FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZLCD & ANOR v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 542*

MIGRATION – Review of decision of Refugee Review Tribunal – whether jurisdictional error – application for Protection (Class XA) visa – missing page in Tribunal written statement of decision – whether breach of s.430(1) and s.430B(6) of the Act – whether proper consideration of applicant's claims – whether applicant accorded procedural fairness – merits review not function of judicial review.

Judiciary Act 1903 (Cth) s.39B
Migration Act 1958 (Cth) ss.5, 36, 65, 91R, 91S, 424A, 430, 430B, 474

SZFLM v Minister for Immigration and Citizenship [2007] FMCA 1
Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham (2000) 168 ALR 407
Randhawa v Minister for Immigration & Ethnic Affairs (1994) 52 FCR 437
Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
NADR v Minister of Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 167
Lee v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 464

First Applicant:	SZLCD
Second Applicant:	SZLCE
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2269 of 2007
Judgment of:	Orchiston FM
Hearing date:	12 March 2008

Date of Last Submission: 12 March 2008

Delivered at: Sydney

Delivered on: 2 May 2008

REPRESENTATION

The Applicants appeared in person

Solicitors for the Respondent: Australian Government Solicitor

ORDERS

(1) The application filed on 24 July 2007 is dismissed.

(2) The Applicant pay the First Respondent's costs fixed in the sum of $4,900 payable within five (5) months of the date of these Orders.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2269 of 2007

SZLCD
First Applicant

SZLCE
Second Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

The Application

1. This is an application pursuant to s.39B of the *Judiciary Act 1903* (Cth) and Part 8 Division 2 of the *Migration Act 1958* (Cth), as amended, (the Act) seeking review of the decision of the Refugee Review Tribunal (the Tribunal) handed down on10 July 2007 which affirmed the decision of the delegate of the respondent Minister (the delegate) to refuse to grant Protection (Class XA) visas to the applicants.

Background

2. The first named applicant was born on 4 August 1961 and was aged 45 years at the time of his application for a protection visa. For

convenience, the first named applicant will be referred to in these proceedings as "the applicant".

3. The second named applicant, who is the wife of the applicant, was born on 17 June 1964 and was aged 42 years at the time of her application for a protection visa.

4. The applicants claim to be nationals of China, and of Han ethnicity.

5. The applicants arrived in Australia on 14 November 2006 on Chinese passports issued in their own names.

6. The applicant lodged an application for a protection visa on 21 November 2006 on the basis that he was a Falun Gong practitioner and feared persecution from the Chinese authorities (Court Book (CB) 1-26). His wife applied for a protection visa as a member of the applicant's family (CB 27-31) and made no specific claims in her own right.

7. On 14 February 2007 the delegate refused to grant the protection visas on the basis that the applicants were not persons to whom Australia had protection obligations under the Refugees Convention (see **Legislative framework**).

Legislative framework

8. Section 65(1) of the Act authorises the decision-maker to grant a visa if satisfied that the prescribed criteria have been met. However, if the decision maker is not so satisfied then the visa application is to be refused.

9. Section 36(2) of the Act relevantly provides that a criterion for a protection visa is that an applicant is a non-citizen in Australia to whom the Minister is satisfied that Australia has a protection obligation under the Refugees Convention as amended by the Refugees Protocol. Section 5(1) of the Act defines "Refugees Convention" and "Refugees Protocol" as meaning the 1951 Convention relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees (the Convention).

10. Australia has protection obligations to a refugee on Australian territory.

11. Article 1A(2) of the Convention relevantly defines a refugee as a person who:

> *owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or particular opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.*

12. Section 91R and s.91S of the Act refer to the persecution and membership of a particular social group when considering Article 1A(2) of the Convention.

The Tribunal proceedings

13. On 16 March 2007 the applicants applied to the Tribunal for review of the delegate's decision (CB 51–56).

14. On 24 April 2007, the Tribunal wrote to the applicant pursuant to s.424A of the Act (CB 59-61) inviting the applicant to comment on information upon which, subject to his response, it might make an adverse finding. The applicant's response was received by the Tribunal on 14 May 2007 (CB 65-69).

15. On 24 April 2007, the Tribunal sent a letter to the applicants inviting them to appear before it to give oral evidence and present arguments (CB 62–63). Both applicants attended and gave evidence at the Tribunal hearing on 29 May 2007.

The applicant's claims and evidence (CB 88–93)

16. The Tribunal summarised the applicant's claims in the protection visa application (CB 88-90). It further summarised the applicant's claims at the Tribunal hearing (CB 90-93), including that:

- the applicant was a practitioner of Falun Gong in China
- the applicant had been beaten and tortured by the Chinese authorities due to his involvement in Falun Gong

- the applicants were able to leave China uninhibited because they "used money" to obtain their passports and eliminate the applicant's file with the authorities.

The Tribunal's findings and reasons (CB 94-96)

17. The Tribunal was not satisfied that the applicant was a genuine Falun Gong practitioner as he claimed. It considered that the applicant was unable to correctly answer questions about the principles of Falun Gong.

18. The Tribunal also found that the applicant's claims that he had been persecuted by the Chinese authorities, were fabricated to assist his protection visa application. It did not accept the supporting evidence given by the applicant's wife and the applicant's brother that the applicant was a Falun Gong practitioner.

19. The Tribunal was not satisfied that the applicant was a witness of truth and did not believe that he used bribery to obtain a passport or to have his police file "eliminated".

20. The Tribunal found that the applicant was not of interest to the Chinese authorities and did not find his explanation about his unhindered departure from China to be satisfactory.

21. For these reasons, the Tribunal found that there was not a real chance that the applicant would suffer serious harm if he returned to China and that he therefore did not have a well founded fear of persecution for a Convention-based reason.

The proceedings before this Court

22. The applicants filed the application in this Court on 24 July 2007 setting out 3 grounds of review of the Tribunal's decision.

23. The applicant appeared in person before the Court on 12 March 2008 with the assistance of a Cantonese interpreter. Ms Griffin appeared for the first respondent.

24. Each of the grounds of application was translated for the applicant, prior to the Court inviting him to say anything he wished to in regard to each ground, and generally.

Grounds of application

25. The grounds of the application are:

   (1) The decision record from the Tribunal is incomplete. Pages 1 and 2 are missing.

   (2) The reasons of the Tribunal in refusing to grant me a visa are not clear as the decision record is incomplete.

   (3) The Tribunal selectively used the evidence I provided in my statements and at the hearing. As a result it did not properly consider my claims and afford me procedural fairness.

Grounds 1 and 2 of the application

26. Grounds 1 and 2 of the application raise the same issue and can therefore be conveniently dealt with together.

27. The applicant claims that pages 1 and 2 of the Tribunal decision record were missing from the copy sent to him. However, having perused the copy of the written statement sent to the applicant on 10 July 2007 (set out at CB 74-84), I am satisfied that only page 2 of that document (the incomplete written statement) was not sent to the applicant. The applicant, in fact, received page 1. It was not numbered on its face, hence the applicant's confusion.

28. The respondent concedes that page 2 of the copy of the incomplete written statement held on the Tribunal file was not sent to the applicant.

29. A complete copy of the written statement was sent to the applicant on 23 August 2007, with the inclusion of page 2 (see CB 86).

30. The issues for consideration are therefore whether the written statement sent to the applicant complies with s.430(1) of the Act in terms of its content; and whether it complies with s.430B(6) of the Act in terms of

its service on the applicant, given that the applicant was not present at the handing down of the Tribunal decision.

31. Section 430(1) provides that:

> *Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:*
>
> *(a) sets out the decision of the Tribunal on the review; and*
>
> *(b) sets out the reasons for the decision; and*
>
> *(c) sets out the findings on any material questions of fact; and*
>
> *(d) refers to the evidence or any other material on which the findings of fact were based.*

32. Section 430B(6) provides that:

> *If the applicant is not present at the handing down of the decision, the Tribunal must notify the applicant of the decision by giving the applicant a copy of the statement prepared under subsection 430(1). The copy must be given to the applicant:*
>
> *(a) within 14 days after the day on which the decision is handed down; and*
>
> *(b) by one of the methods specified in section 441A.*

33. Page 2 of the incomplete written statement contains the following material:

- under the heading, **APPLICATION FOR REVIEW**, brief background information, including the nature of the presenting application to the Tribunal for review of the delegate's decision; when the applicants arrived in Australia from China; when they made their applications for protection visas; when and why the delegate refused the application and when the applicants were so notified; when the applicants applied to the Tribunal for review of the delegate's decision; and the Tribunal's findings that the delegate's decision was an RRT-reviewable decision and that the applicants had made a valid application for review; and

- under the heading, **RELEVANT LAW**, an outline of the applicable legislative provisions. That outline continues onto page 3 of the incomplete written statement.

34. The remainder of the incomplete written statement clearly sets out:

    - the decision of the Tribunal (at CB 96);
    - the Tribunal's reasons for decision (at CB 94-95)
    - the findings on material questions of fact (at CB 94-95); and
    - referred to the evidence and any material on which its findings of fact were based (at CB 88-93).

35. I am therefore satisfied that the incomplete written statement provided by the Tribunal to the applicant complied with its statutory obligations under s.430(1) in this regard. The content of the omitted page 2 does not touch upon the matters specified in s.430(1) which must be present in the written statement provided to the applicant pursuant to s.430B(6).

36. The copy of the incomplete written statement was provided to the applicant by post within 14 days from the date of the handing down of the Tribunal decision, as required under s.430B(6).

37. The failure of the Tribunal to provide page 2 to the applicant within the relevant statutory timeframe, is thus not fatal to its compliance with the statutory obligations imposed on it under s.430(1) and s.430B(6) of the Act.

38. Furthermore, contrary to the applicant's assertion under ground 2, the incomplete written statement clearly discloses well articulated reasons for the Tribunal refusing to grant him a protection visa (and see ground 3 below).

39. I also accept the submission from the first respondent that the present situation is clearly distinguishable from *SZFLM v Minister for Immigration and Citizenship* [2007] FMCA 1 at [22]-[23] in which Driver FM held that posting the applicant a copy of the Tribunal decision with a page missing was a breach of s 430B(6), where the

missing page set out the reasons for the decision. His Honour held that it was insufficient to enable the applicant to understand why the decision was made.

40. I have also considered whether he may have been in any way prejudiced in his capacity to file any amended application in this Court based on his having been served with the incomplete written statement.

41. In this regard, the Court made Orders by Consent at the 21 August 2007 directions hearing (First Court Date) which gave the applicant the opportunity until 16 October 2007 to file any amended application. Two days later, on the 23 August 2007, the Tribunal sought to correct its error and forwarded the applicant a complete sealed copy of the written statement.

42. Whilst this corrected copy is clearly out of time pursuant to s.430(B)(6), being outside the 14 day statutory requirement for service, nonetheless, for the purposes of filing any amended application it cannot be said that the applicant was deprived of a reasonable opportunity to raise any ground on which he wished to rely based on material contained in the omitted page 2 of the incomplete written statement. I therefore detect no procedural unfairness on this basis.

43. Accordingly, for the reasons stated above, Grounds 1 and 2 of the application are rejected.

Ground 3 of the application

44. The applicant has provided no particulars to indicate how, or in what respects, he asserts the Tribunal has "selectively used" the evidence he provided in his statements and at the hearing and that, in consequence, it did not properly consider his claims or afford him procedural fairness.

45. In its **Findings and Reasons** the Tribunal again summarised the written and oral evidence provided by the applicant, and the questions asked of him by the Tribunal at the hearing, in concluding that:

> *The first applicant has such a paucity of knowledge of essential FG beliefs, practice and history that the Tribunal is not satisfied*

that the applicant is really a genuine FG practitioner as he claims (CB 95).

46. The Tribunal also found that the various claims made by the applicant about being persecuted in China in consequence of being a Falun Gong practitioner:

> *are also not plausible and are fabricated to assist his PV application* (CB 95).

47. A fair reading of the Tribunal's decision discloses that the Tribunal understood the claims made by the applicant; explored those claims with him at the hearing; identified the determinative issues and gave him sufficient opportunity to give evidence and make submissions on those issues at the hearing; gave to the applicant in writing its concerns and information it had that may be part of the decision for affirming the decision under review; closely noted the applicant's responses at the hearing and to the s.424A letter; and made findings based on the evidence and material before it.

48. I consider that the Tribunal's findings were open to it on all the evidence and material before it; that it applied the correct law to those findings; and reached its conclusions based on the findings made by it.

49. Furthermore, the Tribunal clearly articulated its reasons for rejecting the applicant's claims based on its finding that the applicant was an unreliable witness who lacked credibility. Its conclusion that the applicant was not a witness of credit was a finding of fact par excellence: *Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at [67].

50. The Tribunal was not required to accept uncritically any and all allegations made by the applicant: *Randhawa v Minister for Immigration & Ethnic Affairs* (1994) 52 FCR 437 at 451. Merely because the applicant disagreed with the Tribunal's factual conclusions and its ultimate conclusion does not amount to an error of law: *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272. As the Full Federal Court observed in *NADR v Minister of Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 167 at [9]:

> *The finding of facts, including the making of findings of credibility, was uniquely within the jurisdiction of the Tribunal and not within the jurisdiction of the Court. It would have been in contravention of Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 at 272 for the Court to have engaged in merits review.*

51. Contrary to the applicant's assertion that the Tribunal "selectively used" the evidence he provided in his statements and at the hearing, the Tribunal is entitled to accord what weight it determines to any of the evidence and material before it. It is ultimately a factual matter for it. As observed by the Federal Court in *Lee v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 464 at [27]:

> *The Tribunal is entitled to accept or reject or give such weight to the evidence proffered as it thinks appropriate in all the circumstances.*

52. In the above circumstances, I am satisfied that the Tribunal complied with the statutory regime in according the applicant procedural fairness in the making of its decision and that it performed the task required of it in accordance with law.

53. Accordingly, for the reasons stated above, Ground 3 of the application is rejected.

Conclusion

54. The Court finds that the Tribunal's decision is not affected by jurisdictional error and is therefore a privative clause decision. Accordingly, pursuant to s.474 of the Act this Court has no jurisdiction to interfere.

55. The application before this Court is dismissed.

I certify that the preceding fifty-five (55) paragraphs are a true copy of the reasons for judgment of Orchiston FM

Associate: Duncan Maconachie

Date: 2 May 2008