FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZKGE v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 893

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming persecution in China by reason of her practice of Falun Gong – applicant not believed – no reviewable error found – application dismissed.

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

Minister for Immigration v Jia (2001) 205 CLR 507
SZILP v Minister for Immigration & Anor [2007] FMCA 592

Applicant:	SZKGE
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG610 of 2007
Judgment of:	Driver FM
Hearing date:	7 June 2007
Delivered at:	Sydney
Delivered on:	7 June 2007

REPRESENTATION

The Applicant appeared in person

Counsel for the Respondents:	Mr J Smith
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) The application is dismissed.

(2) The applicant is to pay the first respondent's costs and disbursements of and incidental to the application, fixed in the sum of $4,700.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG610 of 2007

SZKGE
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 decision was signed on 5 January 2007 and was handed down on 25 January 2007. The Tribunal affirmed a decision of the delegate of the Minister not to grant the applicant a protection visa. The background to the applicant's arrival in Australia, her protection visa claims and the Tribunal's decision on her review application are adequately summarised in the Minister's outline of written submissions filed on 31 May 2007. I adopt as background for the purposes of this judgment paragraphs 2 through to 6 of those written submissions:

> The applicant is a citizen of the People's Republic of China who arrived in Australia on 4 June 2006 and lodged an application for a protection visa on 12 July 2006. She claimed to fear persecution from the authorities because of her practice of and adherence to Falun Gong. She also claimed that police had come to her home and taken away the

> photos she had taken of the demonstrations in Tianan Men Square in June 1989.
>
> On 30 August 2006 a delegate of the first respondent refused the applicant for a visa and the applicant applied to the Tribunal for review of that decision. The applicant attended a hearing conducted by the Tribunal on 5 December 2006 and the Tribunal handed down its decision on 25 January 2007.
>
> Tribunal's decision
>
> The Tribunal did not accept that the applicant was a practitioner of Falun Gong in China and found that the police had not confiscated photos taken by her of the demonstrations in 1989. The reasons for these findings were that the applicant gave inconsistent evidence during the hearing, her account of the events in 1989 was inconsistent with independent reports of those events, and her knowledge of Falun Gong was scant.
>
> The Tribunal accepted that the applicant had taken part in Falun Gong activities in Australia but was satisfied that it was engaged in solely for the purpose of strengthening her claim to be a refugee. Accordingly, the Tribunal disregarded that conduct.
>
> On the basis of these findings the Tribunal concluded that the applicant had no well-founded fear of persecution under the Convention and affirmed the decision under review.

2. These proceedings began with a show cause application filed on 22 February 2007. The applicant asserted actual notification of the Tribunal decision on 6 February 2007. The applicant now relied upon an amended application filed on 3 May 2007. That application asserts bias and a breach of s.424A of the *Migration Act 1958* (Cth) ("the Migration Act"). Attached to the application is a statement apparently intended to elaborate upon the asserted breach of s.424A. The statement is in a template form with which the Court is now very familiar. It does not identify with precision the disclosable information said to have been relied upon by the Tribunal. The applicant also relies upon her affidavit filed with her original application on 22 February 2007. I accepted that affidavit as a submission. It asserts in the most general of terms bias and breach of statutory duty.

3. I explored with the applicant her asserted grounds of review at the hearing before me today. The applicant was assisted by an interpreter

who employed both the Mandarin and Cantonese languages. The interpreter was engaged specifically to interpret in the Mandarin language because in her original application the applicant identified that as her first language and requested an interpreter in that language. However, before the Tribunal the applicant had requested a Cantonese interpreter. The correspondence file also records that after the first court date in this matter on 8 March 2007, the applicant again requested a Cantonese interpreter. That request appears to have been overlooked because of the statement in the applicant's original application that she speaks Mandarin and wanted a Mandarin interpreter. I was able to satisfy myself during the course of today's hearing that the applicant was able to understand what was being said and was able to convey her own statements with clarity.

4. It is plain that the applicant disagrees with the Tribunal decision. She is concerned that the Tribunal did not believe her claims of persecution. She is concerned that the Tribunal did not accept that she is a genuine Falun Gong practitioner. However, as I explained to her, the mere fact that she was not believed does not establish bias either actual or apprehended. In response to my questions she was unable to identify any particular information derived from her protection visa application that was relied upon by the Tribunal in its decision. The applicant made a general reference in her oral submissions to a failure by the Tribunal to apply correctly s.91R of the Migration Act but there is no substance to that assertion. I agree with and adopt for the purposes of this judgment paragraphs 7 and 8 of the Minister's written submissions in relation to the two grounds in the amended application:

> First ground: bias
>
> The allegation of bias is made on the basis that the Tribunal did not believe the applicant. This cannot support such a serious allegation. The Tribunal had good reasons to reject the applicant's credibility: her evidence was not only inconsistent with other evidence given by her and independent evidence, but also, according to the Tribunal, internally inconsistent. This does not suggest that the Tribunal had so prejudged the matter that it was unable or unwilling to change its mind regardless of the evidence: *Minister for Immigration v Jia* (2001) 205 CLR 507.

Second ground: breach of s.424A

An obligation under s.424A arises in respect of information that the Tribunal considers would be the reason or part of the reason for its decision. The basis of the Tribunal's reasons was the inconsistency of her own evidence with other evidence. It was what she said at the hearing that led the Tribunal to reject her claims. The evidence given at the hearing was necessarily given by the applicant for the purpose of the review application and thus came within s.424A(3)(b). The other evidence relied on by the Tribunal was independent information which was not specifically about the applicant or any other person and so came within s.424A(3)(a). For these reasons, there was no obligation under s.424A(1) and the ground must be rejected.

5. The only other question in my mind is the manner in which the Tribunal relied upon what it appeared to treat as an expert opinion about what knowledge could be expected from a genuine Falun Gong practitioner about Falun Gong theory and practice. On page 76 of the court book in the Tribunal decision, the presiding member said:

> *Dr Benjamin Penny was asked in a seminar to the Refugee Review Tribunal how in 2006 you would determine whether someone was a genuine Falun Gong practitioner. He answered as follows:*
>
> *"1. the five exercises. All practitioners would know of their existence and should be able to perform them confidently, allowing for physical disability (like not being able to get into a lotus position), age or a degree of natural clumsiness. I would not be confident that they would be able to tell you the names of each exercise, or each part of each exercise, or the rationale for the exercises that Master Li occasionally notes, as they may well have learnt them by imitation rather than ever looking at a book or a website."*
>
> *When asked where the Falun was located the applicant said it was in the space of the universe.*
>
> *Dr Benjamin Penny has written:*
>
> *"In Falun Gong "Falun" refers to a literal wheel that Master Li inserts into the abdomen of practitioners when they first begin. It was done during the nine introductory lecture sessions in the early days, and now it is said it is done if you start practising earnestly and seriously."*
>
> *(RRT, Falun Gong Seminar, Melbourne, 14 July, 2006, pgs 25-6)*

> *When asked if she could relate any of the topics in "Chuen Falun" (which the Tribunal accepted meant Zhuan Falun), she said it was about how to behave as a man, in a world that is to be harmony. She did not relate any of the topics. Dr Penny has written that he would expect all practitioners to know the main scripture of Falun Gong,* Zhuan Falun. *(RRT, Falun Gong Seminar, Melbourne, 14 July, 2006 pg 21)*

6. The Tribunal concluded at page 77 of the court book:

> *While her failure to accurately discuss Falun Gong theory is not determinative in itself, the Tribunal would have expected a long-standing practitioner to have more understanding of Falun Gong principles.*

7. The Tribunal went on to find that it was not satisfied that the applicant was a Falun Gong practitioner in China. The Tribunal, in my view, needs to be cautious in the manner in which it deals with expert opinion of the kind expressed by Dr Benjamin Penny. In the first place, it may be clear to the Tribunal that Dr Penny's opinions are authoritative but that is not necessarily apparent to a court reviewing a tribunal decision. The Tribunal needs to satisfy itself that an opinion to be relied upon is reliable and the basis for the Tribunal's reasoning ought to be stated.

8. Secondly, the Tribunal must be alert to the risk that it may adopt someone else's judgement rather than exercise the independent mind of the presiding member. I have previously found that a failure to bring an independent mind to bear on a case to be decided amounts to jurisdictional error: *SZILP v Minister for Immigration & Anor* [2007] FMCA 592.

9. Thirdly, it is not apparent on the face of the Tribunal decision that Dr Penny's opinions were raised with the applicant. Under the general law, procedural fairness would require the disclosure of such an opinion to an applicant. In the present case, no jurisdiction of error is apparent in the manner in which the Tribunal dealt with Dr Penny's opinion. First, the applicant's failure to accurately discuss Falun Gong theory by reference to Dr Penny's opinions was not treated as determinative. Secondly, the silence on the face of the record of the Tribunal decision about any discussion of the opinions with the applicant does not support an inference that the opinions of Dr Penny

were not discussed. In order to properly address that issue that would be necessary to refer to a transcript of the Tribunal hearing, which is not available. Thirdly, even if there was a failure to disclose the opinion, demonstrating a breach of the fair hearing rule under the general law, the operation of that rule is excluded by s.422B of the Migration Act.

10. I find that the decision of the Tribunal is free from jurisdictional error. The decision is therefore a privative cause decision and the application must be dismissed. I so order.

11. The application having been dismissed, costs should follow the event. The Minister seeks an order for costs fixed in the sum of $4,700. That is a party-party assessment and is less than the scale of costs under the *Federal Magistrates Court Rules 2001* (Cth) in this instance. The applicant was interested in exploring her rights of appeal but did not wish to be heard on costs. I will order that the applicant pay the first respondent's costs and disbursements of and incidental to the application, which I fix in the sum of $4,700.

I certify that the preceding eleven (11) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 13 June 2007