

# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*SZMLM v MINISTER FOR IMMIGRATION & ANOR* [2008] FMCA 1493

MIGRATION – Persecution – review of Refugee Review Tribunal decision – visa – protection visa – refusal – no breach of s.424A proved – no breach of s.91R(3) proved – s.91R(3) is concerned with conduct not knowledge.

*Migration Act 1958, ss.91R, 424A*

*NBKT v Minister for Immigration & Multicultural Affairs* (2006) 156 FCR 419  
*SZJGV v Minister for Immigration & Citizenship* [2008] FCAFC 105

Applicant:	SZMLM
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1703 of 2008
Judgment of:	Cameron FM
Hearing date:	23 October 2008
Date of Last Submission:	23 October 2008
Delivered at:	Sydney
Delivered on:	11 November 2008

## **REPRESENTATION**

The Applicant appeared in person.

Counsel for the Respondents: Mr J.D Smith

Solicitors for the Respondents: DLA Phillips Fox

## **ORDERS**

- (1) The application be dismissed.

**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA AT  
SYDNEY**

**SYG 1703 of 2008**

**SZMLM**  
Applicant

And

**MINISTER FOR IMMIGRATION & CITIZENSHIP**  
First Respondent

**REFUGEE REVIEW TRIBUNAL**  
Second Respondent

**REASONS FOR JUDGMENT**

**Introduction**

1. The applicant is a citizen of China where she claims she was a Falun Gong practitioner. She alleges that while in high school she went to Beijing to protest and that this subsequently led to her being detained by the police and to facing difficulties in finding employment. The applicant arrived in Australia on 25 April 2007.
2. The applicant claims to fear persecution in China because of her Falun Gong activities.
3. After her arrival in Australia, the applicant lodged an application for a protection visa. This was refused by the Minister's delegate on 1 June 2007. The applicant then applied to the Refugee Review Tribunal ("Tribunal") for a review of that departmental decision. The applicant was unsuccessful before the Tribunal and has applied to this Court for judicial review of the Tribunal's decision.

4. For the reasons which follow, the application will be dismissed.

### **Background facts**

5. The facts alleged in support of the applicant's claim for a protection visa are set out on pages 4 – 12 of the Tribunal's decision (Court Book ("CB") pages 114 – 122).
6. In a statement attached to her protection visa application, the applicant made the following claims:
  - a) while at high school her teacher introduced her to Falun Dafa when she was 15 years old;
  - b) her academic results improved as a result and all her classmates followed her example and learnt Falun Gong from her;
  - c) her teacher was arrested in October 1999;
  - d) in June 2003 she went to Beijing with other high school students who were Falun Gong practitioners. On arrival at the railway station they were detained by the police and sent back to Liaoning;
  - e) she had difficulty finding a job and had to run a small business selling toys; and
  - f) she came to Australia to avoid persecution and in order to practise Falun Gong freely.
7. The applicant appeared before the Tribunal on 16 August 2007 and made the following additional claims:
  - a) during the events of June 2003 at the railway station the applicant and another student were detained for 4 days at the police station and warned that if they continued practising they would be detained again. Her family used their connections to get her out;
  - b) the police also visited her home and confiscated books, Falun Gong material and photographs;

- c) it was difficult to get a job because she had a police record as a Falun Gong practitioner and she obtained a permanent job with the help of family members;
- d) the applicant made various statements about her group's practice of Falun Gong after her teacher's arrest in October 1999 including that:
  - i) the group didn't dare practise any more;
  - ii) when she moved to the career high school she continued with the exercises in company with about five friends in a park and later in private when they were discovered;
  - iii) she could not practise Falun Gong in the privacy of her home because it was forbidden from July 1999;
  - iv) she and her friends didn't practise again because the police would come around to check and her mother was very scared; and
  - v) her group practised once every two days;
- e) she stated she began practising Falun Gong when she was 18 years old;
- f) she visited Thailand, Malaysia and Singapore in late 2006 – early 2007 as an award from her employer which helped her plans to leave China as she was told previous overseas visits would help her obtain a visa to Australia;
- g) following her arrival in Australia she had found fellow practitioners who practised near Central railway station;
- h) her father is a Director in the National Revenue Bureau and a member of the Communist Party and does not want her to return if she wants to continue practising Falun Gong because he fears that she would be caught and it would affect the whole family; and

- i) she practised Falun Gong because it was good for her health, the exercises look nice and she could put all the misery caused by study problems and stress behind her.
8. The applicant appeared before the Tribunal for a second time on 17 December 2007 to explain inconsistencies in her evidence, making the following further additional claims:
- a) she could not practise Falun Gong in private and the police sent her a letter telling her not to practise. The applicant stated the police knew she was practising at home because she lived in a rural area and the doors were usually open and sometimes the police asked the neighbours what she was doing;
  - b) she made further various statements about when she went to Beijing at age 15 including that:
    - i) she was not arrested but the police were aggressive and violent; and
    - ii) the police forced them to write undertakings not to practise and when they refused they were deprived of food for nearly a week. She then said they were given food in the last four days and the police kicked and beat the students with their hands. Finally their families paid money to get them out;
  - c) wherever she goes in China she must show her employment resume which states that she was detained for practising Falun Gong; and
  - d) in Sydney she has been active with the Falun Gong in various demonstrations and she exercises during the week with a group.

### **The Tribunal's decision and reasons**

9. After discussing the claims made by the applicant and the evidence before it, the Tribunal found that it was not satisfied that the applicant is a person to whom Australia has protection obligations under the *United Nations Convention relating to the Status of Refugees 1951*, amended by the *Protocol relating to the Status of Refugees 1967*

(“Convention”). The Tribunal’s decision was based on the following findings and reasons:

- a) although the Tribunal found that since arriving in Australia the applicant became a Falun Gong practitioner and supporter, it was not convinced that she was an active Falun Gong participant from the age of 15 years as claimed. The Tribunal did not find the applicant to be a convincing witness and did not find some of her claims credible, noting that:
  - i) the applicant gave no explanation for the numerical discrepancy in her initial claim that her entire class followed her example and guidance of Falun Gong and her later claim that there were no more than 3 to 5 students in her practice group;
  - ii) on her earlier visits to South East Asian countries the applicant made no attempt to contact the UNHCR or other agencies which could have given her assistance and she said she had visited these countries deliberately to improve her prospects of obtaining a visa to Australia;
  - iii) her knowledge of Falun Gong was not at a level which would be expected of a person who claimed to have been a very committed person practising since before to 1999. The Tribunal was not satisfied that the applicant participated in the Falun Gong events in Sydney otherwise than to strengthen her claim for refugee status and the Tribunal disregarded this conduct pursuant to s.91R(3) of the *Migration Act 1958* (“Act”);
  - iv) given the party status of the applicant’s parents, the Tribunal did not accept that they would have allowed her as a young girl of 15 to travel to Beijing on what was clearly an activity not sanctioned by the Central Committee of the Communist Party;
  - v) her contradictory claims surrounding her alleged detention in Beijing were not accepted by the Tribunal as credible. She initially claimed she was detained for four days, refused

to sign a statement and was released without physical harm following her parents' intervention and later that she was deprived of food for a week and physically persecuted;

- vi) her claim that her education was disrupted and she was forced to sell toys in the street for a living because of her Falun Gong activities contradicted her evidence that she was employed as a designer on a part time basis while at high school and some years following the 2003 Beijing incident; and
  - vii) the Tribunal did not accept that she was unable to find work after leaving high school because of her Falun Gong activities, and preferred her later evidence that the police prevented her from selling from the street because it was illegal to do so.
- b) the Tribunal found that her success in winning overseas trips from her employer in 2006/7 was indicative of her success and that her claimed known Falun Gong practices were not held against her;
  - c) the Tribunal noted that four years had passed since she claimed she was last persecuted. She initially stated that she had not suffered any further persecution beyond the claimed confiscation of Falun Gong material at an unspecified time, but later claimed her activities were monitored up to the time she left China. The Tribunal did not find this claim credible on the basis, first, that it was unlikely she would have been given a passport and exit visa without hindrance and, secondly, that the Chinese authorities would not have the resources to monitor a 15 year old student who was not a Falun Gong leader;
  - d) the applicant told the Tribunal it was not possible for her to apply for a student visa because of her poor English and the costs involved in studying abroad. The Tribunal observed that was not the response it would have expected from a person who was desperate to leave China for fear of persecution and was satisfied that the applicant's primary motivation was to leave China to better her prospects; and



- e) in light of the above, the Tribunal rejected the applicant's claims to have been a Falun Gong practitioner in China and concluded that her conduct in Australia was engaged in solely to strengthen her protection claims. The Tribunal did not accept that at any point she had a genuine commitment to Falun Gong and disregarded her *sur place* conduct pursuant to s.91R(3). Further, it was not satisfied that the applicant would practise Falun Gong on her return to China or be imputed to be a practitioner or supporter of Falun Gong by the Chinese authorities.

### **Proceedings in this Court**

10. In his amended application filed 14 October 2008 the applicant pleaded the following grounds:
- (1) *That the decision of the second respondent was affected by jurisdictional error.*
    - (a) *The second respondent failed to comply with s.424A of the Act.*
  - (2) *The second respondent breached s.91R(3) of the Act.*
11. Dealing with each of these grounds in turn:

### **Breach of s.424A**

12. The applicant particularises the following information which she says the Tribunal should have notified to her pursuant to s.424A(1):
- a) the opinion of the tour operator which brought her to Australia that the applicant was a genuine tourist;
  - b) information as to her good employment record;
  - c) information concerning the status of her parents; and
  - d) information in the report that the Tribunal received from the tour operator which showed her occupation as one different from that set out in her protection visa application.

13. The applicant submitted that this information undermined her claims to have been a person who came to the adverse attention of the Chinese authorities because of her pursuit of Falun Gong and, as far as it contradicted what was said in her protection visa application, it undermined the credibility of that document.

**First particular**

14. As to the first particular, the Tribunal's decision record makes no reference to the tour operator having an opinion that the applicant was a genuine tourist. The decision record discloses that the tour operator advised that it had confirmed the genuineness of the applicant's stated employment in China and that she absconded from the tour group immediately upon arrival at Mascot airport on 25 April 2007. This information is amongst other details contained in a report from the tour operator reproduced at CB 33-35. The tour operator is recorded as claiming that they checked the applicant's *bona fides* with her employer where she had been employed as a cashier for one year and had a good performance record. The report supplied to the Minister's department did not say the applicant was a genuine tourist.
15. Consequently, the matter contained in the first particular was not information before the Tribunal and thus no s.424A(1) obligations arose in respect of it.

**Second particular**

16. As to the second particular, regarding information concerning the applicant's employment record, the relevant information is set out at p.8 of the Tribunal's decision (CB 118) where it said:

*The Tribunal asked the applicant what was her occupation before leaving China, she replied that she was an accounting statement reporter in the accounts department of Shenyang Ke Tong Electrical Manufacturing Co Ltd where she was employed for about one year. (This confirmed earlier advice from the travel agent).*

17. As information given by the applicant to the Tribunal, in answer to its questions, this falls within the exception found in s.424A(3)(b) and is thus not information required to be notified pursuant to s.424A(1):

**Third particular**

18. As to the information concerning the status of the applicant's parents, again, the applicant told the Tribunal who her parents were and what they did. For this reason, s.424A(1) has no application to this information.

**Fourth particular**

19. The final particular of information which the applicant says should have been notified to her pursuant to s.424A(1) was the information that the travel operator's report disclosed the applicant's occupation to be different from that which she herself disclosed in her protection visa application form.
20. In her protection visa application the applicant described her employment as designer and identified a particular company as her employer (CB 18). The report from the tour operator advises that she was a cashier at a different company (CB 34). In her evidence to the Tribunal at the first of her two hearing days the applicant identified the same company referred to in the tour operator's letter as being her employer (T7-T8) and described her role as "internship". Later she said she was an "intern bookkeeper" for that company (T14) where she had worked for about a year (T15).
21. The identity of the applicant's employer was advised by her to the Tribunal and thus this aspect of the matter falls within the exception found in s.424A(3)(b). Similarly, I find that the applicant's own description of her employment with that company which she gave to the Tribunal is not sufficiently different from that contained in the report from the tour operator for the difference in description or nomenclature of her role to be of any significance.
22. It can be noted that information supplied by the applicant also falls within the exception found in s.424A(3)(b). But, more importantly, the applicant has not identified in what way the difference in the information concerning her employment affected the Tribunal's consideration of her application. There is no indication in the

Tribunal's decision record that the discrepancy was a matter of comment by the Tribunal or affected its view of her credibility.

23. For all these reasons, the fourth particular to the first ground alleged in the amended application does not disclose jurisdictional error on the part of the Tribunal.

### **Breach of s.91R(3)**

24. The second ground pleaded in the amended application is relevantly particularised as follows:

*... The second respondent concluded that the applicant was not a convincing witness and was not a Falun Gong practitioner in China for reasons which included her level of knowledge of Falun Gong. As this knowledge had been acquired in Australia the second respondent impermissibly had regard to it in making its finding that the applicant was not a convincing witness.*

25. Section 91R(3) 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.*

26. It is true that conduct which must be disregarded pursuant to s.91R(3) must be disregarded for all purposes: *SZJGV v Minister for Immigration & Citizenship* [2008] FCAFC 105. However, and dealing with the allegation as it is pleaded, it was not the applicant's Falun Gong knowledge or the means by which she came by that knowledge which the Tribunal took into account when reaching its decision but,

rather, the applicant's lack of knowledge of Falun Gong. It was the fact that her ignorance was inconsistent with her claims to have been a Falun Gong practitioner since the age of fifteen which was decisive in this aspect of the Tribunal's review.

27. But in any event, s.91R(3) speaks in terms of "conduct" not "knowledge". The relevant passage from the Tribunal's decision is paragraph numbered 3 at p.13 (CB 123) where it said:

*The applicant demonstrated to the Tribunal that her knowledge of Falun Gong was not at a level which it would expect of a person who claimed to have been practicing [sic] since prior to 1999 and as claimed, a very committed person since the age of 15. She has been in Australia since April 2007 and has had ample opportunity to obtain additional knowledge which was not displayed to the Tribunal. However, photographic evidence suggests that the applicant has attended various Falun Dafa political events in Sydney. The Tribunal is not satisfied that the applicant participated in these activities otherwise than to strengthen her claim for refugee status under the Convention. Consequently, it must disregard her conduct in Australia as required by section 91R(3) of the Act.*

28. A consideration of that paragraph discloses two distinct elements. The first two sentences discuss the unconvincing nature of the applicant's knowledge of Falun Gong while the third and fourth sentences consider the conduct engaged in by the applicant in Australia which the Tribunal was not satisfied was not engaged in otherwise than for the purpose of enhancing her claim for protection. Although included in the same paragraph, they are different issues. One deals with subjective belief and genuine adherence to the tenets of Falun Gong and, in the context of this matter, the credibility of the applicant's claims. The second deals with an application of s.91R(3) requiring the Tribunal to disregard the applicant's engagement in Falun Gong activities in Australia.
29. The fact that the Tribunal, given its lack of satisfaction concerning the applicant's motives for engaging in Falun Gong activities in Australia, was required to disregard that conduct, did not prevent it from testing the applicant's claims to Falun Gong adherence against her actual knowledge of its tenets and practices.

30. For these reasons, the second ground pleaded in the amended application does not disclose jurisdictional error on the part of the Tribunal.

### **Conclusion**

31. Jurisdictional error on the part of the Tribunal has not been demonstrated.

32. Consequently, the application will be dismissed.

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**I certify that the preceding thirty-two (32) paragraphs are a true copy of the reasons for judgment of Cameron FM**

Associate:

Date: 11 November 2008