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MINISTER FOR IMMIGRATION & CITIZENSHIP v SZLFX & ANOR (S503/2008)

Court appealed from: Full Court of the Federal Court of Australia [2008] FCAFC 125

Date of judgment: 27 June 2008

Date of grant of special leave: 14 November 2008

The First Respondent ("SZLFX") is a Chinese citizen who first arrived in Australia in 2002 and who applied for a protection visa in 2007. He claimed to fear persecution in China as a Falun Gong practitioner, having become one after his arrival in Australia. On 11 April 2007 the Minister's delegate refused that application, as did the Refugee Review Tribunal ("RRT") on 31 August 2007. The RRT found that SZLFX was not a credible witness. It was not satisfied that he had ever practiced Falun Gong, let alone that he was a committed practitioner.

SZLFX's principal complaint upon judicial review was that the RRT had breached section 424A of the *Migration Act* 1958 ("the Act"). This was due to its failure to notify him of a conversation it had with a "Michael" from "Falun Dafa (Sydney & suburbs)", the contents of which were capable of undermining his claims. On 11 April 2008 Magistrate Raphael upheld SZLFX's application, finding that the RRT fell into jurisdictional error by failing to put SZLFX on notice of this information.

On 27 June 2008 the Full Federal Court (Branson, Bennett & Flick JJ) noted that the Minister accepted that if *SZKTI v Minister for Immigration & Citizenship* was correctly decided, its case would fail. Their Honours then indicated their agreement with the Full Court in *SZKCQ v Minister for Immigration & Citizenship* that *SZKTI v Minister for Immigration & Citizenship* was not plainly wrong and that it should therefore be followed. Accordingly, the Minister's appeal was dismissed.

The grounds of appeal include:

- The Full Court of the Federal Court of Australia erred in the present case in applying the earlier decision of that Court in *SZKTI v Minister for Immigration & Citizenship* [2008] FCAFC 83 because that case had erred:

  a) in construing section 424(2) of the Act so as to limit the generality of section 424(1);

  b) in interpreting section 424 to mean that the RRT may not lawfully obtain information by telephone without following sections 424(2), 424(3) and 424B of the Act.

On 3 February 2009 SZLFX filed an amended notice of contention, the grounds of which include:

- The RRT failed to comply with the requirements of section 424A(2) of the Act, read with section 441A of the Act.

MINISTER FOR IMMIGRATION & CITIZENSHIP v SZKTI & ANOR (S515/2008)

Court appealed from: Full Court of the Federal Court of Australia [2008] FCAFC 83

Date of judgment: 28 May 2008

Date of grant of special leave: 14 November 2008

The First Respondent ("SZKTI") is a Chinese citizen who arrived in Australia on 23 April 2006. A month later he applied for a protection visa, claiming to fear persecution in China due to his involvement with the Shouters Church ("the Shouters"). On 19 August 2006 the Minister's delegate refused that application and an appeal to the Refugee Review Tribunal ("RRT") duly followed. Pursuant to section 424A of the *Migration Act* 1958 (Cth) ("the Act"), the RRT wrote to SZKTI following the hearing and drew his attention to inconsistencies in his evidence. It also asked him to provide details of his involvement with the Shouters in Australia, including information about those with whom he had come into contact. The RRT then contacted one of those named (a Mr Cheah) and asked him a number of questions over the phone. The RRT then sent SZKTI a further section 424A notice and drew his attention to the fact that Mr Cheah knew of him only superficially. It also flagged the possibility of making a finding under section 91R(3) of the Act.

On 30 April 2008 the RRT refused the Applicant a protection visa. It found that SZKTI's knowledge of the Shouters appeared studied and it did not accept that he was involved with any Christian church in China. While the RRT did accept that SZKTI had been involved with the Shouters in Australia, it referred to the fact that Mr Cheah was only able to make "superficial" comments about SZKTI. The RRT therefore disregarded his activities in Australia pursuant to section 91R(3) of the Act.

On 22 October 2007 Magistrate Turner held that the RRT had not erred in its treatment of Mr Cheah's evidence. There was no breach of section 424A of the Act, nor was there a failure to consider the country information. As there was no jurisdictional error, SZKTI's application for judicial review was dismissed.

On 28 May 2008 SZKTI's appeal to the Full Federal Court (Tamberlin, Goldberg & Rares JJ) was successful. Their Honours noted that the RRT did not invite Mr Cheah to provide information under section 424(2) of the Act, but simply called his mobile phone. The Court found that that amounted to an invitation to give additional information to the RRT without complying with the code of procedure under sections 424(2) and (3) of the Act. The RRT had therefore committed jurisdictional error.

The grounds of appeal include:

- The Full Court of the Federal Court of Australia erred:

  a) in construing section 424(2) of the Act so as to limit the generality of section 424(1);

  b) in interpreting section 424 to mean that the RRT may not lawfully obtain information by telephone and without following sections 424(2), 424(3) and 424B of the Act, either at all or when, as here, the RRT thereafter gave the applicant for a protection visa notice of the information in question and an invitation to respond.

MINISTER FOR IMMIGRATION & CITIZENSHIP v SZJGV & ANOR (S577/2008)
MINISTER FOR IMMIGRATION & CITIZENSHIP v SZJXO & ANOR (S578/2008)

Court appealed from: Full Court of the Federal Court of Australia [2008] FCAFC 105

Date of judgment: 19 June 2008

Date of grant of special leave: 5 December 2008

These matters concern the construction of section 91R(3) of the *Migration Act* 1958 ("the Act") and specifically, whether the requirement to "disregard any conduct engaged in by the person in Australia unless ...." means to disregard for all purposes.

Both Respondents are Chinese nationals who applied for protection visas on the basis of their being Falun Gong practitioners. In both cases the Refugee Review Tribunal ("RRT") was not satisfied that the Respondents had been practitioners in China. It also found that their Australian activities were designed to strengthen their claims for protection visas. The RRT acknowledged that it was therefore bound to disregard the Respondents' Australian activities and it rejected their respective claims for protection visas. The Respondents' subsequent applications for judicial review to the Federal Magistrate's Court were also dismissed.

On 19 June 2008 the Full Court of the Federal Court (Spender, Edmonds and Tracey JJ) unanimously allowed the Respondents' appeals. The Court held, that although the RRT acknowledged that section 91R(3) applied in each matter, it still impermissibly had regard to the conduct in question. It did this by partially relying on that conduct as a reason for concluding that the Respondents were not refugees.

The grounds of appeal (in both matters) include:

- The Full Court erred in applying section 91R(3) of the Act so that, unless the decision maker was satisfied that section 91R(3)(b) applied to the conduct of the applicant for a protection visa, section 91(R)(3) prevented the decision maker from having regard to any conduct by the visa applicant in Australia when making primary factual findings about events outside Australia.

- The Full Court should have found that, on its proper construction, section 91R(3) only operates once the decision maker has made their findings on all primary facts and is applying the Convention definition to those facts as found.

VALE v SUTHERLAND (S38/2009)

Court appealed from: Full Court of the Federal Court of Australia [2008] FCAFC 148

Date of judgment: 20 August 2008

Date of grant of special leave: 13 February 2009

This appeal concerns a bankrupt estate and property transferred by a bankrupt prior to bankruptcy.

The respondent is the trustee of the property of Linda Vale, a bankrupt. The appellant is the husband of the bankrupt.

As at 24 June 1997, the appellant and Mrs Vale were registered as the beneficial owners of seven properties in the Mudgee region. On 23 April 1999 Mrs Vale signed a transfer of her interest in each of these properties to the appellant for a consideration of $1.00 per certificate of title – a total of $7.00.

On 24 April 2001 a sequestration order was made against Mrs Vale and the respondent was appointed as trustee of her estate. On 10 May 2001 the respondent lodged caveats against the properties. On 28 May 2002 a notice, issued pursuant to s 139ZQ of the *Bankruptcy Act* 1966 ("the Act"), was served on the appellant claiming payment of the value of Mrs Vale's half share interest in the properties. That half share interest was valued at $270,000 based on a valuation which was made in September 1998.

On 31 July 2002 a certificate pursuant to s 139ZR of the Act was served on the Land and Titles Office of NSW certifying that the properties were charged with the liability of the appellant to make payment of $270,000 to the respondent.

On 19 April 2006 the respondent commenced proceedings in the Federal Magistrates Court seeking orders for possession of the properties and seeking judgment against the appellant for $270,000 plus interest. The appellant cross-claimed and sought an order setting aside the notice issued under s 139ZQ of the Act. The Federal Magistrate accepted arguments advanced on behalf of the appellant that a notice under s 139ZQ of the Act should be construed strictly and that the notice issued was deficient and should be set aside.

The respondent appealed and called into question each of the findings of specific error. The Full Federal Court, by majority (Gray and Tracey JJ) allowed the appeal. Lindgren J would have dismissed the appeal.

The appellant has issued a Notice of Constitutional Matter pursuant to s 78B of the *Judiciary Act* 1903 (Cth).

The grounds of appeal include:

- The majority of the Federal Court erred in finding that the Federal Magistrate was mistaken in assuming that the valuation had been put in issue in the pleadings. Lindgren J was right to dissent on this point (which had not been taken by the respondent at trial).

VISSCHER v THE HONOURABLE PRESIDENT JUSTICE GIUDICE AND ORS (S30/2008)

Court appealed from: Full Court of the Federal Court of Australia [2007] FCAFC 206

Date of judgment: 21 December 2007

Date of referred to Full Bench: 13 March 2009

These proceedings concern a challenge to decisions of the Australian Industrial Relations Commission ("the AIRC").

Mr Visscher commenced casual employment with Teekay Shipping (Australia) Pty Limited ("Teekay") on 4 March 2000. On 26 March 2001 he was offered permanent employment as a Third Mate. On 21 August 2001 he was offered permanent employment as a Chief Officer. He accepted that offer on 7 September 2001.

Mr Visscher's employment was, in addition to the terms of his contract with Teekay, governed by the Maritime Industry Seagoing Award 1998 and the Teekay Australia/AMOU (Deck Officers) Agreement 1998 ("the 1998 Agreement").

Notwithstanding that Mr Visscher satisfied the requirements contained in the 1998 Agreement for promotion to Chief Officer, the Australian Maritime Officers' Union ("the Union") protested his promotion. The Union wanted Teekay to hold open vacancies for permanent positions as Chief Officer in order to allow employees with longer service to obtain the necessary qualifications.

The Union's protest led to proceedings in the AIRC. The Commissioner recommended that Teekay rescind Mr Visscher's promotion. (Mr Visscher was not a party to, or represented at those proceedings.)

On 20 September 2001 Teekay wrote to Mr Visscher stating that it had chosen to comply with the AIRC's recommendation and was thus rescinding Mr Visscher's promotion to Chief Officer.

Mr Visscher continued to perform the job of a Chief Officer for Teekay after 20 September 2001. He says he did so as a permanent Chief Officer. Teekay says he was acting in the position. In early 2004 matters came to a head. Mr Visscher left his employment with Teekay. He says he did so because Teekay again demoted him from the position of permanent Chief Officer and, on this occasion, he accepted the repudiation of his contract of employment. Teekay says that Mr Visscher resigned.

Mr Visscher then sought relief from the AIRC pursuant to s 170CE of the *Workplace Relations Act* 1996 (Cth). He was unsuccessful at first instance and on appeal to the Full Bench of the AIRC. He then sought writs of mandamus and certiorari directed to the AIRC. That application was filed in this Court, remitted to the Federal Court, and heard and determined by the Full Court of the Federal Court. The question before the Full Court was whether there had been jurisdictional error on the part of the Full Bench. The Court (Ryan, Madgwick and Buchanan JJ) held inter alia, per Buchanan J, that there was no jurisdictional error, that Mr Visscher was not employed as a permanent Chief Officer in 2004 and that his employment as a permanent Chief Officer was terminated by Teekay on 20 September 2001.

On 13 March 2009 Justices Heydon and Bell referred this matter to the Full Court to be argued as if it was an appeal.

The question of law said to justify the grant of special leave is:

- Does a wrongful repudiation of a contract of employment by an employer necessarily terminate the parties' employment relationship, or is the continuing existence and nature of that relationship a question of fact in each case?

INTERNATIONAL FINANCE TRUST COMPANY LIMITED & ANOR v NEW SOUTH WALES CRIME COMMISSION & ORS (S72/2009)

Court appealed from: New South Wales Court of Appeal
[2008] NSWCA 291

Date of judgment: 6 November 2008

Date of grant of special leave: 13 March 2009

Section 10 of the *Criminal Assets Recovery Act* 1990 (NSW) ("the Act") gives the Supreme Court the power to order that no-one disposes of or attempts to dispose of, to otherwise deal with or attempt to otherwise deal with, an interest in property to which that order applies. This is except in such circumstances as are specified in the order itself.

In practice, how this procedure works is that the New South Wales Crime Commission ("the Commission") may make an ex-parte application for a restraining order to the Supreme Court over the subject property. That application must be supported by an affidavit which deposes to an authorised officer's suspicion that the property in question is serious-crime derived property. The Court must then make the order if it considers that, having regard to the matters contained in the affidavit, there are reasonable grounds for that suspicion.

In the present proceedings the Commission made such an application in respect of forty-eight New Zealand bank accounts, one Australian bank account and two share trading accounts. That application was supported by an affidavit of an authorised officer, Mr Arthur Moerman, which alleged that the property in question was the proceeds of a tax-avoidance scheme. The promoter of that scheme was said to be Mr Robert Agius of the accounting firm PKF Vanuatu. After hearing the application ex-parte, the primary judge issued an order restraining any attempts to dispose of or otherwise deal with the subject property.

Upon appeal, the Appellants challenged the making of the restraining orders on several bases. They variously submitted that section 10 of the Act was constitutionally invalid, that various paragraphs of Mr Moerman's affidavit were improperly admitted and that the primary judge erred in concluding that there were reasonable grounds for the relevant suspicion. The Appellants further submitted, inter alia, that the primary judge was required to give reasons for the issuing of the orders but failed to do so.

On 6 November 2008 the Court of Appeal (Allsop P, Beazley JA and McClellan CJ at CL) unanimously found that section 10 of the Act does not invest the Supreme Court with a power repugnant to, or incompatible with, its exercise of Federal judicial power as a court invested with Federal jurisdiction under Chapter 3 of the *Commonwealth Constitution* ("the Constitution"). Their Honours further found that given the nature of the Commission's function, it is essential that it be able to make an ex-parte application. Furthermore, once such an application is made, section 10 raises a justiciable issue in which the Court has an evaluative and determinative role. It is required to make an independent judgment before making the restraining order sought and is not simply bound to "rubber stamp" the Commission's application.

On 17 April 2009 a 'Notice of Constitutional Matter' was filed by the Appellants. The Attorneys-General of the Commonwealth, New South Wales, Victoria, Queensland,

Western Australia and South Australia have all advised that they will be intervening in this matter.

The grounds of appeal are:

- The Court of Appeal of New South Wales erred in holding that section 10(3) of the Act was valid and not repugnant to the exercise by the Supreme Court of New South Wales of the judicial power of the Commonwealth under Chapter 3 of the Constitution.
- The Court of Appeal of New South Wales erred in not dismissing the amended summons filed by the First Respondent in proceeding S12212 of 2008 of the Supreme Court of New South Wales on the ground of the constutional invalidity of section 10(3) of the Act.

MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZIAI & ANOR **(S37/2009)**

Court appealed from: Federal Court of Australia
[2008] FCA 1372

Date of judgment: 8 September 2008

Date of grant of special leave: 13 February 2009

The First Respondent is a Bangladeshi citizen who arrived in Australia on 27 May 2005. Shortly afterwards he applied for a Protection Visa on the basis of his (changed) religious beliefs. That application was refused by the Minister's delegate on 18 August 2005. Two hearings before the Refugee Review Tribunal ("RRT") followed, the decisions in each being set aside by the Federal Magistrates Court. The RRT's second decision, (the subject of the current application) was dated 19 February 2008.

Before the Magistrate, the First Respondent submitted that the RRT had erred in failing to make further inquiries about his claims. This arose in the context of the RRT inquiring of the Ahmadiyya Muslim Association ("the Association") on whether the First Respondent was in fact an Ahmadi. The Association advised the RRT that it did not know of him and that furthermore, certain documents he had provided were forgeries. The First Respondent was then invited to, and did comment upon, that information. Despite this, the RRT accepted the Association's evidence and went onto hold that the First Respondent was a liar. Magistrate Scarlett held that it was reasonable in the circumstances for the RRT to make no further inquiries concerning the evidentiary conflict.

On 8 September 2008 Justice Flick upheld the First Respondent's appeal. His Honour held that simply because the RRT had obtained supposedly "reliable" information did not necessarily absolve it from making further inquiries. He noted that the RRT had no hesitation in making an inquiry of the Association and also in suggesting that an adverse inference could be drawn against the First Respondent by not consenting to that course. His Honour further held that while there may be no general obligation to make inquiries to test the authenticity of documents, where an inquiry initiated by the RRT itself places the authenticity of documents in issue, further inquiries should be made to attempt to resolve that conflict.

The grounds of appeal include:

- The Federal Court erred:

  a) by finding that there was a duty upon the RRT to make further inquiries of Mr Nuruzzaman and/or Mr Hossain;

  b) by finding that the failure to make further inquiries of Mr Nuruzzaman and/or Mr Hossain rendered the RRT's decision so unreasonable that no reasonable person could have made it.

The First Respondent has also filed a 'Notice of Constitutional Matter' and a Summons in this matter. That summons seeks the leave of the Court to rely upon a proposed Notice of Contention, the grounds of which are:

- The Court below failed to find that the RRT fell into jurisdictional error by failing to:

  a) invite the First Respondent to a further hearing following receipt of an allegation that two documents provided by the First Respondent to the RRT were "fake and forged";

  b) further or alternatively, endeavour to contact or take evidence from the identified authors of those documents, or the Association,

  which amounted to a denial of procedural fairness, or a failure to conduct the review required by section 414 and Division 4 of Part 7 of the Act, or both.

LEIGHTON CONTRACTORS PTY LIMITED & ORS v FOX & ORS (S528/2008)
DOWNVIEW PTY LIMITED v FOX & ORS (S534/2008)

Court appealed from: New South Wales Court of Appeal [2008] NSWCA 23

Date of judgment: 7 March 2008

Date of grant of special leave: 17 November 2008

On 7 March 2003 Mr Brian Fox was injured while working on a building site in the Sydney CBD. Leighton Contractors Pty Limited ("Leighton") was that site's principal contractor, but it had contracted-out the concreting work to Downview Pty Ltd ("Downview"). Downview however had engaged its own subcontractor, Aggforce Concrete ("Aggforce") to do the work and it was Aggforce that supplied a pump truck, a driver (Mr Warren Stewart) and an offsider (Mr Fox) to operate it. Both Mr Stewart and Mr Fox were themselves independent contractors.

Under the contract between Leighton and Downview, all site workers had to attend an induction course conducted by Leighton. Downview also had to provide Leighton with the written details of all of its secondary subcontractors. Mr Fox however had not undergone any safety training before commencing work.

Mr Fox brought proceedings in the District Court against Leighton, Downview and Warren Stewart Pty Ltd (the company that supplied Mr Stewart's services). Mr Fox was successful against Warren Stewart Pty Ltd, but unsuccessful against both Leighton and Downview. He then appealed to the Court of Appeal while Leighton cross-appealed, seeking a contribution from Downview.

On 7 March 2008 the Court of Appeal (Giles, McColl & Basten JJA) unanimously allowed Mr Fox's appeal. It also gave judgment for Leighton on its cross-appeal against Downview. In relation to Leighton's liability for Mr Fox's injury, their Honours noted that it remained the principal contractor with overall responsibility for site safety. They found that a principal contractor's obligation to provide a reasonable level of safety for its subcontractors was now well-recognised. The Court of Appeal further held that Judge Gibb should have found that Leighton owed Mr Fox a duty of care. By allowing him to work on site without him having undergone any induction training, Leighton had breached that duty.

In relation to Downview, the Court of Appeal found that it had breached its contractual obligations to Leighton. This concerned, inter alia, its obligation to provide Leighton with the written details of everyone it had engaged to work on site. It had also failed to instruct them on the procedures and requirements relevant to that work. Apart from any contractual obligation to Leighton, Downview had a general law obligation to its subcontractors to conduct its operations safely. Downview's conduct had therefore breached its general law duty and had materially contributed to the accident. As with Leighton, causation was established.

Since filing its notice of appeal on 8 December 2008, this Court has been advised that Downview is now in liquidation.

In matter S528/2008 (the Leighton appeal), the grounds of appeal include:

- The Court of Appeal erred in holding that Leighton as head contractor in charge of a building/construction site owed a common law duty, the content of which required it to train subcontracors engaged to work on the site in the manner in which the subcontractor was to perform its speciality work.

In matter S534/2008 (the Downview appeal), the grounds of appeal include:

- The Court of Appeal of the Supreme Court of New South Wales identified and/or applied a wrong test for determining whether and to what extent Downview owed Mr Fox, an independent contractor, a duty of care, and whether or not Mr Fox established a breach of that duty.

- The Court of Appeal erred in holding that Downview's contractual obligations to Leighton gave rise to a duty of care on its part to Mr Fox.