FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZJGY v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 40*

MIGRATION – Review of decision of the Refugee Review Tribunal – no evidence of bias and no reasonable apprehension of bias – Tribunal failed to raise dispositive issue with the applicant – failure to accord procedural fairness in accordance with s.425 – application allowed.

Migration Act 1958, ss.424A, 425

Re Refugee Review Tribunal; Ex parte H (2001) 179 ALR 425
Minister for Immigration and Multicultural Affairs v Jia (2001) 205 CLR 157
SBBS v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 194 ALR 749; [2002] FCAFC 361
Minister for Immigration and Multicultural and Indigenous Affairs v SBAN [2002] FCAFC 431
VFAB v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 131 FCR 102
SCAA v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 668
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152; [2006] HCA 63
Commissioner of the Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576
NAOA v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 241

Applicant:	SZJGY
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2410 of 2006
Judgment of:	Nicholls FM
Hearing date:	5 November 2007

Date of Last Submission:	5 November 2007
Delivered at:	Sydney
Delivered on:	25 January 2008

REPRESENTATION

Counsel for the Applicant:	Nil
Solicitors for the Applicant:	Nil
Appearance for the Respondents:	Mr G Johnson
Solicitors for the Respondents:	DLA Phillips Fox

ORDERS

(1) The reference to the first respondent be amended to read "Minister for Immigration and Citizenship."

(2) A writ of certiorari issue, quashing the decision of the second respondent.

(3) A writ of mandamus issue, requiring the second respondent to redetermine the matter according to law.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2410 of 2006

SZJGY
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application made under the *Migration Act 1958* (Cth) ("the Act") on 29 August 2006, and amended on 30 March 2007, seeking review of the decision of the Refugee Review Tribunal ("the Tribunal") signed on 5 July 2006, and handed down on 25 July 2006, which affirmed the decision of a delegate of the respondent Minister to refuse a protection visit to the applicant.

Background

2. The first respondent has filed a bundle of relevant documents ("the Court Book" ("CB")) in this matter from which the following background can be discerned. The applicant is a citizen of the People's Republic of China who arrived in Australia on 21 October 2005 and applied for a protection visa on 1 December 2005 (CB 1 to CB 28). On 2 March 2006, a delegate of the respondent Minister refused to grant a

protection visa to the applicant (CB 39 to CB 47). On 4 April 2006, the applicant applied to the Tribunal for review of the decision.

The applicant's claims to protection

3. Before the Tribunal, the applicant claimed that he feared harm on return to China because of his involvement in protests against the corruption of traffic police in China. The applicant claimed to have been a truck driver in China who had taken over a truck driving business and had come into conflict with corrupt government officials over the payment of bribes. These officials included transport operation police and security officials.

The Tribunal

4. The applicant appeared before the Tribunal and gave evidence on 24 May 2006 (CB 60). The Tribunal's account of what occurred at the hearing is set out in its decision record (CB 74.3 to CB 78.1).

5. The Tribunal set out that it understood that the applicant's claims were that he feared return to China on the basis of his involvement in protests against the corruption of traffic police in China, and that an arrest warrant had been issued for him, and that he would be detained and harmed on return (CB 79.9).

6. It found that based on the applicant's "oral evidence" at the hearing before it that: "the Tribunal does not accept that he has been truthful about his past experiences" (CB 80.4). The Tribunal found the applicant's evidence at the hearing to be contradictory, and that aspects of it were implausible, and that when taken together, led it to the view that: "the applicant has not provided a truthful account of his past experiences in China" (CB 81.4).

7. Given the adverse view that it had formed of the applicant's credibility based on these contradictions in his evidence, and the "highly implausible" nature of his evidence, the Tribunal found that it could not be satisfied that the applicant was a person to whom Australia owed protection obligations and therefore affirmed the delegate's decision.

Application to the Court

8. Other than for the labelling of sub-paragraphs and the wording of some particulars to ground 2, the applicant's amended application was in similar terms to that in the originating application. The amended application put forward the following grounds (with particulars):

> *"1. The Tribunal failed to consider my claims, properly and fairly; and particularly, the Tribunal has, intentionally, distorted my claims.*
>
> …
>
> *2. The Tribunal failed to comply with its obligations under s.424A(1) of the Act.*
>
> …
>
> *3. The Tribunal failed to comply with his obligations under s.425 of the Act.*
>
> …"

Hearing before the Court

9. The applicant was unrepresented before the Court. He was assisted by an interpreter in the Mandarin language. Mr G Johnson appeared for the first respondent.

10. At the hearing, the applicant stated that the Tribunal did not give a "fair judgment," and did not properly consider his claims. He stated that a lot of questions at the Tribunal hearing were unclear and were asked in such a way that he did not understand. The applicant also complained that the Tribunal did not provide him with information. He thought that his "message" was: "distorted by the Tribunal." His submission was that this was a breach of s.424A(1) of the Act. (I understood the applicant here to be referring to the adverse view that the Tribunal took). Further, and relevantly to what is set out below, the applicant claimed that the Tribunal did not give him a chance to reply to the points on which it "challenged" his claims, and that the Tribunal did not want him to know the points that "they were challenging." I understood this to be a complaint that the Tribunal did not clearly put to the applicant that it was taking an adverse view of his evidence.

Consideration

11. In my view, it is not necessary to consider grounds 1 and 2 in the amended application, as ground 3 does reveal jurisdictional error in the Tribunal's decision. However, I should note for the parties' benefit that I could not discern jurisdictional error as it was said to arise in either ground 1 or ground 2. Further, for the applicant's benefit, in particular, I reject the applicant's complaints as they are said to arise from the Tribunal member's claimed ideological background, or his alleged lack of competence.

Ground 3

12. In ground 3 the applicant states that the Tribunal failed to comply with its obligations pursuant to s.425 of the Act. I understood the applicant's complaint to be that while the Tribunal member did raise some adverse issues with him during the course of the hearing, that the Tribunal nonetheless did not make it clear what "the negative issues" were. That during the hearing, and at its completion, he understood that the Tribunal member had accepted his evidence and explanations in respect of the "limited" issues raised. He was therefore surprised when he saw the Tribunal's decision record which revealed: "there were many of negative issues arising from the Tribunal's hearing." The applicant emphasised that the Tribunal did not really consider his claims, that "on the surface" it listened to him, but was minded, no matter what he had said at the hearing, to find against him, and that it was doing this "deliberately."

13. To the extent that the applicant complains that there was bias on the part of the Tribunal (a complaint that was made generally about the Tribunal member, and one aspect of this was that the Tribunal member's alleged conduct at the hearing, which I understood to be that the member "deliberately" set out to deceive the applicant in this regard), it is well established that the party alleging bias must support that very serious allegation with evidence (*Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425, *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 157 ("*Jia*"); *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749; [2002] FCAFC 361, *Minister for Immigration*

and Multicultural and Indigenous Affairs v SBAN [2002] FCAFC 431, *VFAB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 102). The material, pointed to by the applicant now before the Court, does not support such an allegation and of course, as was said in *SCAA v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 668 at [38]:

> *"… it will be a rare and exceptional case where actual bias can be demonstrated solely from the published reasons for decision."*

14. The applicant's complaints do not succeed to the extent that they allege bias on the part of the Tribunal. Nor for that matter would a well-informed lay observer reasonably apprehend that the Tribunal was biased (*Jia*).

15. The applicant's complaint, however, does succeed in light of what the High Court said in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; [2006] HCA 63 ("*SZBEL*") about procedural fairness and the Tribunal's relevant obligations pursuant to s.425 of the Act.

16. A number of matters addressed by the High Court in *SZBEL* are relevant to the disposition of the matter before the Court now:

    1) While the High Court said (at [31]) that there are "two reasons to exercise considerable care in approaching" what a Full Federal Court relevantly said in *Commissioner of the Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 ("*Alphaone*") (at [32]), it did endorse what was said in *Alphaone* at [19]:

    "In Alphaone *the Full Court rightly said:*

    > *'It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard.* That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues *and to be informed of the nature and content of adverse material.' (emphasis added)."* (Citations omitted)

2) That where the Tribunal considers an issue to be dispositive to the review, and this is an issue that was not considered by the delegate, and does not tell the applicant what this issue is, then the: "the applicant is entitled to assume that the issues the delegate considered dispositive are 'the issues arising in relation to the decision under review'" (*SZBEL* at [35]).

3) In *SZBEL* at [43]:

> *"The delegate had not based his decision on either of these aspects of the matter. Nothing in the delegate's reasons for decision indicated that these aspects of his account were in issue. And the Tribunal did not identify these aspects of his account as important issues. The Tribunal did not challenge what the appellant said. It did not say anything to him that would have revealed to him that these were live issues. Based on what the delegate had decided, the appellant would, and should, have understood the central and determinative question on the review to be the nature and extent of his Christian commitment. Nothing the Tribunal said or did added to the issues that arose on the review."*

4) That the Tribunal's failure to give the applicant "sufficient opportunity to give evidence", or even make submissions about a "determinative" issue, was a failure to accord procedural fairness (*SZBEL* at [44]).

5) I note in particular, that while not decisive of the appeal before it in *SZBEL*, the guidance provided by the High Court at [47]–[49].

17. In submissions on this ground, Mr Johnson for the Minister made the following points:

1) There was no evidence before the Court to support the applicant's claims that the determinative issues in his case were not discussed with him. That there was, for example, no transcript of the hearing put before the Court by the applicant, and the Court therefore could not know what expressly was put to the applicant. This was with reliance on what the Full Federal Court said in *NAOA v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 241 ("*NAOA*"). The Court

plainly should not assume facts not in evidence before it, and only rely and proceed on the evidence before it.

2) There are indications in the Tribunal's decision record that concerns about, and inconsistencies in, the applicant's evidence were raised with him.

3) It is a matter for the Tribunal to ask questions which are appropriate, and which go to the credibility of an applicant. While the applicant may not have ultimately understood that the Tribunal was saying that it did have concerns about the truth of the applicant's claims, that nonetheless the Tribunal's questions were delivered towards this issue.

4) That the Tribunal's conclusion adverse to the applicant's credibility "flowed logically" from the nature of the questions asked at the hearing.

18. In *SZBEL* at [35], the High Court said:

> *"... the point at which to begin the identification of issues arising in relation to the decision under review will usually be the reasons given for that decision."*

19. Any plain reading of the Tribunal's reasons for decision reveals that the Tribunal found, in summary, that the applicant had: "not given a truthful account of his experiences prior to his departure from China" (CB 80.4). The Tribunal did not find that the applicant had been truthful about his past experiences in relation to the "information" given by him at the hearing. The determinative issue, therefore, for the Tribunal was the applicant's lack of credibility in relations to his experiences in China.

20. In my view it is not possible to rely on the delegate's decision record to say that the delegate had identified the applicant's lack of credibility in relation to his claims as to what occurred in China. This was not the issue which the delegate considered as being dispositive of his claims. This is so notwithstanding that the delegate said that there were "credibility" issues with the applicant's accounts.

21. The delegate set out the background to the applicant's situation (at CB 41.7). She noted that the applicant had used a Taiwanese passport to enter Australia, notwithstanding that he claimed to be from Fujian province in China. Further, the delegate understood (at CB 41.8) that the applicant claimed to be a truck driver who had come into conflict with security officials due to his refusal to make payments to corrupt local police and for organising protests. She noted that he had claimed to have been detained for a month in 2004, and that he was afraid to use his own passport to leave China because security officials were looking for him. Ultimately, the delegate said: "He fears he would be punished if he returned to China for his political beliefs" (CB 42.2).

22. While the delegate subsequently said that there was a "credibility issue", this was clearly confined to the issue of whether or not the applicant was "from China" (CB 45.7), and that even if the applicant was from China, the delegate did: "not find it credible that the applicant was able to leave China through border controls without attracting scrutiny from the security authorities."

23. Subsequently, none of these were relevant factors going to the Tribunal's finding of untruthfulness in the applicant's claims.

24. Further and ultimately (with respect), it is not the applicant's credibility that was at issue following the delegate's decision, but that of the delegate. Contrary to the statement (at CB 46.5): "After careful consideration of the applicant's claims ….", the delegate states: "... I therefore find that the applicant's fear of persecution for reasons of his religion is not well founded." Any plain reading of the applicant's claims as set out in his application, and indeed as set out in the delegate's record, reveal, as the delegate had previously noted in her decision record, that the claims were for "political beliefs", and had nothing to do with the Convention ground of "religion".

25. Plainly, delegates' decisions of this type have always had an importance in what ultimately comes before this Court for consideration. The delegate's decision is, after all, the decision under review by the Tribunal. The Minister may, with the greatest of respect, care to consider that the quality of delegates' decisions has now achieved an even greater importance, at least in so far as s.425 and the Tribunal are concerned, given what the High Court has said in *SZBEL*.

26. This delegate's decision has clear elements of a perfunctory cut-and-paste approach to it. For example, it is not clear that what appears in italics at CB 45.5 ("*Although the government maintained restrictions on the freedom to change one's workplace or residence, the national household registration and identification card system continued to erode, and the ability of most citizens to move within the country to work and live continued to expand* (5.7)" (CB 45.5)) has relevance to the resolution of the applicant's claims.

27. In any event, what is clear is that whatever the delegate can be said to have considered in the circumstances, it cannot be said that the applicant could have properly understood that his credibility, and most certainly the credibility of his claims, as they related to anything other than his nationality and method of departure from China, would be seen as lacking credibility.

28. I agree with submissions made by Mr Johnson that, with reference to the Tribunal's account of what occurred at the hearing, that the Tribunal did ask the applicant at least two questions relating to inconsistencies in his claims:

1) At CB 77.2:

"The applicant was asked about what appeared to be different evidence given regarding his experiences with the PSB. This particularly related to changes to his claims about how the police stopped his truck after late January 2004 and whether they would confiscate his load or allow his load to continue. This also related to whether he ever paid fines to the PSB after January 2004."

2) At CB 77.4:

"The applicant was asked about earlier claims that he was able to leave if the PSB did not notice him and if he was stopped he could not continue to do his job and the difference with the current claim being made."

29. I cannot see on a plain, or even fair, reading of the Tribunal's account of what occurred at the hearing that there were any other instances of where inconsistencies in the applicant's evidence were raised with him.

30. To the extent that the Tribunal also found the applicant's claims to be "highly implausible", and that this, with the inconsistencies, was said to underline its rejection of his claims on credibility grounds, then the only part of the Tribunal's account of the hearing that could even remotely be relevant is at CB 77.7:

> *"The applicant was asked why he had taken over the business if he objected to this aspect of the business."*

31. The High Court said in *SZBEL* at [47]:

> *" … It is not necessary (and often would be inappropriate) for the Tribunal to put to an applicant, in so many words, that he or she is lying, that he or she may not be accepted as a witness of truth, or that he or she may be thought to be embellishing the account that is given of certain events … "*

Nonetheless what is required is that the applicant be given a "sufficient opportunity to give evidence or make submissions about what turned out to be … the … determinative issues arising in relation to the decision under review." (*SZBYR* at [44]).

32. The determinative issue in this case was the Tribunal's view of the applicant's comprehensive lack of credibility and the implausibility of some aspects of his claims.

33. I do not see that what the Tribunal asked the applicant concerning inconsistencies in certain specific, but limited, parts of his evidence, and, at best, what may be said to be inferential only about the implausibility of his reason as to why he took over the trucking business in 2003, that this, in the circumstances, amounts to the Tribunal raising at the hearing with the applicant what turned out to be the overriding determinative issue in the disposition of his application for review. That there were inconsistencies in certain aspects of his claims is in my view, not commensurate with the Tribunal's comprehensive rejection of all of the applicant's evidence, in that it did: "not accept that he has been truthful about his past experiences."

34. Applicants often give contradictory evidence before a Tribunal. Tribunals have often found that certain explanations appear implausible. This does not necessarily mean that a Tribunal will then

automatically proceed to reject all of an applicant's claims. It is, as the High Court said in *SZBEL* at [47], that:

> *"... there may well be cases, perhaps many cases, where either the delegate's decision, or the Tribunal's statements or questions during a hearing, sufficiently indicate to an applicant that everything he or she says in support of the application is in issue."*

35. In my view, however, that did not occur at the hearing before the Tribunal. The Tribunal plainly found that all of the applicant's claims were rejected. But at the hearing raised only, at best, a very limited number of inconsistencies in his evidence, and only one possibly implausible aspect of his claims. It was insufficient, in my view, to then equate this with the comprehensive rejection on credibility grounds, of all of the applicant's claims.

36. Further, the Tribunal also rejected the applicant's claims ("the Tribunal does not accept that these claims are true" (at CB 81.6)) to have been detained in 2004 and to have participated in protest activity in 2005 because "these all arose from his claimed concern about the impact of corrupt activity commencing in 2004" (CB 81.6). What can be understood from this is that the Tribunal rejected the applicant's claims to have been detained and participated in protest activity because of the adverse credibility view that it had taken of the applicant's claims as it related to other aspects of his claims. Further, in relation to the applicant's claims of detention, the Tribunal also rejected the truthfulness of this because: "one could expect that he would provide a consistent and coherent account of the reasons for that detention" (at CB 81.6).

37. None of the Tribunal's credibility concerns, as they related to the applicant's claimed detention in 2004 and 2005, and his claimed protest activity in 2005, were put to the applicant at the hearing. The Tribunal plainly understood the applicant's claims in this regard (see its setting out of his claims and evidence at CB 73.3, item 13, and CB 73.7, item 16). Further, the Tribunal records that the applicant repeated these claims at the hearing (at CB 75.3): "He was detained for about one month and during this time he was again beaten by the police." Also,

further at CB 77.8: "Three good friends of the applicant who had participated in a demonstration in August with the applicant ..."

38. In my view, the Tribunal failed to accord procedural fairness to the applicant pursuant to s.425 of the Act because, firstly, its references at the hearing to inconsistencies in a limited range of the applicant's evidence, and its concern about the implausibility of one very narrow aspect of his claims, does not, in my view, constitute the Tribunal identifying credibility as an issue with the applicant's claims in the circumstances of this case.

39. Secondly, it is not, in my view, sufficient to raise some inconsistencies across a narrow and specific band of the applicant's claims while the dispositive issue is the total rejection of all of the applicant's claims because of credibility concerns.

40. I cannot see that what the Tribunal has reported as having been raised with the applicant was anywhere near sufficient to indicate to the applicant that nearly everything he said in support of the application at the hearing was at issue. On the Tribunal's own account of what occurred at the hearing, I can well understand the applicant's complaint that: "the Tribunal obviously refused to make me clear what the negative issues had raised in relation to my application." I can well understand, on the Tribunal's own account, and in light of its subsequent reasons, that the applicant could have been quite properly surprised at the outcome.

41. During submissions before the Court, Mr Johnson submitted that, in light of what the Full Federal Court said in *NAOA*, it was not open to this Court to make assumptions about what occurred at the hearing. For example, the applicant had provided no evidence of the transcript of the Tribunal hearing to the Court such that the Court could know what was expressly put to the applicant.

42. The difficulty with this submission in this regard, is that the applicant does not dispute the Tribunal's account of what occurred at the hearing. The applicant's complaint is not that the Tribunal has inaccurately reported, or failed to report, what that occurred at the hearing. The applicant's complaint, in effect, asked the Court to look at the Tribunal's own account. In these circumstances, the applicant is not

asking the Court to make any assumption about facts not put in evidence before the Court such as to engage what was said by the Full Court in *NAOA*.

43. In matters of this type, the Minister's representatives often rely on what was said in *NAOA* to remind this Court not to accept what is claimed by way of submission or statement from the bar table to have occurred at a Tribunal hearing without a proper evidentiary basis. But in my view, ironically, this appears to be a situation where what was said by the Full Court in *NAOA* leads to a rejection of the Minister's submission. If the Tribunal had indeed raised the determinative issue (comprehensive adverse credibility)with the applicant in a clear, and appropriately comprehensive way at the hearing, then of course it was always open to the Minister to put before the Court the transcript of the Tribunal hearing that would reveal this. For whatever reason, the Minister has chosen not to do so.

44. Mr Johnson also submitted that just because the applicant did not understand what the Tribunal was saying to him (that is, that it had concerns about the truth of his claims) this did not put this matter within what was found by the Court to have occurred in *SZBEL*. I agree with Mr Johnson that *SZBEL* does not stand for the proposition that in any subjective sense the applicant must be made to understand, by the Tribunal, the determinative issues that arise in relation to the decision under review.

45. However, the issue in the current case is that the Tribunal failed to accord the applicant procedural fairness, not by way of what Mr Johnson now submits, but on its own account of what occurred at the hearing the Tribunal did not give the applicant a sufficient opportunity to give evidence, or make submissions, about the issue of the credibility of all of his claims.

46. Further, and in addition, that the Tribunal's conclusion flowed logically from the nature of the questions asked does not assist the Minister in relation to the issue of whether or not the applicant was accorded procedural fairness at the hearing. The Tribunal's account shows that the applicant indeed was given the opportunity to give evidence about the range of his claims. It may even be the case that the conclusions did flow logically from the nature of this evidence. But the clear issue is

that, on any plain reading of the Tribunal's decision recording this case, the applicant was not put on notice that the determinative issue was the adverse view that the Tribunal took about the truthfulness of the overwhelming part of his evidence.

Conclusion

47. The Tribunal's decision is affected by jurisdictional error in light of the failure to comply with its obligations pursuant to s.425 as set out above. I can see no other reason to deny the applicant the relief that he seeks. I will therefore make orders accordingly that the Tribunal decision be quashed, and the applicant's matter be returned to the Tribunal for reconsideration.

I certify that the preceding forty-seven (47) paragraphs are a true copy of the reasons for judgment of Nicholls FM

Associate: C Darcy

Date: 25 January 2008