FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZQAM v MINISTER FOR IMMIGRATION & ANOR *[2011] FMCA 624*

MIGRATION – Review of decision of Refugee Review Tribunal – applicant claimed to fear persecution for being a homosexual – Tribunal requested witnesses to corroborate applicant's claims – applicant was afforded procedural fairness – no bias on the part of the Tribunal – no jurisdictional error – application dismissed.

Migration Act 1958 (Cth), ss.36, 65, 91R, 414, 420, 422B, 424, 424AA, 424A, 425, 476
Privacy Act 1988 (Cth)

Machmud v Minister for Immigration & Multicultural Affairs [2001] FCA 1041; (2001) 66 ALD 98
Associated Provincial Picture Houses v Wednesbury Corporation [1947] EWCA Civ 1; [1948] 1 KB 223
SZBYR v Minister for Immigration and Citizenship [2007] HCA 26; (2007) 235 ALR 609; (2007) 81 ALJR 1190
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63; (2006) 228 CLR 152; (2006) 231 ALR 592; (2006) 81 ALJR 515
Saeed v Minister for Immigration and Citizenship [2010] HCA 23; (2010) 241 CLR 252; (2010) 267 ALR 204; (2010) 84 ALJR 507
Minister for Immigration and Multicultural Affairs v Jia Legeng [2001] HCA 17; (2001) 205 CLR 507
SZHPD v Minister for Immigration & Citizenship [2007] FCA 157
Re Refugee Review Tribunal; Ex parte H [2001] HCA 28, (2001) 75 ALJR 982
SBBS v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 361; (2002) 194 ALR 749
Minister for Immigration & Multicultural & Indigenous Affairs v SBAN [2002] FCAFC 431
VFAB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 872; (2003) 131 FCR 102
SCAA v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 668
MZXSA v Minister for Immigration and Citizenship [2010] FCAFC 123; (2010) 117 ALD 441
MZYHT v Minister for Immigration and Citizenship [2011] FCA 659
Applicant S296 of 2003 v Minister for Immigration & Multicultural Affairs [2006] FCA 1166
Minister for Immigration & Multicultural & Indigenous Affairs v SGLB [2004]

HCA 32; (2004) 207 ALR 12; (2004) 78 ALJR 992
Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; (2010) 240 CLR 611; (2010) 266 ALR 367; (2010) 84 ALJR 369
NAOA v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 241
Chan v Minister for Immigration and Ethnic Affairs [1989] HCA 62; (1989) 169 CLR 379
Applicant A v Minister for Immigration and Ethnic Affairs [1997] HCA 4; (1997) 190 CLR 225
Semunigus v Minister for Immigration and Multicultural Affairs [1999] FCA 422
Minister for Immigration and Ethnic Affairs v Guo [1997] HCA 22; (1997) 191 CLR 559
Abebe v The Commonwealth [1999] HCA 14; (1999) 197 CLR 510; (1999) 162 ALR 1; (1999) 73 ALJR 584
Minister for Immigration and Multicultural Affairs v Rajalingam [1999] FCA 719; (1999) 93 FCR 220
SJSB v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 225

Applicant:	SZQAM
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 465 of 2011
Judgment of:	Nicholls FM
Hearing date:	11 August 2011
Date of Last Submission:	11 August 2011
Delivered at:	Sydney
Delivered on:	18 August 2011

REPRESENTATION

The Applicant:	In person
Counsel for the Respondents:	Mr T Reilly
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) The application made on 15 March 2011, and amended on 11 August 2011 is dismissed.

(2) The applicant pay the first respondent's costs set in the amount of $5,800.

FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY

SYG 465 of 2011

SZQAM
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application made on 15 March 2011 under s.476 of the *Migration Act 1958* (Cth) ("the Act"), seeking review of the decision of the Refugee Review Tribunal ("the Tribunal") made on 14 February 2011 which affirmed the decision of a delegate of the respondent Minister to refuse a protection visa to the applicant.

Background

2. The applicant is a national of Iran, who first arrived in Australia on 19 November 2006 on a Work and Holiday visa. He was subsequently granted two other Work and Holiday visas. The latter visa remained in force until 9 June 2010. He applied for a protection visa on 3 June 2010.

3. On 21 September 2009 the applicant departed Australia and while off-shore, on 5 October 2010, applied for a Student visa which was

later refused on 1 December 2009. The applicant returned to Australia on 31 October 2009.

Claims to Protection

4. The applicant's claims to protection are set out in his protection visa application (Court Book – "CB" – CB 1 to CB 20).

5. The applicant claimed to have suffered harassment from family members after he told his brother-in-law that he was homosexual. He claimed to have been "pressurised" to marry, or at least become engaged, to a woman whom the family nominated. The applicant claims to have chosen to become engaged in order to "save" himself (CB 17.6).

6. The applicant further claimed he "… was attacked by some religiously addicted youth in our local area" and accused of being an "enemy of Islam" when they become aware that the applicant was homosexual (CB 17.8). The applicant claimed to have gone to the local police station to report the attack by the youths, however: "… [t]he police did not register the incident when they came to know the fact of the assailants' anger and fury." (CB 17.9.)

7. The applicant feared harm from some of his family and the authorities in Iran as homosexuality is unlawful in Iran. He also claimed he would be forced to enter into a heterosexual relationship, amounting to the deprivation of his liberty (CB 18).

The Delegate

8. The applicant was invited to, and attended, an interview with the delegate on 10 September 2010

9. During the interview the delegate asked: "… how he dealt with his sexual preference and how this made him feel at the time." The delegate noted that the applicant seemed confused by this question but nevertheless stated: "… that it was hard but that he did not have conflicting emotions." (CB 53.8.) The delegate found this response implausible considering that the applicant had been raised in a religious

Muslim family and had been made aware of the moral taboo towards homosexuality while at school (CB 53.9 to CB 54.1).

10. The delegate held a number of concerns about the applicant's answers to questions at the interview, specifically regarding his claimed homosexual relationships in both Iran and Australia, and noted that the applicant appeared to be "jovial and flippant" when discussing the claimed harassment suffered in Iran (CB 54 to CB 56). The delegate also held concerns over the timing of the lodging of various visa applications.

11. Ultimately the delegate was not satisfied that the applicant was a homosexual, and questioned if the true motive of the applicant in pursing a protection visa application was "… an alternative migration pathway to remain in Australia." (CB 56.5.)

The Tribunal

12. The applicant applied for review by the Tribunal on 13 November 2010 (CB 58 to CB 64). Before the hearing date, the applicant provided a written statement to the Tribunal on 17 December 2010 (CB 69 to CB 76). The Tribunal wrote to the applicant on 20 December 2010 acknowledging receipt of this written statement and requesting that the applicant be accompanied by any witnesses and a current partner, who could verify his claims and also provide the Tribunal with a contact number for his ex-partner in Japan (CB 77).

13. On 18 January 2011 a Tribunal officer, at the Tribunal's request, called the applicant and reminded him that: "the Member has specifically requested he produce witnesses to verify his claims." (CB 80 and [32] at CB 96.)

14. The applicant attended a hearing before the Tribunal on 19 January 2011 (CB 67 to CB 68). The Tribunal's account of what occurred at the hearing is set out in its decision record at [33] (CB 96) to [49] (CB 99). He was not accompanied by any witnesses. This caused the Tribunal to adjourn the hearing to enable the applicant to arrange witnesses to appear before it ([33] at CB 96 and [36] at CB 97). The Tribunal indicated to the applicant the importance of witnesses to verify his claims that he had actively expressed his sexuality since arriving in Sydney ([37] at CB 97). The hearing resumed

on 11 February 2011. However at that time the applicant was still unable to produce any witnesses ([39] at CB 97).

15. The Tribunal found it difficult to understand why, if the applicant had been actively participating in the gay community in Sydney for four years, he was unable to produce any person who could verify these activities. It therefore: "… had doubts as to whether the applicant was providing a truthful and accurate account of his circumstances… [and] about his sexuality and related activities" ([44] at CB 98).

16. The Tribunal found that the applicant had not provided a truthful account of his circumstances in Iran. It found that the applicant had fabricated his core claims to enhance his application. The Tribunal found that the applicant was not homosexual and that he had not been mistreated as a result ([52] at CB 99 and [56] to [57] at CB 100).

17. The Tribunal formed the view that he attended gay clubs in Sydney and registered to participate in the Mardi Gras to strengthen his application prospects and therefore disregarded the applicant's involvement in these activities pursuant to s.91R(3) of the Act ([54] at CB 100).

Application to the Court

18. The application before the Court put forward the following unparticularised grounds:

> *"1. The Refugee Review Tribunal (RRT) made error of law and failed to exercise the proper procedure in relation to make decision on the review of the applicant's protection visa application.*
>
> *2. The manner in which the tribunal dealt with the application and the applicant was such that it is possible to fairly apprehend that the tribunal did not bring an impartial mind to the resolution of the matter before it.*
>
> *3. The Tribunal denied the applicant natural justice and procedural fairness pursuant to s.420, s.424AA and s.424A of the Migration Act 1958.*
>
> *4. Following the hearing, pursuant to s.424A of the Migration Act, the Tribunal did not refer or put the important information to the applicant to comment on which were the reasons or part of the reason of the decision.*

5. The applicant was deprived of the natural justice and procedural fairness. The Tribunal did not follow the hearing rule as based on Maxim which is clearly recognized as a denial of procedural fairness."

Particulars

The applicant was offered a hearing and accordingly the applicant has responded and attended twice before the hearing. The applicant was asked, by the tribunal, to bring a witness which he could not manage due to some complication of his situation and privacy but he has clearly outlined his evidence before the Tribunal. In the tribunal's decision it is noted that the Tribunal is in breach of s.424 of the Migration Act.

6. The Tribunal exceeded its jurisdiction or constructively failed to exercise its jurisdiction by asking itself some wrong question in deciding the review application. The tribunal failed to maintain their procedural fairness.

7. The tribunal was biased as it did not consider the claim with the neutral point of view as such the applicant was deprived of the natural justice.

8. The tribunal in its decision made on 14 Feb 2011 relied upon country information and some inconsistencies in the appellant's claims set out in the protection visa application and the claims made before the Tribunal as part of the reason for affirming the decision under review.

*9. The tribunal is bound to follow procedural fairness in reaching its decisions, and a failure to accord procedural fairness will lead to jurisdictional error, which is not protected from review by the privative clause (*S157/2002 v Commonwealth of Australia [(2003) ALR 24]: Re Minister for Immigration and Multicultural Affairs; Ex Parte Miah [[2001' 206 CLR 1])."

[Errors in original.]

19. On 20 June 2011 the applicant presented a document headed "amended application" to the Court's Registry. It was not accepted for filing. At the first Court date orders were made requiring the filing of any such document to be done so by 18 May 2011. No leave was sought prior to the hearing to file this document out of time.

Before the Court

20. At the hearing the applicant appeared in person. The Minister was represented by Mr T Reilly of counsel. Written submissions were provided by both parties.

21. I agree with Mr Reilly that the application is of a "template" nature (often seen in this Court in matters of this type), is vague and unparticularised. Some parts are difficult to understand in the circumstances of this case, for example: "In the Tribunal's decision it is noted that the Tribunal is in breach of s.424 of the Migration Act" does not appear to have any relevance to the facts of this case. Further, general claims about a failure to exercise discretion because the Tribunal Member asked the wrong question are meaningless without any particulars.

22. Notwithstanding that it was of similar presentation, the applicant confirmed that he wanted to press his amended application. There was no objection by the Minister. Leave was granted for the amended application to be filed in Court.

23. Although the applicant said he wanted to rely on all the documents he had put to the Court. It soon became apparent that the applicant had little idea as to what was stated in any of these documents (the two applications and the written submissions) that he had put before the Court. Other than the two matters set out below, the applicant was unable to assist the Court with any explanation as to his complaints about the Tribunal's decision.

24. At first the applicant stated that a friend had assisted in the drafting of these documents. When I asked for the name of the friend, the answer was "Amin". Although referring to "Amin" as a friend, the applicant said he did not know his surname. This then became a law student to whom he was referred to by a work colleague. When asked which law school he attended, the applicant's answer was that this was an "older person, a law graduate".

25. Two issues require comment. First, it is of concern that yet again there presents a situation where "friends", or others, in the community, most probably (as appears in the current case) for money, purport to assist unrepresented applicants. Such assistance only results in confusion and complexity with written statements that to a large extent bear no relevance

to the actual circumstances of an applicant's case and the particular Tribunal decision. Second, this not only results in exploitation of vulnerable people (the applicants), but it cannot be in the Minister's interests to have the time of his legal representatives and the Court wasted.

26. In any event the following complaints can probably be derived from the application, the written submissions, the amended application and what the applicant told the Court:

    1) A breach of s.424A of the Act and of the "rules of procedural fairness";

    2) Bias on the part of the Tribunal;

    3) Breaches of ss.420, 424 and 424AA;

    4) The complaint about the Tribunal's treatment of the matter of the applicant's need to bring witnesses to the hearing may have been articulated as an assertion of jurisdictional error on the basis that the Tribunal imposed a burden of the onus of proof on the applicant. That is, that the Tribunal took the position that the applicant's claims would not be accepted without corroboration by a third party (*Machmud v Minister for Immigration & Multicultural Affairs* [2001] FCA 1041; (2001) 66 ALD 98 ("*Machmud*"));

    5) "*Wednesbury*" unreasonableness (*Associated Provincial Picture Houses v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223); and

    6) Other general complaints.

Consideration

Breach of s.424A and Procedural Fairness

27. At best, the applications and submissions can only be said to particularise this complaint as the Tribunal having relied on country information and inconsistencies in the applicant's evidence which should have been put to him pursuant to s.424A of the Act.

28. One immediate difficulty for the applicant, and illustrative of the circumstances of the drafting of his applications and submissions, is that there is no evidence before the Court that the Tribunal at any time considered that there was country information before it that would be the reason for affirming the delegate's decision such as to bring any such information within the scope of s.424A(1) (*SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; (2007) 235 ALR 609; (2007) 81 ALJR 1190 ("*SZBYR*") at [17] to [18]).

29. What is clear, both from the Tribunal's account of the hearing (which the applicant has not challenged with any evidence to the contrary) and to the extent that the decision record can illuminate this point, is that there was no occasion in this case where there was country information that the Tribunal considered would be the reason for affirming the delegate's decision.

30. The applicant also complains that the inconsistencies in his various accounts should have been put to him for comment pursuant to s.424A.

31. The Tribunal's thought processes, its preliminary views, and even its adverse conclusions, about the inconsistencies, and indeed of the entirety of the applicant's evidence, are not "information" for the purposes of s.424A (*SZBYR* at [18]).

32. For the sake of completeness, even though the applicant makes no reference to s.425 of the Act, I note and agree with the Minister's submissions that s.425 does not require that the Tribunal give the applicant a running commentary on its views of the evidence during the hearing (*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152; (2006) 231 ALR 592; (2006) 81 ALJR 515 at [48]).

33. What is required of course is that the Tribunal raise issues dispositive of the review that did not arise from the delegate's decision. The evidence before the Court reveals that the central issue in this case was the applicant's claim to be a homosexual. This was certainly a live issue before the delegate. The applicant could have been under no doubt that the delegate did not believe his claim.

34. In any event, the Tribunal's account of the hearing reveals that the Tribunal raised this issue and the matters flowing from it, with him (see in particular [44] at CB 98 and [47] and CB 99).

35. The applicant also asserts a breach of procedural fairness. Other than the reference to the Tribunal's handling of the witness issue (dealt with below) it is not clear what other matters fall into this complaint.

36. In any event, even putting the existence of s.422B to one side (and even when seen in light of the High Court treatment of such exclusion clauses in *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252; (2010) 267 ALR 204; (2010) 84 ALJR 507), I cannot see that the Tribunal was in breach of any procedural fairness obligations at common law.

37. The material before the Court reveals that the applicant was invited to, and attended, a hearing before the Tribunal, at which the central issue and those matters following from it were exposed to him for comment. The applicant knew what was against him and was given the opportunity to comment. The applicant was given the opportunity to put submissions in writing to the Tribunal which it considered.

38. At the hearing before the Court, the applicant complained that the Tribunal asked him questions about his attendance in Sydney at "gay pubs". At best, I understood the applicant's complaint to be that such questioning was unfair and not relevant.

39. The Tribunal's account of the hearing reveals that the Tribunal did ask such questions of the applicant. But given what is set out in the Tribunal's record and, in light of the applicant's claims, I cannot see that the questioning reveals any unfairness or was not relevant. In fact, given the applicant's claims it was highly relevant. The applicant claimed to be homosexual. He gave evidence that in the four years he had been living in Sydney he "expressed his sexuality freely" (see CB 17, CB 56.4 and [40] at CB 97). He claimed that he had attended "two gay clubs in Sydney" ([41] at CB 98). It was in that context that the Tribunal asked the applicant questions about the clubs and his attendance. Far from being irrelevant or unfair, the Tribunal was entitled to question the applicant and satisfy itself as to the evidence he was giving.

Bias

40. Similarly, the allegation of bias on the part of the Tribunal appears to arise from its treatment of the witness question (see below). If it was meant to refer to any other matter or to arise from another matter, then such a serious allegation would need to be clearly stated and to be supported by evidence (see *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507, *SZHPD v Minister for Immigration & Citizenship* [2007] FCA 157, *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28; (2001) 75 ALJR 982, *SBBS v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 361; (2002) 194 ALR 749, *Minister for Immigration & Multicultural & Indigenous Affairs v SBAN* [2002] FCAFC 431, *VFAB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 872; (2003) 131 FCR 102 and *SCAA v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 668). The applicant has done neither.

41. As to the allegations of bias, such a claim requires clarity and specificity in expression and evidence in support (see authorities in [40] above). At best, the applicant's claim here is that the Tribunal was biased because the Tribunal was influenced by "the decision of previous unsuccessful and false gay cases" (see written submission at page 3.2).

42. There is absolutely no evidence before the Court to support this claim. What was plainly persuasive to the Tribunal was the quality of the applicant's own evidence and the lack of support for his claims.

43. For the remainder, no bias is present simply because the Tribunal did not believe the applicant.

44. The applicant's written submissions, and indeed the applicant before the Court, also complained that the Tribunal asked irrelevant questions and that this demonstrated its bias. From the applicant before the Court it appeared that these irrelevant questions were the questions about gay venues and questions more generally about his sexuality.

45. The applicant has not provided any evidence to the Court to challenge the Tribunal's account of the hearing. In these circumstances it is not open to this Court to draw assumptions as to what may otherwise have

happened (*NAOA v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 241).

46. On the Tribunal's account and bearing in mind the nature of the applicant's claims (that he is homosexual), questions about his sexuality and his family's attitude towards it were highly relevant.

47. Further the applicant himself raised the issue of his openly gay lifestyle in Australia, as shown by his attendance at gay venues. The Tribunal was entitled to pursue this with the applicant.

Breach of ss.420, 424AA and 424

48. It is difficult to understand in the circumstances how claims of breaches of ss.420, 424 and 424AA assist the applicant.

49. Even if there had been some error in relation to s.420, it would not amount to jurisdictional error (*Applicant S296 of 2003 v Minister for Immigration & Multicultural Affairs* [2006] FCA 1166 at [6] per Gyles J and *Minister for Immigration & Multicultural & Indigenous Affairs v SGLB* [2004] HCA 32; (2004) 207 ALR 12; (2004) 78 ALJR 992 at [45] per Gummow and Hayne JJ).

50. Section 424AA is a facilitative provision that is available to the Tribunal to discharge any s.424A(1) obligation (*Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611; (2010) 266 ALR 367; (2010) 84 ALJR 369). In the current case, no such obligation is apparent. The Tribunal relied on information provided by the applicant himself for the purposes of the review, including whatever he told the delegate (see [34] at CB 98 "… The applicant repeated the claims he provided to the Department…"). As such, any obligation would be excluded by the operation of s.424A(3)(b).

51. It terms of s.424, it may on some extreme view be said that the Tribunal invited the applicant to provide information in the form of any written corroboration. But the failure to present such information meant that there was nothing to which the Tribunal should have regard to (see s.424(1)).

Witness Corroboration

52. At the hearing before the Court, I raised with Mr Reilly whether the Tribunal's approach to the question of witnesses and corroboration of the applicant's claims fell within the type of error identified in *Machmud.*

53. The question is whether the Tribunal impermissibly insisted that the applicant's claims would not be accepted without third party corroboration (see *MZXSA v Minister for Immigration and Citizenship* [2010] FCAFC 123; (2010) 117 ALD 441 at [87] to [91] and *MZYHT v Minister for Immigration and Citizenship* [2011] FCA 659 at [33]).

54. The need to ask this question arises from the Tribunal officer's file notes at CB 77 and CB 80. In effect, prior to the hearing the Tribunal "specifically" requested an officer of the Tribunal to ask the applicant to "produce witnesses to verify his claims".

55. The issue then is: did this represent some communication by the Tribunal, to the effect that the applicant would not be believed without corroboration? That is, that there was some expectation of "proof" in this regard, or was it, that the Tribunal was seeking to convey to the applicant that the presentation of his claims would benefit from such corroboration?

56. The former would reveal error. The latter, would be a Tribunal seeking to be fair in giving the applicant notice of a deficiency in the presentation of his case and the opportunity to address it.

57. When the applicant was invited to attend a hearing with the Tribunal, he was put on notice that, on what was before it, the Tribunal was unable to make a favourable decision for him (CB 67).

58. The applicant plainly understood this because he put a written submission to the Tribunal in response to its letter (CB 69 and CB 71 for an attached statement). In this lengthy statement, the applicant made reference, amongst other matters, to a number of activities which he had undertaken in Australia, including attendance at the gay Mardi Gras and at gay bars (CB 73 and CB 74). He stated he had friends who knew he was gay.

59. The Tribunal officer's first written communication to the applicant (CB 77) referring to unsuccessful attempts to advise him of the Tribunal's "wish" that he bring "… witnesses and current partner who

can verify your claims…" (CB 77.4) must be seen in this context. So too the second "case note" (CB 80).

60. As the authorities (as set out above at [53]) make clear, there is a difference between a situation where a Tribunal will not believe an applicant without third party corroboration and one where a Tribunal that does not believe an applicant's account and finds that the lack of corroboration is but one element in, or confirmation of, that disbelief.

61. In the current case the applicant's claims to protection did not fail only because he had no corroborating witnesses. It was plainly open to the Tribunal to ask the applicant why he was unable to provide even one witness to corroborate his claim in circumstances where he had lived in Sydney for over four years and claimed "… to have expressed his sexuality fully…" ([40] at CB 97).

62. It was the dissonance between the claim of an openly gay lifestyle in Sydney over a long period and the lack of any corroboration for this that was of concern to the Tribunal. A concern which it squarely put to the applicant at the hearing ([44] at CB 98).

63. What is of further weight in how the Tribunal's analysis is to be read is that, at least on a fair reading, the Tribunal rejected the applicant's claims to be a homosexual based on its view of the applicant's own evidence. For example, his own: "… limited and superficial information regarding the clubs and Mardi Gras…" ([54] at CB 100) and because, given the applicant's own claims of an open and active gay lifestyle, it was reasonable to expect that the applicant could bring forward at least one person who could support his claim in this regard.

64. That the Tribunal relied in part on his inability to do so does not reveal a situation where the Tribunal would not believe the applicant without that corroboration. The issue is that the applicant's claims remained limited and implausible without corroboration.

65. No error is therefore revealed in this regard.

66. The applicant also complains to the Court that he could not bring any witnesses because he was concerned about their privacy.

67. What must be immediately noted is that, as Mr Reilly submitted, there is no record in the material before the Court of the applicant having expressed any such concern to the Tribunal or offering it as an explanation.

68. What is before the Court reveals that the applicant told the Tribunal he was: "… confident that some witnesses could be found to verify his claims" (at the "first" hearing as noted at [37] at CB 97).

69. Subsequently the applicant contacted the Tribunal to advise it that a witness was not available ([38] at CB 97). At the resumption of the hearing the applicant told the Tribunal that he: "… was unable to find any witnesses" ([39] at CB 97).

70. No concern about privacy was expressed at the relevant times. How the references to the *Privacy Act 1988* (Cth) in the applicant's amended application were meant to assist the applicant's case was never explained. If what the applicant is now seeking to say is that he did not bring any witnesses before the Tribunal because of concerns about their privacy, then given his failure to raise this with the Tribunal, and given his lack of any other explanation, it was open to the Tribunal to find that the applicant had not provided even one witness, in circumstances where it would have been expected, given his other evidence, that he could have done so.

71. No error is revealed.

***Wednesbury* unreasonableness**

72. The written submissions also assert that it was unreasonable in the *Wednesbury* sense, and an error for the Tribunal, to find that the applicant's "case" was fabricated and to therefore find that the applicant was not at risk of persecution.

73. The Tribunal gave cogent reasons for its disbelief of the applicant. While it is often said that "minds may differ" in these matters (and in the current case it must be said there is very little margin for any such difference), what remains here is that, on any plain reading of the material before the Court, the Tribunal's conclusion was not so unreasonable that no reasonable person could have come to it.

Other Complaints

74. The written submissions also assert that the Tribunal failed to give the applicant any benefit of the doubt. The inspiration for this probably derives from [203] to [204] of the United Nations High Commissioner for Refugees' "Handbook on Procedures and Criteria for Determining Refugee Status" (Geneva 1992) dealing with benefit of doubt in refugee matters.

75. However, I note that while the Handbook may be a useful reference for those whose task it is to determine whether or not a person is a refugee (that is, relevantly, the Tribunal), it does not have binding force in Australian law (see *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 at 392 per Mason CJ, *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4; (1997) 190 CLR 225 at 302 per Kirby J and *Semunigus v Minister for Immigration and Multicultural Affairs* [1999] FCA 422 at [8] to [9] per Finn J).

76. However, where the Tribunal's finding as to a claim, or an aspect or integer of a claim, is attendant with any real doubt, the Tribunal is required to consider the alternative, that is that its finding may be incorrect, and to then determine whether an applicant may have a well-founded fear of persecution for a Convention reason in those circumstances (*Minister for Immigration and Ethnic Affairs v Guo* [1997] HCA 22; (1997) 191 CLR 559 at 576 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ, endorsed in *Abebe v The Commonwealth* [1999] HCA 14; (1999) 197 CLR 510; (1999) 162 ALR 1; (1999) 73 ALJR 584 ("*Abebe*"), and further explained by the Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v Rajalingam* [1999] FCA 719; (1999) 93 FCR 220 per Sackville J, with whom North J agreed).

77. None of this applies to the applicant's case before the Tribunal. The Tribunal had no such doubts about the findings of fact, such that it should proceed on the basis that the applicant's claims were true.

78. The danger of the applicant relying on friends of friends, even those who claim legal qualifications, is evidenced by the following in the applicant's written submissions:

> *"… The Hon. Court would realize that the tribunal's job is not to review the delegate's decision rather its job is to review the*

applicant's application and consider all the relevant documents that were submitted till date."

79. The friend/friend of a friend/law student/law graduate who assisted the applicant should read s.414 of the Act. (The Tribunal must review an RRT reviewable decision. In this case the delegate's decision.)

80. The written submissions also assert that there was a "misconstruction" of the relevant law on the part of the Tribunal and a constructive failure to exercise jurisdiction because the Tribunal failed to be "satisfied in accordance with the prescribed criteria". This is in part particularised by the assertion that there was no evidence to support the finding that the applicant had fabricated his claims.

81. The Tribunal is not required to find evidence to "disprove" an applicant's claims, it is required to consider the claims and evidence put before it (ss.65 and 36 of the Act. See also *SJSB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 225 and *Abebe* at [187].).

82. In the current case the Tribunal could not reach the requisite level of satisfaction because of findings that informed its final conclusion as to the credibility of the applicant's claims. These findings were all open to the Tribunal on what was before it, and for which it gave reasons.

Conclusion

83. For the applicant to succeed, the Court would need to discern jurisdictional error in what the Tribunal has done. No such error is revealed. I will make an order dismissing the application, as amended.

I certify that the preceding eighty-three (83) paragraphs are a true copy of the reasons for judgment of Nicholls FM

Date: 18 August 2011