FEDERAL COURT OF AUSTRALIA

SZKHD v Minister for Immigration and Citizenship [2008] FCA 112

SZKHD v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL
NSD1868 OF 2007

COLLIER J
19 FEBRUARY 2008
BRISBANE (HEARD IN SYDNEY)

NO QUESTION OF PRINCIPLE

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY **NSD1868 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZKHD** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**COLLIER J**
DATE OF ORDER:	**19 FEBRUARY 2008**
WHERE MADE:	**BRISBANE (HEARD IN SYDNEY)**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The decision of the Tribunal dated 14 December 2006 be quashed.
3. The matter be remitted to the Tribunal to be determined according to law.
4. The first respondent to bear the costs of the appellant, if any, to be taxed if not otherwise agreed.

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

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PLACE:	**BRISBANE (HEARD IN SYDNEY)**

REASONS FOR JUDGMENT

1 This is an appeal from the decision of Driver FM dated 24 August 2007, dismissing an application seeking judicial review of a decision of the second respondent ("the Tribunal"). The Tribunal had affirmed a decision of the delegate of the first respondent to refuse to grant a protection visa to the appellant.

2 The appellant seeks the following orders:

1. The appeal be allowed.
2. The decision of the Tribunal dated 14 December 2006 be quashed.
3. The matter be remitted to the Tribunal to be determined according to law.
4. Costs.

Background

3 The appellant is a citizen of the People's Republic of China who arrived in Australia on 29 June 2006. On 3 July 2006 the appellant lodged an application for a protection visa with the Department of Immigration and Multicultural Affairs (as it was then known). A delegate of the first respondent refused the application for a protection visa on 28 July 2006.

On 8 August 2006 the appellant applied to the Tribunal for a review of that decision.

4 The appellant claimed to have well-founded fear of persecution for her practice of Falun Gong and her membership of the Falun Gong Shanghai secret organisation to support Falun Gong practitioners. She claimed to have became a Falun Gong practitioner in 1997 and was a Falun Gong activist in her area. In 2000, after a sit-in demonstration, the appellant was secretly arrested by Chinese National secret agents and sent to a Shanghai female labour camp where she was interrogated and tortured; she was later transferred to the Shanghai Female prison. After her release in 2003, she was active in North China in supporting Falun Gong activities. In 2006 she showed evidence of the Chinese government's treatment of Falun Gong to Falun Gong members in Malaysia and Singapore, such as the government's organ harvesting activities. She claimed to have escorted Falun Gong members from North China to travel to Malaysia. She claimed that the police were searching for her because they knew she had lied to them in order to be released and that she had continued membership of the organisation.

5 The appellant claimed that since her arrival in Australia she has contacted Falun Gong practitioners in Australia and was involved in activities in Australia. She claimed to have participated in a Falun Gong practice group and handed out flyers in public. The appellant also claimed she wrote a declaration quitting the Communist party and that it had been published on the internet.

Application for review to the Tribunal

6 The appellant attended two hearings before the Tribunal to give oral evidence and provided the Tribunal with various documents. On 28 August 2006 she submitted to the Tribunal a report by a psychologist to the Red Cross in relation to subsidised accommodation/living expenses. The report diagnosed her as: "Axis I: Major Depressive Disorder, Severe with Suicidal Ideation" and "Axis IV: Exposure to persecution, loss of a daughter, negative life events/incarceration, economic problems". It gave a recommendation the appellant have a social worker or support person with her at the Tribunal hearing of 25 September 2006. The appellant did attend the hearing with a Red Cross worker in attendance. On 25 October 2006 the appellant provided a letter from a witness in Australia in support of her Falun Gong activities in Australia.

7 The Tribunal accepted that the treatment of some people involved in Falun Gong in China would involve serious harm and accepted the appellant had studied Falun Gong. However, it did not accept the appellant held, "a genuine belief in, or commitment to, Falun Gong beliefs and practises". It considered the material claims raised and gave findings on each of these claims in support of its conclusion that she was not a genuine Falun Gong practitioner.

8 The Tribunal was not satisfied as to the claimed arrest, detention, and the appellant's activities in Singapore and Malaysia. It found the appellant could only give a generalised account of the demonstration in 1999 which she claimed led to her arrest. The Tribunal was not satisfied the appellant was involved in, or that she was detained as a result of, those activities. Further, the Tribunal found her account of the arrest and release was inconsistent, vague and implausible. The Tribunal was not satisfied the court document produced by the appellant was evidence of her arrest in light of country information and the appellant's claim that the arrest was secret. The Tribunal found it implausible that the appellant would have placed herself at further risk after her release by escorting the Falun Gong activists out of China. The Tribunal found it implausible the appellant failed at the first hearing to mention she handed out pamphlets regarding organ harvesting in Kuala Lumpur when it was such a high profile activity. It also did not find plausible she would have been involved in such an activity immediately prior to an imminent return to China. The Tribunal was not satisfied the appellant would have been able to travel unquestioned around China. Furthermore, the appellant did not seek protection in Malaysia or Singapore whilst there.

9 The Tribunal accepted that the appellant participated in Falun Gong activities in Australia and that she gave the impression to her co-practitioners she was a committed practitioner. Consequently, the Tribunal placed little weight on the statements by other practitioners in support of her claims. The Tribunal did not accept that the photographs of the appellant at demonstrations had been published and that her declaration to quit the Community party would bring her adverse interest by the authorities. The Tribunal was of the view the appellant engaged in activities in Australia to strengthen her claims and disregarded the conduct under s 91R(3) of the *Migration Act 1958* (Cth) ("the Act").

10 In relation to the appellant's mental health issues, the Tribunal stated:

> "The Tribunal is mindful of the applicant's mental health issues and does not question the conclusions of the treating psychologist."

11 It also noted that it endeavoured to give her the opportunity to put her case, and was aware of minor inconsistencies in her claims but had not placed any weight on them.

12 The Tribunal concluded it was not satisfied the appellant was a Falun Gong practitioner. It was not satisfied that she had suffered past persecution or that she faced a real chance of being persecuted if she returned to China for a Convention related reason. The Tribunal affirmed the delegate's decision to refuse grant of the visa.

Application for judicial review before the Federal Magistrate

13 By application filed on 6 February 2007 in the Federal Magistrates Court the appellant sought judicial review of the Tribunal's decision. A further amended application was filed on 23 July 2007 which asserted two grounds: that the Tribunal overlooked the fact the psychological report corroborated her claims that she had been detained for three years, and that the Tribunal erred in makings its finding under s 91R(3) of the *Migration Act 1958* (Cth) ("the Act").

14 In order to discern the meaning of "conclusions" by the Tribunal on the medical report, the Federal Magistrate considered the contents of the psychologists report as follows:

> "[15] A difficulty is that the report does not contain anything clearly identified as 'conclusions'. The first page of the report is simply introduction and the second page deals with the applicant's presentation and history. The third page is in part a completion of that history and is followed by what are described as 'diagnostic formulations' and recommendations. The Tribunal's reference to 'conclusions' could have been a reference to either the 'diagnostic formulations' or the recommendations. It is unlikely to have been a reference to the recommendations because those were outside the scope of the Tribunal's function. The diagnostic formulations were:
>
> > Axis I 296.3 Major Depressive Disorder, Severe With Suicidal Ideation
> >
> > Axis IV: Exposure to persecution, loss of a daughter, negative life events/incarceration, economic problems
>
> [16] The first statement is a statement of opinion as to what the applicant's mental condition was. The second statement is an expression of opinion as to

> the cause of that condition. It is unfortunate that the Tribunal was not more specific in stating what it was accepting. If the Tribunal was accepting the opinion as to the condition without the opinion as to the cause of the condition, it should have said so. It did not. At CB 107 the Tribunal found that the applicant's account of her arrest, release and the payment of bribes by her parents to be 'inconsistent, vague and implausible'. The Tribunal was not satisfied that the applicant was a Falun Gong practitioner at all or that she was imputed with such practice in China in the past. The Tribunal was not satisfied that the applicant suffered past persecution. It would be wholly inconsistent with that finding for the Tribunal to have accepted the psychologist's opinion that the applicant had a mental condition caused by persecution. In these unsatisfactory circumstances, I am left to infer that the Tribunal only intended to accept the psychologist's opinion as to the applicant's mental condition, not the cause of it. The opposite conclusion would render the decision absurd and irrational."

15 Accordingly his Honour found, with some hesitation, that the appellant had not established that the Tribunal overlooked the conclusions of the consultant psychologist's report.

16 The Federal Magistrate was of the view the second ground did not sustain jurisdictional error for the following reason:

> "[18] I also agree with the Minister's submissions concerning the challenge to the Tribunal's decision in relation to s.91R(3) of the Migration Act. I have previously found that this section imposes an imperative duty on the Tribunal to disregard conduct engaged in Australia where advanced by an applicant in order to enhance protection visa claims. While, in theory, the Tribunal might not be required to disregard conduct in Australia where there are multiple motivations for it, only one of which is a desire to enhance protection visa claims, one cannot draw from this Tribunal decision any recognition of multiple motivations for that conduct. At CB 109 the Tribunal goes through a course of consideration of the applicant's conduct as a necessary step before concluding that she had engaged in that conduct in order to strengthen her claim for refugee status. I do not draw from that consideration any suggestion that there was any alternative motivation for the conduct. I reject the contention that there was any obligation on the Tribunal to look for alternative motivations.
> 19] The second complaint in relation to the Tribunal's application of s 91R(3) seeks to draw support from my recent decision in *SZGYT v Minister for Immigration & Anor* [2007] FMCA 883. This case is distinguishable. In *SZGYT* it was apparent from the terms of the Tribunal decision that the Tribunal had directed its attention to the commencement of the applicant's conduct in Australia, rather than the entire period of that conduct. There is nothing on the face of this decision to indicate that the Tribunal fell into that error. Likewise, the Tribunal was in no doubt in its conclusion. I agree with

the Minister's submissions that there was no misconstruction of s 91R(3)."

17 The Federal Magistrate distinguished this case from *SZGYT v Minister for Immigration* [2007] FMCA 883 where the Tribunal limited itself to the commencement of the conduct in Australia rather than the entire period of the conduct. His Honour found there was nothing on the face of the decision in this case to indicate such an error.

18 As his Honour found the appellant had failed to establish jurisdictional error by the Tribunal, the application was dismissed.

Appeal to this Court

19 The notice of appeal filed in this Court on 14 September 2007 included the following grounds of appeal:

> 1. "The appellant contended in the Federal Magistrates Court that, in relation to a psychological report which she provided to the Tribunal, the report corroborated the appellant's claims that she was detained for three years between 2000 and 2003, the Tribunal overlooked the report in the course of finding that 'the appellant was [not] in fact detained and imprisoned for three years as claimed' and, on this basis, the Tribunal fell into jurisdictional error. Federal Magistrate Driver (at paragraphs 16 and 17) rejected this ground of review. His Honour erred in making this finding. The Tribunal overlooked the psychological report submitted by the appellant; and
> 2. The appellant contended in the Federal Magistrates Court that the Tribunal fell into jurisdictional error in making its findings under s 91R(3) of the Migration Act. Federal Magistrate Driver (at paragraphs 18 and 19) rejected this ground of review. His Honour erred in making this finding."

20 These grounds reiterate grounds raised before his Honour.

21 (In addition I note that an affidavit was filed on 14 September 2007 by the appellant in which she indicated that she wished to apply for leave to appeal from the decision of his Honour. I note that this affidavit was unnecessary, as the appellant's notice of appeal from his Honour's decision was filed within 21 days as required by O 52 r 15(1) *Federal Court Rules*.)

22 At the hearing of the appeal before me the appellant restated the key facts as claimed before the Tribunal and the Federal Magistrates Court, including that she had been

imprisoned for three years and tortured both physically and mentally because of her involvement in Falun Gong. Other than this, she did not make any submissions in support of the grounds raised in her appeal.

First Ground of Appeal

23 The psychological report to which the appellant makes reference in her first ground of appeal is in evidence before me. In this report the consultant psychologist, under the heading "Background History" makes reference to the incarceration of the appellant in jail and an Education Centre.

24 In relation to this ground of appeal, Ms Clegg for the first respondent submitted in summary that:

- the Tribunal did no more than accept that the consultant psychologist, in her report, identified the appellant as having a recognised mental health issue
- the report was only corroborative of the fact that the appellant suffered from a recognised mental health issue. The underlying cause of that issue is not established by the report as it merely recites what the appellant had informed the psychologist. The Tribunal's statement must be read in light of the preceding discussion in the Tribunal's decision where it was clear that the Tribunal did not believe the appellant's claims
- it cannot be said that the Tribunal implicitly accepted the facts as told to the psychologist.

25 The Tribunal's consideration of the appellant's claims is detailed, extending over some twenty-one pages. Under the heading "Arrest and detention" the Tribunal considered the appellant's claims as to her secret arrest and detention, and the document purporting to be evidence of the appellant's incarceration, and found specifically that it was not satisfied that the appellant was in fact detained and imprisoned for three years as claimed.

26 However, the Tribunal does, contrary to the submissions of the first respondent, seem to accept the contents of the report of the consultant psychologist. In particular under the heading "Other relevant considerations", the Tribunal states as follows:

> "The Tribunal is mindful of the applicant's mental health issues *and does not question the conclusions of the treating psychologist*. In this respect the Tribunal endeavoured to give the applicant every opportunity to put her case including facilitating two separate hearings at substantial intervals in order to provide the applicant with the opportunity to get the benefit of counselling as well as putting all adverse information to her after the second and final hearing in writing. The Tribunal is also aware that there are a great many minor inconsistencies in the applicant's evidence at both hearings and in her written statements and responses. The Tribunal has not placed any weight on these inconsistencies." (emphasis added)

27 While the Tribunal was clearly at pains to fairly consider the claims of the appellant and the evidence before it, I consider that the first ground of appeal of the appellant in this case has substance. The reasons I form this view are as follows:

- I agree with his Honour's view expressed at [14] that the consultant psychologist's report was plainly relevant material of some substance which the Tribunal needed to take into account
- the extent to which the Tribunal took the report into account is, with respect, at best uncertain. In stating that it did not question the conclusions of the consultant psychologist, it naturally follows that the Tribunal accepts such conclusions of the consultant psychologist as appear from her report
- as observed by his Honour, the "conclusions" of the consultant psychologist were most likely in relation to the diagnostic formulations to which I have referred earlier in this judgment
- however, it is clear from a plain reading of the report of the consultant psychologist that her diagnostic formulations were inextricably linked with her acceptance of the factual claims of the appellant concerning the appellant's alleged incarceration in China. This is plain from a consideration of the report as a whole, and even clearer from Diagnostic Formulation Axis IV on p 3 of the consultant psychologist's report which the consultant psychologist explains as the condition afflicting the appellant because of, *inter alia*, her "negative life events/incarceration"
- as his Honour observed at [16]:

  > "It is unfortunate that the Tribunal was not more specific in stating what it was accepting. If the Tribunal was accepting the opinion as to the condition without the opinion as to the cause of the condition, it

should have said so. It did not."

- while one interpretation of the view taken by the Tribunal of the psychologist's report is that the Tribunal accepted the consultant psychologist's diagnostic formulations but rejected the factual basis of those formulations (as submitted by the first respondent in the case before me), this arguably makes a nonsense of the consultant psychologist's report, and is an interpretation by the Tribunal which should not be accepted in the absence of clear indication by the Tribunal. Such clear indication is not apparent here. With respect, an equally likely interpretation of the Tribunal's findings in relation to the consultant psychologist's report is that the Tribunal did not, in fact, take into account the consultant psychologist's report in any meaningful sense

- in my view the submission of the first respondent is that the Tribunal did no more than accept that the consultant psychologist identified the appellant as having a recognised mental health issues strains the limits of subtlety and is not clearly supported by the Tribunal's decision in this case.

28 His Honour's concern as to the finding of the Tribunal in relation to this issue is patent from the terms of the judgment, in particular his Honour's expressed hesitation in reaching his conclusion at [16]. In my opinion, justice to the appellant warrants that the consultant psychologist's report before the Tribunal be given proper consideration by the Tribunal. This was not done in this case. Accordingly, in my view the appellant's first ground of appeal is substantiated.

Second Ground of Appeal

29 Section 91R(3) of the Act provides:

> (3) For the purposes of the application of this Act and the regulations to a particular person:
>
> (a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;
>
> disregard any conduct engaged in by the person in Australia unless:
>
> (b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's

> claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.

30 In relation to the appellant's activities in Australia since she arrived in this country, the Tribunal made the following finding:

> "The Tribunal has formed the view that the applicant engaged in activities in Australia in order to strengthen her claim for refugee status and she has no real commitment at all to Falun Gong. As the Tribunal is not satisfied that the applicant's conduct was otherwise than for the purpose of strengthening her claim to be a refugee under the Refugees Convention it must disregard her conduct in Australia as required by section 91R(3) of the Act."

31 I have already restated the findings at [18] and [19]of his Honour's judgment with respect to s 91R(3). Section 91R(3) clearly places the onus of proof on the appellant, to the civil standard, to establish that her activities in Australia were engaged in for reasons other than for the purpose of strengthening her refugee claims (*NBKT v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 195 at [89]). Further, findings by the Tribunal as to whether the appellant had engaged in activities for the purpose contemplated by s 91R are clearly findings of fact for the Tribunal.

32 In my view, no error has been demonstrated in his Honour's reasoning in relation to the Tribunal's construction and application of s 91R(3) to the facts of this case. Accordingly, the second ground of appeal fails.

Conclusions

33 As I have found for the appellant on her first ground of appeal, it follows that the appeal is allowed.

34 No submissions were made by the appellant as to costs, but it follows that the first respondent should bear the costs of the appellant, if any, to be taxed if not otherwise agreed.

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The decision of the Tribunal dated 14 December 2006 be quashed.
3. The matter be remitted to the Tribunal to be determined according to law.
4. The first respondent to bear the costs of the appellant, if any, to be taxed if not otherwise agreed.

I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier.

Associate:

Dated: 20 February 2008

Counsel for the Appellant:	The appellant appeared in person
Counsel for the Respondent:	L Clegg
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	19 February 2008
Date of Judgment:	20 February 2008