FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZLNM v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 366*

MIGRATION – Visa – Protection (Class XA) visa – Refugee Review Tribunal – application for review of decision of Refugee Review Tribunal affirming decision not to grant protection visa – citizen of People's Republic of China claiming fear of persecution as a Falun Gong practitioner – whether Tribunal failed to consider a relevant matter – whether the Tribunal failed to comply with *Migration Act 1958* (Cth) s.424A(1) – whether Tribunal failed to investigate the applicant's claim – illogicality – procedural fairness – certiorari and mandamus.

Migration Act 1958 (Cth) ss.91R, 422B, 424, 424A, 425, 474

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 referred to.
Abebe v The Commonwealth (1999) 197 CLR 510 referred to.
SZCIJ v Minister for Immigration and Multicultural Affairs & Anor [2006] FCAFC 62 followed.
SZGSI v Minister for Immigration and Citizenship [2007] FCAFC considered.
SZIRO v Minister for Immigration and Citizenship [2007] FCA 260 followed.
Prasad v Minister for Immigration and Ethnic Affairs (1985) FCR 155
Re Minister for Immigration and Ethnic Affairs; Ex parte S20/2002 (2003) 198 ALR 59 referred to.
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63 followed.
SZEPZ v Minister for Immigration & Multicultural Affairs [2006] FCAFC 107 followed.

Applicant:	SZLNM
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 3257 of 2007
Judgment of:	Scarlett FM

Hearing date:	20 March 2008
Date of Last Submission:	20 March 2008
Delivered at:	Sydney
Delivered on:	31 March 2008

REPRESENTATION

Applicant:	In person
Solicitors for the Applicant:	Not legally represented
Counsel for the Respondent:	Ms Mitchelmore
Solicitors for the Respondent:	Australian Government Solicitor

ORDERS

(1) That there be an order in the nature of certiorari quashing the decision of the Refugee Review Tribunal made on 4 October 2007 affirming the decision of a delegate of the First Respondent not to grant the Applicant a Protection (Class XA) visa.

(2) That there be an order in the nature of mandamus remitting the Applicant's application for a Protection (Class XA) visa to the Refugee Review Tribunal for determination according to law.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3257 of 2007

SZLNM
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Application

1. The Applicant, a citizen of the People's Republic of China, asks the Court to set aside a decision of the Refugee Review Tribunal made on 4th October 2007. The Tribunal affirmed a decision of the delegate of the Minister not to grant the Applicant a protection visa.

2. By her application, filed on 19th October 2007, the Applicant asks the Court for:

    a) a writ of certiorari quashing the Tribunal decision; and

    b) an order in the nature of mandamus requiring the Tribunal to reconsider the matter.

Background

3. The Applicant arrived in Australia on 16th March 2007 and applied for a Protection (Class XA) visa on 22nd March 2007. The ground for her application appears in a statement the Applicant supplied with her application:

> *I am a Falun gong practitioner and was persecuted by the Chinese authorities. I was forced to give up my job with a handsome income and flee my country of origin. Please allow me to explain to you my experience of practicing Falun gong and being persecuted in China and my fear for persecution upon return to China.*[1]

4. In a decision dated 27th April 2007, a delegate of the Minister refused the application for a visa. The delegate considered Independent Country Information and found:

> *I accept that the applicant was a Falun Gong practitioner. I also accept that she might have some subjective fear of being harmed should she return to China on account of her Falun Gong activities. However, even if I consider that the applicant's subjective fear is genuine, I find that there is no objective basis for that fear.*[2]

Application for Review by the Refugee Review Tribunal

5. The Tribunal wrote to the Applicant on 18th May 2007, inviting her to attend a hearing on 5th July 2007. The Applicant attended the hearing on 5th July and gave evidence with the assistance of an interpreter in the Mandarin language.

6. On 14th May 2007 the Applicant applied to the Refugee Review Tribunal for a review of that decision. She did not attach any additional documentary evidence to her application.

7. The following day, 6th July 2007, the Tribunal wrote a letter to the Applicant headed "Invitation to Comment on Information". The letter, which was clearly intended to comply with s.424A(1) of the Migration Act, told the Applicant that the Tribunal had information that would,

[1] The Applicant's statement is set out in full on pages 30-32 of the Court Book.
[2] Court Book at 45

subject to any comments she made, be the reason, or part of the reason, for deciding she was not entitled to a protection visa.

8. The Tribunal's letter then set out the information, which related to the activities of another woman named Xu Jing. The letter wen ton to tell the Applicant that:

> *This information is relevant because it may be the reason or part of the reason for the Tribunal to conclude that the account of Xu Jing's return to China and of what followed was not true and to be unsatisfied that you have a well founded fear of persecution in China as a result of the events you described.*
>
> *You are invited to comment on this information. Your comments should include, if possible, exact details of Xu Jing's travel to and from Australia, her full name and her date of birth.*[3]

9. The letter also told the Applicant that if the Tribunal did not receive the comments within the period allowed (by 31st July) she would lose any entitlement she might otherwise have had under s.425 of the Migration Act to appear before the Tribunal to give evidence and present arguments. This may have been a little confusing, as the Applicant had already appeared at a hearing only the day before.

10. The Applicant wrote to the Tribunal on 27th July 2007 and provided written comments upon the information in the Tribunal's letter.

11. On 9th August 2007, the Tribunal wrote to one Jing Xu, referring to a telephone conversation with a Tribunal officer the day before, and confirming that the Tribunal wished to interview her on 17th August 2007.

12. The Tribunal signed its decision on 17th September 2007 and handed the decision down on 4th October 2007. In the Decision Record[4] the Tribunal referred to the Applicant's claim to have been arrested by the police and detained for 21 days after Falun Gong tapes and books were found at her home. The Tribunal referred to the Applicant's claim that a co-practitioner, Xu Jing, had returned to China from Australia bringing a copy of a Falun Gong publication called the Nine Commentaries and a CD. The Applicant claimed that she and Xu Jing made copies of the

[3] Court Book at 57
[4] A copy of the Tribunal Decision Record can be found on pages 91 to 97 of the Court Book

documents and distributed them. When the Applicant learned that the PSB were investigating the source of the documents, she left for Australia.

13. In a section headed "Other evidence" the Tribunal referred to the interview with Xu Jing:

> *I learned subsequent to the hearing that Xu Jing was back in Australia. I arranged to interview her to see if her evidence would throw any light on the matters which remained unclear following the applicant's hearing.*
>
> *Xu Jing also claimed to be a Falun Gong practitioner, but her knowledge of Falun Gong beliefs was poor. Her account of her bringing to China and involvement in the dissemination of the Nine Commentaries broadly coincided with the account of the applicant. Although she claimed to have been warned by a friend in the local police station that she should be careful, nothing actually happened to her or her friends before she left for Australia.*[5]

14. In the Tribunal's Findings and Reasons[6] the Tribunal accepts that the Applicant is a citizen of China.

15. However, the Tribunal did not accept that the Applicant was a genuine Falun Gong practitioner:

> *I do not accept that the applicant is a genuine practitioner of Falun Gong. What she demonstrated she knew about Falun Gong is easily acquired knowledge and she is ignorant about anything more than the purely superficial.*
>
> *That does not mean, however, that she might not be imputed with the practice of Falun Gong as a result of her – albeit limited – claimed involvement in the distribution of "subversive" materials. Because I found the story she told – involving her friend bringing a copy of the Nine Commentaries and a related DVD back from Australia and then passing them around – an extremely dangerous thing to do – inherently implausible, I would have dismissed her claim out of hand, had I not discovered that Xu Jing was in Australia. I thus felt that I would submit my scepticism to the test of an interview with her. I was not reassured.*

[5] Court Book at 95
[6] Court Book 95-97

> *To be very clear, I am not rejecting the applicant's claims because of what Xu Jing said to me. Had I not interviewed Xu Jing, I would have found the applicant's account implausible and I would not have accepted it for reasons that I will set out below. I wanted to see, however, if Xu Jing would do anything to change my mind. She did not.*[7]

16. The Tribunal did not accept that the Applicant was a genuine Falun Gong practitioner or that she had ever been detained. The Tribunal did not accept that the Applicant's activities in Australia regarding Falun Gong had been engaged in otherwise than for strengthening her claim to be a refugee. Accordingly, the Tribunal disregarded those activities in accordance with the provisions of s.91R of the Migration Act.

17. The Tribunal did not accept that there was a real chance of the Applicant suffering harm in China for reason of her political opinion, real or imputed, of for reason of her membership of a particular social group or for any other Convention reason. The Tribunal found that the Applicant did not have a well founded fear of persecution in China for a Convention reason and affirmed the decision not grant her a Protection (Class XA) visa.

Application for Judicial Review

18. The Applicant commenced proceedings in this Court on 19th October 2007. Her application claims that the decision involved an error of law (in) that:

    a) The decision involved an important exercise of the power conferred (by the) Migration Regulations.

    b) The Respondent did not carefully consider the information which is in favour of the Applicant.

    c) There was no evidence or other materials to justify the making of the decision.

19. The alleged Ground 1(a) is not a ground for relief at all.

20. The application then sets out six grounds:

[7] Court Book 96

a) A claim that the Applicant is a citizen of China who would be at risk of suffering Convention-related persecution if she were to return.

b) The Refugee Review Tribunal failed to understand the Applicant's claims and failed to consider relevant matters, "further particulars to be provided". No further particulars were provided.

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

d) The Tribunal refused to grant the Applicant a protection visa without any proper grounds or proper investigation.

e) The Applicant sincerely hopes that the Australian Government could protect her because she would be jailed if she were to return to China.

f) The decision made by the Tribunal is illogical.

21. The Applicant did not make any written submissions. She attended court and made oral submissions. The Applicant said that there were number of facts that the Refugee Review did not consider. She had provided photographs which the Tribunal did not give sufficient weight to.

22. When asked about the claimed breach of s.424A of the Act the Applicant said only that she had been involved in Falun Gong activities and had provided photographs which were not considered.

23. When asked about her claim that the Tribunal decision was illogical, the Applicant said that Australia is a country subject to the rule of law but she did not get protection. She was very nervous at the Tribunal hearing.

24. The Applicant asked for an adjournment to provide fresh evidence but I informed her that the Court did not have the jurisdiction to consider fresh evidence.

25. The Applicant said that the Tribunal did not consider that she would be killed or put in prison if she were to return to China.

Conclusions

26. The statement in 1(a) that the decision involved an important exercise of the power conferred by the Migration Regulations is not a claim of any error of law.

27. The claim in 1 (b) that the Tribunal did not carefully consider the information in favour of the Applicant is, as counsel for the Minister submitted, an argument going to merits review. The weight that the Tribunal gives to particular evidence is a matter for the Tribunal (see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[8]). The Tribunal considered the Applicant's claims to be a Falun Gong practitioner and to fear persecution for that reason. This ground fails.

28. The claim in 1(c) that there was no evidence to justify the Tribunal's decision is, as counsel for the Minister submitted, a misconception of the Tribunal's review function. It was for the Applicant to advance whatever evidence she wished to support her claim (*Abebe v The Commonwealth*[9]). There is no obligation on the Tribunal to disprove an applicant's claim. If the applicant does not satisfy the Tribunal that he or she is eligible for a visa, the application must be dismissed.

29. This ground fails.

30. The ground (a) claiming that the Applicant is a citizen of China who would be at risk of suffering persecution within the meaning of the Refugees Convention does not allege any error of law. It is merely a statement of the Applicant's claim for a protection visa. It is not a ground of review.

31. The ground (b) claims that the Tribunal failed to understand the Applicant's claims and failed to consider relevant matters. The Applicant did not supply any further particulars except to tell the Court that she had provided photographs that were not considered. The Tribunal did not accept that the Applicant's activities in Australia, to which the photographs presumably referred, were engaged in other than for the purpose of strengthening her refugee claim. The Tribunal therefore disregarded the evidence of those activities.

[8] (1996) 185 CLR 259
[9] (1999) 197 CLR 510 at [187]

32. The Applicant has not established that the Tribunal failed to understand her claim or failed to consider a relevant consideration. This ground fails.

33. The Applicant complained of a breach of s.424A of the Migration Act, but did not provide any particulars of that claim. The only matter to which a claim of a breach of s.424A (1) could apply is the information obtained from Xu Jing as a result of the Tribunal's interview on 17th August 2007.

34. It appears from the material in the Court Book that the Applicant was not present when the Tribunal interviewed Xu Jing. There is no evidence that the Applicant was even aware that the interview was to take place. It is quite clear that the operation of s.422B of the Migration Act excludes the common natural justice hearing rule (see *SZCIJ v Minister for Immigration and Multicultural Affairs & Anor*[10]), so no complaint can be made on that score.

35. There can, however, in those circumstances, be a breach of s.424A(1), whether or not the Applicant is present (*SZGSI v Minister for Immigration and Citizenship*[11]), if the information obtained from the interviewee were to be considered by the Tribunal as part of the reason for affirming the decision under review. In this case, however, the Tribunal was at pains to point out that it was:

> *…not rejecting the applicant's claims because of what Xu Jing said to me. Had I not interviewed Xu Jing, I would have found the applicant's account implausible and I would not have accepted it for reasons I will set out below. I wanted to see, however, if Xu Jing would add anything to change my mind. She did not.*[12]

36. What the Tribunal makes clear is that there was no information obtained from Xu Jing that was the reason, or part of the reason, for affirming the decision under review. The Tribunal had already decided that the Applicant's account was implausible and was merely seeking to find out whether Xu Jing could provide evidence that would support the Applicant's account. Xu Jing did not provide information that

[10] [2006] FCAFC 62 at [7]-[8]
[11] {2007] FCAFC 110
[12] Court Book at 96

supported the Applicant's account but did not provide information that contradicted what the Applicant had to say.

37. In other words, there was an absence of favourable information. An absence of information is not "information" for the purposes of s.424A(1).

38. There is no breach of s.424A (1) of the Migration Act and this ground fails.

39. The Applicant's ground (d) claims that the Tribunal refused to grant her protection visa without any proper grounds or proper investigation. The Tribunal's power to seek information under s.424 of the Act is discretionary and there is no obligation on the Tribunal to investigate the Applicant's claims (*SZIRO v Minister for Immigration and Citizenship*[13]*; Prasad v Minister for Immigration and Ethnic Affairs*[14]). This ground fails.

40. The Applicant's ground (e) expresses the Applicant's hope that the Australian Government will protect her because she will be jailed if she returns to China. This is not an allegation of an error of law and does not allege any jurisdictional error.

41. The Applicant's ground (f) complains that the Tribunal's decision is illogical. The Applicant provides no particulars of any illogicality. Counsel for the Minister, Ms Mitchelmore, referred the Court to the High Court decision *Re Minister for Immigration and Ethnic Affairs; Ex parte S20/2002*[15], where Gleeson CJ stated that the description of reasoning as illogical, unreasonable or irrational "may merely be an emphatic way of disagreeing with it".[16]

42. As the Applicant has not provided any particulars of any illogicality, the ground must fail.

43. There is, however, another issue that must be considered. The delegate accepted that the Applicant was a Falun Gong practitioner and that she might have some subjective fear of being harmed should she return to

[13] [2007] FCA 260 at [12]
[14] (1985) 6 FCR 155
[15] (2003) 198 ALR 59
[16] (2003) 198 ALR 59 at 61 [5]

China on account of her Falun Gong activities. The delegate found that there was no objective basis for that fear because the Applicant did not have a high enough profile as a Falun Gong practitioner.

44. However, the Tribunal did not accept that the Applicant was a genuine practitioner Falun Gong. There is no evidence that I can discern that this issue was ever communicated to the Applicant. Whilst the Tribunal asked the Applicant questions about her beliefs, there is nothing in the Decision Record that shows that the Tribunal ever put to her that the very fact of her being a Falun Gong practitioner, which the delegate had accepted, was in issue.

45. Ms Mitchelmore put to the Court that the very questioning of the Applicant was sufficient to indicate that the Tribunal was putting that matter in issue. I do not accept that submission. The Tribunal's questions about the Applicant's Falun Gong beliefs were just as much relevant to the matters that the delegate found, that the Applicant was a Falun Gong practitioner with a subjective fear of harm, but no objective basis for that fear because she was not a high profile practitioner.

46. It was also put that the Applicant had not provided any transcript of the hearing to show that the Tribunal did not raise the question with her. That, with respect, puts the cart before the horse. The failure to provide a transcript means that the Court should rely on the Tribunal decision record as an account of the proceedings, and in my view the decision record does not show that the Applicant was ever made aware that the matters the delegate accepted were again being called into question. The Tribunal's s.424A letter to the Applicant, seeking her comments on certain information about Xu Jing, gives no indication that the Tribunal would conclude that the Applicant was not a Falun Gong practitioner at all.

47. In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*[17] the High Court dealt with the question of statutory procedural fairness in compliance with s.425(1) of the Act:

> *[35] The Tribunal is not confined to whatever may have been the issues that the delegate considered. The issues that arise in*

[17] [2006] HCA 63

> *relation to the issue are to be identified by the Tribunal. But if the Tribunal takes no step to identify some issue other than those that the delegate considered dispositive, and does not tell the applicant what that other issue is, the applicant is entitled to assume that the issues the delegate considered dispositive are "the issues arising in relation to the decision under review". That is why the point at which to begin the identification of issues arising in relation to the will usually be the reasons given for that decision. And unless some other additional issues are identified by the Tribunal (as they may be), it would ordinarily follow that, on review by the Tribunal, the issues arising in relation to the decision under review would be those which the original decision-maker identified as determinative against the applicant.*[18]

48. The Tribunal, by its s.424A letter, clearly raised the issue of the Applicant's involvement with Xu Jing about the distribution of the Nine Commentaries. There is nothing to show, however, that the Tribunal ever drew to the Applicant's attention that even though the delegate accepted that she was a Falun Gong practitioner, the Tribunal was likely to find that she was not.

49. In my view, there is a breach of s.425 of the Act and a consequent jurisdictional error. Accordingly, orders in the nature of certiorari and mandamus will issue. I would make it clear, however, that the Court will not accede to the Applicant's request that the order in the nature of mandamus require that the Tribunal be differently constituted. It is well established that such an order is outside the Court's jurisdiction (*SZEPZ v Minister for Immigration & Multicultural Affairs*[19]).

I certify that the preceding forty-nine (49) paragraphs are a true copy of the reasons for judgment of Scarlett FM

Associate: Virginia Lee

Date: 25 March 2008

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[18] [2006] HCA 63 at [35]
[19] [2006] FCAFC 107