FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZLXR v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 367*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming persecution in China based upon her practice of Falun Gong – applicant not believed – whether the Tribunal breached s.424AA or s.424A(2A) considered – no reviewable error found – application dismissed.

Federal Magistrates Court Rules 2001 (Cth)
Migration Act 1958 (Cth), ss.424A, 424AA

SZLTC & Ors v Minister for Immigration [2008] FMCA 384

Applicant:	SZLXR
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 201 of 2008
Judgment of:	Driver FM
Hearing date:	13 May 2008
Delivered at:	Sydney
Delivered on:	13 May 2008

REPRESENTATION

The Applicant appeared in person

Counsel for the Respondents: Mr G Kennett

Solicitor for the Respondents: Australian Government Solicitor

ORDERS

(1) The application is dismissed.

(2) The applicant is to pay the first respondent's costs and disbursements of and incidental to the application in the sum of $5,000 in accordance with rule 44.15(1) and item 1(c) of part 2 of schedule 1 to the *Federal Magistrates Court Rules 2001* (Cth).

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 201 of 2008

SZLXR
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. This is an application to review a decision of the Refugee Review Tribunal ("the Tribunal"). A decision was handed down on 8 January 2008. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa. The applicant is from China and had made claims of persecution based upon her practice of Falun Gong. Background facts relating to the applicant's arrival in Australia for protection visa claims and the Tribunal decision on them are conveniently summarised in the Minister's written submissions filed on 6 May 2008. I adopt as background for the purposes of this judgment paragraphs 1 through to 6 of those written submissions:

> The applicant is a citizen of the Peoples Republic of China who arrived in Australia on 15 May 2007 and applied for a protection visa on 7 June 2007. On 9 July 2007 a delegate of the Minister decided to

refuse the visa, and on 30 July 2007 the applicant applied for review of the delegate's decision by the Refugee Review Tribunal.[1]

The Tribunal handed down its decision, affirming the decision of the delegate, on 8 January 2008.[2]

Briefly, the applicant claimed that she was an adherent of Falun Gong. The police had searched her home and detained her briefly, and after being detained she saw her fellow practitioners being arrested. While hiding at a friend's place she heard that one of those fellow practitioners had succumbed to torture and told the police about her. She asked her friend to get her a visa to come to Australia.[3]

The Tribunal concluded that the applicant was not a truthful or reliable witness and had fabricated aspects of her evidence.[4] It specifically did not accept:

(a) that she had commenced practising Falun Gong in October 2006 as claimed;[5]

(b) that she had joined a group in Guilin city and practised between October 2006 and April 2007;[6]

(c) that she had been detained and questioned by police because of suspected involvement in Falun Gong;[7]

(d) that she had seen her fellow practitioners being arrested but escaped arrest herself;[8]

(e) that she was wanted by police in connection with Falun Gong when she left China;[9]

(f) that she had a genuine interest in Falun Gong, or would attempt to practice it if returned to China.[10]

The Tribunal accepted that the applicant had been involved in Falun Gong activities in Australia but considered that she had done so in

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1 See Relevant Documents (RD) 78.
2 RD 77 (date of handing down shown at RD 94).
3 See the summary at RD 81-82.
4 RD 91.8.
5 RD 92.4.
6 RD 92.9-93.1.
7 RD 93.2.
8 RD 93.3.
9 RD 93.8.
10 RD 94.2.

> order to strengthen her claim to be a refugee. Accordingly the Tribunal disregarded these activities.[11]
>
> The Tribunal thus had no basis upon which to conclude that the applicant had a well-founded fear of persecution for a Convention reason in China.

2. These proceedings began with a show cause application filed on 29 January 2008. The application raises the single ground of asserted unfairness in the Tribunal decision. The application provides no particulars of unfairness. The supporting affidavit filed with it simply annexes a copy of the Tribunal decision. On 19 February 2008 I gave the applicant the opportunity to amend her application and to provide additional evidence but she has not taken up that opportunity.

3. I conducted a show cause hearing in this matter on 25 March 2008. At that time it became apparent that there was an issue as to whether the Tribunal met its obligations under s.424AA of the *Migration Act 1958* (Cth) ("the Migration Act"). I ordered the Minister to show cause why relief should not be granted in relation to that issue pursuant to rule 44.12(1)(b) of the *Federal Magistrates Court Rules 2001* (Cth) ("the Federal Magistrates Court Rules"). The Minister filed written submissions in relation to that issue on 6 May 2008.

4. I have before me as evidence the book of relevant documents filed on 25 February 2008. I also have before me the affidavit of Naomi April Tondl filed on 8 April 2008 to which is annexed a transcript of the hearing conducted by the Tribunal.

5. In her oral submissions the applicant did not deal with the issue that the Minister was required to respond to. Her submissions were directed to attempting to explain inconsistencies and other problems in her evidence to the Tribunal. To some extent what the applicant told me had already been told to the Tribunal. For example, the applicant told me that her protection visa claims were made by an unregistered migration agent with whom she had entrusted her affairs, perhaps unwisely. The applicant had already drawn that issue to the attention of the Tribunal at the hearing.

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[11] RD 94.3-94.5.

6. The Tribunal dealt with that issue in its reasons at RD 92. The Tribunal noted that it had not assessed claims made in the protection visa application and it only assessed the specific claims made to the Tribunal. However, the Tribunal took into account the applicant's evidence concerning the contact she had with the migration agent in assessing her overall credibility. I see no error in the Tribunal's approach.

7. The issue that requires determination is whether the Tribunal erred in not disclosing in writing to the applicant adverse information derived from a document which the applicant had not submitted in support of her review application for the Tribunal. The adverse information was plainly important to the outcome of the review. At RD 93 the Tribunal states:

> *The applicant submitted a document which purported to be from her employer and which stated that her employment had been terminated for reasons of a membership of an evil cult (Falun Gong) and that the decision to terminate had been reported to higher authorities. This letter was dated 17 April 2007. Evidence before the Tribunal also indicated that the applicant had submitted another letter from her employer in connection with her application for a visitor visa in April 2007 and that letter stated that the applicant was a continuing employee and intended to return to her work at the end of her holiday in Australia. The content of these letters is inconsistent. The applicant told me that she had no knowledge of the letter submitted with her application for a visit visa and that her friend had made all the arrangements however, I do not accept this explanation. I did not find the applicant to be a truthful witness and consider that the letter of 17 April 2007 is false and has no probative value. The letter, which was submitted to the Tribunal prior to the hearing, has no address and it is not clear how it came into the applicant's possession. The style and content of the letter appears designed to provide the applicant with support for her claim that she had been implicated in Falun Gong practice. I have placed no weight on the letter of 17 April 2007 as evidence to support the applicant's claims of practice in China.*

8. In my view the inconsistent information the Tribunal derived from the document supporting the applicant's visitor visa application was significant in not only destroying the credibility of her documentary evidence but her credibility generally.

9. The Minister concedes that prior to 29 June 2007 the adverse information in the visitor visa application relied upon by the Tribunal would have required disclosure pursuant to s.424A of the Migration Act. However, the Minister submits that the effect of s.424A(2A) of the Migration Act which commenced operation on 29 June 2007 is to relieve the Tribunal of an obligation of disclosure under s.424A provided that the Tribunal meets its obligations of disclosure orally, pursuant to s.424AA, also enacted with effect from 29 June 2007. Section 424A(2A) provides that the Tribunal is not obliged under s.424A 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 s.424AA. I accept that the subsection has the effect that the Minister contends. The review application in this case was received by the Tribunal on 30 July 2007. It follows that both s.424A(2A) and s.424AA apply.

10. Section 424AA provides as follows:

> *If an applicant is appearing before the Tribunal because of an invitation under section 425:*
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> *(a) the Tribunal may orally give to the applicant 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) if the Tribunal does so--the Tribunal must:*
>
> *(i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and*
>
> *(ii) orally invite the applicant to comment on or respond to the information; and*
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> *(iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and*
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> *(iv) if the applicant seeks additional time to comment on or respond to the information--adjourn the review, if the*

> *Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.*

11. I dealt with the operation of s.424AA in *SZLTC & Ors v Minister for Immigration* [2008] FMCA 384. At [16] of that judgment I noted that although s.424AA in its terms appears to confer a discretion upon the Tribunal, if the Tribunal elects to embark upon a course of oral disclosure at a hearing there are resultant obligations as set out in s.424AA(b)(i),(ii), (iii) and (iv). Section 424AA(a) repeats the stipulation in s.424A(2A) that the particulars given of the adverse information must be clear. The question is whether the Tribunal met those obligations.

12. The Minister contends the Tribunal did meet those obligations and points to the transcript of the Tribunal hearing at pages 32 and 33. The relevant parts of the transcript are conveniently summarised in the Minister's submissions at paragraphs 13 through to 16. I incorporate those paragraphs in this judgment:

> During the Tribunal hearing the presiding member told the Applicant that she had concerns about some of the information in her case, and continued:
>
> > *Now I'm going to go through each of those concerns so that you have an opportunity to comment on those things that I'm worried about. I have to tell you what it is about each concern that I have, why I'm concerned about it and what relevance it has to your application.*
> >
> > *With each thing that I talk about I will ask you whether you wish to comment or respond to what I'm worried about. If you think you need extra time to comment on the information you can ask me for that extra time. If you ask for extra time I will consider your reasons for asking for the extra time. So do you understand what I'm putting to you? Okay, all right. Well let's go through them one by one.*[12]
>
> The presiding member then summarised the employment letter in the following terms:
>
> > *… there's a letter to the consulate and it says that this letter certifies that* [the applicant] *is a staff member of the company and*

[12] Transcript p.32.

> *is permitted to take her annual leave to go to Australia for sightseeing during the period of April/May this year. We guarantee that she will obey the outbound local laws during travelling and come back to China on the completion of her trip and her position in the company will be kept for her until she returns.*[13]

Having given the other letter to the interpreter to read to the Applicant, the presiding member said:

> *Now the reason that I'm telling you about this is that the two letters seem to have been written at the same time and what they're saying conflicts. So they're saying quite different things about you and your employment. So the tribunal might from looking at those two letters, those conflicting letters think perhaps that the evidence that you've given may not be truthful. Now remember what I said before, I have to give you an opportunity to comment on that information. You can ask for additional time if you wish and I have to consider your request if you want additional time.*[14]

The Applicant responded that she had no idea how her friend had organised her trip to Australia and the following exchange ensued:

> *MS NICHOLLS: Okay. Is that how you wish to respond to that conflicting information?*
>
> *THE INTERPRETER: Yes.*

13. I accept the Minister's submission that the detailed summary of the employment letter and the reference to the visa application was sufficient to discharge the obligation on the Tribunal to give clear particulars of the relevant information.

14. I also accept that the Tribunal sufficiently explained why the information was relevant and the consequences of it being relied upon. It is clear that the Tribunal invited the applicant to comment on or respond to the information. It is also clear that the Tribunal told the applicant that she might ask for additional time to comment and respond.

15. Although the applicant did request additional time to respond to other matters raised by the Tribunal (see the transcript at page 36) she did not

[13] Transcript p.32.
[14] Transcript p.32.

ask for more time to respond to this information. The Tribunal took the trouble to confirm that the response given by the applicant was her response to the conflicting information.

16. I am satisfied that the Tribunal met its obligations under s.424AA(b) and s.424A(2A)[15]. I am satisfied that there is no jurisdictional error in the decision of the Tribunal. The decision is, therefore, a privative clause decision and the application must be dismissed.

17. The application having been dismissed, costs should follow the event. The Minister seeks scale costs of $5,000. The applicant indicated she may need time to pay. I will not require payment by any particular time. The applicant submitted that $5,000 may be an excessive amount. I am satisfied that it is not. The Minister has been represented at three hearings in this matter, the Court book has been prepared and two sets of written submissions. Ms Tondl has prepared an affidavit to which was annexed a transcript of the Tribunal hearing. The Minister was represented by counsel today. The issue that the Minister was required to address was an issue of significance.

18. I will order that the applicant is to pay the first respondent's costs and disbursements of and incidental to the application in the sum of $5,000 in accordance with rule 44.15(1) and item 1(c) of part 2 of schedule 1 to the *Federal Magistrates Court Rules 2001* (Cth).

I certify that the preceding eighteen (18) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 15 May 2008

[15] and thus relevantly also s.424AA(a)