FEDERAL COURT OF AUSTRALIA

SZLQX v Minister for Immigration & Citizenship [2008] FCA 1286

SZLQX v MINISTER FOR IMMIGRATION & CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL
NSD 854 OF 2008

JACOBSON J
12 AUGUST 2008
SYDNEY

NO QUESTION OF PRINCIPLE

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 854 OF 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZLQX**
Appellant

AND: **MINISTER FOR IMMIGRATION & CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **JACOBSON J**

DATE OF ORDER: **12 AUGUST 2008**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the first respondent's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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PLACE: **SYDNEY**

REASONS FOR JUDGMENT

Introduction

1 This is an appeal from orders made by Nicholls FM, dismissing an application for review of a decision of the Refugee Review Tribunal dated 20 October 2007. The Tribunal affirmed a decision of a delegate of the Minister not to grant the appellant a protection visa.

2 The appellant is a citizen of the People's Republic of China. She arrived in Australia on 3 June 2007, and applied for a protection visa on 26 June 2007. The delegate decided to refuse to grant the visa on 31 July 2007. The appellant applied to the Tribunal for a review of the delegate's decision.

Decision of the Refugee Review Tribunal

3 The appellant claimed to have a well-founded fear of persecution in China on the Convention grounds of religion, imputed political opinion and membership of a particular

social group. However, the Tribunal found that in her evidence before it, the appellant did not disclose any spiritual or philosophical insights in her discussion of the principles of the Falun Gong. The Tribunal said that, whilst standing by itself, this was not probative, it did not appear to the Tribunal to help the appellant's case that her evaluation of the principles of Falun Gong was stated only in terms of its benefit to her health.

4 The Tribunal took into account that it was necessary to consider that even a relatively less informed or devout Falun Gong practitioner might nevertheless face a degree of risk or harm in China, whatever that level of risk might be. But the Tribunal went on to say that the appellant stated that even in Australia, where she is of course free to practise Falun Gong, she had not done so, because she had been busy working. The Tribunal regarded this as significant because it suggested to the Tribunal that the appellant was not really serious or sincere in her adherence to the practice of Falun Gong.

5 The Tribunal did not give any weight to the appellant's claims that she had been so nervous at the hearing before the Tribunal that she could not remember the details she was asked to discuss. The Tribunal gave more weight to her claims that she had never heard of any of the central teachings of Falun Gong.

6 The Tribunal's decision record states that it put to the appellant that her claims appeared vague and contradictory, and that this might have implications as to how much or how little of her account the Tribunal might find credible. The appellant then asked if she could demonstrate Falun Gong practice or movements, and the Tribunal provided her with that opportunity. The Tribunal considered that the very basic demonstration, or meditation performed by the appellant in answer to the opportunity could not be considered to be uniquely or essentially the practice of Falun Gong.

7 The Tribunal went on to say that considering all of this evidence, in addition to the appellant's statement that she had put income generation in Australia ahead of the practice of Falun Gong, the Tribunal was not satisfied that she had ever been a Falun Gong practitioner or ever had any genuine interest in Falun Gong.

8 The Tribunal went on to say that it found the appellant to be an unreliable witness. It relied in its decision upon what it described as the appellant's vagueness and on her self-

claimed lack of knowledge of Falun Gong, as well as upon internal inconsistencies in her evidence at the Tribunal hearing. The Tribunal was therefore not satisfied that the appellant faced a real chance of persecution on Convention grounds in the People's Republic of China.

Decision of the Federal Magistrate

9 The appellant's application for review before Nicholls FM stated two grounds. The first was that the Tribunal failed to consider the fact that she had been practising Falun Gong in Australia. The second was a breach of s 424A of the *Migration Act 1968* (Cth).

10 A number of other grounds were stated by the appellant orally in the hearing before the Federal Magistrate. These included a claim that the Tribunal was biased and that there was a breach of "section 91K" of the Act. Although the appellant was unable to explain to the Federal Magistrate what she meant by this complaint, it seems to me that she was relying upon s 91R(3), since she raised that matter before me this afternoon.

11 The Federal Magistrate found at [20] that, contrary to what was asserted by the appellant, the Tribunal did consider her evidence, and did consider the question of whether she had a well-founded fear of persecution if she were to return to China. His Honour rejected the ground of review based on s 424A of the Act, referring to the decision of the High Court in *SZBYR v Minister for Immigration & Citizenship* (2007) 235 ALR 609 at [18].

12 The learned Federal Magistrate, apparently taking into account the fact that the appellant was not legally represented, said at [28] that it appeared that the appellant's complaint was an assertion that there had been a breach of s 425 of the Act. His Honour said at [30] that, in terms of procedural fairness in the context of s 425, the critical issue before the Tribunal was squarely put in issue at the hearing, because the Tribunal specifically raised its concerns as to the vague and contradictory nature of the evidence with the applicant. His Honour referred to the decision of the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152.

13 The learned Federal Magistrate found at [39] that he could not discern any jurisdictional error in the decision of the Tribunal.

The Appeal

14 The Notice of Appeal raises three grounds of appeal, all of which were raised as grounds of review before the Federal Magistrate. Thus, the focus of the Notice of Appeal is upon the decision of the Tribunal. The appellant also relies in her Notice of Appeal on s 424A of the Act. Although the Notice of Appeal contains no reference to s 91R(3) of the Act, the appellant did raise that ground of appeal in her submissions before me.

15 The appellant appeared in person this afternoon. I will deal briefly with each of the grounds stated in the Notice of Appeal.

16 First, there is no basis for the suggestion that the Tribunal was biased against the appellant. This is so, whether or not the claim is made upon the basis of actual bias or apprehended bias. There is nothing to suggest that the Tribunal approached the matter with a closed mind, nor is there anything to suggest any reasonable apprehension of bias on the part of the Tribunal.

17 The appellant said in her submissions that there was no basis for the rejection of her claim, and that the Tribunal did not assess her application. She also said that the Tribunal rejected her claim without any evidence.

18 These related grounds of attack on the decision of the Tribunal are simply not supported by the terms of the decision of the Tribunal. As Nicholls FM observed at [20], the Tribunal did consider the appellant's evidence, and this ground of review must be rejected.

19 Nor is there any basis in the claim that the Tribunal did not give the appellant an opportunity to comment on its reasons for rejecting her claim, and that it did not therefore comply with s 424A of the Act. As the Federal Magistrate observed, the Tribunal's internal reasoning process is not "information" for the purposes of s 424A(1) of the Act, nor do the principles of procedural fairness require the Tribunal to put those matters to an applicant before delivering its reasons. This is plain from the decisions of the High Court in *SZBYR* at [18], and *SZBEL* at [32] and [44].

20 The proper approach to construction of s 91R(3) of the Act was dealt with by a Full Court in *SZJGV v Minister for Immigration & Citizenship* [2008] FCAFC 105 at [21]ff. It is true that in the present case the Tribunal took into account conduct that was engaged in by the appellant in Australia. This is shown in the passage in which the Tribunal observed that the appellant said that she had not been practising Falun Gong in Australia because she was busy making money. In particular, as I said above, the Tribunal took into account the fact that the appellant had put "income generation in Australia before Falun Gong."

21 In my view the answer to the suggestion that there was a breach of s 91R(3) is found in a decision which I gave in a matter of *SZHFE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2006] FCA 648. The Full Court in *SZJGV* referred to this decision at [16] and [17] of its reasons for judgment, without any apparent disapproval of my reasons. In that case I was of the view that the effect of s 91R(3) is that it is only enlivened where an applicant seeks to rely on conduct in Australia to support a claim to have a well-founded fear of persecution.

22 The conduct to which the Tribunal referred, namely the appellant's work-related activities in Australia, was not conduct upon which she sought to rely to support her claim to have a well-founded fear of persecution. It seems to me, therefore, that the Tribunal was not bound under s 91R(3) to disregard that conduct. In my view, there is no breach of that section within the principles which I stated in *SZHFE*, nor is there any breach of the principles stated by the Full Court in *SZJGV*.

Conclusion and Orders

23 It follows, in my view, that the appeal must be dismissed. The orders of the court will be that the appeal be dismissed, and that the appellant pay the costs of the first respondent of the appeal.

I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for

Judgment herein of the Honourable Justice Jacobson.

Associate:

Dated: 22 August 2008

The Appellant was self-represented.

Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	12 August 2008
Date of Judgment:	12 August 2008