

FEDERAL COURT OF AUSTRALIA

SZHNV v Minister for Immigration & Multicultural Affairs [2006] FCA 1686

**SZHNV v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS
AND REFUGEE REVIEW TRIBUNAL
NSD1669 OF 2006**

**STONE J
6 DECEMBER 2006
SYDNEY**

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD1669 OF 2006

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: SZHNV
 Appellant**

**AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
 AFFAIRS
 First Respondent**

**REFUGEE REVIEW TRIBUNAL
Second Respondent**

JUDGE: STONE J

DATE OF ORDER: 6 DECEMBER 2006

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The appellant be granted leave to rely on the ground of appeal in paragraph 3 of the Notice of Appeal filed on 31 August 2006.
2. The appeal be allowed.
3. The orders made by the Federal Magistrates Court on 16 August 2006 be set aside and in lieu thereof, the Court orders that:
 - 3.1 there be an order in the nature of certiorari to quash the decision of the Refugee Review Tribunal made on 22 September 2005 and handed down on 13 October 2005.
 - 3.2 there be an order in the nature of mandamus requiring the Refugee Review Tribunal to review according to law the decision of the delegate of the first respondent to refuse the protection visa sought by the appellant.
 - 3.3 the first respondent pay the costs of the appellant before the Federal Magistrates Court.
4. The first respondent pay the appellant'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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JUDGE: STONE J

DATE: 6 DECEMBER 2006

PLACE: SYDNEY

REASONS FOR JUDGMENT

1 The appellant is a citizen of China and claims to fear persecution in China because he is a member of an ‘underground’ Christian church. He lodged an application for a protection visa on 8 February 2005. As discussed below, the circumstances surrounding his application for a protection visa, and in particular the information that he provided with his visa application, are relevant to this appeal and warrant a greater level of detail than would ordinarily be the case.

2 In his application for a protection visa, the appellant claimed that his parents were deeply devout Christians, and that he was baptised and given a Christian name at a very young age. Whilst he was in primary school, the appellant’s uncle was arrested and detained by the Chinese authorities, allegedly because of his position in the underground church. Following his uncle’s arrest and detention, the appellant claimed that his parents, and also he and his sisters, became more actively involved in the underground church’s activities. He stated:

‘After uncle was gone, my parents took many job over in our church.

As their children we also gave lots of help. My sisters and I normally would prepare the place in order for the members' coming and prepare food and drinks, pass on the pamphlets etc. when I grew up to twenty years old, I became one of the two main leaders in our church to assist the priest.'

The appellant claimed that in December 2001, he was arrested by the Chinese police:

'In December 2001 when I was cooking some dinner at home for my parents five policemen suddenly knocked on my door. They didn't show me any warrant or order for arrest, just asked me to follow them for the sake of the safety of my parents. I didn't say a word and left home with them.'

3 The appellant claimed he was detained for 40 days, during which time he was beaten by the police. He claimed that he was only released "under the condition that our family underground church must be dismissed". After this incident he ceased his religious activities and travelled to several places in China. Having established that he could not enjoy freedom of religion in China, the appellant claimed that he decided to leave China for Australia and did so with the assistance of an overseas relative of a church member. A delegate of the first respondent did not believe that the appellant faced persecution in China, essentially because the delegate was not satisfied that he would have been a person of adverse interest to the Chinese authorities, and rejected his application for a protection visa.

The Tribunal's decision

4 The appellant sought review of this decision in the Refugee Review Tribunal, and prepared a statement to accompany his application for review. This statement seems to have been intended to meet some of the concerns raised by the delegate of the Minister, particularly in relation to the length of time that the appellant took to leave China following his detention (several years), the proof of his detention and the extent of his Christian activities in Australia.

5 At the hearing, the Tribunal indicated to the appellant that it would first address the question of whether the appellant was a practising Christian. If the appellant's Christianity was established, the Tribunal would proceed to determine the likelihood that the appellant would face persecution in China for his faith. The Tribunal asked a series of questions about the appellant's faith and the underground

church, including whether the underground church was affiliated with Protestant or Catholic traditions and whether the appellant could recite the Lord's Prayer. The Tribunal also asked about the appellant's religious activities in Australia, which commenced approximately 6 months after his arrival. The Tribunal sought written confirmation of the appellant's church attendance in Australia. Such confirmation was never provided.

6 The Tribunal also questioned the appellant about the circumstances surrounding his departure from China. The Tribunal noted that the appellant's passport was legally issued to him in 2000, prior to his detention. The Tribunal also referred to the appellant's claim in his protection visa application that he had travelled widely prior to leaving China and noted that this was inconsistent with the appellant's oral evidence to the Tribunal. The Tribunal referred to a further inconsistency between the appellant's visa application, which stated that the appellant had experienced difficulty in obtaining an Australian visa, and his oral evidence, which was that he had never intended to go to Australia from China.

7 Ultimately, the Tribunal was not satisfied that the appellant was a committed Christian or, if he was, that he was a significant enough figure in his church to attract the interest of the authorities. The Tribunal accepted that the appellant was detained and beaten, but rejected the claim that this was because of his religion. The Tribunal affirmed the delegate's decision concluding:

'...the Tribunal is not convinced that there is a real chance that the applicant will face persecution for his religion on his return to China and it is not satisfied, on the basis of his evidence, that he would be restricting his religious practice because of his fear of persecution, nor are such fears well founded, because his religious beliefs are neither deep nor enduring. The applicant confirmed that his primary desire was to leave China to better his prospects.'

Review in the Federal Magistrates Court

8 The appellant sought judicial review of the Tribunal's decision in the Federal Magistrates Court on 9 November 2005. His amended application in that Court set out five grounds of appeal, which can be summarised as follows:

1. the Tribunal displayed bias against the appellant in making its findings as to

the appellant's Christianity;

2. the Tribunal erred in finding that because the appellant could get a passport in China he was not a person of interest to the Chinese authorities;
3. in referring to the appellant's inability to identify whether the underground church of which he claimed to be a member was affiliated with the Protestant or Catholic Church, the Tribunal demonstrated that it misunderstood the appellant's claims;
4. the Tribunal's reasoning was not rational or logical;
5. the Tribunal failed to assess the chance that the appellant would face persecution in China because of his membership of the underground church.

9 The Federal Magistrate found that there was no foundation for any allegation of bias. His Honour clearly accepted that the allegation that the Tribunal failed to allow the appellant an opportunity to provide proof of his membership of a Sydney church was based on nothing more than the fact of the Tribunal's unfavourable decision regarding the appellant. His Honour further considered and rejected the possibility that the manner in which the Tribunal hearing was conducted could have been sufficiently overbearing or intimidating so as to give rise to apprehended bias.

10 His Honour noted that the second ground of appeal summarised above was a challenge to the Tribunal's findings of fact and could not constitute jurisdictional error. Further, his Honour noted that the ease with which the appellant gained a passport did not form a significant part of the Tribunal's reasons. His Honour noted that the Tribunal did not misunderstand the appellant's claims, it simply did not accept them. Further, his Honour could find no irrationality in the Tribunal's reasoning and emphasised that the Tribunal was under no obligation to provide evidence to justify a rejection of an applicant's claims. Accordingly, his Honour dismissed the appellant's application with costs.

This appeal

11 The appellant's notice of appeal in this Court, filed on 31 August 2006, contained three grounds of appeal, which, in summary, are:

- (a) the Tribunal was biased in basing its rejections of the appellant's claims on assumptions rather than evidence;
- (b) the Tribunal failed to meet its statutory obligation to provide particulars of certain information that was the reason or part of the reason for its decision to affirm the decision of the delegate (presumably the obligation referred to was that contained in s 424A of the *Migration Act 1958* (Cth));
- (c) the Federal Magistrates Court did not consider the appellant's application properly.

12 The appellant's allegation of bias has no merit. The Tribunal did not base its conclusion on assumptions but on the inadequacy of the appellant's evidence. On the appellant's evidence and on the other material before the Tribunal, the Tribunal was not satisfied that the appellant would face persecution for his religion if he was returned to China. There is no indication of bias or prejudice in this conclusion.

13 The appellant's third ground of appeal is not particularised. On my reading of his Honour's reasons, the Federal Magistrate addressed each of the appellant's grounds of appeal from the Tribunal's decision. This ground of appeal must be rejected.

14 The appellant's second ground of appeal appears to be directed towards the Tribunal's obligations under s 424A of the Act and was not, it seems, raised before the Federal Magistrate. Counsel for the Minister opposed the grant of leave to rely upon this new ground of appeal, on the basis that there was no compelling reason for permitting the appellant to depart from the trial issues: *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424.

15 There are several factors that I consider relevant to the application for leave to rely on this new ground. First, the appellant was unrepresented before the Federal Magistrate. Second, the Minister has not suggested that if the matter had been raised before the Federal Magistrate, further evidence could or would have been adduced that would have defeated the submission, or that the Federal Magistrate was in a better position than this Court to consider this ground of appeal. Third, and in my

view the most compelling consideration in this case, is my assessment of the likelihood of the appellant succeeding on the proposed ground of appeal if permitted to rely on it. For the reasons that follow, I consider that the appellant ought to be granted leave to rely on the second ground of appeal in the notice of appeal and that, on this ground, the appeal should be allowed.

16 There were a number of instances where the Tribunal compared the appellant's oral evidence with his previous 'written statement'. It is clear from a comparison of the written statement which accompanied the appellant's protection visa application, and the statement that accompanied his application to the Tribunal, that the 'written statement' referred to by the Tribunal on each occasion was the statement that accompanied the appellant's protection visa application. In several of these instances the Tribunal, despite the inconsistency, accepted the appellant's later account. These instances concerned the appellant's travel within China before his departure from that country and whether his initial intention in leaving China was to go to Indonesia or to come to Australia. Clearly these inconsistencies could not have contributed to the Tribunal's decision.

17 The Tribunal, however, noted two further discrepancies between the appellant's statement in his visa application and the evidence he gave to the Tribunal. The first relates to the Tribunal's assessment of the appellant's claim that he had been arrested by five policemen who turned up at his parents' home and took him away without giving any reason for this behaviour. The appellant said that his arrest, subsequent detention and ill-treatment was because of his involvement in Christianity. The Tribunal doubted the appellant's account of this incident because:

'This action by the police appears to be at odds with the applicant's earlier claims that his parents were the leaders of the church in the village, in which case they would be the obvious targets, if the police were, as claimed, seeking alleged underground church leaders.'

I understand the Tribunal's reference to "earlier claims" to be a reference to the appellant's written statement accompanying his protection visa application. The Tribunal, nevertheless, gave the appellant the benefit of the doubt and accepted that he had been taken into custody and had been beaten. However, it did not accept the appellant's account of the reason why he was arrested and detained, namely, because

he was a Christian.

18 Counsel for the Minister submitted that as the Tribunal ultimately had accepted that the appellant had been detained, this issue could not have been the reason or part of the reason for affirming the decision under review and therefore in this case also, s 424A was not activated. Accepting this, however, the question still remains whether the inconsistency detected by the Tribunal was, at least in part, a reason for it rejecting that the appellant's claim to be a Christian.

19 It seems clear from the Tribunal's decision that the inconsistency between his written account, which emphasised the important role his parents played in the underground church, and his evidence of his arrest (in particular, that his parents were present but not arrested), was relied upon to support the crucial finding that the appellant's arrest was not on account of his Christianity. This is clear from the following extract from the Tribunal's reasons:

'The Tribunal was not convinced on the basis of his evidence, that the applicant has even a basic knowledge of the Christian fundamentals. Furthermore, it was informed by the applicant that when the police came to his home, his parents and siblings were present. However, they took him away without providing any explanation. This action by the police appears to be at odds with the applicant's earlier claims that his parents were the leaders of the church in the village, in which case they would be the obvious targets, if the police were as claimed seeking alleged underground church leaders.'

The Tribunal has given the applicant the benefit of the doubt, that he was taken into custody, for whatever reason, and suffered a beating on one occasion which resulted in his head being split. However, it does not accept the claim that this occurred because he was a Christian.'

20 The fact that, on the account accepted by the Tribunal, the police took away the appellant and not his parents, was not the Tribunal's main reason for rejecting the claim that his commitment to Christianity would expose him to persecution should he be returned to China. The Tribunal also relied on the appellant's inability to identify the religious affiliation of his underground church, his ignorance of the Lord's Prayer and his tardiness in attending a Chinese Christian Church in Sydney.

21 This brings me to the second of the two further discrepancies identified by the Tribunal. In its summary of the appellant's oral evidence at the hearing the Tribunal

noted that when the appellant was asked questions about his written statement that he had assisted a “priest” of the underground church, he was unable to confirm that the community had a priest. Although not mentioned under the heading of “Findings and Reasons” there is no reason to doubt that this was also part of the reason for the Tribunal’s conclusion about the level of the appellant’s commitment to Christianity.

22 Pursuant to s 424A of the *Migration Act*, the Tribunal was required to furnish the appellant with particulars of any information which it considered would be the reason or part of the reason for affirming the delegate’s decision and to invite the appellant to respond. This requirement was not complied with by the Tribunal in respect of the information in the written statement that gave rise to the two further discrepancies discussed in [17]-[21] above. Following the Full Court’s decision in *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214, in particular at [9], [154] and [184], it is clear that information provided by visa applicants with their applications for protection visas does not fall within the exception in s 424A(3)(b). A failure to comply with the requirements of s 424A of the Act is a jurisdictional error: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162.

23 For the reasons given above the appeal will be allowed with costs.

I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Stone.

Associate:	Dated: 6 December 2006
Counsel for the Appellant:	The appellant appeared in person.
Counsel for the First Respondent:	Mr R J Bromwich
Solicitor for the First Respondent:	Clayton Utz
Date of Hearing:	24 November 2006
Date of Judgment:	6 December 2006

