FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZLHA v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 143

MIGRATION – Visa – protection visa – Refugee Review Tribunal – application for review of RRT decision affirming a decision of a delegate of the Minister refusing to grant a protection visa – applicant a citizen of China claiming a fear of persecution as a Falun Gong practitioner – no reviewable error.

Migration Act 1958 (Cth), ss.91R, 424A, 474

SZJAA v Minister for Immigration & Citizenship [2007] FMCA 164 followed
SZKSY v Minister for Immigration & Citizenship [2007] FMCA 1504 followed

Applicant:	SZLHA
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2770 of 2007
Judgment of:	Scarlett FM
Hearing date:	4 February 2008
Date of Last Submission:	4 February 2008
Delivered at:	Sydney
Delivered on:	4 February 2008

REPRESENTATION

Applicant:	In Person
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) The Application is dismissed.

(2) The Applicant is to pay the First Respondent's costs fixed in the sum of $3,700.00 and I allow six (6) months to pay.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2770 of 2007

SZLHA
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(Revised from transcript)

1. The applicant is a citizen of the Peoples Republic of China. She asks the Court to conduct a judicial review of a decision of the Refugee Review Tribunal which affirmed the decision of a delegate of the Minister for Immigration not to grant her a protection of (Class XA) visa. The decision was signed on 25 July 2007 and handed down on 14 August.

2. The applicant claims that the decision involved an error of law on the ground that the Tribunal did not carefully consider the information which was in favour of the applicants. There was no evidence or other materials to justify the making of the decision. In her application she sets out what are described as grounds but are in effect particulars of the grounds upon which she relies.

3. Briefly, she says that:

   a) if she returns to China her country of origin she would be at risk of suffering persecution within the meaning of the Convention relating to the status of refugees;

   b) that the member of the Tribunal failed to understand her claims and failed to consider relevant matters;

   c) that the Tribunal failed to comply with its obligations under s.424A of the Migration Act;

   d) that the Tribunal failed to grant her a visa without any proper grounds or any proper investigation;

   e) she seeks protection fro the Australian government because she fears that will be gaoled if she returns to the Peoples Republic of China; and

   f) the Tribunal's decision is illogical.

4. The lawyers for the Minister for Immigration & Citizenship have filed a response in which they oppose the orders that the applicant seeks. Their response in summary says;

   a) that the application for judicial review does not establish any jurisdictional error in the Tribunal's decision; and

   b) the applicant invites the Court to undertake a review of the merits of the Tribunal's decision but fact finding about the merits of the applicant's case is not part of the function of the Court.

5. The background to this matter is that the applicant arrived in Australia on 23 November 2006. She applied for a protection (Class XA) visa on 30 January 2007. A delegate of the Minister for Immigration refused to grant a visa on 24 February 2007 and so the applicant applied to the Refugee Review Tribunal on 6 March.

6. The Tribunal wrote to the applicant and invited her to attend a hearing. The applicant attended that hearing which took place on 16 April 2007. The applicant gave evidence at the hearing with the assistance of an interpreter and the Tribunal summarised her evidence in the Tribunal

decision record. Basically, the substance of the applicant's claim is that she fears persecution and arrest and detention if she returns to China because she is a practitioner of Falun Gong. She claims to have commenced the practice of Falun Gong on the recommendation of a friend in 1996. From 1999 she and her friends practised Falun Gong in secret at home because the Chinese government have cracked down on Falun Gong practitioners.

7. In her application for a visa the applicant said that on 3 January 2005 she and the friend were apprehended and taken to a detention centre in Hedong. In the detention centre the applicant was beaten, was abused and was forced to write promises that she would not practice Falun Gong. She was warned that she could be imprisoned and severely punished. After 10 days her family were required to pay a significant sum of money and the applicant was later released. However, she had to report to the police every week for a period of six months. She also was expelled from the factory where she worked and she lost her age permit pension.

8. The applicant did recover her health after her detention and sets out that she and her friends met together to practice Falun Gong at home and in secret. However, on 8 January 2006 the applicant's friend was arrested for the practice of Falun Gong and the mother of that friend rang the applicant and advised her to hide for her own safety. She went to a relative's place and later found out that the police had come looking for her on a couple of occasions.

9. Eventually it was suggested to her that she should leave China and seek asylum overseas and she was able to apply for a passport with the assistance of other people and she approached a travel agency. She left China and travelled to Singapore and to Malaysia on 17 July 2006. She said she tried to apply for protection there but was told that Falun Gong practitioners were not accepted. On 25 July 2006 the applicant returned to China and with the aid of her relatives attempted to obtain a visa to enter Australia. The applicant was granted a short term business visa in November 2006 and arrived in Australia on 23 November 2006 and in due course applied for a protection visa in January 2007.

10. The Tribunal handed down its decision on 14 August 2007 and a copy of the Tribunal decision record can be found in the Court book at pages

97 through to 118. In that decision the Tribunal sets out the relevant law and sets out under the heading "Claims and Evidence" first a summary of the applicant's claims from her application for a visa, second the contents of a letter that the Tribunal wrote to the applicant on 15 May 2007, third a summary of a letter that the applicant provided to the Tribunal on 10 July 2007, fourth an extract of independent country information about relevant matters.

11. The independent country information deals with these issues:

(1) The treatment of Falun Gong practitioners in China.

(2) The belief and practice from Falun Gong taken from the Australian Falun Gong web site.

(3) Information about the likelihood of people wanted by the PSB or subject to an arrest warrant being detained if the attempt to depart from China.

12. The Tribunal's findings and reasons are set out on pages 113 through to 118 in the Court book. The Tribunal accepted that the applicant is a citizen of the Peoples Republic of China based on the passport that the applicant provided at the hearing. The Tribunal noted that the applicant claimed to fear persecution in China because she was a Falun Gong practitioner and was satisfied that the applicant had a degree of knowledge of Falun Gong and that since her arrival in Australia the applicant has attended Falun Gong practice and has attended various protests against the Chinese Communist Party in the context of being a Falun Gong practitioner.

13. The Tribunal accepted that the photographs provided showing that the applicant was involved in protests were in fact genuine photos; however the Tribunal did not accept that the applicant was telling the truth about being a Falun Gong practitioner in China or that she is a genuine Falun Gong practitioner here in Australia. The Tribunal explained that this view flowed from the Tribunal's findings about her credibility.

14. The Tribunal then sets out on pages 114 through to 117 the reasons why it did not accept that the applicant was credible in relation to her claims of having practiced Falun Gong in China. The Tribunal noted

the applicant's history of attending Falun Gong practice in Australia and attending protests and demonstrations against the Chinese Community Party but finds that this was done solely for the purpose of assisting her claim for refugee status in Australia, and the Tribunal referred to the provisions of s.91R of the Migration Act.

15. Because the Tribunal found itself obliged to disregard the applicant's conduct in Australia the Tribunal was not satisfied that the applicant would have a well founded fear of persecution if she were to return to China for a Convention reason. The Tribunal affirmed the decision not to grant the applicant a protection visa.

16. The applicant commenced proceedings in this Court on 10 September by filing an application and an affidavit in support. She has set out, as I indicated earlier, a claim of an error of law and has set out six particulars which I shall look at in some detail. The applicant attended Court on the hearing of this matter on 31 January 2007. She told the Court that the Tribunal member was biased against her and she did not know why the Tribunal drew the conclusions against her under s.91R that she had practised Falun Gong only to strengthen her refugee claims.

17. She complained that the Tribunal had her erroneously made a negative finding about her credibility and said that her arguments were based on the principal of natural justice. When asked to explain what she meant by natural justice she said that she had practised Falun Gong in Australia but she started to practise in China. If she was not persecuted to some extent she would not have escaped from China and felt that the Tribunal member had erroneously arrived at the conclusion that the applicant did not practise Falun Gong.

18. When asked to explain her claim of illogicality the applicant thought that the Tribunal member had concentrated on details in her file in an application for a business visa rather than on her refugee claims and felt that that was not logical. The applicant was of a view that the decision made by the Tribunal was not fair. She reiterated that she would be persecuted if she were obliged to return to her home country.

19. The applicant's application sets out, as I said, six particulars a) through to f). The first is no more than a claim that the applicant is a citizen of

China and if she were obliged to return to her country she would be at risk of suffering persecution. Particular a) is in fact a reiteration of the applicant's factual claim. b) is an assertion that the Tribunal failed to understand her claims and failed to consider relevant matters. The words, 'Further particulars to be provided' appear on the application but no further particulars of any claim under this heading have been provided.

20. The applicant's claim of failure to understand her claim by the Tribunal and a failure to consider relevant matters hinged very much on the applicant's claim that the Tribunal was biased against her and did not consider her evidence in a favourable way. The applicant was not able to point to any particular part of her claim that had not been considered or any particular misunderstanding.

21. Turning to the claim in particular c) that the Tribunal failed to comply with its obligations under s.424A of the Migration Act, the applicant was unable to provide any answer although she told the Court that she had prepared the application herself and someone had just translated it from Chinese into English for her. There is so far as I can see no basis for finding that there is a breach of s.424A of the Migration Act. The basic reason why the Tribunal refused the applicant's claim was its findings as to her credibility and credibility findings are findings of fact and there was evidence upon which the Tribunal was able to make those findings.

22. True it is that the Tribunal considered matters in the applicant's business visa file and compared those matters with the applicant's claims for a protection visa and the Tribunal noted certain discrepancies. However, the Tribunal when dealing with that information complied with s.424A(1) by writing to the applicant on 15 May 2007 in a letter headed, 'Invitation to comment on information' and set out those details. The letter indicated to the applicant what the significance of those details were and warned her that the Tribunal may find that parts of her evidence about the applicant's evidence were untruthful and that this might cause the Tribunal to doubt her truthfulness in relation to other parts of her evidence which might then lead the Tribunal to conclude that the

applicant did not have a well founded fear of persecution should she return to China in the near future.

23. The applicant was invited to comment on that information in writing in English by 7 June 2007. The applicant did comment in writing by means of a letter on 10 July 2007 in which she set out further claims and enclosed a further document which she had prepared which was translated into English.

24. In my view, as far as that information is concerned the Tribunal complied with s.424A of the Migration Act. True it is that the Tribunal relied on independent country information but that is information that comes within the exceptions set out in s.424A(3) of the Migration Act. I am not of a belief that the applicant has shown any breach of the Tribunal's obligations under s.424A of the Migration Act.

25. The applicant claimed that the Tribunal refused to grant her a visa without any proper grounds or proper investigation. This submission is misconceived for two reasons. First, it is incumbent upon an applicant for a visa to satisfy the Minister or the Tribunal that the applicant is entitled to the visa. In this case if the Tribunal is not satisfied then the visa then the visa cannot be granted. It is not an obligation on the Tribunal to provide evidence to disprove an application. Similarly, there is no obligation on the Tribunal to conduct its own investigation of an applicant's claims. Sections 424 and 427 of the Migration Act give the Tribunal certain powers to make further inquiries but impose no obligation on the Tribunal to do so.

26. The fifth particular contained a hope that the government in Australia would protect the applicant and set out her fear that she would be gaoled if she returned to China. That is of course a factual aspect of the applicant's claim that she made to the Tribunal and (indistinct).

27. As to the applicant's claim of the Tribunal's decision being illogical, even if illogicality were a ground for finding jurisdictional error the applicant has not indicated any particular area of illogicality. The applicant takes exception to the Tribunal's finding under sub-s.91R(3) of the Migration Act but there is no error of law which has been identified. There was certainly evidence upon which the Tribunal was

able to consider the applicant's claim and there appears to me to be no misapplication of that section.

28. Mr Izzo of counsel who appeared for the Minister made this submission which I consider with respect to be relevant.

> *Strictly speaking having regard to the terms of s.91R(3)(b) it was unnecessary for the Tribunal to make a positive finding that the applicant had engaged in the practice of Falun Gong for the purpose of strengthening her claim to refugee status.*

29. It sufficed that the applicant was unable to discharge the onus of proving that her conduct was engaged in otherwise than for that purpose. However, that does not mean the Tribunal committed any error of law. In *SZJAA v Minister for Immigration & Citizenship* [2007] FMCA 164 in an identical context Smith FM said at [26]:

> *That reference to s.91R(3) of the Migration Act might overstate the effect of that section but this was not to the detriment of the applicant since the Tribunal achieved a positive adverse conclusion in relation to a matter that the section only required the Tribunal to have been left in doubt.*

30. In my view, again with respect, his Honour's description in SZJAA is a correct description of the effect of that section. It is also submitted and I believe correctly that there is no suggestion that the Tribunal committed the error of examining only whether the applicant commenced the practise of Falun Gong in Australia for the purpose of enhancing her protection visa claim without considering whether the applicant carried on that practise for other reasons. I am referred to my own decision of *SZKSY v Minister for Immigration & Citizenship* [2007] FMCA 1504 at 36-38. I certainly have not changed my view since I handed down the decision in SZKSY.

31. The applicant's application and her oral submissions have not disclosed any jurisdictional error. The Court is not of course in a position to re-examine the factual merits of her claim for refugee status. I am mindful of the fact that the applicant is not legally represented. My own reading of the decision does not disclose any arguable case for a jurisdictional error. Accordingly, I am obliged to find that the Tribunal decision is a privative clause decision as defined by s.474 of the

Migration Act. As such the decision is not subject to review by the Court and the application must be dismissed.

32. There is an application for costs on behalf of the Minister in the sum of $3700. As the applicant has been unsuccessful in her claim it is an appropriate case for an order for costs. The sum of $3700 is certainly a figure that is within the scale provided by the Federal Magistrate Court rules. The applicant has pointed out that she does not have the funds to meet that costs order. As she told the Court when she applied for a protection visa she did not get a work permit attached to her bridging visa because she did not apply within 45 days of her arrival in Australia. Indeed, that appears to be so. I note from the Court at page 98 that the applicant arrived on 23 November 2006 and did not apply for a protection visa until 30 January 2007. That is clearly more than 45 days and as such the applicant would not have received a permit entitling her to work. The applicant therefore has some grounds for pointing out that she does not have funds to meet the costs order.

33. Whilst that is not a ground for not making an order for costs, it is certainly a matter that should be taken into account when considering time to pay. In the circumstances I will allow six months to pay.

I certify that the preceding thirty-three (33) paragraphs are a true copy of the reasons for judgment of Scarlett FM

Associate: A. Coutman

Date: 13 February 2008