FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZLTC & ORS v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 384*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming religious persecution in China – applicant not believed – whether the Tribunal breached s.424AA of the *Migration Act 1958* (Cth) considered.

Federal Magistrates Court Rules 2001 (Cth)
Migration Act 1958 (Cth), ss.91R, 422B, 424A, 424AA

SBCC v Minister for Immigration [2006] FCAFC 129
SZBEL v Minister for Immigration [2006] 231 ALR 592
SZBYR v Minister for Immigration [2007] HCA 26, (2007) 235 ALR 609
VAF v Minister for Immigration (2004) 206 ALR 471
WALT v Minister for Immigration [2007] FCAFC 2

First Applicant:	SZLTC
Second Applicant:	SZLTD
Third Applicant:	SZLTE
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 3796 of 2007
Judgment of:	Driver FM
Hearing date:	27 March 2008
Delivered at:	Sydney
Delivered on:	27 March 2008

REPRESENTATION

The First and Second Applicants appeared in person

Counsel for the Respondents: Mr T Reilly

Solicitors for the Respondents: Sparke Helmore

ORDERS

(1) The application is dismissed.

(2) The first and second applicants are 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 3796 of 2007

SZLTC
First Applicant

SZLTD
Second Applicant

SZLTE
Third 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"). The Tribunal decision was handed down on 27 November 2007. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicants protection visas. There are three applicants; a husband, a wife and their child. I appointed the first applicant the litigation guardian of the third applicant for the purposes of this proceeding. The protection visa claims were made by the first applicant, the applicant husband.

2. Relevant background is contained in the Minister's written submissions filed on 17 March 2008. I adopt as background for the purposes of this judgment, with minor amendments, paragraphs 2, 3 and 4 of those submissions. References to the applicant are references to the first applicant:

> The applicant arrived in Australia on 29 June 2004: court book ("CB") 113.2, and applied for the visa on 12 June 2007: CB 1-29. The delegate refused the visa on 27 June 2007: CB 30-38, and the applicant applied to the Tribunal for review on 13 July 2007: CB 42-45. The Tribunal held a hearing on 18 September 2007: CB 53-54, and on 19 September 2007 wrote to the applicant pursuant to s.424A of the *Migration Act 1958* (Cth) ("the Migration Act"): CB 80-81. It held a second hearing on 13 November 2007: CB 104-105.
>
> The applicant claimed to fear persecution in China for reason of his religion. He claimed to be a Falun Gong practitioner, and that on 5 October 1999 the police came to arrest him after he was informed on. The applicant claimed to have gone into hiding, that his parents were harassed, and that on 13 November 2000 the applicant travelled to Japan, but that he was beaten in Japan in January 2004 at the instigation of the Chinese government, after which he came to Australia and lived and worked illegally until being detained on 22 May 2007. He visited China on 5 or 6 occasions while in Japan, and was able to avoid the police by not returning to his home town, and was told that the police were still looking for him. The applicant's wife and son (the second and third applicants) came to Australia in 2007 to join the applicant. He claimed to practice Falun Gong in Australia. See generally CB 115-123.
>
> The Tribunal did not accept the applicant to be a credible witness, and found that he was not a genuine Falun Gong practitioner in China, Japan or Australia, or had ever been harassed for reason of being suspected Falun Gong practitioner in China or Japan. The Tribunal noted the applicant's frequent returns to China when in Japan, and rejected his explanations for being able to do so without difficulty. The Tribunal also noted the applicant's failure to claim protection in Australia until after he was detained in 2007, despite claiming to have been attacked in Japan, and his limited knowledge of Falun Gong displayed at the hearing given his claims to have practised it in Japan and Australia for 7 years. The Tribunal found that the applicant's actions were not consistent with a genuine fear of persecution in China, and that his knowledge of Falun Gong has been acquired to assist his application for the visa, and disregarded his Falun Gong practice in Australia pursuant to s.91R(3) of the Migration Act. The Tribunal concluded that the applicant was not a genuine Falun Gong practitioner

and rejected all his claims of past harm in China, and found that as a result he would not practice Falun Gong in China in future, or that there was a real chance of harm to the applicant in China in future. See generally CB 125-129.

3. The applicants rely upon a show cause application filed on 11 December 2007. The grounds in that application are set out in handwriting in an annexure:

> *1. The Tribunal failed to act judicially and thereby failed to afford the Applicant procedural fairness in rejecting his claim to fear persecution upon refoulment by reason of information about his Falun Gong practices while in Australia being discovered by Chinese authorities.*
>
> *Particulars*
>
> *(a) It was not open to the Tribunal to reject the Applicant's claimed fear of persecution without cogent material supporting a conclusion that the applicant's commitment to Falun Gong was not genuine.*
>
> *(b) The Tribunal rejected the Applicant's claim of fear of persecution being well-founded in circumstances where it accepted that "the full fact [about PS13 spies in Australia are] are yet to be established.*
>
> *2. The Tribunal constructively failed to exercise its jurisdiction in accordance with the Migration Act 1958 by not affording the Applicant procedural fairness and putting him on notice of critical information from Master Li's book and "about cultivating the heart/mind nature" in circumstance where it relied on such information to discredit his claim to be a Falun Gong practitioner and, correspondingly, his claim to fear persecution if returned to China.*
>
> *Particulars*
>
> *(a) While acknowledging the Applicant is a recent adherent to Falun Gong the Tribunal nevertheless discredited the Applicant's claim base*[d] *on a disproportional interrogation of Falun Gong exercises.*
>
> *(b) The Tribunal found that the Applicant displayed no evidence of the knowledge and understanding of the name of the exercise appeared limited.*

(c) *The Tribunal found the applicant "was unable to answer how many parts or movements there were to the first exercise".*

(d) *The Tribunal was satisfied the Applicant would only face a "remote chance of persecution if he returned to China" base*[d] *on its assessment that the applicant has not "developed a genuine commitment to the practice of Falun Gong in China, Australia or Japan".*

3. The Tribunal constructively failed to exercise its jurisdiction and to afford the Applicant natural justice in circumstances where the Tribunal did not consider all the integers of the Applicant's claim.

Particulars

(a) *The Applicant claimed "he suffered restrictions in China because of his involvement* [in] *Falun Gong activities". The applicant was attacked and threatened in japan in relation to his Falun Gong activities.*

(b) *The Tribunal member failed to deal with the Applicant's above claim in circumstances where my claims* relat[ed] *to Falun Gong.*

4. The application is supported by a short affidavit which annexed a copy of the Tribunal decision. In addition, the affidavit refers to a request for an extension of time to respond to an invitation to comment apparently issued pursuant to s.424A of the Migration Act. I received the affidavit, subject to the qualification that the best evidence of what occurred in relation to that invitation is contained in the court book filed on 8 January 2008. I received the court book as evidence of the Tribunal's decision, its process and the material it had before it. I also received as an exhibit an Auscript transcript of the hearings conducted by the Tribunal on 18 September 2007 and 13 November 2007.

5. It is apparent from the court book that the second hearing was deemed necessary by the Tribunal because of complaints about the interpretation at the first Tribunal hearing. The first applicant raised with me at the outset of today's hearing that issue of interpretation. He expressed concern that the Tribunal interpreter was not fluent in the Fuqinese dialect. That was not one of the grounds of review in the show cause application. To the extent that the applicant wished to

make an issue of it for the purposes of this proceeding, I note that the Tribunal provided a second hearing at which the applicants were assisted by a Fuqinese interpreter: CB 104. I also note from the transcript that the first applicant was able to converse freely with the presiding member both in Mandarin and in Fuqinese. It is apparent that the second applicant had difficulty in Mandarin, but was able to converse with the presiding member at the second Tribunal hearing. I also note that the first applicant requested a Mandarin interpreter for this proceeding in his application to the Court and in other documents submitted to the Court, including an information sheet and a request to participate in the Minister's Panel Advice Scheme.

6. From my observation, the first applicant had no difficulty in communicating through the Mandarin interpreter at the hearing conducted today. His wife, the second applicant, did have difficulty and I was obliged to ask the first applicant to communicate with her. In the event, the only submissions made by the wife related to the merits of her husband's protection visa claims and a desire for justice. In my view, no issue of fairness both in relation to the Tribunal proceeding and the proceeding in this court based on issues of interpretation arises.

7. As to the grounds in the show cause application, I accept the Minister's submission that there is no substance to the first ground and the third ground. I also accept that there is no substance to the second ground to the extent that it is based upon an asserted breach of s.424A of the Migration Act. I accept in that regard and incorporate in this judgment, with minor amendments, paragraph 6 of the Minister's written submissions:

> *The Application contains three grounds. The first claims that it was not open for the Tribunal to find that the Applicant was not a genuine* [Falun Gong] *practitioner, but this conclusion was open for the reasons the Tribunal gives. This ground seeks merits review. The ground purports to quote from the Tribunal's decision, but the quote does not appear in the Tribunal's reasons. The second ground claims that the Tribunal was obliged to inform the Applicant about information concerning* [Falun Gong] *which it discussed with the Applicant at the hearing. However there is no such obligation. Common law procedural fairness does not apply given s 422B, and s 424A does not require such information to be given to the Applicant, both because it is not specifically*

> *about him (s 424A(3)(a)) and because it does not in its terms constitute a rejection, denial or undermining of his claims to protection within* SZBYR v MIAC *(2007) 235 ALR 609 (HCA) at [17]. The Tribunal was entitled to explore the Applicant's knowledge of* [Falun Gong] *at the hearing:* SBCC v MIMA *[2006] FCAFC 129 at [45];* WALT v MIMA *[2007] FCAFC 2 at [30]. Its reasoning concerning that exploration is a thought process, not "information". The final ground claims that the Tribunal failed to address the Applicant's claims of past harm because of his* [Falun Gong] *practice in Japan, but the Tribunal did address this claim at CB 128.8, albeit by rejecting it.*

8. There remain two issues for consideration. The first is whether, apart from s.424A, the Tribunal breached an obligation of disclosure in relation to Master Li's book *Zhuan Falun* about the practice of Falun Gong and its philosophy. It is apparent from the Tribunal decision that the Tribunal regarded the applicant's lack of knowledge about critical elements of Falun Gong as a matter of significance. The Tribunal refers to some discussion about Falun Gong practice and philosophy and *Zhuan Falun* at CB 118. The Tribunal alluded briefly to its concern about the applicant's lack of knowledge about Falun Gong in its s.424A letter dated 19 September 2007: CB 80. The Tribunal referred to independent evidence about Falun Gong at CB 123 to 125.

9. Under the heading "Findings and Reasons" at CB 126 and 127 the Tribunal, after referring to the applicant's numerous trips between China and Japan, which themselves were seen to undermine his claims of having a well-founded fear of persecution, discussed his demonstrated understanding of Falun Gong. The presiding member said:

> *The Tribunal accepts that the applicant has some knowledge of the principles and practices of Falun Gong. This included some ability to discuss the principles of the universe and energy from Falun Gong and some knowledge of the Falun Gong exercises. However, the Tribunal does not accept that the applicant's level of knowledge, even allowing for some nervousness and the difficulty for the applicants in the context of a hearing situation, was in any way consistent with a genuine Falun Gong practitioner of some 8 years standing who has lived in Japan and Australia for lengthy periods where the practice of Falun Gong is not banned. The Tribunal considers that the applicant was unable to provide further details or elaborate on concepts that are crucial to the*

> *practice of Falun Gong. The Tribunal considers it significant that the applicant was unable to describe, in anything other than a limited manner, his understanding of Master Li's book,* Zhuan Falun*. The independent evidence indicates that* Zhuan Falun *is considered by Falun Gong practitioners to be a crucial text on Falun Gong and genuine practitioners would be able to repeat verbatim parts of the text. The Tribunal does not accept that the applicant has read the book in anything other than a cursory manner and considers that the applicant has done so only for the purposes of the Tribunal hearing.*

10. The Tribunal went on to discuss the applicant's ability to perform Falun Gong exercises and concluded at CB 127:

> *Thus, although the Tribunal is prepared to accept that the applicant has some knowledge of Falun Gong, the Tribunal considers that the applicant has learnt this information about Falun Gong for the purposes of the Tribunal hearing and does not accept that his knowledge is in any way consistent with his claimed years of practise in Japan and Australia.*

11. It is apparent that the first applicant's inability to demonstrate substantial knowledge about Falun Gong was significant in the Tribunal's adverse credibility finding.

12. The applicant's second ground of review draws attention to the information the Tribunal derived from Master Li's book and asserts that he should have been put on notice of that information and the significance of it. As I have already noted, there is no substance to that ground to the extent that it is based on s.424A because of the exclusionary provision in s.424A(3)(a). In addition, to the extent that the adverse credibility finding was based on the applicant's own evidence, there was no obligation of disclosure because of s.424A(3)(b).

13. Arguably, an obligation of disclosure might arise in two other ways. First, it might arise if the Tribunal came under an obligation of disclosure in accordance with the principles enunciated by the High Court in *SZBEL v Minister for Immigration* [2006] 231 ALR 592. In my view, no such obligation arose in this case because it is clear from the decision of the delegate, in particular reproduced at CB 37, that the applicant's claim of being a genuine Falun Gong practitioner was subject to question.

14. The other possibility is that an obligation of disclosure arose from s.424AA. That section provides as follows:

> *If an applicant is appearing before the Tribunal because of an invitation under section 425:*
>
> *(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*
>
> *(iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and*
>
> *(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.*

15. The section applies in relation to review applications made after 29 June 2007 when the section commenced operation. The applicants applied to the Tribunal on 13 July 2007, so the decision is caught by the section. The section has not, to my knowledge, received any judicial consideration. There are some important similarities between s.424A and s.424AA, but there are also some significant differences. One important difference is that s.424A is couched in mandatory terms. Section 424AA on its face appears to confer a discretion to disclose rather than to impose an obligation of disclosure. That appears from the use of the word "may" in s.424AA(a). It does not follow, however, that an obligation under s.424AA cannot arise, for example, if an obligation existed to ensure a fair hearing for the purposes of s.425

based upon *SZBEL*. As I have already noted, however, no such obligation arises in this case.

16. It appears from the terms of s.424AA that 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). It also appears that if the Tribunal embarks upon a course of disclosure under s.424AA it does not enjoy the protections in s.424A(3). It would have been a simple matter for the Parliament to reproduce the exclusions in s.424A(3) in s.424AA. The fact that Parliament has chosen not to reproduce those exclusions leads me to think that they do not apply in relation to disclosure under s.424AA.

17. It appears to be necessary in cases like the present to consider the Tribunal's description in its reasons of what occurred at the hearing and any other information that may be available, including a transcript of the Tribunal hearing, in order to determine whether the Tribunal has embarked upon a disclosure for the purposes of s.424AA, so as to analyse any issue of compliance with its obligations. There is nothing on the face of the Tribunal reasons that indicates the Tribunal was purporting to demonstrate compliance with the section. The transcript of the first Tribunal hearing on pages 11 to 14 sets out a discussion between the presiding member and the applicant in which the presiding member was seeking to test the applicant's knowledge of Falun Gong theory and practice, including the book by Master Li. It does not appear to me, however, from that discussion that the presiding member was consciously seeking to disclose information for the purposes of s.424AA. Further, it does not appear to me that if the Tribunal had embarked upon such a course of disclosure it had met its obligations under s.424AA(b).

18. It is unnecessary to resolve the potentially difficult question of whether the Tribunal had embarked upon a course of oral disclosure because I am satisfied that the information relied upon by the Tribunal was not "information" for the purposes of s.424AA(a). It is significant that Parliament has chosen to refer to information for the purposes of s.424AA(a) in the same terms as appears in s.424A(1)(a). Because Parliament has expressed itself in the same terms in both sections, the

interpretation given to the term "information" for the purposes of s.424A(1)(a) is relevant.

19. Perhaps most importantly in *SZBYR v Minister for Immigration* [2007] HCA 26 at [17] the High Court stated:

> *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, one might have thought, have been a relevant step towards rejecting, not affirming, the decision under review.*

20. The High Court's reasoning is, in my view, directly relevant in this case. Master Li's book did not of itself undermine the applicant's claims. The applicants were not making any claims inconsistent with what was contained in Master Li's book. The contents of the book were therefore not information that would be a reason or part of the reason for affirming the decision under review. The Tribunal made an adverse credibility finding because the first applicant was not able to

demonstrate an understanding of what was in the book. Thus, what was critical was not the contents of the book, but the applicant's lack of understanding of it.

21. It is well-established that gaps, lack of detail or specificity of evidence or conclusions reached in weighing evidence by reference to those gaps is not "information" for the purposes of s.424A(1)(a)[1]. Neither, in my view, is it "information" for the purposes of s.424AA(a) of the Migration Act. I find therefore that the second ground, to the extent that it is based upon an asserted breach of an obligation arising from s.424AA, fails. As I have already noted, I otherwise reject that ground and the remaining grounds in the application.

22. I have also considered whether any issue arises from the Tribunal decision in relation to s.91R(3) of the Migration Act. The Tribunal considered information provided by the first applicant about his conduct in Australia. It is apparent from what the Tribunal says at CB 127 and 128 that the Tribunal rejected that evidence as establishing a genuine commitment by the first applicant to Falun Gong. The Tribunal ultimately disregarded the first applicant's conduct in Australia because it was not satisfied that the conduct was engaged in for a reason other than to enhance the applicant's protection visa claims. The Tribunal was entitled to take into account information relating to that conduct for the purpose of determining whether it was required to disregard that conduct. In my view, the Tribunal's analysis of the information for that purpose was unexceptionable.

23. I conclude that there is no jurisdictional error in the decision of the Tribunal. The Tribunal decision is therefore a privative clause decision and the application must be dismissed.

24. The application having been dismissed, costs should follow the event. The Minister seeks costs fixed in the sum of $5,200, noting that the Minister was required by the Court to produce a transcript of the Tribunal hearing. The first applicant did not wish to be heard on costs.

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[1] *VAF v Minister for Immigration* (2004) 206 ALR 471 at [24]

25. I am not persuaded that departure from the court scale of costs in this instance is warranted. While the Minister was required to produce a transcript of the Tribunal hearing, that was pursuant to an order of the Court for the assistance of the Court and both the Minister and the applicants. In my view, the costs of the production of the transcript should lie where they fall.

26. I will order that the first and second applicants are 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 twenty-six (26) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 1 April 2008