FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v SZOCT [2010] FCAFC 159

Citation:	Minister for Immigration and Citizenship v SZOCT [2010] FCAFC 159
Appeal from:	SZOCT v Minister for Immigration & Anor [2010] FMCA 425
Parties:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZOCT and REFUGEE REVIEW TRIBUNAL**
File number:	NSD 1174 of 2010
Judges:	**JACOBSON, BUCHANAN AND NICHOLAS JJ**
Date of judgment:	23 December 2010

Catchwords:	**ADMINISTRATIVE LAW –** judicial review – jurisdictional error – interrogation of a visa applicant about belief in Christianity – whether decision maker acted as an arbiter of religious belief – whether use of material was irrational or lacking in logic – whether decision maker asked wrong question – whether there was a constructive failure of jurisdiction
Legislation:	*Migration Act 1958* (Cth) ss 65, 91R(3), 425, 430(1)
Cases cited:	*Craig v South Australia* (1995) 184 CLR 163 cited *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48 cited *Minister for Immigration and Citizenship v SZLSP* (2010) 272 ALR 115 referred to/distinguished *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 followed/cited *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 followed *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 cited *NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 214 ALR 264 cited *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 cited

Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 198 ALR 59 followed

Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham (2000) 168 ALR 407 cited

SBCC v Minister for Immigration and Multicultural Affairs [2006] FCAFC 129 referred to

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152 cited

SZJBD v Minister for Immigration and Citizenship [2009] FCAFC 106 cited

SZLSP & Anor v Minister for Immigration [2009] FMCA 932 cited

SZOCT v Minister for Immigration and Anor [2010] FMCA 425 reversed

SZOIW v Minister for Immigration and Anor [2010] FMCA 568 cited

WALT v Minister for Immigration and Multicultural and Indigenous Affairs [2007] FCAFC 2 cited

Wang v Minister for Immigration and Multicultural Affairs (2000) 105 FCR 548 referred to

Date of hearing: 25 November 2010

Date of last submissions:	25 November 2010
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	84
Counsel for the Appellant:	Mr T Reilly

Solicitor for the Appellant:	DLA Phillips Fox
Counsel for the First Respondent:	Ms C Burnett
Counsel for the Second Respondent:	The Second Respondent submitted save as to costs

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	
GENERAL DIVISION	NSD 1174 of 2010

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION AND CITIZENSHIP Appellant

AND:	SZOCT First Respondent REFUGEE REVIEW TRIBUNAL Second Respondent

JUDGES:	JACOBSON, BUCHANAN AND NICHOLAS JJ
DATE OF ORDER:	23 DECEMBER 2010
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal is upheld.

2. The orders of the Federal Magistrates Court of Australia are set aside and in lieu thereof it is ordered that:

(a) The application for judicial review is dismissed.

(b) The applicant is to pay the first respondent's costs as taxed, if not agreed.

3. There be no order as to the costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA	

NEW SOUTH WALES DISTRICT REGISTRY	
GENERAL DIVISION	NSD 1174 of 2010

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION AND CITIZENSHIP Appellant
AND:	SZOCT First Respondent REFUGEE REVIEW TRIBUNAL Second Respondent
JUDGES:	JACOBSON, BUCHANAN AND NICHOLAS JJ
DATE:	23 DECEMBER 2010
PLACE:	SYDNEY

REASONS FOR JUDGMENT

JACOBSON J:

1 The essential issue which arises on this appeal is whether an evaluation made by the Refugee Review Tribunal ("the Tribunal") of answers to questions given by a Visa Applicant on the topic of his knowledge of Christianity gave rise to jurisdictional error in the Tribunal's determination.

2 The background facts, the decision of the Tribunal and the decision of the Federal Magistrate are set out in the reasons for judgment of Buchanan J. I have had the benefit of reading his Honour's judgment in draft and I agree with his exposition of the facts and the principles which apply to the matter.

3 I also agree with Buchanan J that the relevant part of the exchange which took place at the hearing between the Presiding Member and the Visa Applicant is a matter for concern. However, unlike his Honour, I have come to the view that the assessment made by the Tribunal of the Visa Applicant's credit was affected by jurisdictional error.

4 The relevant passage in the reasons for decision of the Tribunal is set out by Buchanan J at [32] below. For convenience, I will reproduce the essential part of the passage which in my view exposes the error. It formed part of [74] of the Tribunal's reasons and is as follows:

He claimed to have a favourite verse in the Bible which he knew by heart, but he could not say it for the Tribunal. He knew parts of a few stories from the Bible. The Tribunal was not satisfied that he had a level of knowledge of the Bible a person might reasonably be expected to have if they had been a believer in Christianity in China from 2004 until 2008 or had been associated with the practice of Christianity in China from 2004 until 2008.

5 A number of Full Courts of the Federal Court have considered the question of the standard of knowledge which the Tribunal is entitled to expect from, and explore with, applicants for protection visas. The relevant passages from the judgments are set out and discussed by Buchanan J.

6 There are four essential principles which are relevant to the disposition of the appeal. Without seeking to depart from his Honour's statement of the principles or the full exposition of the principles in the various authorities, I will endeavour to encapsulate them as follows.

7 First, where an applicant applies for a protection visa on the ground of a well-founded fear of persecution by reason of religion, it is permissible for the Tribunal to explore the level of his or her knowledge and understanding of the religion: *SBCC v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 129 at [45].

8 Second, if the Tribunal questions the applicant about his or her beliefs, it is permissible for it to evaluate the applicant's answers against probative material which evinces the doctrines of the religion. The weight to be given to the evaluation will

ordinarily be a matter for the Tribunal: *Minister for Immigration and Citizenship v SZLSP* (2010) 272 ALR 115 ("*SZLSP*") at [38].

9 Third, where the Tribunal rejects an applicant's claim to be a follower of a particular religion, there must be a sufficiently disclosed rational basis for concluding that the elements of which the applicant was ignorant were elements that an adherent to the religion might reasonably be expected to know: *SZLSP* at [39].

10 Fourth, where the Tribunal's rejection of the claim is based upon an evaluation of the way in which the applicant has expressed himself, or herself, on matters of emphasis or detail of the particular religion, the issue is a difficult one: *SZLSP* at [39]. The principle which appears to follow from the Full Court authorities, and from recent High Court authority referred to in [64] of the reasons of Buchanan J, is that the decision may be affected by jurisdictional error if it reveals a sufficient lack of rational or logical connection between the Tribunal's assessment of the applicant's credit and the material upon which it relied to make that assessment.

11 The Presiding Member of the Tribunal asked the Visa Applicant a series of highly specific and closed questions about his knowledge, by rote, of passages from the Bible. The questions went so far as to ask him to give the reference to the exact chapter and verse in the particular Book to which reference was made.

12 However, no claim of bias, or reasonable apprehension of bias was made against the Tribunal. In my view, that was a proper "concession" in the present case.

13 In my opinion the first two principles stated above are satisfied. That is to say, whatever one's personal distaste for the line of questioning that was followed, the Presiding Member explored the level of the Visa Applicant's knowledge and understanding of one aspect of Christianity against material which may be thought to evince a part of the doctrines of the religion.

14 It is the application of the third and, in particular, the fourth principles upon which this appeal turns. The third principle does not seem to be enlivened because this is not a case in which the Tribunal proceeded on the basis that the Visa Applicant was entirely ignorant of the relevant tenets. Rather, the case turns on the fourth principle because the Tribunal was not satisfied that he had displayed a level of knowledge of the Bible that might reasonably be expected of him.

15 What is to be borne in mind, however, is that the state of satisfaction reached by the Tribunal was not as to the Visa Applicant's level of knowledge of Christianity *per se*. Rather it was not satisfied that he had a level of knowledge of the Bible that a person might reasonably be expected to have if they had been a believer in Christianity in China from 2004 to 2008, or had been associated with the practice of Christianity in China during that period.

16 It is clear, as Buchanan J observes at [63], that the evaluation made by the Tribunal of the Visa Applicant's answers to questions going to his knowledge of specific aspects of the Bible was treated by the Tribunal as destructive of his credit. It was this assessment, revealed in the extract from the Tribunal's reasons set out above, which led the Tribunal to form the view that it was not satisfied he was a

witness of truth in relation to his claim that he was a believer in Christianity in China, or that he was associated with the practice of Christianity in that country.

17 It seems to me that all of the other adverse credit findings made by the Tribunal are subsidiary to the credit finding in relation to the Visa Applicant's claimed belief in, and practice of, Christianity in China from 2004 to 2008.

18 Thus, the question which arises is whether the opinion reached by the Tribunal as to its state of satisfaction under s 65 of the *Migration Act 1958* (Cth) was one that could be formed by a reasonable person or:

… was based on findings or inferences of fact which were not supported by some probative material or logical grounds: *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 657 [145]; see also *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [34]

19 This approach is consistent with that adopted by the majority Justices and the minority in the recent decision of the High Court in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 which is referred to by Buchanan J at [64].

20 What also emerges from that authority is that an affirmative answer to the question is not lightly to be given. A court should be slow to interfere and a clear case must be made out.

21 I concede that the question in the present case is a difficult one. However, ultimately I have come to the view that the answer is not one on which reasonable minds may differ.

22 The vice in the Tribunal's reasons for failing to reach the necessary state of satisfaction is that there is, in my opinion, no rational or logical connection between an assessment of the Visa Applicant's failure to reveal an encyclopaedic knowledge of verses from the Bible and what might be expected from a person who believed in and practiced Christianity in China between 2004 and 2008.

23 Nor, in my opinion, is the Tribunal's finding based on any probative material in the sense referred to in the High Court authorities to which I have referred. This can be tested by asking whether there is any probative material disclosed in the Tribunal's reasons to support its conclusion that it was not satisfied that he had a level of knowledge of the Bible that a person might reasonably be expected to have if they had been a believer in, or practitioner of Christianity in China during the period in question.

24 The approach taken by the Tribunal was not merely to make itself the arbiter of doctrine with respect to Christianity, but the arbiter of the level of knowledge to be expected by one who claimed to have practised Christianity in China from 2004 to 2008. There was no probative material put forward by the Tribunal to suggest any basis for its ability to fulfil that role.

25 I would add, although not necessarily in answer to the questions that arise on the appeal, in my respectful opinion, the approach taken by the Tribunal tends to deflect attention from the real question which arises in such matters.

26 That question is whether the applicant has a well-founded fear of persecution on the ground of his or her religious convictions.

27 I would therefore dismiss the appeal.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jacobson.

Associate:

Dated: 22 December 2010

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	
GENERAL DIVISION	NSD1174/2010

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION AND CITIZENSHIP Appellant
AND:	SZOCT

	First Respondent REFUGEE REVIEW TRIBUNAL Second Respondent
JUDGES:	JACOBSON, BUCHANAN AND NICHOLAS JJ
DATE:	23 DECEMBER 2010
PLACE:	SYDNEY

REASONS FOR JUDGMENT

BUCHANAN J:

28 The first respondent to this appeal (whom I shall hereinafter refer simply as the respondent) was born on 15 July 1960. He is a citizen of the People's Republic of China. He has a younger sister who lives in Australia. He had previously been in Australia between 12 October 2003 and 16 October 2003 on a short stay business visa. He came again to Australia on 30 October 2008 on a sponsored family visitor visa which permitted him to stay until 30 January 2009. He did not leave Australia at that time but, more than eight months after his arrival, on 15 July 2009 (coincidentally his 49th birthday) applied for a Protection (Class XA) visa.

29 The foundation for the respondent's claim for a protection visa was that he was an adherent to the Christian religion, that he had been persecuted in China for his faith by being arrested and beaten and that he would be persecuted again if he returned to China. In his claims for a protection visa the respondent said that his wife died in China in December 2007 after ill treatment by Chinese authorities during a period of imprisonment which resulted from their shared practice of the Christian faith. The delegate of the Minister who considered the respondent's claims for a protection visa was willing to accept that he was a Christian. The delegate did not however accept that he had been or would be persecuted for his faith. On 25 September 2009 the delegate rejected the application for a protection visa. The delegate found:

Whilst the applicant may be a Christian, and may or may not be a member of the local church, there is no reliable evidence to support his claim that he has been subject to persecution in the past or will face persecution in the future on the basis of his religious beliefs or for any other Convention reason.

30 The respondent then applied to the Refugee Review Tribunal ("the RRT") constituted under the *Migration Act 1958* (Cth) ("the Act") for review of the delegate's decision. On 30 December 2009 the RRT affirmed the decision of the delegate not to grant the respondent a protection visa. Unlike the delegate, the RRT did not accept that the respondent was truly a believer in Christianity. The RRT also did not accept the respondent's claims about the treatment of his wife in China as a result of her practice of Christianity. As to this latter aspect the RRT said:

76. The applicant claimed that his wife was detained in 2005 and in 2007, the second time for a period of six months doing hard labour. He had not been able to provide the Tribunal with any documentation relating to the detention as he claimed her release certificate was still in China. Upon questioning, he was unable to tell the Tribunal about the name of the detention centre, despite having visited the detention centre during her six-month stay there, having a release certificate from the detention centre and having lodged a complaint about it to the appeals office. The Tribunal is not satisfied he is a witness of truth in relation to his claim that his wife was arrested and detained twice for the practice of Christianity in China.

31 The RRT's findings about the respondent's own lack of belief in Christianity appeared to be the result of an examination by the RRT of the depth of the respondent's knowledge of the Bible. The RRT referred to the questions it asked the respondent during a hearing it conducted "by teleconference" on 7 December 2009 in the following passages:

33 ... The Tribunal asked if he had a favourite verse from the Bible and he said it was Matthew, Chapter 4, Verse 1 which was about the temptation of Jesus. The Tribunal asked if he had a favourite verse which he knew by heart that he could tell the Tribunal and he said it was about the miracle where Jesus fed 5,000 people with loaves and fishes. The Tribunal asked him which verse this was and he said it was Matthew, Chapter 5, Verse 2. He was able to tell the Tribunal about this story. The Tribunal asked him what this story meant to him and he said it was because Jesus was a holy power and this was one of his miracles. He then said he forgot where this was in the Bible other than that it was in the New Testament. He said that he read the Bible in China when he had the free time to do this which was usually at night. He often read it two or three days in a week.

34. The Tribunal showed the applicant a Bible which was used in the hearing room for the purpose of swearing oaths. The Tribunal said that it was the New King James Version of the Bible and at Matthew, Chapter 5, verse 2 it contained a verse where Jesus went up a mountain and told a sermon including "the Beatitudes". He could not say the words of Matthew, Chapter 5, Verse 2, which he said was his favourite verse in the Bible, and which he knew by heart. He did not know what the Beatitudes which were contained in Matthew, Chapter 5, Verse 2, were. He then said it was not his favourite verse and he was confused. The Tribunal asked if he had another favourite verse which he could tell the Tribunal about. He told the Tribunal about when Jesus

treated an epileptic. He could not name which verse this was as he did not pay attention to which verse it was when he heard it in China. He said he sang hymns and he said prayers in China. He said the Lord's Prayer.

32 The RRT's conclusions about this issue were expressed as follows:

74. The applicant claimed to have read his Bible every day in Australia and to have gone to church in Australia every week or fortnight, claimed to have read his Bible two or three times a week in China and attended a local, unregistered church from 2004 to 2008 in China on a regular basis. He claimed to have a favourite verse in the Bible which he knew by heart, but he could not say it for the Tribunal. He knew parts of a few stories from the Bible. The Tribunal was not satisfied that he had a level of knowledge of the Bible a person might reasonably be expected to have if they had been a believer in Christianity in China from 2004 until 2008 or had been associated with the practice of Christianity in China from 2004 until 2008. The Tribunal is not satisfied that he was a witness of truth in relation to his claim he was a believer in Christianity in China in a local, unregistered church from 2004 to 2008 or that he was associated with the practice of Christianity in China in a local, unregistered church from 2004 to 2008.

33 Apart from the findings about the respondent's truthfulness to which I have already referred, the RRT also found that the respondent was not truthful when he claimed that he was able to leave China without difficulty because a friend with "connections" assisted him to have his passport re-issued. Rejection of this claim was based upon the RRT's conclusion that the respondent was not a person of adverse interest to Chinese authorities. That conclusion also appeared to be based on the conclusion in paragraph 74 of the RRT decision, set out above, that the respondent was not, in fact, a practising Christian in China.

34 The RRT's findings, that the respondent was not truthful in the claims to which I have referred, led to a series of subsidiary conclusions in which various more detailed aspects of the respondent's claims were all rejected. Those findings were expressed as follows:

79. For the reasons stated above and because of the Tribunal's concerns with the applicant's credibility, the Tribunal does not accept that the applicant was a believer in Christianity in China or that he was associated with the practice of Christianity in China.

80. Because of the Tribunal's concerns about the applicant's credibility, the Tribunal does not accept that the applicant departed China for the reasons he has provided or that the authorities are interested in him because of these reasons.

81. Because of the Tribunal's concerns about the applicant's credibility, the Tribunal does not accept that the applicant was persecuted or discriminated against because he had been a believer in Christianity in China or for being associated with Christian services held in China. The Tribunal is not satisfied that the applicant has been harmed in the past of by reason of being a believer in Christianity in China or for being associated with Christian services held in China or for any other Convention-related reason.

82. Because of the Tribunal's concerns about the applicant's credibility, the Tribunal does not accept that the applicant's wife was arrested and detained. Accordingly, the Tribunal does not accept that applicant has made any complaint to the public authorities in China because of his wife's detention and the Tribunal does not accept that the applicant left China in order to avoid persecution because of the appeal he claims he made because of his wife's detention. The Tribunal does not accept that the applicant has ever expressed, or had been perceived as having expressed, a political opinion that had brought him to the adverse attention of the authorities. The Tribunal is not satisfied that if he were to return to China, he will engage in any activity including lodging any further appeals or any other activity that would be, or could be perceived as being, anti-government. The Tribunal is satisfied that he will be of no interest to Chinese authorities for this reason if he were to return to China.

83. Because of concerns about his credibility, the Tribunal does not accept that his wife was a leader of a local, unregistered church from 1999, that church services took place at their home from 1998 and from her restaurant from May 2005, that she was arrested and detained in 2005 and in April 2007 and was abused and sentenced to hard labour, that he was arrested, beaten and detained along with others in August 2008 for his practice of Christianity in a local, unregistered church and is not satisfied that he was fined and he has been monitored or is a person of interest to the public authorities in China because of his practice of Christianity in China or his association with his wife's involvement in a local, unregistered church. Further, the Tribunal rejects all claims that flow from his and his wife's claimed attendance at a local, unregistered church and the Tribunal does not accept that he will practice Christianity upon his return to China. He stated that he has never been sought after by the police or the Public Security Bureau during the time his wife was in detention or after he was released from detention. It does not accept that he has been investigated or sought after by the police because of his practice of Christianity in China or his association with his wife's involvement in a local, unregistered church or that he will be monitored or have his religious freedom curtailed if he returns to China, because the Tribunal is not satisfied that he or his wife attended a local, unregistered church in China. The Tribunal does not accept that he complained to the authorities about his wife's detention. The Tribunal does not accept that he has come to the adverse attention of the authorities in China for his practice of Christianity or his association with his wife's involvement in a local, unregistered church.

84. Because of concerns about his credibility, the Tribunal does not accept that the applicant will attend a local church or preach the gospels if he returns to China.

85. Because of concerns about his credibility, the Tribunal does not accept that the applicant has been persecuted or discriminated in the past by reason of being a believer in Christianity in China or for being associated with Christian services held in China, for having complained to the authorities about his wife's detention or for any other Convention-related reason. The Tribunal does not accept that the Chinese authorities are interested in him because of these reasons.

86. Having considered the applicant's claims singularly and cumulatively, the Tribunal finds that there is no real chance that the applicant will be persecuted for a Convention reason if he were to return to China now or in the reasonably foreseeable future.

35 After his application for a protection visa was dismissed by the RRT the respondent applied to the Federal Magistrates Court of Australia ("the FMCA") for judicial review of the decision of the RRT. The application was made on 27 January 2010. On 18 June 2010 the application for judicial review was upheld and the decision of the RRT was set aside (*SZOCT v Minister for Immigration & Anor* [2010] FMCA 425). The Minister has appealed from the decision of the FMCA.

36 In its judgment the FMCA was very critical of the approach taken by the RRT to the examination of the respondent's belief in Christianity. The FMCA stated that, contrary to the impression left by paragraph 74 of the RRT decision (set out earlier) the true position was (at [18]):

18. It was not part of the applicant's written claims that he had a favourite verse in the Bible which he knew by heart. The transcript of the Tribunal hearing reveals that the proposition that the applicant ought to have a favourite verse came from the presiding member.

37 The FMCA went on to say:

21. It is reasonable to assume that a person claiming protection on the basis of alleged serious harm suffered by them by reason of their religion might know something about that religion. If the Tribunal followed a uniform practice of asking questions of applicants in order to satisfy itself that they knew something of the faith that they professed, there would be little ground for complaint. However, the cases coming before this Court do not show such a common practice. Rather, the Tribunal adopts a practice of grilling Chinese applicants claiming to be Falun Gong practitioners or Christians about their faith and their practice by asking a series of testing general knowledge questions of a kind which are almost never put to adherents of other faiths from other countries.

22. … it is a real concern that in ten years I have never seen a case in which persons claiming persecution as Muslims, Buddhists, Hindus or indeed any other religion are tested on their knowledge in the same way Christians (and Falun Gong practitioners) are. It may be that some decision makers hold a jaundiced view about Chinese asylum seekers, in particular when protection visa claims are made through a migration agent with a poor reputation. If that is the case it is to be deplored. It is the responsibility of decision makers to make decisions impartially and consistently with the Refugees Convention and the Migration Act. The courts must be vigilant to ensure that decisions are made on the basis of principle, not prejudice …

23. Apart from the problem of a discriminatory approach being taken to the assessment of claims by Chinese Christians, there is the additional problem of the Tribunal setting itself up as the arbiter of what a Christian should know about the faith. Such an assumption is often not even stated and cannot readily be tested …

24. …. the Tribunal elected to badger the applicant for a favourite verse and then to demand that he recite that verse verbatim and accurately by reference to an English language King James version of the Bible. The Tribunal appears to have reasoned from an assumption that a person attending a local unregistered Church in China from 2004 to 2008 on a regular basis should be able to recite verbatim a verse

from the Bible that made sense in English when compared with the King James English translation of the Bible. The applicant told the Tribunal that he read the Bible in the Chinese language. He was speaking through an interpreter. He was also made confused by he presiding member's questions. In my view, the approach taken by the Tribunal was most unfair.

…

30. … How much of the Bible would a person need to know in order to satisfy the Tribunal's test? The assumption underlying the Tribunal's reasons is that there is some minimum standard that a person might expect, but the standard is not clear, apart from an expectation that a genuine Christian ought to be able to recite a favourite verse from the Bible. If, as appears from the Tribunal's reasons and the transcript, that standard was that an applicant who studies the Bible in the Chinese language must be able to recite a passage from the Bible as known to him or her verbatim, through an interpreter, by reference to the King James version of the Bible in the English language, then the standard is absurd and unreasonable …

31. I conclude that the Tribunal committed a jurisdictional error because by approaching the applicant's claims on the basis that he had to satisfy the Tribunal that he possessed a particular level of doctrinal knowledge to justify being regarded as a Christian, the Tribunal asked itself the wrong question and there was a constructive failure of jurisdiction.

38 The grounds of appeal stated in the Minister's notice of appeal filed on 8 September 2010 make the following points:

3.1 The Tribunal questioned the First Respondent about his religious knowledge. This questioning did not set up some standard of religious knowledge that all Christians must meet. Rather, it was based on the First Respondent's own agreement at the hearing that he had a favourite verse from the Bible, and his specific claims concerning his past religious study and practice. The Tribunal did no more than address the facts of the case before it, not set up some general standard applicable to all applicants who claimed to be Christian.

1.2 In those circumstances it was open for the Tribunal to find that the First Respondent was not a witness of truth in relation to his claims of being a practitioner in a local, unregistered church in China from 2004 to 2008. Even if reasonable minds could differ about such a finding, this is not a jurisdictional error.

1.3 In questioning the First Respondent about his religious knowledge the Tribunal was acting within its jurisdiction even if it made an error of fact (which is not conceded). His Honour's disagreement with the Tribunal's dissatisfaction with the First Respondent's religious knowledge does not establish any jurisdictional error by the Tribunal.

39 These grounds were supplemented by written submissions which argued that: the finding of the RRT that the respondent was to be disbelieved when he claimed to be at risk of persecution as a believer in Christianity was only one of the areas in which he was disbelieved; the decision of the RRT could not be said to be illogical or

irrational; and the RRT had come to a conclusion on a factual question which was within its jurisdiction to decide.

40 Before attention is given to the reason why the decision of the RRT was set aside by the FMCA (that it constructively failed to exercise its jurisdiction because it asked itself the wrong question) something should be said about the matter which prompted the FMCA's disapproval of the approach taken by the RRT – examination by the RRT of the bona fides of claimed religious belief and practice. The question of what standard of knowledge the RRT is entitled to expect of applicants for protection visas who claim a risk of persecution on account of their religious faith is a sensitive and difficult one. So far as the work of this Court, and of the FMCA, is concerned the central question for examination in any particular case where the issue requires attention is whether the approach taken by the RRT has led to jurisdictional error. Jurisdictional error is not established merely by distaste for the nature of the enquiry carried out by the RRT in the performance of its functions or the methods by which that enquiry is pursued. Nevertheless, there are limits to the licence which the RRT has in this area. In *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548 (*"Wang"*) Gray J made the following statements at [16]:

The RRT receives many applications from persons who seek protection visas, claiming well-founded fear of being persecuted by reason of religion. It is inconceivable that every member of the RRT is properly equipped to assess each such applicant on the basis of the applicant's knowledge of the faith that he or she professes. Religion is a matter of conscientious belief, professed adherence and practice. The RRT seems to have approached the issue on the basis that the appellant had to satisfy the RRT that he was possessed of a specific level of doctrinal knowledge to justify being regarded as a Christian. It is not appropriate for the RRT to take on the role of arbiter of doctrine with respect to any religion.

41 The last sentence of his Honour's remarks has been referred to in a number of subsequent cases. However, it is important to appreciate three things about the context in which this statement was made: first, his Honour's remarks were not reflected or adopted in the judgments of Wilcox J or Merkel J who constituted the majority on the Full Court in that case; secondly, Gray J's comment was not made by way of criticism of a finding unfavourable to an applicant for a protection visa as the RRT in that case had accepted the applicant's claims to be a Christian; and, thirdly, subsequent cases have made it quite clear that it is not impermissible for the RRT to test an applicant's claims to be an adherent to a particular faith.

42 In *SBCC v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 129 ("*SBCC*") reliance was placed, by an applicant who claimed to be a Falun Gong practitioner, upon the remarks made by Gray J in *Wang*. The Full Court (French, Lander and Besanko JJ) said (at [45]):

45 Whatever reservations might properly be held about the exploration of a person's religious knowledge in determining whether he or she is an adherent to a particular religion, it does provide a rational foundation for determining whether a person's claim to profess a particular religion is genuine. Such an inquiry is necessary in a case in which a person claims that his or her continued adherence to a religion upon return to the home country will attract persecution on that ground …

43 In *WALT v Minister for Immigration and Multicultural and Indigenous Affairs* [2007] FCAFC 2 ("*WALT*") a Full Court (Mansfield, Jacobson and Siopis JJ) said (at [28]-[30]):

28 In *Wang* at 552, [16], Gray J pointed out that it is not appropriate for the Tribunal to take on the role of arbiter of doctrine with respect to any religion. So much may be accepted. Degrees of understanding and commitment of those practising any particular faith will vary. To ascribe to all who are, or claim to be, adherents to a particular religion a required minimum standard of practice or a required and consistent minimum understanding of its tenets may be erroneous.

29 But it does not follow that the questioning of a person, even a person as young as 11, who claims to have in effect given up his family and community connections for having espoused a particular religion, about that person's beliefs on matters which that particular religion teaches or its tenets, means that the Tribunal is necessarily becoming the arbiter of the doctrine of that religion.

30 We agree with the learned primary judge, that the Tribunal did no more than that. It did not set a level of knowledge of, and commitment to, Christianity which the appellant was required to meet to satisfy it that he had converted to Christianity. It merely explored the level of his knowledge and understanding, and his commitment…

44 However the nature of questioning in some cases may generate concern about a lack of objectivity, or predisposition, on the part of the RRT. For example, in *SZJBD v Minister for Immigration and Citizenship* [2009] FCAFC 106, although Perram J and I did not share his view, Spender J said (at [19]):

19 There is, in my view, substance to the contention that the specificity of the questions and the use made by what were said by the RRT to be "wrong answers" to those specific questions manifested at least apprehended bias by the RRT on the question of whether the applicant was a genuine Falun Gong practitioner.

45 It should be noted that his Honour's concern was not directed to the fact that there had been an examination of the extent of religious belief but rather to the nature of that examination and the use to which the results of it were put. On the other hand, in that case I came to the view that no jurisdictional error had been demonstrated. In passages with which Perram J agreed, I said (at [82] and [88]):

82 In my view the criticisms which were made in the present case, even accepting for present purposes that the questioning was highly specific and arguably onerous, do not sustain a conclusion of jurisdictional error by reason of reasonable apprehension of bias. Bias (or the reasonable apprehension of bias) is not demonstrated by the selection and administration of a series of highly specific questions, even if they take on the appearance of an examination. The critical issue is what use was made of the responses. An assessment of that issue must take account of the latitude allowed to administrative decision makers and to the nature of the process undertaken by the RRT.

…

88 The administration of a series of highly specific questions, and the account taken of the applicant's inability to answer them correctly, should be seen as elements only of a more general foundation for the conclusion that the applicant had not shown that she was, as she claimed to be, a Falun Gong practitioner. In my view it was not demonstrated that the RRT acted inappropriately in coming to that conclusion. In all the circumstances in my view, the argument that there was a sufficient basis for a reasonable apprehension of bias should not be accepted.

46 More recently, in *Minister for Immigration and Citizenship v SZLSP* [2010] FCAFC 108 (*"SLZSP"*) Kenny and Rares JJ came to the view that the approach taken by the RRT to questioning of an applicant for a protection visa about his knowledge and belief of Falun Gong did demonstrate jurisdictional error. Kenny J (after referring to *WALT* and *SBCC*) said (at [37]-[39]):

37 These authorities indicate that the question whether applying an "arbitrary standard" of knowledge of religious doctrine constitutes jurisdictional error is a complex one. I accept that a Tribunal which relies on the premise that "every believer or follower of [a religion] must have certain knowledge or provide certain answers concerning aspects of that religion" may well fail to engage with the question whether the particular applicant before it is in fact a follower of the religion, and so fall into jurisdictional error. There is, however, a difference between: (a) operating from the premise that all believers will have certain specific knowledge; and (b) concluding, after exploring the matter and without any preconception as to what knowledge *all* believers will demonstrate, that a particular applicant's lack of knowledge indicates that he is not a genuine adherent of a religion. Further, it must be remembered that the Tribunal's written reasons typically represent a Tribunal's concluded view after considering all the evidence. If a Tribunal ultimately finds that an applicant's lack of particular knowledge is a reason to reject his claim, this finding does not necessarily mean that the Tribunal approached the matter from the outset on the a priori basis that the applicant was *required* to demonstrate that knowledge.

38 Absent an explicit statement in the Tribunal's reasons that an applicant must meet a particular standard of knowledge to establish that he is a follower of his claimed religion, it may not always be possible to distinguish a potentially illegitimate a priori approach from a legitimate exploration of an applicant's knowledge. As the analysis in *WALT* and *SBCC* demonstrates, the Tribunal's reliance on other factors besides its evaluation of an applicant's knowledge will typically be a strong indicator that the Tribunal has conducted a legitimate exploration rather than made a determination by reference to a preconceived minimum standard of knowledge. Even where the Tribunal relies primarily on its evaluation of the applicant's answers, however, it will not necessarily run into jurisdictional error. As the authorities emphasize, there is nothing objectionable in the Tribunal questioning an applicant about his or her beliefs. When the Tribunal does so, it is not prohibited from evaluating the applicant's answers against probative material evincing the doctrines of the religion in question, and the weight to be given to that evaluation will generally be a matter for the Tribunal.

39 If the Tribunal is to avoid jurisdictional error, however, certain qualifications must be added to the preceding statements. Where the Tribunal rejects an applicant's claim based on perceived deficiencies in the applicant's knowledge of religious

doctrine, there must be a basis for concluding that the particular elements of doctrine in question are elements that an adherent to the religion in the applicant's position might be reasonably expected to know. If this condition is satisfied, and the applicant is wholly ignorant of the relevant doctrinal elements, it will be a short step to infer that the applicant is not a follower of the religion as he or she claims. Where the Tribunal's material and the applicant's answers differ in matters of expression, emphasis or detail, however, the issue becomes more complex. In these circumstances, the perceived variations between the Tribunal's material and the applicant's answers must be such that there is a logical connection between those variations and the conclusion that the applicant is not an adherent of the religion. Depending on the facts of a particular case, trivial variations in detail or superficial differences in expression may not rationally justify the conclusion that an applicant's knowledge is less than would be expected of a genuine adherent. Under such circumstances, jurisdictional error is a possibility.

(Her Honour's emphasis)

and (at [72]):

72 … Under the circumstances of the present case, the respondents have met their burden. On the face of the Tribunal's written statement, the Tribunal's conclusion that the first respondent's answers were not correct was not grounded in probative material and logical grounds. That is, the statement does not disclose any material by reference to which a rational decision-maker could have evaluated the first respondent's answers; no such material can be found in the record; and no other logical basis justifies the Tribunal's finding. In these the circumstances, it is appropriate to infer that the Tribunal's decision-making was arbitrary and irrational such as to constitute jurisdictional error. In support of validity, the Minister could only speculate as to the nature and existence of purportedly probative but unidentified and unidentifiable material, an approach antithetical to that of s 430 of the Migration Act. Accordingly, the Federal Magistrate did not err in finding jurisdictional error.

47 Rares J said (at [87]):

87 The written statement prepared by the tribunal for the purposes of the present decision is bereft of any reasoning process or evidence to support the finding of fact that the husband knew little or almost nothing about Falun Gong. The tribunal member's bare assertion that the husband had not answered his questions "correctly" about what it asserted were basic elements of Falun Gong, was not self-evidently correct.

and (at [94]):

94 The tribunal's findings were concerned with the objective accuracy of answers based on unidentified, and thus unknown, criteria that it applied. And, there is no means to assess whether it was acting on material that it was entitled to take into account or on some other basis or, even, on nothing at all. Thus, the brevity of the tribunal's written statement under s 430(1) and the absence of any identified basis for its findings of material fact about the husband's knowledge and practice of Falun

Gong lead to the inference that the tribunal had no evidence or other material referred to in s 430(1)(d) or s 430(3)(b): *Yusuf* 206 CLR at 346 [69].

48 At the time of the judgment now under appeal, the judgment of the Full Court in *SZLSP* had not been delivered but it is apparent from the reasons of the FMCA in the present case that the earlier judgment of Scarlett FM in *SZLSP & Anor v Minister for Immigration* [2009] FMCA 932 (which was upheld on appeal subsequently) was regarded as taking an approach consistent to the approach taken by the FMCA in the present case. The FMCA in the present case also referred to a judgment of Raphael FM in *SZOIW v Minister for Immigration and Anor* [2010] FMCA 568 in which a similar approach was taken.

49 The reasoning in *SZLSP* does not provide a close analogue with the present case because, in that case, one defect in the approach taken by the RRT was its failure to identify the material by reference to which its very briefly expressed conclusion, that the applicant did not have a sufficient knowledge of Falun Gong to claim likely persecution as a result, was reached. The present is not such a case. Nevertheless, the majority approach in *SZLSP* provides a recent example of the concern with which the Court will view an unwarranted use by the RRT of its inquisitorial powers. That concern was clearly reflected in the judgment of the FMCA now under appeal.

50 I take it to be established by the authorities to which I have referred that it is not impermissible, despite the observations of Gray J in *Wang*, for the RRT to enquire about the depth of knowledge possessed by an applicant for a protection visa when claims for the protection visa are based on the suggested likelihood of persecution for religious reasons. On the other hand, there must be a satisfactorily disclosed foundation from which any conclusion, that adequate knowledge is not held, may proceed. There must also be a sufficient and proper foundation for any conclusion that inadequacy or defects in apparent knowledge falsify a claim to religious conviction and the likelihood of consequent persecution. The material obtained by the RRT from its examination must not be put to use in a way which is so irrational as to suggest the absence of a proper foundation for the stated conclusions (see also *NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 214 ALR 264 (*"NADH"*) at [110]-[121], [136]).

51 In a case such as the present, it is usually necessary to make a distinction between the process which is adopted by the RRT and the use to which an applicant's answers, arising from that process, are put. A failure to provide a fair hearing would represent a failure to afford an applicant with a hearing which met the requirements of s 425 of the Act (see e.g. *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152). On the other hand, misuse of material obtained in an otherwise unchallengeable process (i.e. one not tainted by jurisdictional error) would raise different considerations, such as the ones discussed in *NADH* and *SZLSP*.

52 The approach which was taken by the RRT at the hearing in the present matter does provide some basis for concern. I shall set out some extracts from the transcript shortly. Some allowance should be made, in assessing the answers given by the respondent to the RRT's questions, for the somewhat artificial environment in which

the hearing proceeded. The respondent gave evidence by video link from Melbourne. The member of the RRT and the interpreter were in Sydney. The exchange between the RRT and the respondent was necessarily punctuated by the need for translation of questions and responses, the interpreter was remote from the respondent and video link technology is unable to replicate the immediacy of a face to face interview or hearing. The RRT evidently expected a recitation of a passage from the Bible. At one point, the member of the RRT identified and held up an authorised King James version of the Bible. The King James version is not the only version available. It could not be presumed to have been used (even as translated) by adherents in China. The respondent said he had a Bible in his own language. He was not asked what version it was. It will be noted that the respondent said, at one point, that he had become confused after he had given a series of apparently direct answers to the questions administered by the RRT. Apart from his apparent inability to recite from the Bible by memory (a daunting task it might be thought, even for professed Christians in Australia) the respondent did appear able, on request, to later give a passable recitation of part of the Lord's Prayer, until stopped by the RRT. In all the circumstances, the strictness of the RRT's examination, and the requirement for a recitation by heart from the Bible, may seem hard to reconcile with a spirit of open enquiry.

53 On the other hand, it seems possible that the RRT's questioning merely unfolded in response to the respondent's answers. The initial enquiry whether the respondent had a favourite verse from the Bible seems innocent enough, even though it seems very likely from the respondent's answers that he misunderstood exactly what the Tribunal was asking. Part of the exchange proceeded as follows:

TRIBUNAL MEMBER: What did you do at the church meetings in China?

APPLICANT: Spread Gospels from Bible and books.

TRIBUNAL MEMBER: What books?

APPLICANT: Bible.

TRIBUNAL MEMBER: No other books?

APPLICANT: No.

TRIBUNAL MEMBER: Do you have a favourite verse in the Bible?

APPLICANT: Yep.

TRIBUNAL MEMBER: What is that?

APPLICANT: Chapter 4 in Matthew.

TRIBUNAL MEMBER: Would you like to say it to me please?

APPLICANT: Passage 1, chapter 4 Matthew, it's about Jesus Christ.

TRIBUNAL MEMBER: Can you say it to me?

APPLICANT: About the content, right?

TRIBUNAL MEMBER: Yes. Can you say the favourite verse to me?

APPLICANT: It's about Jesus Christ's temptation. One day Jesus Christ was lead by the Holy Spirit to a wild land and was tempt by the devil and he was starved for forty days.

TRIBUNAL MEMBER: Mr [Applicant] *I asked you about a favourite verse, not a chapter. Do you have a favourite verse?*

APPLICANT: This is verse.

54 In the King James version of the Bible, Matthew Chapter 4 verses 1 and 2 read:

1 THEN was Jesus led up of the spirit into the wilderness to be tempted of the devil.

2 And when he had fasted forty days and forty nights, he was afterward an hungred.

55 The respondent's paraphrase was therefore accurate but the RRT did not seem satisfied. The exchange between the RRT and the respondent continued:

TRIBUNAL MEMBER: Do you know it word for word?

APPLICANT: Can you elaborate it?

TRIBUNAL MEMBER: Sometimes people have favourite verses from the Bible I am asking if you know a verse by heart that you can tell me. Do you know any words of the Bible by heart?

APPLICANT: Yes, I do.

TRIBUNAL MEMBER: Tell me them?

APPLICANT: Jesus Christ miracle feed five thousand people.

TRIBUNAL MEMBER: Do you understand what I mean by a verse? A verse is like a short sentence or group of sentences. Can you tell me which verse Jesus' miracle of feeding the five thousand comes from? In other words where is it in the Bible?

APPLICANT: In Matthew.

TRIBUNAL MEMBER: Where in Matthew?

APPLICANT: Chapter 5, passage 2.

TRIBUNAL MEMBER: Can you say it to me? Do you know it by heart?

APPLICANT: Yes. The story is about one day Jesus Christ went to a wild land and many people heard he's here and people gathered together to listen to his teaching and when time passed by Jesus Christ noted that so many people had nothing to eat so he asked one disciple how shall we feed them. One disciple said we don't have enough food for so many people and the other disciple handed over five bread and then Jesus Christ broke those five breads and give them away to all the people.

56 As the RRT pointed out in its decision, Matthew Chapter 5 verse 2 introduces the "Beatitudes" ("Blessed are …" etc). The story of the feeding of the multitude is in Matthew Chapter 14 verses 15-21:

15 And when it was evening, his disciples came to him, saying, This is a desert place, and the time is now past; send the multitude away, that they may go into the villages, and buy themselves victuals.

16 But Jesus said unto them, They need not depart; give ye them to eat.

17 And they say unto him, We have here but five loaves, and two fishes.

18 He said, Bring them hither to me.

19 And he commanded the multitude to sit down on the grass, and took the five loaves, and the two fishes, and looking up to heaven, he blessed, and brake, and gave the loaves to his disciples, and the disciples to the multitude.

20 And they did all eat, and were filled: and they took up of the fragments that remained twelve baskets full.

21 And they that had eaten were about five thousand men, beside women and children.

57 As a paraphrase of the story I would regard what the respondent said as being within an acceptable range of knowledge, if that was a relevant subject for enquiry. The RRT again seemed more concerned with correct identification of a particular passage. The questions continued:

TRIBUNAL MEMBER: Can you give me the, tell me exactly where that is in the Bible please?

APPLICANT: In Matthew's testament.

TRIBUNAL MEMBER: Whereabouts in Matthew?

APPLICANT: What is question?

TRIBUNAL MEMBER: Whereabouts in Matthew is that story?

APPLICANT: I forgot.

TRIBUNAL MEMBER: Earlier you said it was in Matthew 5, passage 2, so what is in Matthew 5 passage 2?

APPLICANT: I forgot.

TRIBUNAL MEMBER: Mr [Applicant], in the hearing room in Sydney there is a copy of the Holy Bible, the new King James version, and that is the Bible on which we ask people to swear an oath. I have a copy of that Bible in front of me and in that Bible I have opened it to Matthew 5 verse 2, and in that passage it talks about Jesus going up on to the mountain and telling to the people the Beatitudes. Do you know about that? Do you know what the Beatitudes are?

APPLICANT: Chapter 5 passage 2?

TRIBUNAL MEMBER: Yes, you said that was your favourite verse in the Bible.

APPLICANT: That's my favourite.

TRIBUNAL MEMBER: Can you tell me what Matthew 5 chapter 2 says?

APPLICANT: What is about?

TRIBUNAL MEMBER: I am asking you what it is about, you said it was your favourite.

APPLICANT: That was actually not my favourite. My mind is very confused now.

TRIBUNAL MEMBER: Do you have another one that is your favourite?

APPLICANT: And my favourite one is that Jesus Christ healed epilepsy.

TRIBUNAL MEMBER: Healed? Can you tell me what that person healed?

APPLICANT: Epilepsy, he heals epilepsy.

TRIBUNAL MEMBER: Is it epilepsy? Is that what you said?

APPLICANT: Yes.

TRIBUNAL MEMBER: What verse is that?

APPLICANT: Which verse? I did not pay attention to which verse it belongs to.

58 The transcript gives the impression that the RRT regarded the reference to "epilepsy" as an error. In fact, Matthew Chapter 9 verses 2-7 tells the story of a man cured of palsy. It is impossible to know what role the interpreter was playing in those exchanges but I would again regard the respondent's answer as falling within an acceptable range of knowledge about this particular issue, if that was a relevant matter to examine in this way.

59 The approach taken by the RRT appeared to assume that religious conviction, and overt religious practice likely to result in persecution, would be reflected by some form of rote learning of a Sunday school kind. Such an approach may be quite misplaced in many cases, although it must be accepted, in the present case at least, that the respondent was the one who identified the Bible as the main focus of his religious activity, as the transcript shows.

60 I accept the possibility, as the FMCA concluded, that the respondent was treated unfairly as a result of the questioning by the RRT. The respondent's answers may reveal as much confusion and misunderstanding on his part as an evident lack of knowledge. However, any preference for a different approach to the issue (or to issues of this kind) cannot be allowed to obscure the necessity to find that jurisdictional error has been committed before this Court or the FMCA intervenes in the work of the RRT or, indeed, has power to do so.

61 The grounds for judicial review in the proceedings commenced in the FMCA did not include reliance upon the matter which led to the RRT's decision being set aside. Each of the grounds which were relied on were (correctly in my view) rejected by the FMCA. The matter which proved conclusive for the FMCA was identified by the FMCA itself. There is nothing untoward about that and I am not to be taken as suggesting that the Minister did not have an adequate opportunity to deal with the aspect of the case which the FMCA found troubling and ultimately decisive. The contrary is the case. However, the suggestion that the respondent was treated unfairly by the RRT's approach to this issue did not come from him.

62 The conclusion by the FMCA that the RRT had made a jurisdictional error was not based on any finding that there had been a failure to provide the respondent with a hearing in accordance with s 425 of the Act. Indeed, the FMCA explicitly found (at [28]) that "[t]here was no breach of s 425". Rather, the finding of the FMCA (at [31]) was that the RRT had "asked itself the wrong question and there was a constructive failure of jurisdiction". This finding requires attention to the use to which the respondent's answers to the RRT were put.

63 It is clear from the decision of the RRT that the respondent's answers in general, and the level of his knowledge of the Bible in particular, were treated by the RRT as destructive of his credibility. Assessment of the respondent's credibility was within the legitimate province of matters for assessment by the RRT (see *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at [67]).

64 The next question, therefore, is whether the way in which the RRT assessed the credit of the respondent, and the material it used to do so, revealed such a lack of rational or logical connection between the two that it might be concluded that the RRT's conclusion (relevantly, the conclusion in the last sentence of paragraph 74) was "one at which no rational or logical decision maker could arrive on the same evidence" (see *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [130]-[131]). In my respectful opinion, neither the record of the exchange between the RRT and the respondent or any other matter appearing from the decision of the RRT would justify a finding on an application for judicial review that the assessment made by the RRT of the respondent's credit was one which was not

open on any view of the material before it. That question is not easy to satisfactorily examine, much less affirmatively answer, in judicial review proceedings in which the bare record of the proceedings can rarely be a substitute for participation in the interview process. The authorities demonstrate that a clear case of jurisdictional error must emerge from the record before intervention will be justified. Despite my concern about the nature and focus of the RRT's questions, in my view the present is not such a case.

65 The FMCA did not approach the issue in the way I have described. Instead the FMCA concluded that the wrong question had been asked, with the result that there had been a constructive failure to exercise the jurisdiction given to the RRT. That is a legitimate approach in an appropriate case (see *Craig v South Australia* (1995) 184 CLR 163 at 177). However, in the present case the question under examination was whether the respondent's claim to have been a practising Christian in China should be accepted. That was a relevant matter to examine even if it might not provide a final answer to the question whether he might face persecution in China (e.g. for imputed religious faith). The way in which the question was examined by the RRT does not appear to me to have been whether the respondent's knowledge of the Bible corresponded to some "particular level of doctrinal knowledge to justify being regarded as a Christian" (c.f. paragraph [31] of the judgment of the FMCA) but was, rather, the more pragmatic approach of assessing whether the level of knowledge actually displayed by the respondent corresponded with the level of knowledge likely to be possessed by a person who had (as he claimed) studied the Bible two or three times a week in China over a period of four years (and nearly every day in Australia) and whether the level of knowledge disclosed gave support to the respondent's claims or, alternatively, suggested that he should be disbelieved. Despite any criticisms which might be available about the approach taken by the RRT, in my respectful view the matters examined by the RRT were legitimate ones in the circumstances. The RRT did not ask itself the wrong question. It did not constructively fail to exercise its jurisdiction. There was a rational and logical connection between the respondent's answers and the RRT's assessment about the level of his knowledge, and between that assessment and the RRT's conclusion that he was untruthful in his claim to have been a practising Christian in China.

66 The High Court has recently again emphasised the limits upon judicial intrusion into an assessment of the merits of claims by visa applicants that they are persons to whom Australia owes protection obligations (see *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48).

67 Accordingly, although I understand the concerns expressed by the FMCA, and I accept that there is room for disquiet about the approach which was taken, I do not share the view that the procedures or decision of the RRT fall into any of the recognised categories of jurisdictional error. The criticisms which are available appear to me to go more to questions of "style" and methodology rather than to expose a failure on the part of the RRT to comply with its statutory obligations. In the circumstances, I think the FMCA had no power to intervene and was obliged not to do so.

68 I would uphold the appeal in the present case and set aside the judgment of the FMCA. In lieu thereof I would order that the application for judicial review of the

FMCA be dismissed. I would order that the respondent pay the costs of the proceedings before the FMCA. However, as the point on which the respondent succeeded before the FMCA was not taken by him, I would make no order against him concerning the costs of the present appeal. The orders I would make are:

1. The appeal is upheld.

2. The orders of the Federal Magistrates Court of Australia are set aside and in lieu thereof it is ordered that:

(a) The application for judicial review is dismissed.

(b) The applicant is to pay the first respondent's costs as taxed, if not agreed.

3. There be no order as to the costs of the appeal.

I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan.

Associate:

Dated: 22 December 2010

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	
GENERAL DIVISION	NSD 1174 of 2010

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION AND CITIZENSHIP Appellant
AND:	SZOCT First Respondent REFUGEE REVIEW TRIBUNAL Second Respondent
JUDGES:	JACOBSON, BUCHANAN AND NICHOLAS JJ
DATE:	23 DECEMBER 2010
PLACE:	SYDNEY

REASONS FOR JUDGMENT

Nicholas J**:**

69 I have had the advantage of reading a draft of the reasons for judgment of Jacobson J and Buchanan J. I agree with Buchanan J that the appeal should be allowed. Subject to what follows, I also agree with his Honour's reasons and the orders he proposes.

70 The Tribunal was required to affirm the decision of the delegate refusing the respondent a protection visa unless it was satisfied that the respondent was a non-citizen to whom Australia owed protection obligations. The Tribunal decided that it was not so satisfied. It gave reasons for its decision in accordance with the requirements of s 430(1) of the *Migration Act 1958* (Cth) (**the Act**). Those reasons make clear that the Tribunal did not accept that the respondent was a witness of truth.

71 There is nothing in the Tribunal's reasons for decision to show that the respondent's claim to protection would not have succeeded if the Tribunal had considered the respondent to be a witness of truth. What appears to have been an attempt by the Tribunal (at para [89]) to make a "relocation" finding (along the lines of that considered in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 442) fell well short of its mark. Hence, the question is whether there was probative material from which it could logically or rationally be inferred that the respondent was not a witness of truth (*Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 at [38]) or, put slightly differently, whether that inference was one which no rational or logical decision-maker could draw on the same evidence (*Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [130]).

72 The learned Federal Magistrate's reasons for setting aside the Tribunal's decision focused upon the Tribunal's evaluation of the respondent's knowledge of the Bible. The Tribunal observed at para [74] of its reasons for decision that it was "not satisfied" that the respondent had "a level of knowledge of the Bible a person might reasonably be expected to have if they [sic] had been a believer in Christianity in China from 2004 until 2008" and that it was "not satisfied" that the respondent was "a witness of truth in relation to his claim that he was a believer in Christianity in China in a local, unregistered church from 2004 to 2008 or that he was associated with the practice of Christianity in China in a local, unregistered church from 2004 to 2008."

73 The Tribunal's reference to the respondent's religious beliefs and practices between 2004 and 2008 must be understood in its broader context. The Tribunal hearing took place in December 2009. The Tribunal accepted that the respondent arrived in Australia in October 2008. It also accepted, amongst other things, that he commenced attending church soon after his arrival, that he had attended church in Australia on a weekly or fortnightly basis and that he read his Bible nearly every day. Nevertheless, the Tribunal was not satisfied that this conduct was otherwise than for the purposes of strengthening his claim to be a refugee and it was therefore disregarded by the Tribunal pursuant to s 91R(3) of the Act. This most likely explains why the Tribunal, at least on the face of its reasons for decision, attempted to evaluate the respondent's credit by reference to, amongst other things, the extent of his knowledge of the Bible as at October 2008.

74 None of the questions asked of the respondent by the Tribunal indicate that it was conscious of the need to explore the extent of the respondent's knowledge of the Bible as at October 2008 as opposed to December 2009 and it is apparent from the transcript of the hearing that it made no attempt to do so.

75 Paragraphs [74] to [79] of the Tribunal's reasons for decision are amongst those which appear under the heading "Credibility of the applicant". While para [74] is the first of the matters dealt with under that heading, it is apparently not the only matter which led the Tribunal to conclude that the respondent was not a witness of truth. There are three other matters referred to by the Tribunal which fall within that category.

76 First, the Tribunal referred (at para [75]) to the respondent's claim that he was a person of interest to the Chinese authorities because his wife had been arrested and

detained in 2005 and 2007 and he had been arrested and detained in 2008. The respondent told the Tribunal that he was a person of interest to the Public Security Bureau and the police because he was a member of the local church and because his wife had been the church leader. But there was independent information available to the Tribunal which is referred to in its reasons for decision suggesting that if the respondent was able to obtain relevant travel documentation and leave China without difficulty then he was not a person of interest as he claimed.

77 Secondly, the Tribunal referred (at para [76]) to the respondent's claim that his wife was detained in 2005 and 2007 and, in the latter case, for a period of six months. The Tribunal observed that the respondent could not provide any documentation relating to his wife's detention including a certificate of release which the respondent said was still in China. The Tribunal also observed that the respondent was unable to tell the Tribunal the name of the detention centre in which his wife was imprisoned despite him having visited his wife there during the term of her detention, having been provided with a certificate of release from the detention centre upon her release and having lodged a complaint about her treatment there. This led the Tribunal to conclude that it was not satisfied that the respondent was a witness of truth in relation to his claim that his wife was arrested and detained twice for the practice of Christianity in China.

78 Thirdly, the Tribunal referred (at para [77]) to the respondent's claim that his wife became a Christian in 1998 and a preacher in 1999 but that he did not attend any meetings of the local church which were held in their house before 2004 "as he was busy and away a lot." As to this, the Tribunal said it was not satisfied that the respondent's account was truthful. While the Tribunal's reasons on this particular matter are not particularly well expressed, it is tolerably clear that the Tribunal was not satisfied with the respondent's explanation as to why he had not participated in the meetings held in his house if in fact those meetings had taken place as he claimed.

79 Having referred to the respondent's knowledge of the Bible (para [74]) and the other three matters to which I have referred (para [75]-[77]) the Tribunal said (at para [78]) that it did not find the respondent to be a credible witness and that "[h]aving considered these matters singularly and cumulatively, the Tribunal finds that he is not a witness of truth."

80 I respectfully agree with Jacobson J that it could not be logically or rationally concluded on the basis of the Tribunal's exploration of the respondent's knowledge of the Bible at the Tribunal hearing that the respondent did not have a level of knowledge which might reasonably be expected of a person who had believed in and practiced Christianity in China between 2004 and 2008. There are two further matters to which I would also refer in support of that conclusion.

81 The Tribunal accepted (at para [70]) that the respondent attended church on a regular basis in Australia between October 2008 and November 2009 and that he read his Bible nearly every day. Yet it did not conclude that the extent of the respondent's knowledge of the Bible was not that which might reasonably be expected of a person who had read his Bible nearly every day for a little over 12 months. It would have been difficult, if not impossible, for the Tribunal to reach that

conclusion given its acceptance of the respondent's account of the time spent by him reading the Bible in Australia. But unless that was the conclusion the Tribunal came to, I do not see how it could logically or rationally infer anything about the extent of the respondent's knowledge of the Bible at some earlier point in time without specifically exploring that issue. None of the questions asked of the respondent were directed to ascertaining the extent of his knowledge of the Bible other than at the time of the Tribunal hearing.

82 The Tribunal stated (at para [74]) that the respondent "knew parts of a few stories from the Bible". The implication seems to be that this was all the respondent knew. But the Tribunal did not explore the respondent's knowledge of the Bible in any general sense. Rather, as the judgment of Buchanan J demonstrates, it tested the respondent on his ability to recite particular passages from memory. The idea that the respondent knew only parts of a few stories from the Bible had no evidentiary foundation in the material before the Tribunal.

83 If the Tribunal's lack of satisfaction that the respondent was a person to whom Australia owed protection obligations was based on its assessment of the extent of the respondent's knowledge of the Bible when compared to what might reasonably be expected of a person who believed in and practiced Christianity in China from 2004 until 2008, I would readily agree with Jacobson J that the Tribunal's decision could not be permitted to stand. However, as its reasons for decision make clear, there were other matters which led the Tribunal to find that the respondent was not a credible witness. It drew upon these "singularly and cumulatively" in support of that finding.

84 The other matters relied upon by the Tribunal were logically and rationally capable of supporting the Tribunal's finding that the respondent was not a witness of truth. Once the Tribunal found, as was open to it, that the respondent was not a witness of truth, it was also open to the Tribunal to hold that it was not satisfied that the respondent was a non-citizen to whom Australia owed protection obligations.

I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Nicholas.

Associate:

Dated: 22 December 2010