FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZILV v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 1707*

MIGRATION – Visa – protection visa – Refugee Review Tribunal – application for review of decision of Refugee Review Tribunal affirming decision not to grant protection visa – citizen of China claiming fear of persecution on the grounds of political opinion of his parents – whether Tribunal failed to comply with *Migration Act 1958* (Cth) ss.424A, 425A or 426 – where applicant did not attend the Tribunal hearing – Tribunal differently constituted – certiorari and mandamus.

WORDS & PHRASES – "the effect of".

Migration Act 1958 (Cth) ss.91, 91S, 361, 420, 422B, 424A, 425A, 426, 426A, 474

SZICU v Minister for Immigration [2007] FMCA 1086 followed.
Uddin v Minister for Immigration [2005] FMCA 841 distinguished.
Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin [2005] FCAFC 118 referred to.
Dostanov v Minister for Immigration [2007] FMCA 792 referred to.
SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 2 referred to.
SZBYR v Minister for Immigration and Multicultural and Indigenous Affairs [2007] HCA 26 referred to.
SZEZI v Minister for immigration and Multicultural and Indigenous Affairs [2005] FCA 1195 distinguished.
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 24 referred to.
SZEPZ v Minister for Immigration and Multicultural Affairs [2006] FCAFC 107 followed.

Applicant:	SZILV
First Respondent:	MINISTER FOR IMMIGRATION AND CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL

File Number:	SYG 687 of 2006
Judgment of:	Scarlett FM
Hearing date:	4 October 2007
Date of Last Submission:	4 October 2007
Delivered at:	Sydney
Delivered on:	12 October 2007

REPRESENTATION

Applicant:	In Immigration detention
Solicitor for the Applicant:	Michael Jones
Counsel for the Respondent:	Mr Cleary
Solicitors for the Respondent:	Clayton Utz

ORDERS

(1) That an order in the nature of certiorari is to issue to quash the decision of the Second Respondent made on 27 May 2003 and handed down on 20 June 2003 affirming a decision not to grant a protection visa to the Applicant.

(2) That an order in the nature of mandamus is to issue remitting the application of the Applicant for review of the decision not to grant a protection visa to the Second Respondent for determination according to law.

(3) That the First Respondent is to pay the Applicant's costs fixed in the sum of $5,000.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 687 of 2006

SZILV
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Application

1. The Applicant, a citizen of China, asks the Court to set aside a decision of the Refugee Review Tribunal handed down on 20th June 2003. The Tribunal affirmed a decision of the delegate of the Minister not to grant the Applicant a protection visa.

2. The Applicant claims that:

   a) The Tribunal, in inviting him to attend a hearing, failed to comply with sections 425A and 426 of the Migration Act 1958; and

   b) The Tribunal, when affirming the delegate's decision, failed to comply with section 424A of the Migration Act.

3. As these reasons will show, the Applicant's first claim has not been successful but I am satisfied that the Tribunal failed to comply with section 424A of the Act, which is a jurisdictional error.

Background

4. The Applicant arrived in Australia on 17th July 1999. He applied for a Protection (Class XA) visa on 14th March 2002, but it was refused on 3rd April 2002.

5. The Applicant claimed that he arrived in Australia as a student. He claimed that his father was targeted by a corrupt politician for personal gain. When he called home to China to speak to his mother, he found that his father was in prison and his mother was in hospital. A friend told him that the police were also looking for him as well.

6. After his application for a protection visa was refused, the Applicant sought a review of that decision by the Refugee Review Tribunal.

Application for Review by the Refugee Review Tribunal

7. The Applicant applied to the Refugee Review Tribunal on 1st May 2002. He submitted a short written statement with his application, claiming:

> *My parents have been persecuted by the Chinese authority, because my parents have different political opinion. My parents also are victims of political struggle among the groups of the Chinese Communist Party…*
>
> *Recently, I heard my mother was detained since she didn't explore so-called crime of my father. I called and begged my relatives many times. At last, they told me the situation is very serious now and some person announced I would be detained too if I dare go back.*
>
> *I know I cannot go back to China now. I don't want to live in prison or be persecuted to death at so young age. It would be appreciated if RRT and the Australian government could understand my situation and give me a protective visa. I believe my case comply with the definition of refugee. I need protection of the Australian government to avoid this tragedy caused by political persecution.*[1]

8. The Tribunal wrote to the Applicant on 15th April 2003, inviting him to attend a hearing on 27th May 2003. The Applicant did not attend the

[1] Court Book 47

hearing. The Tribunal's records show that an officer of the Tribunal telephoned the Applicant on 21st May 2003 to inquire if he intended to attend the hearing:

> *21.05.03 NO REPLY check completed and movement record done. Phoned applicant and asked if he is attending his hearing scheduled for the 27/05/03. He said he will not be attending and has already told his adviser.*[2]

9. The Tribunal noted that the Applicant did not appear at the time and date of the hearing decided to use its powers under s.426A of the Migration Act to make a decision on the review without taking any further action to enable the Applicant to appear before it.

The Refugee Review Tribunal Decision

10. The Tribunal signed its decision on 27th May 2003 and handed the decision down on 20th June of that year. A copy of the Tribunal's decision and reasons for decision can be found at pages 61 to 69 of the Court Book.

11. In its decision, the Tribunal set out a summary of the evidence before it, which was of necessity brief, taken from the Department's file. That information essentially consisted of the Applicant's passport and his application for a protection visa.

The Tribunal's Findings and Reasons

12. The Tribunal's Findings and Reasons are set out on pages 66 to 69 of the Court Book.

13. The Tribunal accepted that the Applicant was a national of the People's Republic of China. However, the Tribunal stated that it had "a number of problems with the Applicant's claims":

> *Firstly, the information in the applicant's protection visa application dates from March 2002 and the applicant has provided no updated information concerning his family's situation. As the applicant chose not to attend a hearing, I have*

[2] CMS Case Notes reproduced in Court Book 54

not had the opportunity to obtain further details from him in this regard.

Secondly, although the applicant claims that he has been told that the applicant (sic) police are after him, it is not clear to me why this would be the case. In relation to this, the applicant has been in Australia during the period he claims his parents have had problems. Thirdly, the applicant has not provided any information which could lead me to conclude that it would be unreasonable for him to return to China and live somewhere other than his hometown.

Fourthly, on the evidence before me, I cannot be satisfied that the essential and significant reason for any harm faced by the applicant's parents is their race, their religion, their nationality, their membership of a particular social group or their political opinion. From the information provided by the applicant, it appears that any problems his parents have faced are due to his father's refusal to give a job to Liu's relative. The applicant appears to be claiming to fear harm for the same reason.[3]

14. The Tribunal found that there was nothing in the evidence that could lead it to be satisfied that the Applicant feared persecution for reasons of his race, religion, nationality or political opinion. The Tribunal also considered whether any harm that the Applicant feared was for reason of his membership of a particular social group, being his family. The Tribunal considered the provisions of s.91S of the Migration Act and found that:

Pursuant to this provision, a person who is pursued because he or she is a relative of a person who is being targeted for a non-Convention reason does not fall within the grounds for persecution covered in the Convention.[4]

15. The Tribunal conceded that s.91S did not prevent a family from being a particular social group for the purpose of establishing a Convention reason for persecution but stated that the family could not be used as "a vehicle to bring within the scope of the Convention persecution that it motivated for non-Convention reasons".[5] The Tribunal was not satisfied that the Applicant's parents had been targeted for a Convention reason and s.91(5) of the Migration applied. The Tribunal

[3] Court Book 66-67
[4] Court Book 67-68
[5] Court Book 68

found that the Applicant's fear of being harmed did not fall within the Convention grounds.

16. The Tribunal was not satisfied that the Applicant had a well-founded fear of persecution for a Convention reason and affirmed the delegate's decision not to grant the Applicant a protection visa.

Application for Judicial Review

17. The Applicant's amended application filed in Court on the morning of the hearing seeks the following declarations and order:

    i) A declaration that the Tribunal decision was not a privative clause decision within the meaning of s.474 of the Migration Act 1958;

    ii) A declaration that the Tribunal decision was made in excess of the jurisdiction of the Tribunal and is consequently void and of no effect; and

    iii) An order that the Applicant's application for a protection visa, which was the subject of the Tribunal decision, to be returned to a differently constituted Tribunal for reconsideration according to law and any directions of the Court.

18. The Applicant initially relied on three grounds of review, but did not press the second ground and did not read an affidavit which was filed in Court in support of that ground.

19. The first ground upon which the Applicant relied claims that the Tribunal failed to exercise its jurisdiction because it failed to comply with sections 425A and 426 of the Migration Act.

20. The second ground (initially the Applicant's third ground) is that the Tribunal failed to comply with s.424A of the Act.

The Applicant's First Ground

21. The Applicant claims that the Tribunal was required by s.425A to give the Applicant a notice in relation to a hearing of his case. Under

s.426(1)(b) that notice was required to notify the Applicant of the effect of s.426(2).

22. The Tribunal wrote to the Applicant on 15th April 2003 inviting him to a hearing on 27th May 2003. The effect of subsection 426(2), as set out in subsection (3), is that if an applicant does not, within 7 days of being notified, give the Tribunal notice, in writing, that he or she wants the Tribunal to obtain oral evidence from a person or persons named in the notice, then the Tribunal is not required to have any regard to the applicant's wishes.

23. The Applicant claims that the Tribunal's notice did not adequately notify him of the effect of subsection 426(2), either with regard to the requirement that a notice to the Tribunal be in writing or that it would have different consequences if given to the Tribunal outside the 7 day time limit. The notices were therefore not valid notices under s.425A.

24. Mr Jones, who appeared for the Applicant, submitted that the Tribunal's letter to the Applicant[6] asked the Applicant to:

- *Complete the 'Witnesses' part of the form if you want the Tribunal to get oral evidence from another person; please note the Tribunal does not have to get evidence from any person you name.*[7]

25. Mr Jones submitted that s.426(2) does not limit an applicant to making a request on any particular form, so long as it is made in writing. He noted that Nicholls FM in *SZICU v Minister for Immigration*[8] did not accept a similar argument but submitted that his Honour was clearly wrong and the court should decline to follow the decision in *SZICU*. He submitted that the better view is by analogy with *Uddin v Minister for Immigration*[9] in respect of a notice that unlawfully limits a person's options as set out in the legislation.

26. Mr Jones also submitted that there was a further argument that did not appear to have been put to the court in *SZICU*, concerning the actual "effect" of subsection (2). This effect is to be found in subsection (3), which says:

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[6] A copy of the Tribunal's letter dated 15 April 2003 appears at pages 52 and 53 of the Court Book
[7] Court Book 52
[8] [2007] FMCA 1086
[9] [2005] FMCA 841

> *If the Tribunal is notified by an applicant under subsection (2), the Tribunal must have regard to the applicant's wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice.*

27. Mr Jones submitted that the Tribunal's letter did not notify the Applicant of the effect of subsection (2) to the extent that, if not complied with, the Tribunal would be under no obligation to even consider a request from the Applicant to take oral evidence from another person. He referred the court to the decision of the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin*[10], where the Court held that the Tribunal's consideration of a validly made request under the parallel section 361 must involve giving 'genuine regard' to the request.[11] It followed that in the case of a request made outside the limitations of the section no such regard need be given at all.

28. Mr Jones, in his written submission, referred the Court to the decision of Nicholls FM in *Dostanov v Minister for Immigration*[12], where the significance of the duty imposed on the Tribunal was considered[13].

29. Mr Jones submitted that s.426 is part of the codified natural justice hearing rule in Division 4 of Part 7 (see s.422B). Failure to comply with its terms amounts to a jurisdictional error on the part of the Tribunal.

Consideration of the Applicant's First Ground

30. I am not persuaded that either of the two arguments raised in the Applicant's first ground establishes that the Tribunal made a jurisdictional error.

31. The Applicant claims that the Tribunal failed to comply with sections 425A and 426 of the Migration Act.

32. Section 426(1) sets out the requirements of a notice of invitation to appear under s 425A:

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[10] [2005] FCAFC 118
[11] [2005] FCAFC 118 at [48]-[50]
[12] [2007] FMCA 792
[13] [2007] FMCA 792 at [55]

> *(1) In the notice under section 425A, the Tribunal must notify the applicant:*
>
> *(a) that he or she is invited to appear before the Tribunal to give evidence; and*
>
> *(b) of the effect of subsection (2) of this section.*

33. Section 426(2) states:

> *(2) The applicant may, within 7 days after being notified under subsection (1), give the Tribunal written notice that the applicant wants the Tribunal to obtain oral evidence from a person or persons named in the notice.*

34. In *SZICU*, Nicholls FM agreed with a submission from counsel for the Minister that the words "the effect of" in s.426(2) did not require a verbatim representation of the words used in s.426(2), saying that what is required is that an applicant is notified of the effect of that subsection. He held that the relevant elements are:

> *1. That the applicant be advised of the option of asking the Tribunal to call a witness or witnesses.*
>
> *2. That the exercise of this option must be done in writing.*
>
> *3. That this must be done within seven days after being notified of the hearing.*[14]

35. His Honour held that the Tribunal had complied with these requirements. His Honour noted that the Tribunal's letter stated:

> *You can also ask the Tribunal to obtain oral evidence from another person or persons.*

36. He went on to note that the letter directed the Applicant to ask the Tribunal to obtain oral evidence from witnesses by doing so in writing and referred the Applicant to that part of the "Response to Hearing Invitation" form headed "witnesses'. His Honour held:

> *This meets the obligation to inform the applicant, and would meet the requirement that the applicant notify the Tribunal of any witnesses in writing.*[15]

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[14] [2007] FMCA 1086 at [17]
[15] [2007] FMCA 1086 at [18](2)

37. His Honour was also referred to the decision in *Uddin v Minister for Immigration* but distinguished that decision on the facts.[16]

38. Mr Jones submits on behalf of the Applicant that I should find that the decision in *SZICU* is clearly wrong and decline to follow it. I am not so persuaded. On the contrary, with respect, I believe that his Honour's reasoning is correct and I intend to follow the decision in *SZICU*. Also, I consider that the decision in *Uddin* should be distinguished.

39. The other part of that ground alleges that the Tribunal's letter did not notify the Applicant of the effect of s.426(2). Mr Jones submitted that the actual effect of subsection (2) is found in subsection (3), which says:

> *(3) If the Tribunal is notified by an applicant under subsection (2), the Tribunal must have regard to the applicant's wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice.*

40. With respect, I do not agree. The effect of subsection (2) is not found in subsection (3). It is found in subsection (2). Section 426(1)(b) does not require the Tribunal to notify the Applicant of the effect of subsection (3), but of subsection (2). The Tribunal did so.

41. The Tribunal's letter complied with the requirements of ss.425A and 426. It did not fall into jurisdictional error in this regard. The Applicant's first ground has not been made out.

The Applicant's Second Ground

42. The second ground on which the Applicant relies is a failure to comply with s.424A of the Migration Act.

43. The particulars of this ground are that the Tribunal took into account as part of the reason for affirming the decision information given by the Applicant in his application for a protection visa but not given to the Tribunal for the purposes of the review. Specifically, this was information that:

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[16] *Ibid* at [21]-[23]

- The Applicant had been in Australia during the period he claimed his parents were having problems with the police
- The problems faced by the Applicant's parents were due to his father's refusal to give job to a relative
- The Tribunal did not give the Applicant particulars of this information, ensure that he understood why it was relevant, or ask him to comment on it as required by s.424A(1).

44. Mr Jones submitted that the Applicant's failure to attend the hearing did not relieve the Tribunal of its obligations under s.424A as it was at the time of the decision, since those obligations could not at that time be complied with at the hearing.

45. He submitted that according to the Tribunal's reasons[17] it took into account as part of the reason for upholding the decision under review two pieces of information that the applicant had provided to the Department of Immigration and Multicultural and Indigenous Affairs[18] but not to the Tribunal:

a) that the Applicant had been in Australia during the period he claimed his parents were having problems with the police; and

b) that the problems faced by the Applicant's parents were due to his father's refusal to give a job to a relative.[19]

46. This was information that was about the Applicant or his parents, was not given to the Tribunal by the Applicant for the purpose of the review[20] and was not non-disclosable information. Mr Jones submitted that the Tribunal did not comply with s.424A(1) in respect of that information.

47. Counsel for the Minister, Mr Cleary, submitted that no obligations under s.424A arose in this matter. The Tribunal's reference to the dates in the Applicant's protection visa application and the claim that the problems faced by the Applicant's parents were due to his father's

[17] at page 67 of the Court Book
[18] Which was the title of the Department at the time the applicant applied for a protection visa
[19] The relative referred to was not a relative of the applicant but the brother in law of a local politician called Liu.
[20] see *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2

refusal to give a job to the relative of the local politician cannot be identified and construed as adverse and thus cannot constitute "information" for the purpose of s.424A.[21]

48. It was also submitted on behalf of the Minister that the reason for rejecting the Applicant's claims was a lack of satisfaction due to the absence of detail and extrinsic explanation of the Applicant's claim.[22] There is no breach of s.424A in circumstances where the Applicant fails to attend the Tribunal hearing and the Tribunal relies on the overall lack of detail in the application for a protection visa.

Consideration of the Applicant's Second Ground

49. I am satisfied that there has been a breach of s.424A of the Migration Act. The Tribunal stated in the Findings and Reasons:

> *I have a number of problems with the applicant's claims.*[23]

50. This may just be an unfortunate choice of words, and I accept that a Court should not scan a Tribunal's decision with an eye too finely attuned to error, but the use of the phrase "a number of problems" tends to suggest that the Tribunal was doing more than making a finding that the Applicant's evidence was insufficient to allow the Tribunal to be satisfied that the Applicant met the criterion for a protection visa.

51. The Tribunal then set out four reasons as to why the Tribunal was not satisfied that the Applicant had a well-founded fear of persecution for a Convention reason. The first reason merely relates to the inadequacy of the information, which was out of date. The Applicant had not attended the hearing to provide further evidence, so the Tribunal did not have an opportunity to obtain further details from him.[24]

52. However, the Tribunal went further than commenting on the inadequacy and the insufficiency of the Applicant's evidence and commenced an analysis of the information provided in the application

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[21] See *SZBYR V Minister for Immigration and Multicultural and Indigenous Affairs* [2007] HCA 26 at [18]
[22] See *SZEZI v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1195 at [29]
[23] Court Book at 66
[24] Court book 66-67

for a protection visa. Specifically, the Tribunal made these two findings:

> *Secondly, although the applicant claims that he has been told that the applicant*[25] *police are after him, it is not clear to me why this would be the case. In relation to this, the applicant has been in Australia during the period he claims his parents have had problems.*
>
> *From the information provided by the applicant, it appears that any problems have faced are due to his father's refusal to give a job to Liu's relative. The applicant appears to be claiming to fear harm for the same reason.*[26]

53. It is clear that the Tribunal has used this information as part of the reason for affirming the delegate's decision. It is more than a mere finding that there is an overall lack of detail in a situation where the Applicant has not attended the hearing. The decision in *SZEZI* can be distinguished.

54. The information was provided by the Applicant in support of his application for a protection visa, not as part of his application for review. It was not information included in the Applicant's rather bland statement provided with his application for review. It is not excluded by s.424A(3).

55. The Tribunal did not give the information to the Applicant, ensure that the Applicant understood why it was relevant, or invite the Applicant to comment upon it. This constitutes a breach of s.424A(1) and is a jurisdictional error. In fairness, I note that the Tribunal decision was handed down on 20th June 2003, before the decisions in *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* and *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*[27] handed down.

56. As there is jurisdictional error, the Tribunal decision is not a privative clause decision and does not attract the protection of s.474 of the Migration Act. I propose to make orders in the nature of certiorari and mandamus, setting aside the Tribunal decision and remitting the

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[25] sic
[26] Court Book at 67
[27] [2005] HCA 24

Applicant's application for review to the Refugee Review Tribunal for determination according to law.

57. In remitting the matter to the Tribunal, I do not intend to order that the Tribunal be differently constituted, as the Applicant seeks. I am not satisfied that the Court has the power to make directions about the constitution of the Tribunal. That is a matter for the Principal Member under s.420 of the Act.[28]

58. The Applicant is legally represented and I will consider an order for costs.

I certify that the preceding fifty-eight (58) paragraphs are a true copy of the reasons for judgment of Scarlett FM

Associate: Virginia Lee

Date: 10 October 2007

[28] *SZEPZ v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 107