signed by other Falun Gong practitioners at Villawood. The Tribunal had difficulties with accepting that the applicant would continue to practice privately and did not accept the reasons given for doing so by the applicant.

3. The grounds upon which the applicant submitted that the Tribunal fell into jurisdictional error in the way in which it came to its conclusions are set out in the amended application filed in court at the hearing. These are:

> **"1. The RRT failed to comply with s.424A of the Act**
>
> **Particulars**
>
> (i) The RRT failed to comply with s424A by failing to give the requisite notice in relation to the following information:
>
> (a) information contained in an RRT case note dated 14 June 2007.
>
> **2. There is apprehended bias in relation to the RRT**
>
> **Particulars**
>
> (i) There is an apprehension of bias because:
>
> (a) the RRT had a preconceived view of how a committed Falun Gong practitioner should behave; and
>
> (b) rejected claims that were inconsistent with that preconceived view."

4. The file note which is referred to is found at [CB54] and is reproduced below.

> *"**Case Note***
>
> ***Case Number:** [Number]* ***State Processed:** NSW*
>
> ***Primary Review Applicant:***
>
> *[Applicant's name]*
>
> ***Gender**: Male* ***DOB:** [Applicant's date of birth]*
>
> ***Case Note Info:***
>
> ***Date & Time:** 14/06/2007 09:04:00AM*

User: *[Name]*

Note Type: *Case Note*

Comments:

> *Spoke with Michael from Falun Dafa (Sydney and suburbs) who confirmed that Belmore Park in Sydney is a practice site for Falun Dafa. He is not aware of a Mr Li being the leader, he said that they do not have leaders, they have co-ordinators for various sites, and there are a few of them."*

It is important to note that this file note was produced immediately before the applicant attended the hearing. I believe it is safe to presume that the Tribunal intended to utilise its source "Michael" to assist it in making credibility findings on the story put by the applicant in his statutory declaration. Section 424A of the *Migration Act 1958* (Cth) ("the Act") is in the following form:

> (1) Subject to subsections (2A) and (3), the Tribunal must:
>
> > (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
> >
> > (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and
> >
> > (c) invite the applicant to comment on or respond to it.
>
> (2) The information and invitation must be given to the applicant:
>
> > (a) except where paragraph (b) applies--by one of the methods specified in section 441A; or
> >
> > (b) if the applicant is in immigration detention--by a method prescribed for the purposes of giving documents to such a person.
>
> (2A) The Tribunal is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 424AA.
>
> (3) This section does not apply to information:
>
> > (a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or

> (b) that the applicant gave for the purpose of the application for review; or
>
> (ba) that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department; or
>
> (c) that is non-disclosable information.

It is accepted by the applicant that the first sentence of the report is confirmatory of the applicant's claims. It can therefore not be a matter which could be a reasonable part of the reason for affirming the decision under review. The issue in these proceedings relates to the second sentence.

5. The respondent submits that the material about Mr Li was also not information that the Tribunal would consider to be a reasonable part of the reason for affirming the decision under review. It argued that in order for it to come within that class of information, it should constitute a rejection, denial or undermining of the applicant's claim to be owed protection obligations under the Convention: *SZBYR v Minister for Immigration* [2007] 235 ALR 609 at [17]. The respondent argues that the material was neutral and did not detract from the applicant's claim. In this particular case, the applicant's claim to Australia's protection arose out of his adherence to Falun Gong. If the applicant was a genuine Falun Gong practitioner the Tribunal would be required to assess whether or not he was likely to be persecuted if he should be *refouled* into China. The genuineness of his adherence to the sect was therefore a fundamental constituent of his claim. If the file note undermined the applicant's credibility, then it was a matter which fell within s.424A(1)(a). The respondent argues that the material was neutral because it did not constitute a denial of the existence of Mr Li, and that the statement that Falun Gong had co-ordinators rather than leaders, and that there were a few of them, was not a rejection of the applicant's statement, but a semantic distinction. The respondent argued in the alternative that it could be inferred by the absence of any specific findings by the RRT in relation to Mr Li that the matter was not material to its decision: *NARI v Minister for Immigration* [2005] FCA 186 at [37]; *Minister for Immigration v Yusuf* (2001) 206 CLR 323 at [10], [68]-[69], which the respondent submitted stood for the proposition that given the absence of any specific finding it can be

inferred that the matter was not material to the Tribunal's decision. The respondent argued that if this inference was accepted, then the case note would be of no more relevance than the "dob-in" letter in *VEAL of 2002 v Minister for Immigration* (2005) 225 CLR 88. At [12] the court stated:

> " …As for s.424A, it is enough to notice that that provision is directed to "information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review". The Tribunal said, in its reasons, that it did not act on the letter or the information it contained. That is reason enough to conclude that s.424A was not engaged."

The applicant argues that the views expressed by the High Court in *VEAL* have been somewhat modified by those more recently published in *SZBYR* at [17]:

> "Secondly, the appellants assumed, but did not demonstrate, that the statutory declaration "would be the reason, or a part of the reason, for affirming the decision that is under review". The statutory criterion does not, for example, turn on "the reasoning process of the Tribunal", or "the Tribunal's published reasons". The reason for affirming the decision that is under review is a matter that depends upon the criteria for the making of that decision in the first place. The Tribunal does not operate in a statutory vacuum, and its role is dependent upon the making of administrative decisions upon criteria to be found elsewhere in the Act. The use of the future conditional tense ("would be") rather than the indicative strongly suggests that the operation of s.424A(1)(a) is to be determined in advance – and independently – of the Tribunal's particular reasoning on the facts of the case. Here, the appropriate criterion was to be found in s.36(1) of the Act, being the provision under which the appellants sought their protection visa. The "reason, or a part of the reason, for affirming the decision that is under review" was therefore that the appellants were not persons to whom Australia owed protection obligations under the Convention. When viewed in that light, it is difficult to see why the relevant passages in the appellants' statutory declaration would itself be "information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review". Those portions of the statutory declaration did not contain in their terms a rejection, denial or undermining of the appellants' claims to be persons to whom Australia owed protection obligations. Indeed, if their contents were believed, they would, on might have thought, have been a relevant step towards rejecting, not affirming, the decision under review."

6. I am unable to be sanguine about the information as the respondent. I believe that it is capable of being seen as undermining the applicant's claims. The applicant said there was a leader called Mr Li. The gravamen of the report was that if there was a Mr Li, he wasn't the

leader. There may not have even been a Mr Li. In *VEAL*, the court made reference to the subconscious effect, initially discussed by Brennan J in *Kioa v West* (1985) 62 ALR 321 at 380:

> " … in the ordinary case where no problem of confidentiality arises, an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made. It is not sufficient for the repository of the power to endeavour to shut information of that kind out of his mind and to reach a decision without reference to it. Information of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information. He will neither be consoled nor assured to be told that the prejudicial information was left out of account."

The court in *VEAL* was anxious not to enlarge this concept and to keep it within one of relevant enquiry, which it concluded was "*what procedures should have been followed*": *VEAL* at [19]. I do not think that the discussion of the subconscious effect in *VEAL* is of much assistance as it related to the claim under s.438 *Migration Act 1958* (Cth) ("the Act") rather than under s.424A. In another "dob-in" letter case, *SZHXK v Minister for Immigration* [2007] FCA 759, Spender ACJ sitting on appeal from Turner FM upheld the Federal Magistrate's finding that where the Tribunal had specifically abjured the use of the dob-in letter, s.424A was not invoked. At [18] his Honour said:

> "In my judgment, the statement by the Tribunal that the letter played no part in its decision is not shown to be wrong. The consequence is that the information in the letter was not in fact "part of the reason" for its decision, so as to engage s.424A(1). The learned Federal Magistrate was entitled to conclude that this ground should be rejected. There was no breach of s.424A or a denial of procedural fairness generally in the way the Tribunal dealt with the 'dob-in'."

7. Given the restrictions on the natural justice hearing rule in migration matters enforced by the provisions of s.422B *Migration Act*, the provisions that do give an applicant a measure of procedural fairness are of critical importance. One of those provisions is s.424A(1). Having found that the second sentence of the report constitutes information which could undermine the applicant's claims, where there is no specific denial of the use of that information I would be reluctant to infer that from the failure to mention the report that it was not considered by the Tribunal.

The judgment of McHugh, Gummow and Hayne JJ in *Yusuf* refers to s.430(1), the section under which the Tribunal is obliged to prepare a written statement setting out the decision, the reasons for the decision, findings on any material questions of fact and refers to evidence on which those findings of fact were based. It was on this basis that their Honours said at [69]:

> "Understanding s 430 as obliging the Tribunal to set out what were its findings on the questions of fact it considered material gives the section important work to do in connection with judicial review of decisions of the Tribunal. It ensures that a person who is dissatisfied with the result at which the Tribunal has arrived can identify with certainty what reasons the Tribunal had for reaching its conclusion and what facts it considered material to the conclusion. Similarly, a court which is asked to review the decision is able to identify the Tribunal's reasons and the findings it made in reaching that conclusion. **The provision entitles a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material.** This may reveal some basis for judicial review … The Tribunal's identification of what it considered to be the material questions of fact may demonstrate that it took into account some irrelevant consideration or did not take into account some relevant consideration." [emphasis in bold added, emphasis in italics in original]

The respondent refers to *NARI v Minister for Immigration* [2005] FCA 186. In that case, the appellants' (husband and wife) claims were based on the husband's fear of persecution because of his membership of a particular social group, being his family. The appellant's father claimed to have been targeted by the Federal Security Service ("FSB") in Russia and the Tribunal accepted that the father had a genuine fear for his life. In the Tribunal's decision, reference was made to the fact that the Tribunal put to the appellant that he had delayed applying for a protection visa and that this "*cast doubt on whether he genuinely feared being persecuted if he went back to Russia now*": *NARI* at [33]. The appellant provided an explanation of the delay and the Tribunal in its decisions indicated that it had regard to the appellant's delay in deciding not to accept that the appellant had a genuine fear of being persecuted upon return. The explanation for the delay was rejected by the Tribunal, though no reasons were given. After referring to the above paragraph of *Yusuf*, Bennett J stated at [39]:

> "While no reasons were given for rejecting the appellant's explanation for the delay, it is implicit in the Tribunal's treatment of the delay that it either did not accept the

> explanation or that it did not find that the explanation sufficiently discounted negative inferences raised by the delay."

However, her Honour concluded (at [42]) that it could not be said that the delay was the sole reason for the Tribunal's conclusion, or the dominant reason. Thus, her Honour said, even if there were a failure to consider the explanation of the delay, it would not have amounted to jurisdictional error. This does not appear to indicate that her Honour drew an inference that the failure to mention the explanation meant that it was not considered by the Tribunal.

8. Inferences are not required to be drawn. They are a matter particularly in the discretion of the trial judge. In *Gama v Qantas Airways Ltd (No 2)* [2006] FMCA 1767 at [9] I said the following in relation to the drawing of inferences:

> "An inference will be a *'matter of conjecture'* where the circumstances give rise to "*conflicting inferences of equal probability": Richards Evans & Co Ltd v Astley* [1911] AC 674 as per Lord Robson at [687]. Lord Robson's comments were approved in *Luxton v Vines* (1952) 85 CLR 352, cited with approval by Muirhead J in [*Nominal Defendants v Owens* (1978-79) 22 ALR 128] at [132], where the plaintiff relied on inferences being drawn to establish both the circumstances and cause of his injury and the negligence which formed the substance of the complaint. The majority concluded that no inference could be drawn as the circumstances gave
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> > " … rise to nothing but conflicting conjectures of equal degrees of probability and no affirmative inference … can reasonably be made",
>
> given that for whatever explanation provided by the applicant for the accident,
>
> > " … reasons of equal sufficiency or insufficiency exist for other explanations."
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> *Luxton* has since been approved: see, for example, *Greater Taree City Council v Craig Michael Peck* [2002] NSWCA 331; *Squillacioti v Roads & Traffic Authority of New South Wales & Anor* [2002] NSWCA 133."

To determine whether the file note was or was not material to the Tribunal's decision would, in the absence of a specific finding, be a 'matter of conjecture'. The Tribunal accepted that the applicant lived in Belmore Park, but not that he was a Falun Gong practitioner. It may have been the case that the Tribunal's findings about what a Falun Gong practitioner would have done in the applicant's position meant that the information contained in the file note was not considered by the Tribunal. But it is not more probable than not that the failure to

mention the file note meant that it was rejected by the Tribunal. In the circumstances, I do not propose to draw the inference that the failure to mention the material about Mr Li meant that it was not material to the Tribunal's decision.

9. In these circumstances I am satisfied that the Tribunal fell into jurisdictional error by failing to comply with s.424A and giving the requisite notice in relation to the information contained in the RRT case note dated 14 June 2007, being the information that "Michael" from Falun Dafa was not aware of a Mr Li being the leader of the practitioners in Belmore Park and that those practitioners do not have leaders, they have co-ordinators at various sites and there are a few of them. Having come to this decision, it is not strictly necessary to deal with the second ground of the applicant's submission that there is apprehended bias in relation to the Tribunal but, for the sake of completeness, I propose to do so. The applicant submits that there is an apprehension of bias on the part of the RRT because the Tribunal had a pre-conceived view of how a committed Falun Gong practitioner should behave. In his helpful written submissions he cites three examples. The first is:

> "That a genuine practitioner would not need to be prompted to mention something this important as is practice with other practitioners [CB81]".

What the Tribunal actually said was [CB81]:

> *"The applicant did not mention participating in any of the classes at Belmore Park, which according to his evidence was why he moved from Lidcombe, until the Tribunal specifically asked whether he approached the mentor after class to ask questions or whether he practised with the group. The applicant then replied that he did from 10.30am to about 12pm and then they would all ask questions. The Tribunal does not find it plausible that a genuine practitioner would need to be prompted to mention something as important as his practice with other practitioners."*

I did not have the benefit of a transcript of the Tribunal hearing. I have to confess that I find the whole paragraph, from which the above comments are extracted, slightly confusing. It may well be that a proper analysis of what was said indicates that the applicant did make it clear to the Tribunal that he had practiced from Belmore Park from August 2005 to August 2006 without having been prompted to do so. But I do not read the extracted part as the Tribunal placing the

applicant within a template. I think that all the Tribunal is really saying is: "If the applicant is genuine, he would have told me about his practice during that time without having to be prompted". In order to decide whether there is a template, one must look at all the examples, both individually and collectively.

10. The second example is the Tribunal's statement at [CB82] that:

> *"The Tribunal does not accept that a committed Falun Gong practitioner would stop practicing entirely for an extended period, particularly in view of the fact that his father had returned to China …"*

The applicant had given an explanation for why he did not practise in the period from February 2005 to June or August 2005. For many people, the explanation would have been persuasive. It was that he had given his word to his father that he would not practise Falun Gong. The applicant argues that:

> "Besides the fact that it is hard to see how a period of four to six months could be considered to be an extended period, the RRT had a preconception that a committed Falun Gong practitioner would not stop practising for an extended period. That does not take into account the Applicant's personal circumstances, being the Applicant's dependence on his father to survive (in fact, after his father cut off funding in August 2005 the Applicant ultimately ended up homeless), the Applicant's desire to please his father and the Applicant becoming overloaded with stress. It would appear that the Applicant's failure to be as robust in the face of adversity compared with the RRT's committed Falun Gong practitioner meant that the Applicant's evidence was not given the consideration required by law."

I am of the view that the manner in which the comment is made by the Tribunal, whilst capable of being read as no more than a shorthand way of indicating that it did not accept that the applicant was a committed Falun Gong practitioner for the reasons given, when added to the earlier reference to "a committed Falun Gong practitioner", strengthens the case that such a person existed in the mind of the Tribunal.

11. The third reference referred to by the applicant is that found at [CB82] where the Tribunal says:

> *"The Tribunal does not accept that a committed practitioner, who is free to practice, would choose not to for the reasons given by the applicant."*

The applicant argues that this indicates a preconception on the part of the Tribunal as to how a committed or genuine Falun Gong practitioner would behave and the characteristics that such a practitioner should have. In holding this preconception, the Tribunal was unable to consider the applicant's actual psychological and physical situation. The applicant relied heavily on the views of the Full Bench in *NADH of 2001 v Minister for Immigration* [2004] FCAFC 328 to establish his argument of apprehended bias. I think there is much to distinguish this case and *NADH*. That case dealt with the makings of findings of implausibility where the Tribunal:

> " … reached these conclusions on one part only of a body of oral responses which otherwise contained an apparently succinct, knowledgeable, and at times apparently subtle, grasp of the Christian religion.": *NADH* at [112]

This is not such a case. The Tribunal dressed up its comments based upon the use of the words "a committed Falun Gong practitioner" in a similar way that the Tribunal dressed up its comments in *NADH* with the words "such a committed Catholic", but it is using the phrase to indicate that certain conduct does not appear to be consistent with commitment to the philosophy. The criticism of the Tribunal made in *NADH* is best expressed at [115]:

> "By and large fact-finding is a task within jurisdiction, though factual error is not necessarily mutually exclusive of jurisdictional error: *Re Minister for Immigration and Multicultural Affairs: Ex parte Applicant S 20/2002* (2003) 198 ALR 59. Where fact-finding has been conducted in a manner which can be described, as here, in substantial respects unreasoned, and mere assertion lacking rational or reasoned foundation, at times as plainly and *ex facie* wrong and as selective of material going one way, these considerations may found a conclusion that the posited fair-minded observer might, or indeed would, reasonably apprehend that the conclusions had been reached with a mind not open to persuasion and unable or unwilling to evaluate all the material fairly. How else, the fair-minded observer might ask, can one explain the largely unreasoned rejection of documents as vague, when they plainly were not, and as not saying the appellants were Catholics, when expressly or impliedly they did?; and how does one explain not dealing with answers which revealed an apparently detailed knowledge of the Christian religion and the Catholic faith, when a conclusion is drawn that persons are not Christian based on weighing some answers to questions of less than central importance? The answer to these questions might be that the Tribunal lacked an appreciation of the need to weigh all the material. If that were the case it would itself support a conclusion of jurisdictional error. The answer might also be the lack of an ability or willingness to deal with the material before it with a mind open to persuasion fairly evaluating all the material."

Whilst it is not necessary in every case in which apprehended bias might be found that the criticisms of the Tribunal should be as serious as those expressed above, I am of the view that something more is required than what has occurred in this case. Whilst I think the use of the term "a committed Falun Gong practitioner" lays the Tribunal open to the criticism that it may have a template in mind, I would not go so far as to say that the applicant's explanations for his conduct were not considered at all because they did not fit into the template. I think that this is the case even taking the three examples cumulatively. In my opinion what the Tribunal is in reality saying is that it is not satisfied that the applicant is a genuine Falun Gong practitioner for the reasons given. To the extent that these reasons may be mistaken, they are mistakes of fact and while

> "factual error is not necessarily mutually exclusive of jurisdictional error: *Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59": *NADH* at [115],

I am unable to say that any factual errors that the Tribunal may have made (and they appear to amount to a rejection of the applicant's explanations) cross the line that is settled by the authorities.

12. In light of my earlier findings in relation to the s.424A complaint by the applicant, I would grant the applicant the constitutional writs sought and order that the respondent pay the applicant's costs which I assess in the sum of $5,000.

I certify that the preceding twelve (12) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate:

Date: 11 April 2008