

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZIJU v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 51

MIGRATION – RRT decision – reliance on information obtained by Tribunal in telephone inquiry to China – incomplete disclosure to applicant – breach of s.424A(1) found – matter remitted.

Migration Act 1958 (Cth), ss.414, 420, 422B, 424A, 424A(1), 424A(1)(a), 424A(1)(b), 425, 438, 439(3), 440

Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 225 CLR 88
Elrifai v Minister for Immigration [2005] FMCA 1484, (2005) 225 ALR 307
Minister for Immigration & Multicultural Affairs v SZGMF [2006] FCAFC 138
SZBYR v Minister for Immigration & Citizenship [2007] HCA 26
SZELA v Minister for Immigration & Anor [2005] FMCA 1068
SZJDY v Minister for Immigration & Anor [2007] FMCA 1760

Applicant:	SZIJU
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2106 of 2007
Judgment of:	Smith FM
Hearing date:	25 October 2007
Date of Last Submission:	14 November 2007
Delivered at:	Sydney
Delivered on:	30 January 2008

REPRESENTATION

Counsel for the Applicant: Mr M Seymour

Counsel for the First Respondent: Mr D Godwin

Solicitors for the Respondents: DLA Phillips Fox

ORDERS

- (1) A writ of certiorari issue directed to the second respondent, quashing the decision of the second respondent handed down on 12 June 2007 in matter 060677199.
- (2) A writ of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent dated 30 September 2005.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 2106 of 2007

SZIJU
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The Refugee Review Tribunal has the duty to review administrative decisions concerning refugee status under procedures which afford the applicant a full and fair opportunity to answer adverse information about them which is relied upon by the Tribunal. It is also obliged to conduct its proceedings in a manner which avoids apprehension about its impartiality. These duties are easily jeopardised when it decides itself to make inquiries in an applicant's country of nationality to test the veracity of his or her claims. The present case is another example where the Tribunal has withheld from an applicant a full disclosure of its own inquiries, without any apparent justification (cf. *SZELA v Minister for Immigration & Anor* [2005] FMCA 1068, and *SZJDY v Minister for Immigration & Anor* [2007] FMCA 1760). I have concluded that there was a breach of s.424A(1) of the *Migration Act 1958* (Cth), and that the matter must be remitted for consideration according to law.

2. The applicant's application for a protection visa was supported by an elaborate narrative, in which he claimed to have been seriously injured by a car driven by a drunk police officer in his hometown in The People's Republic of China, and to have been denied compensation. The public protests of his father and himself resulted in his being mistreated as an anti-government activist. This did not deter him, and he decided to convey his protest to the people's representatives attending a national congress in Beijing. He obtained a job as cleaner in a hotel where many of them stayed, and "*secretly left copies of my petitions against [the officer] and those corruptive officials in the room of those representatives. But, I was discovered just after one day*". A friend told him that the PSB were looking for him, and he therefore hid, and then fled overseas on a false passport containing an Australian visa. In support of these claims, he presented documents which purported to confirm his true identity.
3. The application was refused by a delegate on 30 September 2005. The delegate did not doubt the truth of the applicant's narrative, but opined that "*the basis of the applicant's claims is a personal grievance, deriving from a perceived injustice following a motor vehicle collision. It is not a Convention ground*".
4. On appeal, the applicant presented to the Tribunal copies of his petitions and an X-ray of a broken leg, and gave more details of his claims at a hearing held by the Tribunal as first constituted. In its decision handed down on 19 January 2006, it had doubts about his real identity, since his passport appeared to be genuine, without evidence of tampering or alterations. It affirmed the delegate's decision, because it was not satisfied as to the credibility of the applicant's claimed history. That decision was set aside by consent order on 21 July 2006, for reasons which do not appear in the material before me.
5. On remitter, the applicant attended a hearing held by a different member of the Tribunal on 26 September 2006 and 30 October 2006. He presented further documents, including arrest warrants, and medical evidence about his father.
6. After the hearing, the Tribunal sent to the applicant an invitation to comment on photographs which it had obtained from the current internet site for the Beijing Hotel. It put to the applicant that these

showed proximity to a prominent landmark, and décor in the hotel rooms, which were inconsistent with his inability to remember any landmarks near the hotel, and his memory of a different décor. In response, the applicant presented a map showing that the hotel was far from any landmarks, and that the hotel's photograph in proximity to the landmark was "*manufactured ... for commercial promotion purpose*". He maintained his memory of the décor, and suggested it might have been changed by the hotel since the relevant date.

7. The Tribunal member then directed further inquiries. Their outcome was recorded in an email "*record of telephone conversation to China*" dated 8 May 2007. This stated:

Hi Lilly,

Here you go:

At the request of Member Lilly Mojsin, I telephoned XX Hotel in Beijing at around 17:45pm on 08 May 2007 at [number] and introduced myself in Mandarin to the operator. I explained to the operator I am from RRT in Sydney Australia and asked her to transfer me to the manager of the Human Resources Department. She transferred me through. I confirmed with the person I talked to that he is the manager of the Human Resources and he told me his surname is H. I addressed him as Mr H and introduced myself again and asked whether he could answer a few questions. He asked me what is Tribunal doing and why the Tribunal wants to ask questions about the hotel. I explained to him the role of the Tribunal and told him that the questions are related to a certain application in the Tribunal. He came to ask me to disclose the applicant's name and I told him that I can't do it because the information is confidential. He was hesitating and I told him that he can refuse to answer these questions if he doesn't want to. But Mr H finally agreed and expressed that he is happy to answer my questions.

1. *Would you be able to inform us if in [months, year] your cleaners worked 8 hours per day?*

Mr H: Cleaners normally work on shift. Normally they work 7hours 30 minutes in compliance with the National Labour Law. No cleaners are allowed to work for [sic: more] than 40 hours a week.

2. *Would you be able to inform us if you employed any persons to clean from level 15 to level 17 only. If not, how were your cleaners employed to work?*

Mr H: Cleaners are employed to work on each floor. Normally 3 or 4 cleaners share the work per level. Level 15 to level 17 are not designated to certain cleaners.

3. *Were there any delegates to the Chinese Peoples Congress staying at the hotel in [month, year]?*

Mr H: Chinese Peoples Congress is on in Beijing every year after 5 March. But no delegates to the Chinese Peoples Congress have ever stayed in the hotel.

4. *Could you tell us the colour of the furniture in [month, year], is a light colour as it is in the pictures on the internet?*

Mr H: Different rooms have different colours of furniture. Pink, pine tree colour etc.

5. *Has the XX Hotel changed the furniture (colour/style) since [month, year], if so when.*

Mr H: The hotel is doing continuous renovation every year on different floors.

Could you please let me know whether this is ok? If you need further help, just let me know.

Ta.

8. On 10 May 2007, the Tribunal sent to the applicant's agent an invitation to comment on information, which was identified and explained as follows:

The Tribunal contacted the XX Hotel in Beijing on 8 May 2007 and asked the following questions and received the following response:

Q - Would you be able to inform us if in [months, year] your cleaners worked 8 hours per day?

A - Cleaners normally work on shift. Normally they work 7hours 30 minutes in compliance with the National Labour Law. No cleaners are allowed to work for more than 40 hours a week.

Q - Would you be able to inform us if you employed any persons to clean from level 15 to level 17 only. If not, how were your cleaners employed to work?

A - Cleaners are employed to work on each floor. Normally 3 or 4 cleaners share the work per level. Level 15 to level 17 are not designated to certain cleaners.

Q - Were there any delegates to the Chinese Peoples Congress staying at the hotel in [month, year]?

A - Chinese Peoples Congress is on in Beijing every year after 5 March. But no delegates to the Chinese Peoples Congress have ever stayed in the hotel.

This information is relevant because as you told the Tribunal that you worked from level 15 to level 17 and as the hotel has told the Tribunal that cleaners are employed to work on each floor it suggests that you did not work at the XX Hotel in Beijing as claimed.

This information is also relevant as you told the Tribunal that you placed petitions in a tissue box in the rooms of delegates to the Peoples Congress and as the Hotel has advised no delegates of the Peoples Congress ever stayed in the hotel it suggests you could not have written a petition and left it for the delegates as claimed. It also suggests that you are not a witness of truth and it also suggests that the summons warrant you provided to the Tribunal is not a genuine document. It suggests that the Chinese authorities do not seek to arrest or harm you for leaving a petition with delegates of the Peoples Congress. It also suggests that your father was not harmed for your profile.

If the Tribunal reaches a finding that you are not a witness of truth and that you have created your claims in order to obtain the visa sought, the Tribunal may find that you were not injured by a police officer and it may find that you are not sought by the Chinese authorities and it may find you do not have a well-founded fear of persecution.

*You are invited to comment on this information. Your comments are to be in writing and in English. They are to be received at the Tribunal by **24 May 2007**.*

(emphasis in original)

9. It should be noted in relation to this letter:

- i) It did not set out nor attach the full text of the email, and this was never shown to the applicant. There is no evidence that full disclosure was prevented by any certificate of the Minister under s.438 of the Migration Act, or direction of the Tribunal under s.440. Nor was disclosure to the applicant prevented by s.439(3), in circumstances where the communication would clearly be for the purposes of the Act as reflected, for example, in ss.414, 420, 424A, and 425. There is no evidence that Mr H sought, or was given, an undertaking as to confidentiality, even if this could have provided justification for the withholding of information from the applicant.
- ii) The letter did not reveal the source of the information put to the applicant, but suggested an officially authorised and fully informed source in relation to the hotel. Importantly, it withheld from the applicant information that a particular current employee of the hotel was the sole source, and the circumstances in which he had given information. Nor was the applicant told that no attempt was made to discover the period and nature of that person's previous employment and his qualifications to give reliable evidence as to matters at an earlier time.
- iii) The letter omitted the information in items 4 and 5 of the email. This provided positive support for the applicant's previous evidence, and he was deprived of the opportunity to point this out. More significantly, the vagueness of Mr H's responses to these questions, and their failure to address the specific date at which his attention was directed, might suggest that he had no actual knowledge of the situation as at the relevant date. The applicant was not given this information, which might have undermined the weight to be given to the other evidence provided by Mr H.

10. The applicant's responses to the letter should have caused the Tribunal to reconsider the need to give full disclosure, and the fairness of withholding the full text of the email from the applicant when relying upon its contents. He said:

I have not been clearly informed by the Tribunal who the Tribunal had spoken to at the XX Hotel in Beijing; but I have been confirmed from a reliable source that the person, who had been in charge of recruiting cleaners and who had supervised my job during the period around [the relevant date], had already dismissed permanently by the hotel, because he had also been suspected to get involved in distributing copies of my petitions at the hotel.

11. He suggested that other staff at the hotel had been subject to PSB investigation, and that his incident was the cause of the hotel not being allowed to receive delegates to later congresses. He also suggested that he was upset at the Tribunal's inquiry, and had grounds to fear that it had caused repercussions on his family in China.
12. In its statement of reasons handed down on 12 June 2007, the Tribunal clearly treated the information recorded in the email as a reason for affirming the delegate's decision. In particular, it is apparent that it gleaned information from the email which caused it to accept the hotel employee's evidence as being relevant and reliable, and to prefer it to that of the applicant.
13. The Tribunal accepted that "*Chinese authorities can and do take seriously, and control, actions by residents and citizens who petition the delegates to the Peoples Congress in Beijing*". However, it said:

The Tribunal contacted the XX Hotel, by telephone, asking the Human Resources Manager

Q - Were there any delegates to the Chinese Peoples Congress staying at the hotel in [month, year]?

A - Chinese Peoples Congress is on in Beijing every year after 5 March. But no delegates to the Chinese Peoples Congress have ever stayed in the hotel.

When put to the applicant, by s.424A letter, the applicant responded that he has confirmed from a reliable source that his case has been regarded as the most serious "political matter" at the XX Hotel since its establishment and many staff have been subjected to investigation not only by the Public Security Bureau but also by the National Security Bureau (NSB) and that in such a serious political matter, the XX Hotel has not been allowed to receive any delegate of Chinese Peoples Congress since [relevant year]. I reject his explanation. The applicant told TI

that his friend L had been arrested. The applicant did not inform either Tribunal that any other staff of the hotel had been subjected to investigation or harm because of his actions of petition distribution. I am of the view that it is a late invention made to bolster his claim. I place weight on the information provided by the XX Hotel to an officer of the Tribunal.

The Tribunal also asked the Human Resources Manager of the XX Hotel,

Q - Would you be able to inform us if in [months, year] your cleaners worked 8 hours per day?

A - Cleaners normally work on shift. Normally they work 7hours 30 minutes in compliance with the National Labour Law. No cleaners are allowed to work for [sic: more – CB 198] than 40 hours a week.

Q - Would you be able to inform us if you employed any persons to clean from level 15 to level 17 only. If not, how were your cleaners employed to work?

A - Cleaners are employed to work on each floor. Normally 3 or 4 cleaners share the work per level. Level 15 to level 17 are not designated to certain cleaners.

The applicant had told the Tribunal that he worked from level 15 to level 17. In his s.424A response the applicant stated that the person, who had been in charge of recruiting cleaners and who had supervised his job during the period around [relevant date], had been dismissed by the hotel, because he had been suspected of being involved in distributing copies of his petitions at the hotel. I reject this explanation. The applicant had not told either T1 or T2 that any other person in a supervisory capacity had been adversely affected because of his activities. I am of the view that it is a late invention made to overcome the information obtained by the Tribunal from the Hotel XX.

On the evidence before me I find that the applicant did not work in the XX Hotel Beijing. As he did not work in the XX Hotel and as the delegates to the Peoples Congress have never stayed at the hotel, I find that the applicant did not place petitions, about the action of policeman Z, in tissue boxes in the rooms of delegates to the [relevant year] Peoples Congress. I am satisfied the applicant is not a witness of truth.

14. In my opinion, this reasoning reveals reliance on information whose “particulars” were considered by the Tribunal to be a part of the reason for affirming the delegate’s decision. Those particulars expressly included the fact that the source of relevant evidence was the “Human Resources Manager” of the hotel, which had not been given to the applicant. They must also have included the full text of the email which recorded the telephoning and conversation with that person and the Tribunal’s employee, and which satisfied the Tribunal that his evidence could be accepted as reliably establishing facts as at the date of the relevant incident. As I have indicated, there were parts of the email which were relevant to that assessment and which were not given to the applicant.

15. In my opinion, this establishes a breach of s.424A(1) in relation to both paragraphs (a) and (b). It provides:

Applicant must be given certain information

(1) Subject to subsection (3), the Tribunal must:

(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; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and

(c) invite the applicant to comment on it.

16. I have in other cases, found in this obligation a need for a Tribunal to reveal the whole contents of information coming to it as a result of its independently conducted inquiries, in circumstances where a partial or vague disclosure to an applicant would not “allow him to appreciate its potential significance in the case and to allow him a real, rather than a token, opportunity to prepare a response” (see *SZELA* (supra) at [51], also *SZJDY* (supra) at [26]-[28], *Elrifai v Minister for Immigration* [2005] FMCA 1484, (2005) 225 ALR 307 at [34] and ff., and *Minister for Immigration & Multicultural Affairs v SZGMF* [2006] FCAFC 138).

17. In my opinion, the withholding of the full contents of the email in the present situation did deprive the applicant of knowledge of some of the particulars of information relied upon by the Tribunal, and also of the opportunity to understand in their relevant context, such pieces of it as were put to him. This was a failure by the Tribunal to take an obvious and “practicable” step to ensure that the applicant could be sufficiently informed to understand, and then to comment effectively upon, the particulars of information which were put to him.
18. I do not accept the Minister’s submission that “particulars of information” in s.424A(1)(a) do not include particulars relating to the derivation of adverse evidence which is accepted by the Tribunal. Such particulars must inherently be “a part of the reason” for affirming the delegate’s decision, since they provide the information which allows reliance by the Tribunal on the adverse evidence. Particular information identifying the derivation of adverse evidence is distinct from the “reasoning process” which assesses the relevance and weight of the adverse evidence (cf. *SZBYR v Minister for Immigration & Citizenship* [2007] HCA 26 at [17]).
19. Moreover, if I am wrong in this opinion, I consider that the Tribunal’s obligations under s.424A(1)(b) encompass the giving of particulars as to the derivation of adverse evidence which might affect a consideration of whether the information is reliable, since those particulars inherently assist a proper understanding of the “relevance” of the adverse evidence to the Tribunal’s review.
20. I also do not accept the Minister’s submission that s.424A(1) was not engaged in this case, because a fuller disclosure of the email would not have been required under common law principles of procedural fairness. The present was not a case where there was a need to accommodate a public interest in withholding full disclosure, and the Minister’s reliance upon *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 225 CLR 88 at [29] is therefore misconceived, even if it is possible to limit the requirements of s.424A(1) by reference to principles of procedural fairness. Nor do I accept that requiring a fuller disclosure of the contents of the email, in particular of its aspects which would have allowed the applicant better to understand the source and context of the

matters put to him, “*went well beyond*” the normal requirements of procedural fairness (cf. *SZBYR* (supra) at [14]). In my opinion, in the present case, the applicant was denied some particulars of evidence which principles of procedural fairness would have required to be given to the applicant. My above conclusions allow s.424A(1), read with s.422B, to achieve in the present case no more than the normally prevailing principles of fairness expected from an administrative review tribunal.

21. It is very well established that a failure to observe the requirements of s.424A(1) is a jurisdictional error permitting the giving of relief in the nature of the Constitutional writs. No ground of discretion against giving that relief is raised by the Minister, and in my opinion the present application should be upheld.

I certify that the preceding twenty-one (21) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 30 January 2008