FEDERAL COURT OF AUSTRALIA

SZUOY v Minister for Immigration and Border Protection [2015] FCA 769

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| Citation: | SZUOY v Minister for Immigration and Border Protection [2015] FCA 769 |
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| Appeal from: | SZUOY v Minister for Immigration and Border Protection [2015] FCCA 1343 |
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| Parties: | **SZUOY v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and ADMINISTRATIVE APPEALS TRIBUNAL** |
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| File number: | NSD 678 of 2015 |
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| Judge: | **FARRELL J** |
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| Date of judgment: | 27 July 2015 |
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| Catchwords: | **MIGRATION** – appeal from decision of Federal Circuit Court dismissing application for judicial review of decision of Refugee Review Tribunal – decision of delegate of Minister to refuse Protection (Class XA) visa |
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| Legislation: | *Migration Act 1958* (Cth) ss 91R(3) (repealed), 424AA, 424A, 425 |
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| Cases cited: | *SZLPN v Minister for Immigration and Citizenship* [2010] FCA 202*SZUOY v Minister for Immigration and Border Protection* [2015] FCCA 1343  |
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| Date of hearing: | 27 July 2015 |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords  |
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| Number of paragraphs: | 30 |
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| Counsel for the Appellant: | The appellant appeared in person with the assistance of an interpreter |
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| Solicitor for the First Respondent: | Ms A Carr of DLA Piper Australia |
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| Counsel for the Second Respondent: | The second respondent submitted save as to costs |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 678 of 2015 |

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

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| BETWEEN: | SZUOYAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | FARRELL J |
| DATE OF ORDER: | 27 July 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The name of the second respondent be changed so as to read “Administrative Appeals Tribunal”.
2. The appeal be dismissed.
3. The appellant pay the first respondent’s costs, as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 678 of 2015 |

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

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| BETWEEN: | SZUOYAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | FARRELL J |
| DATE: | 27 July 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

1. This is an appeal from a decision of Judge Manousaridis of the Federal Circuit Court of Australia delivered on 22 May 2015: see *SZUOY v Minister for Immigration and Border Protection* [2015] FCCA 1343 (“*SZUOY*”). The primary judge dismissed with costs an application for judicial review of a decision of the Refugee Review Tribunal made on 30 May 2014. These reasons have been revised from an ex tempore judgment.
2. The Minister sought leave to change the name of the second respondent to “Administrative Appeals Tribunal”. I granted that leave.

# Background

1. The appellant is a male citizen of the People’s Republic of China. He arrived in Australia on 28 July 2012 on a tourist visa, which was valid until 28 October 2012. The appellant applied for a Protection (Class XA) visa on 25 September 2012. A delegate of the Minister decided to refuse to grant the visa on 8 February 2013.
2. The basis for the appellant’s claim for protection is set out at [2]-[8] of the primary judge’s reasons, as follows (footnotes omitted):

[2] The applicant is from the Fujian Province in China. He claimed his family owned a pig farm which they were forced to close in 2009 when the local government sold it for a real estate development project. The applicant’s family received no compensation for the sale of the land.

[3] In January 2010 the applicant participated in a protest against the local government and the real estate development company. The protest was organised by another landowner. The Public Security Bureau (PSB) arrested the applicant, the landowner, and 10 other people. The authorities alleged that those participating in the protest were engaging in “*anti-government activities and* [disturbing] *normal social orders*”. The applicant was detained for one month at a detention centre and during that time he was physically and mentally harmed and mistreated by the police. The applicant was released after his father paid a 9,000RMB fine and promised in writing not to attend any further protests in the future.

[4] The applicant suffered from depression after his arrest and detention. In May 2010 a distant relative of his wife, who was Christian and a secret member of the Local Church, came to the applicant’s home. The applicant was evangelised by his wife’s relative and she persuaded the applicant and the applicant’s wife to attend secret meetings of the Local Church. In July 2010 the applicant and his wife were baptised at a church brother’s home.

[5] In late 2010 the applicant started working for a “*construction team*” owned by his wife’s relative’s husband in a town 250km from the applicant’s hometown in Fujian. The applicant and his wife’s relative’s husband could not find any meeting groups of the Local Church in the town, so they established and developed three secret meeting groups between the period of December 2010 and November 2011.

[6] The applicant returned to his hometown in April 2012. He was there informed by a church brother that one of the secret meeting groups had been raided by the PSB and the wife’s relative’s husband and other church brothers and sisters were arrested. Two days later the applicant learnt that the PSB had discovered the “*leading role*” played by the applicant in the Local Church. The applicant sensed he was in danger and went into hiding at a friend’s place for three months.

[7] During the time the applicant was in hiding, the police questioned the applicant’s wife, parents and sisters and searched the applicant’s home. In July 2012 the applicant left China with the help of a church brother who arranged the applicant’s trip to Australia through a “*snake head*”. The applicant has continued to actively attend the Local Church in Australia.

[8] The applicant believes he will be subjected to persecution because of his Christian belief if he returns to China.

# Tribunal Decision

1. The appellant applied for review of the delegate’s decision on 26 February 2013. The Tribunal affirmed the delegate’s decision on 30 May 2014 for the reasons set out in the Statement of Decision and Reasons of that date (“Decision Record”).
2. In summary, the Decision Record indicates that:
* The Tribunal found that the appellant’s claims were not credible and that the appellant had fabricated his claims in order to obtain a protection visa: [45];
* The Tribunal did not accept that the appellant “was involved with the Local Church in China and/or that the [appellant] suffered persecution from the Chinese authorities because of hitting [sic] his involvement with the Local Church”. The finding was based on country of origin information which reports that Fujian authorities are more liberal in relation to Christians, but that there is a 4,000 seat Local Church in Longtian and that both registered and unregistered churches are full of worshippers. The Tribunal noted a submission made after the hearing which noted that the 4,000 seat Church has only been reported from one source, being Jason Kindopp. However, the Tribunal was not satisfied that this brought the information into disrepute; the same submission refers to evidence by Mr Kindopp in attachments A and C: [37];
* The Tribunal considered post-hearing submissions made by the appellant’s migration agent regarding the difference between the Local Church (shouters) and Little Flock (Christian assembly) and the suggestion that the 4,000 seat church in Longtian belongs to Little Flock. The Tribunal did not accept at face value that the church in Longtian belongs to Little Flock and that that was the reason that the appellant was not aware of it “due to the lack of any independent evidence that the Church [be]longs to Little Flock and the lack of credibility of the applicant’s overall claims”: [38];
* The Tribunal found that the appellant’s evidence that he was a member of a Local Church which is different to that referred to in the country of origin information was “fanciful and fabricated” because in his evidence to the Minister’s delegate and the Tribunal the appellant referred extensively to Witness Lee, Watchman Nee and the Recovery Bible. It also noted that Mr Kindopp recorded that the Church at Longtian was a “local church” as opposed to “little flock”. Mr Kindopp’s work was quoted regularly in country of origin information and the Tribunal had no reason to think he made a mistake or did not understand the distinction: [39];
* Although the Tribunal accepted that the appellant had had at least some contact with the Local Church in Australia, this conduct was disregarded under s 91R(3) (now repealed and contained in s 5J(6)) of the *Migration Act 1958* (Cth) because the Tribunal found that the conduct was engaged in for the purposes of strengthening the appellant’s refugee claim: [44];
* The Tribunal did not accept the appellant’s claims that his father’s land had been confiscated, and that he had been involved in a protest, for reasons which include that the appellant’s family (his parents, wife and two children) continued to live at the residence where the appellant was allegedly harassed; the fact that they remain indicates that they are not at risk or of interest to the authorities. Acknowledging the appellant’s evidence that his family could not move because of financial difficulty and that he could not afford to send money to China to help them and at the same time support himself in Australia, the Tribunal did not consider it realistic that the appellant would leave his family in a place where they would be at risk: [41]; and
* The Tribunal thought it was significant that the appellant was able to leave China using his own passport through legal channels: [42].
1. The Tribunal concluded that the appellant was not of interest to Chinese authorities while he was in China, or after he left, and would not become a person of interest if he were to return because of his involvement in the Local Church in Australia. The Tribunal relied on “reputable country of origin information” regarding acceptance of the Local Church and Christianity more broadly in the local area; it said that information was more recent and reliable than information (including from Wikipedia) provided by the appellant: Decision Record at [45]-[47].
2. In the result, the Tribunal found that the appellant was not owed protection obligations either as a refugee or as a beneficiary of complementary protection.

# Federal Circuit Court Decision

1. The appellant applied for judicial review of the Tribunal’s decision by an application filed 25 June 2014. The grounds of the application were as follows (as written):

1. The Applicant appeals against or in the alternative seeks a declaration as specified above regarding the entirety of the purported privative clause decision of the Refugee Review Tribunal made on 30 May 2014 on the grounds that it was not a decision under the act.

Particulars

i. Section 5E

ii. Transcript and evidence, whereby the Tribunal refused to accept facts that are obvious.

2. According to the standards of the reasonable observer, it is apprehended that the Tribunal could not have arrived at its erroneous conclusions as to the level of religious tolerance in China had it given the Applicant a fair hearing according to the requirements of the Act.

*Particulars*

i. *Including but not limited to an assertion that the intolerance of the Chinese Government towards religious practice is “improving”.*

ii. *The consequent declaration that the Applicant will not suffer persecution on his return.*

3. The Tribunal appeared to not permit the facts as to the application of the Refugee Convention to be considered.

*Particulars*

*Refusal to consider obvious and well known facts regarding religious persecution in China.*

4. The Tribunal was apparently so predisposed to refuse to believe the applicant as to deny them procedural fairness by way of statutory breach

5. The Tribunal’s conclusion was encumbered by characteristics which would lead a reasonable person to apprehend bias, and was thus not an effective decision that is protected by Section 474.

6. Such other grounds as this Honourable Court may deem just.

1. The appellant also handed up written submissions at the hearing. The primary judge found that there was a large overlap between the written submissions and the grounds of application; the primary judge decided to consider the application primarily by reference to the matters raised in the written submissions.
2. First, the primary judge found that paragraphs 1-8 and 19 of the written submissions repeated the appellant’s claims made to the Tribunal; they therefore sought impermissible merits review: *SZUOY* at [14].
3. Paragraph 9 complained that that the delegate and the Tribunal had searched for something until they “caught [him] out”; he explained by way of example that he had been unable to recite the opening verses of some of the gospels in the Bible. The primary judge held that this ground did not raise jurisdictional error: *SZUOY* at [15]-[16]. The transcript did not reveal that the Tribunal had asked the appellant questions about his knowledge of the gospels, and the Tribunal did not rely on the appellant’s knowledge of the gospels or of Christianity as a reason for rejecting the appellant’s claims.
4. In paragraph 10, the appellant submitted that the Tribunal “got that ‘country information’ wrong”, being information regarding the treatment of the “Shouters” churches. The primary judge rejected this submission because it sought merits review; the weight to place on country information was a matter for the Tribunal: *SZUOY* at [17].
5. Paragraphs 11 and 12 contained allegations that the appellant had been denied a fair hearing and that the Tribunal was not going to believe him regardless of what he said. The appellant referred to the fact that the Tribunal concluded that the appellant “may have worked” on a pig farm, even though the Tribunal, contrary to the delegate, found that the appellant was aware of the breed of pigs in his district. The primary judge rejected these submissions because the Tribunal’s conclusion did not itself indicate any unfairness: *SZUOY* at [18].
6. The appellant submitted at paragraphs 13, 14 and 18 that the Tribunal member had decided the matter before she heard the appellant, on the basis of: the length of the Tribunal hearing (about an hour); that the Tribunal member “seemed in a hurry to get [him] out the door”; that the Tribunal member did not believe the witnesses; and that he had the impression that the member had written much of her decision before the hearing. Having considered a transcript of the hearing, the primary judge found that the Tribunal member appropriately put the issues she had with their evidence to the witnesses; the expression of those views did not manifest any actual bias or give rise to a reasonable apprehension of bias: *SZUOY* at [20]-[21]. In addition, there was nothing to suggest that the Tribunal did not accord the appellant a fair hearing as required by s 425(1) of the *Migration Act 1958* (Cth): *SZUOY* at [21].
7. Paragraph 15 complains about the Tribunal member’s repeated references to the 4,000 seat church in Fujian and that the member “would [not] listen to the obvious”. The primary judge did not accept this submission insofar as it claimed that the Tribunal did not consider the appellant’s response to country information put to him relating to the Longtian church: *SZUOY* at [22]. The Tribunal rejected the appellant’s explanation about his Local Church being different from the one which existed in Longtian as “fanciful and fabricated” on the basis of evidence from both the appellant and from one of the witnesses called by the appellant: *SZUOY* at [24].
8. Finally, in relation to paragraphs 16 and 17, the appellant disagreed with the Tribunal’s reliance on the appellant’s not having sent money to China as a reason for not accepting the appellant’s explanation for his family not moving from the place at which the appellant feared harm. The primary judge held that these paragraphs sought impermissible merits review: *SZUOY* at [25].
9. The primary judge then dismissed the grounds listed in the application at [26]-[27] of *SZUOY* as follows:

[26] The first ground of the application is a bald assertion that the Tribunal’s decision was not one authorised or made under the Act. By itself, it does not identify any jurisdictional error by the Tribunal. The remaining grounds are all to the same effect, namely, the Tribunal conducted itself in such manner as to give rise to a reasonable apprehension of bias. The only submissions the applicant made in support of that claim are those the applicant made in the Written Submissions which I have already considered and not accepted.

[27] … the applicant made one submission in relation to the grounds stated in the application, and that was in relation to ground 2. The applicant claimed he attended the Local Church, he was persecuted by the government, and that if he returned to China he would be arrested. These submissions seek to restate the claims the applicant made before the Tribunal, and disclose no jurisdictional error.

1. In the result, the primary judge found that the Tribunal did not commit any jurisdictional error.

# Appeal to this Court

1. There are three grounds of appeal listed in the appellant’s notice of appeal filed in this Court on 12 June 2015. They are (as written):

1. RRT has bias against me as I was deprived of the benefits of doubts.

2. RRT has denied me procedural fairness by failing to provide adequate reasons for the finding of a fact.

3. The Tribunal under evaluated the risk of serious harm that I will face if going back to China.

1. The appellant filed an affidavit on the same date, in which he states that all the evidence he gave to the Tribunal and to the primary judge was true and that he wished to seek review of his case.
2. The appellant also provided written submissions as an annexure to a second affidavit filed in this Court on 19 July 2015. The written submissions contain two introductory paragraphs and then 19 numbered paragraphs. Except for the deletion of one introductory paragraph relating to the loss of the appellant’s lawyer, the written submissions filed in this Court are identical to those filed in the Federal Circuit Court.
3. In addition to the copies of the Decision Record and the primary judge’s reasons, the Appeal Book contained a copy of the submissions provided to the Tribunal by the appellant’s migration agent after the Tribunal hearing and a copy of the transcript of the Tribunal hearing.
4. The appellant appeared at the hearing with the assistance of an interpreter.
5. Although the grounds of the appeal are slightly differently cast compared with the grounds of the application considered by the primary judge, the matters raised by the appellant in his written and oral submissions are the same. The Minister correctly submits that the appellant’s grounds do not set out any ground of error by the primary judge; a claim of error must be implied from the restated complaints concerning the Tribunal’s conduct, reasoning and decision.
6. In relation the first ground: From my review of the transcript of the hearing and the Decision Record, it is plain that the Tribunal member had a number of issues relating to the appellant’s application arising out of the interview with the delegate. It appears that an interpretation error during the interview with the delegate (in relation to whether the appellant was able to name types of pigs kept by his father) raised a credibility issue which was in part addressed by correct interpretation at the Tribunal hearing; it is unfortunate that a credibility issue can arise in this way.
7. Each of the issues of concern to the Tribunal member was raised with the appellant and with two witnesses who are members of the Local Church in Sydney. While that process caused concern to the appellant that he was not believed and that the Tribunal member was biased against him, it was appropriate for the Tribunal member to put issues of concern to the appellant to give him an opportunity to comment. The Tribunal member would be required to put “information” (other than information which falls within s 424A(3)) which would be a reason or part of a reason for affirming the delegate’s decision to the appellant at the hearing or in writing in accordance with ss 424AA and 424A of the Migration Act. I do not perceive from the questioning by the Tribunal member at the hearing, by reason of the length of the Tribunal hearing or from the Tribunal Record evidence that the Tribunal member’s mind was not open to persuasion or that a hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and that conduct would think that the Tribunal member was biased. Robust questioning and the tentative expression of views do not establish bias. There is no indication that the Tribunal member sought to prevent the appellant from putting any evidence or submission that he wished to at the hearing and the Tribunal member received written submissions after it. I do not perceive legal error in the way the primary judge dealt with the issue of bias at *SZUOY* at [18]-[21]. Further, insofar as the appellant now suggests that he was not given the benefit of the doubt, it has little (if any) role to play where a claim has been rejected upon the basis of an assessment of the claimant’s credibility: see *SZLPN v Minister for Immigration and Citizenship* [2010] FCA 202 at [17] per Flick J.
8. In relation to ground two, the Tribunal gave detailed reasons for its findings of fact. The Tribunal member considered the appellant’s application, the matters put at the hearing and in submissions made by the migration agent after the hearing; it stated its findings at [36]-[51] of the Decision Record. The appellant’s primary concern appears to be the Tribunal’s reliance on country of origin information in relation to the Local Church, the Longtian church and whether he is part of a sect peculiarly targeted by the authorities in Fujian province. While minds may differ, the weight to be accorded to country of origin evidence available to the Tribunal and as submitted by the appellant’s migration agent is peculiarly a matter for the Tribunal. I perceive no error in the way the primary judge dealt with this issue in *SZUOY* at [17]-[24].
9. The third ground invites impermissible merits review. The Tribunal did, in fact, consider the risks to the appellant if he were to return to China but was not satisfied that he was at risk of harm in light of the Tribunal’s other findings and it was satisfied that the appellant’s contact with the Local Church in Australia was for the purpose of furthering his refugee claims and so should be disregarded under s 91R(3) (now repealed) of the Migration Act.
10. I will therefore dismiss the appeal with costs.

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| I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Farrell. |

Associate:

Dated: 28 July 2015