HIGH COURT OF AUSTRALIA

FRENCH CJ,
HEYDON, CRENNAN, KIEFEL AND BELL JJ

MINISTER FOR IMMIGRATION AND CITIZENSHIP APPELLANT

AND

SZLFX & ANOR RESPONDENTS

Minister for Immigration and Citizenship v SZLFX [2009] HCA 31
26 August 2009
S503/2008

ORDER

1. Appeal allowed.

2. Set aside Orders 1 and 3 of the orders made by the Full Court of the Federal Court of Australia on 27 June 2008, and in their place make the following orders:

"(a) Appeal allowed.

(b) Set aside Orders 1, 2 and 3 of the orders made by the Federal Magistrates Court of Australia on 11 April 2008, and in their place order that the application to that Court be dismissed."

3. Appellant to pay the first respondent's costs of the appeal to this Court.

On appeal from the Federal Court of Australia

Representation

S B Lloyd SC with L A Clegg for the appellant (instructed by Sparke Helmore Lawyers)

G C Lindsay SC with L J Karp for the first respondent (instructed by Christopher Levingston & Associates)

Submitting appearance for the second respondent

CATCHWORDS

Minister for Immigration and Citizenship v SZLFX

Immigration – Refugees – Review by Refugee Review Tribunal ("RRT") – Person telephoned, for purpose of obtaining information from that person, without procedures set out in ss 424(3) and 424B of *Migration Act* 1958 (Cth) ("Act") being followed – Whether RRT breached ss 424(3) and 424B of Act.

Immigration – Refugees – RRT did not give notice to first respondent of file note of conversation between RRT employee and third person – Whether RRT was required by s 424A of Act to give notice – Whether file note was "the reason, or a part of the reason, for affirming the decision that is under review".

Words and phrases – "get any information", "invite", "reason, or a part of the reason".

Migration Act 1958 (Cth), Pt 7 Div 4, ss 424, 424A, 424B.

1 FRENCH CJ, HEYDON, CRENNAN, KIEFEL AND BELL JJ. This appeal and the appeal in *Minister for Immigration and Citizenship v SZKTI* ("*SZKTI*")[1] were heard together. As the judgment in *SZKTI* bears upon this appeal, the reasons for judgment in *SZKTI* will need to be read in conjunction with these reasons for judgment. A submitting appearance was filed by the second respondent, the Refugee Review Tribunal ("the RRT").

2 This appeal is from a decision of the Full Court of the Federal Court of Australia (Branson, Bennett and Flick JJ) ("the Full Court")[2], in which that Court followed an earlier decision of the differently constituted Full Court (Tamberlin, Goldberg and Rares JJ) in *SZKTI v Minister for Immigration and Citizenship*[3]. Both cases raise a common issue relating to statutory construction under the *Migration Act* 1958 (Cth) ("the Act"). It follows from this Court's decision in *SZKTI* that the appeal in this case as it concerns ss 424 and 424B of the Act must also be allowed. However, it needs to be noted that there was a second discrete issue, which only arose in this case, concerning the requirements of s 424A of the Act. This issue was not dealt with by the Full Court[4].

The facts

3 The first respondent is a citizen of the People's Republic of China. On 16 October 2002, the first respondent arrived in Australia and entered as the holder of a student visa. He applied for a Protection (Class XA) visa on 10 April 2007. The first respondent claims to fear that he will be persecuted if he is returned to China because he is a Falun Gong practitioner.

4 In 2004, the first respondent undertook studies at a place described as UTS. In his protection visa application, the first respondent claimed to have commenced practising Falun Gong at the end of 2004 after he failed some of his university subjects and after his girlfriend ended their relationship. He claimed that in January 2005 he started practising Falun Gong every morning with a group in Belmore Park. He named the leader of the group as a Mr Li. He said that he did temporarily cease practising Falun Gong after his father, who came to

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1 [2009] HCA 30.

2 *Minister for Immigration and Citizenship v SZLFX* [2008] FCAFC 125.

3 (2008) 168 FCR 256.

4 *Minister for Immigration and Citizenship v SZLFX* [2008] FCAFC 125 at [2].

visit him at the beginning of 2005, ordered him to stop. He claimed, however, that he did not stop for very long, and resumed practising Falun Gong in Belmore Park at the end of the semester, after he failed his examinations.

5 The first respondent indicated that in June 2005, his father discovered that he had failed his exams. This led to a break-down in the first respondent's relationship with his father which resulted in his father ceasing financial support for his studies. The first respondent said that he applied for a leave of absence from the university and continued to learn Falun Gong.

6 The first respondent claimed that, by August 2006, he had used up all his money but never stopped learning Falun Gong. He said he lived in Belmore Park and ate from donations. He claimed that he spent each day practising Falun Gong in the morning and afterwards reading in the library, until he was arrested by police in March 2007 because his visa had expired.

7 On 16 April 2007, a delegate of the Minister decided to refuse to grant a protection visa to the first respondent. By a letter of the same date, the delegate notified the first respondent of this decision and explained his review rights.

8 By an application dated 22 April 2007, the first respondent applied to the RRT for review of the delegate's decision. On 14 June 2007, the first respondent attended an RRT hearing. In a decision handed down on 31 July 2007, the RRT concluded that the first respondent was not a person to whom Australia owed protection obligations and, therefore, that he was not entitled to a Protection (Class XA) visa.

9 Immediately before the first respondent attended the hearing on 14 June 2007, an employee of the RRT made a telephone call regarding Falun Gong activities at Belmore Park. The following comment was written on the file note relating to that call:

> "Spoke with Michael from Falun Dafa (Sydney & suburbs) who confirmed that Belmore Park in Sydney is a practice site for Falun Dafa. He is not aware of a Mr Li being the leader, he said that they do not have leaders, they have co-ordinators for various sites, and there are a few of them."

The first respondent was not given notice of the existence of this file note.

The history of the proceedings

10 The first respondent sought judicial review of the RRT's decision in the Federal Magistrates Court. He submitted that the RRT fell into jurisdictional error by failing to comply with s 424A of the Act in that it did not give notice of the above file note to the first respondent. This ground of appeal was successful before the Federal Magistrates Court (Raphael FM)[5].

11 The decision of the Federal Magistrate was handed down on 11 April 2008. The Minister filed a Notice of Appeal in the Federal Court of Australia on 2 May 2008. Subsequently, on 28 May 2008, a Full Court of the Federal Court (Tamberlin, Goldberg and Rares JJ) handed down its decision in *SZKTI v Minister for Immigration and Citizenship*.

12 This led the first respondent on 20 June 2008 to file a Notice of Contention submitting that the judgment of the Federal Magistrate should be upheld on the ground that the RRT had committed jurisdictional error by failing to comply with ss 424(2), 424(3) and 424B of the Act. The first respondent particularised this ground by pleading that the RRT did not invite a person identified as "Michael" (from whom it elicited evidence by telephone) to give additional information by a method identified in s 424(3), and as specified in s 424B of the Act. The relevant provisions are set out in this Court's decision in *SZKTI*.

13 The Full Court held that the Notice of Contention succeeded because the earlier decision in *SZKTI v Minister for Immigration and Citizenship* should be followed[6]. That aspect of this case is covered by this Court's decision in *SZKTI*.

Section 424A

14 The Notice of Appeal before the Full Court had also raised the issue of whether the Federal Magistrate erred in finding that the RRT had failed to comply with s 424A of the Act. Because the Full Court followed the decision in *SZKTI v Minister for Immigration and Citizenship* it found it unnecessary to deal with that question.

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5 *SZLFX v Minister for Immigration and Citizenship* [2008] FMCA 451 at [9].

6 *Minister for Immigration and Citizenship v SZLFX* [2008] FCAFC 125 at [1].

15 Section 424A was inserted into the Act by the *Migration Legislation Amendment Act (No 1)* 1998 (Cth) and it appears in Div 4 of Pt 7 of the Act. Section 424A(1)(a) relevantly provides:

> "(1) … the Tribunal must:
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> (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, 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; …"

16 The issue arising in respect of s 424A centres upon the file note of 14 June 2007 set out above. The first sentence of the file note is corroborative of the first respondent. The second sentence deals with Mr Li and whether Falun Gong has leaders or co-ordinators. There is some overlap in the meaning of "leader" and "co-ordinator" such that it is not impossible to imagine them being used interchangeably in certain contexts.

Submissions in this Court

17 The first respondent contended that it could be inferred from the second sentence of the file note that the RRT held an opinion that the second sentence would be part of the reason for affirming the decision to refuse the first respondent a protection visa.

18 The RRT's reasons did not refer to the file note or its contents[7]. Nevertheless, the first respondent submitted that the RRT's reasons referred to the practice of Falun Gong in Belmore Park (a topic to which the file note was directed) and also submitted that "the evidence as a whole"[8] relied on and referred to by the RRT must include the file note.

19 The Minister contended that no issue was taken by the RRT as to the appropriate title for a Falun Gong leader or as to Mr Li. It was submitted that the question for the Federal Magistrate, and the relevant jurisdictional fact, was whether the RRT considered that the evidence would, if left unanswered, be a

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7 See s 430(1)(d) of the Act, which requires the setting out of evidence upon which a decision is based.

8 Refugee Review Tribunal, Statement of Decision and Reasons, 31 July 2007 at 15.

part of the reason for concluding that the first respondent was not a refugee. It was further submitted that there was no evidence that the RRT ever considered the file note or its contents or that they were the reason or part of the reason for its decision.

20 This Court has construed s 424A in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*[9] and in *SZBYR v Minister for Immigration and Citizenship* ("*SZBYR*")[10]. There was no challenge to those authorities or the principles they contain, the emphasis in argument being on whether or not the file note in question was "the reason, or a part of the reason, for affirming the decision" under review and how that was to be assessed. Notably, it was contended by the first respondent that upon a proper review of the evidence the Federal Magistrate was correct in his conclusions.

21 In *SZBYR*[11], it was stated that:

> "Section 424A does not require notice to be given of every matter the Tribunal might think relevant to the decision under review. Rather, the Tribunal's obligation is limited to the written provision of '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'."

22 Furthermore, it was emphasised that for s 424A(1)(a) to be engaged, the material in question should in its terms contain a "rejection, denial or undermining"[12] of the review applicant's claim to be a refugee. The Federal Magistrate approached the issue framed by reference to s 424A by considering whether the file note could or might undermine the credibility of the first respondent. He considered it could and also considered that no inference that the file note was not material to the decision should be drawn from the RRT's failure to mention the file note.

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9 (2005) 228 CLR 294; [2005] HCA 24.

10 (2007) 81 ALJR 1190; 235 ALR 609; [2007] HCA 26.

11 (2007) 81 ALJR 1190 at 1195 [15] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; 235 ALR 609 at 615.

12 *SZBYR* (2007) 81 ALJR 1190 at 1196 [17] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; 235 ALR 609 at 615.

23 This approach was, with respect, flawed given the following observations in *SZBYR*[13]:

> "[I]f the reason why the Tribunal affirmed the decision under review was the Tribunal's disbelief of the appellants' evidence arising from inconsistencies therein, it is difficult to see how such disbelief could be characterised as constituting 'information' within the meaning of para (a) of s 424A(1). … However broadly 'information' be defined, its meaning in this context is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence."

24 As a Full Court of the Federal Court of Australia (Dowsett, Bennett and Edmonds JJ) pointed out correctly, shortly after *SZBYR*, in *SZKLG v Minister for Immigration and Citizenship*[14], s 424A depends on the RRT's "consideration", that is, its opinion, that certain information would be the reason or part of the reason for affirming the decision under review. Here, there was no evidence or necessary inference that the RRT had "considered" or had any opinion about the file note.

25 As observed equally correctly by Heerey J in *MZXBQ v Minister for Immigration and Citizenship*[15], s 424A speaks of information which "would", not which "could" or "might", be the reason or part of the reason for affirming the decision under review.

26 The RRT's reasons show that what counted against the first respondent were internal inconsistencies in his evidence. The RRT disbelieved the first respondent's evidence that he was a practitioner of Falun Gong because of the inadequacy of his testimony in recollecting matters the RRT would have expected him to recall, such as the content of lectures given to him by his mentor or details of the practice of Falun Gong. It was clear from the reasons of the RRT that adverse credibility findings arose from matters which were not subject to any obligation under s 424A. The only inference available was that the RRT did not consider the second sentence of the file note to be the reason or part of

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13 (2007) 81 ALJR 1190 at 1196 [18] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; 235 ALR 609 at 616.

14 (2007) 164 FCR 578 at 589 [33].

15 (2008) 166 FCR 483 at 492 [29].

the reason for affirming the decision. In these circumstances the first respondent cannot sustain the submission that the attitude of the RRT as evidenced in its reasons showed that the RRT regarded the second sentence of the file note as materially adverse to him.

Conclusion

27 The Full Court erred in upholding the first respondent's claims in respect of the construction of ss 424 and 424B of the Act. Further, the Federal Magistrate erred in finding that a breach of s 424A had occurred.

Order

28 The appeal should be allowed. In accordance with an undertaking given on behalf of the Minister, the Minister is to pay the first respondent's costs and the orders for costs given below in favour of the first respondent will not be disturbed.