FEDERAL MAGISTRATES COURT OF AUSTRALIA

A125 of 2003 v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 250

MIGRATION – Persecution – review of Refugee Review Tribunal decision. Status – refugee status – refusal.

VISA – protection visa.

Migration Act 1958, ss.91X, 424A

SZEEU v Minister for Immigration & Multicultural & Indigenous Affairs (2006) 150 FCR 214
SZDPY v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 627
SZHFC v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 1359
SZECF v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 1200
SZGGT v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 435
Applicant S301/2003 v Minister for Immigration & Multicultural Affairs [2006] FCAFC 155
NBKS v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCAFC 174

Applicant:	A125 of 2003
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 54 of 2006
Judgment of:	Cameron FM
Hearing dates:	9 November 2006 and 8 February 2007
Date of Last Submission:	8 February 2007
Delivered at:	Sydney
Delivered on:	8 March 2007

REPRESENTATION

Counsel for the Applicant:	Mr L. Karp
Solicitors for the Applicant:	Parish Patience Immigration Lawyers
Counsel for the Respondents:	Mr T. Reilly
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) A writ of certiorari issue directed to the second respondent quashing the decision of the second respondent dated 29 November 2005.

(2) A writ of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent dated 20 June 2002.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 54 of 2006

A125 of 2003
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. By an amended application dated 31 October 2006 and filed in court on 9 November 2006, the applicant seeks review of the decision of the Refugee Review Tribunal ("Tribunal") dated 29 November 2005 which affirmed an earlier decision of the delegate of the Minister for Immigration and Multicultural Affairs ("Minister") dated 20 June 2002 refusing the applicant's application for a protection visa.

2. Section 91X *Migration Act 1958* (Cth) ("Act") provides that the Court must not publish the applicant's name.

Background facts

3. The Tribunal described the applicant as follows:

> *In his application for protection visa the applicant states that he was born in [A] Nepal in 1966. He indicates that he travelled to Australia using a passport in his own name issued in [A] in 2001. He states that he is Brahmin Hindu. He states that he was married in [B] in 1994 and that his wife and son (born in 1996) reside in Nepal. He states that he was self employed as "principal/teacher/ owner" in a school prior to coming to Australia. He indicates that he obtained a Bachelor of Arts in Nepal in 1991. He indicates that he lived at the same address in [A] Nepal from 1990 until September 2001. (Court Book ("CB") pages 118-119)*

4. The applicant's claims are set out on page 13 of the Tribunal's decision (CB 127). In summary, he claims to have been persecuted in Nepal and fears further persecution from Maoists and others:

   a) because of his political opinion – his membership of the Nepalese National Democracy Party;

   b) because of his membership of a particular social group and his imputed political opinion – teachers/principals of/in private schools in Nepal; and

   c) because of his religion – as a Christian evangelist.

5. The applicant arrived in Australia on 26 September 2001 (CB 12).

The Tribunal's decision and reasons

6. After discussing the claims made by the applicant and the evidence before it, the Tribunal found it was not satisfied that the applicant is a person to whom Australia has protection obligations under the *United Nations Convention relating to the Status of Refugees 1951* amended by the *Protocol relating to the Status of Refugees 1967* ("Convention"). In its view:

… there is no plausible evidence before [the Tribunal] that the applicant has suffered persecution in his country because of his political opinion, his imputed political opinion, his membership of a particular social group, his religion or for any other Convention reason. Nor, in the Tribunal's view does the evidence establish that there is a real chance that the applicant will suffer persecution for a Convention reason either now or in the reasonably foreseeable future if he returns to his country. (CB 130-131).

7. The Tribunal:

a) did not accept that the applicant left Nepal and fears to return there because he is a Christian who is involved in evangelistic activities. It did not consider that the evidence before it supported the conclusion that the applicant was persecuted because of his religion prior to his coming to Australia or that the evidence established that the applicant would be persecuted because of his religion were he to return to Nepal; and it

b) did not accept that the applicant suffered harm from Maoists or anyone else in Nepal because of his political opinion, his imputed political opinion or because he was a member of a particular social group. In this regard the Tribunal did not accept:

(i) that the applicant was attacked by Maoists in August 2001;

(ii) that there have been threats to close down his school or do damage to it unless donations are given to the people who were threatening the applicant;

(iii) that the applicant and/or his wife have had to make donations to Maoists to prevent his school being closed or damaged;

(iv) that the applicant moved to Kathmandu in August 2001 to avoid the Maoists (and thus did not stay at his home until leaving for Australia); and

(v) that the applicant's wife had to make a donation to Maoists in January 2005 and that afterwards Nepalese Army officials raided his house and the school.

8. Of particular significance to these proceedings is:

a) the Tribunal's finding that until he left Nepal in September 2001 the applicant lived at his family's home and ran his business; and

b) its non-acceptance of the applicant's allegation that he went to Kathmandu in August 2001 to avoid harm he feared at home. The Tribunal found this claim to be an invention to assist the claim for protection. (CB 128).

9. At CB 130 the Tribunal relied on its assessment of the applicant's credibility when rejecting the reliability of certain documents proffered by the applicant to the Tribunal in support of his application:

> *In the circumstances of this case, where the Tribunal finds that the applicant has not always been honest in his evidence before the Tribunal, it does not consider that the various documents produced by the applicant [from] Nepal to support his claims are reliable evidence of the facts in those documents.*

Proceedings in this Court

10. The sole ground for review of the Tribunal's decision set out in the amended application is that the Tribunal's decision is infected with jurisdictional error by reason of a failure by the Tribunal to comply with the requirements of s.424A of the Act. The particulars of that ground are:

a) The Tribunal failed to disclose to the applicant in writing, that the entry in his "Form C" to the effect that he stayed in his home in [B], until he left Nepal, was a part of the reason for affirming the decision under review.

b) The Tribunal failed to ensure, as far as was reasonably practicable, that the applicant understood why that information was relevant to the review.

11. The "Form C" is the applicant's application for a protection visa dated 8 October 2001 and reproduced at pages 10 to 21 of the Court Book.

12. Section 424A provides:

(1) Subject to subsection (3), the Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and

(c) invite the applicant to comment on it.

(2) …

(3) This section does not apply to information:

(a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or

(b) that the applicant gave for the purpose of the application; or

(c) that is non-disclosable information.

13. The applicant's case is encapsulated in three paragraphs of the written submissions filed on his behalf:

10. This case raises a short point as to s424A of the Migration Act 1958.

11. The Tribunal concluded that the applicant stayed at his family home in [B] until September 2001, contrary to the claim … that the applicant fled to Kathmandu in August of that year. The Tribunal's conclusion that he stayed in [B] until September, first recorded at CB 128.8, was used in part to rebut the claim that the applicant had been subject to threats, and attacked by Maoists in August 2001 (see CB 129-30 …). That was in turn part of the reason for affirming the decision under review.

12. As the Tribunal indicates from page 9 of the transcript, the conclusion that the applicant stayed in [B] until September 2001 originally derives from the applicant's "Form C", specifically at CB 13. The applicant submits that that information should have been disclosed to the applicant in

writing, and its relevance explained to him, pursuant to s.424A Migration Act. *The Tribunal committed jurisdictional error by failing to follow the requirements of that section.*

14. In response, the Minister's submission states:

> *1. The only point taken in the Amended Application concerns whether the Tribunal breached s.424A(1) of the* Migration Act 1958 *(the Act) when it relied upon information that the Applicant "continued to live in the family home in Nepal … until he left to come to Australia": CB 129.9 …*
>
> *2. This information falls within s.424A(3)(b) as it was given at the hearing: see pp.9-10 of the transcript, confirming the Tribunal's account at CB 123.3. Para 12 of the Applicant Submissions states that the information "originally derives" from the Applicant's protection visa application at CB 13.5, but this does not affect the operation of s.424A(3)(b). As the information at CB 13.5 was both adopted and expanded upon at the Tribunal hearing by the Applicant it plainly falls within s.424A(3)(b):* SZHFC v MIMA *[2006] FCA 1359 (Allsop J) at [24].*

15. The Tribunal's finding that the applicant continued to live at his family home prior to departing for Australia, and did not, as claimed, escape to Kathmandu for a period before his departure for Australia, was part of the basis for its conclusion that the applicant had not suffered harm from Maoists in Nepal (CB 129). The fact that the alleged escape to Kathmandu was not mentioned in the protection visa application form was also part of the basis for the Tribunal affirming the delegate's decision in that it contributed to the Tribunal's negative view of the applicant's truthfulness.

16. At the hearing before the Tribunal, there was more than one occasion when the applicant's address or residence in Nepal was the subject of questioning and evidence. The transcript of the hearing before the Tribunal makes it clear that the Presiding Member put to the applicant the address details contained in the protection visa application form and the applicant responded, at some points by agreeing with the detail contained in the form (to the effect that he was living with his family up to departure) and

at other points by stating that prior to leaving Nepal he had been living in Kathmandu.

17. The following passages appear in the transcript of the Tribunal hearing at which the applicant was speaking through an interpreter:

Q Do you remember when you made, a long time ago, your application to the Department of Immigration – your application for a protection visa?"
A Yes, I do.

Q. It's like these sorts of forms. They look like that with your photo on them. Do you remember those forms?
A. Yes, I do.

Q. Now, who prepared these forms?
A. My migration agent.

Q. And did you sign them; is that your signature on them, do you remember?
A. Yes.

Q. And did you read them before you signed them?
A. No, no, I didn't.

Q. You didn't read them? Did anyone read them back to you in your language?
A. No.

Q. Why did you sign them if you didn't know what was in them?
A. It is the matter of trust.

Q. When you say the migration agent prepared them, how did he get the information to put in the documents?
A. He asked to write the story about me and I give it to him.

…

Q And what about all the other details – where you lived, your visa application, the languages you spoke – what about all those details; did you give those to him?
A. Yes.

…

Q As far as you know, were there any other details in your application form that the agent put in that you didn't tell him about?

A We just sat together. There were some questions he asked me and there was some he wrote by himself.

Q I didn't get that. He asked questions?

A Yes, there were some questions he asked me and there was some that he wrote himself.

Q So some of it is made up by the agent and you don't know; is that what you are saying?

A. Yes, that's what I meant.

Q. Well, it's not true?

A. Why?

Q. Are you saying he made it up and it's untrue or he – what do you mean by "he made it up"?

A I came to realize later that there were some things that he had written by himself.

Q. And what were they, do you know?

A. Among them one was regarding the religion.

Q. Any others?

A. Among them there's some tick mark.

Q. Some what?

A. Tick mark, where there are some tick marks.

…

Q. The general information about your persecution in [the] application, is that based on things you told him or not?

A. Yes, it is.

Q. Just before you came to Australia, which was a while ago now, where were you living, Mr [A125 of 2003]?

A. I used to live in [B].

Q. Going back to the application again that we have just been talking about, it says from 1990 till September 2001 you were living in [B] Nepal; is that correct?
A. Yes, it is.

Q. And so right up until the time you left Nepal you were living – that's the family home, is it?
A. Yes.

Q. So that's where you were living right up until you left; is that correct?
A. No, I used to not live there.

Q. This form, which you have just agreed is correct, says you were living at that address from January 1990 till September 2001, okay?
A. I don't know about the exact date. It is the best (inaudible). Maybe it was July, August – maybe August.

Q. I will ask you again. Where were you living just before you came to Australia?
A. I used to live in [B].

Q. What was your address?
A. (Not interpreted)

Q. So that is the address in the application form that I have just read you out?
A. Yeah.

…

Q. So just before you came to Australia you were living at the address which is noted in your application --
A. Yep.

…

Q. What caused you to actually leave in September? What happened? Did something happen in September to cause you to leave?
A. It was not September, it was during August that happened to me.

Q. What happened?
A. They came to the school and attacked me.

Q. What happened to you?
A. I ran after that.

Q. How did you get away?
A It was like this seat which I'm sitting, and there was a window at the back of the chair, and then I ran from the window.

Q. Was this the attack that you say is reported in these documents? I think there's an article in here, in these documents?
A. Yes, that was the incident.

Q. But after that you still managed to – you were still living at your home?
A. No.

Q. Well, you told me earlier that you were.
A. No, I did not live there in the home.

Q. I'm sorry, but you didn't live at your home then?
A. No.

Q. But you told me earlier that you were living at your home just before you came to Australia.
A. I have already told earlier that after that incident I left my home.

Q. You didn't tell me this morning?
A. I already told you earlier that before coming here I left the school.

Q. Sir, this morning I asked you where you were living just before you came to Australia. We spent a bit of time on it.
A. I was about (inaudible) as well. I left in September.

Q. Where did you go?
A. I broke the glass at the back of my chair.

Q. Are you telling me that after that incident with the glass you left the family home to live somewhere else; is that what you are saying?
A. Yes, I left my family home.

Q. Where did you go; where did you go to live?
A. I went to Katmandu.

Q. When did you go to Katmandu? Can you translate that for him, please: when did you go to Katmandu?
A. I went to Katmandu the same night I was attacked.

Q. What night was that? Just from your memory, sir, when was that; when were you attacked?
A. August 18, 2001.

Q. Where did you live in Katmandu?
A. I was living with my friend's place.

Q. And where was your friend's place?
A. I used to live in Dhapasi.

Q. How do you spell that?
A. D-h-a-p-a-s-i.

Q. Is today the first time you've told anyone that you were living in Katmandu from August 18, or around that time, until you left Australia; is today the first time you have told someone about that?
A. Yes, I've told some people.

Q. Have you told your adviser?
A. No, I have not.

18. The applicant's case is that the information that the applicant was still living at the family home until his departure and which was a reason relied upon by the Tribunal when affirming the delegate's decision, was sourced from the protection visa application form. The applicant contends that, to the extent that this information was canvassed in the evidence before the Tribunal, this did not amount to the sort of adoption of that information which would bring it within s.424A(3)(b) of the Act. The Minister's position is that to ask whether the information has been adopted is to ask the wrong question. The Minister says that the real question is whether the information was provided to the Tribunal during the hearing by means of the evidence given at that hearing, rather than by means of the protection visa application form.

19. There is also a further issue, that being whether the Tribunal's reliance on the information that the alleged escape to Kathmandu was mentioned for

the first time at a Tribunal hearing, and, by implication, had been omitted from the protection visa application form, also amounted to a possible breach of s.424A.

Information – the applicant stayed at home until he left for Australia

20. In this matter, it is clear that the Tribunal has relied, when arriving at its decision, on information concerning the applicant's residence immediately before his departure from Nepal which is found in the protection visa application form. The issue which this poses for determination is whether the applicant's oral evidence at the Tribunal hearing amounted to a giving of the same information to the Tribunal in a way which brought the information within the scope of s.424A(3)(b). The consequence of a negative answer to this question will be that the Tribunal's decision will be affected with jurisdictional error requiring it to be set aside.

21. Based on the transcript extracts quoted above, the applicant did not adopt the contents of the protection visa application form, regarding where he was living, in the way in which *SZBMI* did as described by Moore J in *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at 224 [17]. That is to say, he did not give evidence to the Tribunal that he had read the document prior to signing it and that its contents were true and correct. However, even if the applicant had, this would not be sufficient to transform the information contained in the protection visa application form into information which the applicant gave to the Tribunal as comprehended by s.424A(3)(b): *SZEEU* per Moore J at 225 [20] and Weinberg J at 252 [157].

22. However, the fact that the information was not supplied by adoption of the form does not conclude the matter. Rather, I think the answer to the argument about this information lies in considering whether the evidence at the hearing was of a nature which made the information given there separate information falling, in its own right, under the exception in s.424A(3)(b). Indeed the Minister submitted that if information contained in material not given by the applicant to the Tribunal prior to a hearing for the purposes of the application is, at the Tribunal hearing, subject to

sufficient examination or questioning, then the responses can be taken to be a giving of the information within the meaning of s.424A(3)(b).

23. This approach is seen in Kenny J's judgment in *SZDPY v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 627 at [35]:

> *It is clear that the appellant specifically provided the Tribunal with his educational details. I reject the appellant's submission that the information does not fall within s.424A(3)(b) because it was given in response to questions in the nature of 'cross-examination'. The Tribunal's questions were specific and arose, naturally enough, from the appellant's visa application. The appellant gave direct answers. The relevant information was simple and could be easily given in response to such questions. Further,* SZEEU *provides support for the proposition that where an applicant affirms a specific fact before the Tribunal that information will be covered by the exclusion in s.424A(3)(b). At [91] Moore J, with whom Weinberg J at [173] and Allsop J at [264] agreed on this issue, said:*
>
> > "While it appears that the Tribunal originally came to know that the appellant entered Australia on a business visa from sources other than the appellant (an inference which could be drawn from the way the letter of 4 February 2004 was framed) it is tolerably clear from the Tribunal's reasons that it discussed this fact (that the appellant had entered Australia on a business visa) with the appellant and he affirmed he had. Thus it was information comprehended by s.424A(3)(b) even though it was information also derived from an alternative source."
>
> *Similar reasoning applies in this case. The appellant gave the Tribunal information concerning his educational and employment history at the Tribunal hearing, although the Tribunal had reference to the appellant's visa application in discussing some aspects of his history with him.*

24. The decision of Allsop J in *SZHFC v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 1359, in particular his Honour's comments at [24] and [25], is also applicable. In that case, the Tribunal had regard to information concerning the applicant's residence in India which was in the protection visa application. His Honour expressed

the view that this information had been provided orally at the Tribunal hearing saying:

> *… If the Tribunal, as here put an earlier statement or application to the applicant and asks questions about it, it does not seem to me capable of being denied that the answers given to those questions would be information for the purposes of s.424A(3)(b). If the Tribunal then takes that information that is, for want of a better expression, that raw information or data into account, nothing would prevent the operation of s.424A(3)(b) … In other words, if facts are given to the Tribunal in answers, they are information falling within s.424A(3)(b). That section is not limited to volunteered or unprompted information.* [24]

25. The significance of their Honours' comments is that a response to a question by the Tribunal which goes to information contained in a prior document, rather than to an adoption of the entirety of the document itself, will amount to information for the purposes of s.424A(3)(b).

26. A consideration of the relevant portions of the transcript of the Tribunal hearing indicates that the applicant did acknowledge that he lived at home until he left Nepal for Australia although, admittedly, he contradicts this elsewhere in his evidence.

27. Here, it is a case that the applicant's oral evidence contained the same information as was in his protection visa application form. To that extent he gave to the Tribunal "raw information" which was the same as information in the protection visa application form, namely that he lived at home until he departed Nepal for Australia. Consequently s.424A(3)(b) applies to this information and there has been no breach of s.424A(1) in respect of it.

Information – the applicant failed to say in his protection visa application form what he said in his oral evidence about leaving his home for Kathmandu in August 2001

28. The second issue to be determined is whether, in affirming the delegate's decision, the Tribunal at least impliedly relied on the absence from the protection visa application of any reference to the departure in August

2001 which the applicant first described in his evidence at an earlier Tribunal hearing.

29. The passage in question in the Tribunal's decision, on which further submissions from the parties were sought, states:

> *The Tribunal does not accept that the applicant went to Kathmandu in August 2001 to avoid harm that he feared in his area [from Maoists]. He gave evidence to the Tribunal that he first mentioned this at the last Tribunal hearing and the present Tribunal finds that this claim was invented by the applicant to assist his claim for protection.* (CB 128)

30. As to the question of the disparity between the visa application form and the oral evidence, other comments by Allsop J in *SZHFC* at [24] are relevant here:

> *If, however, the importance placed by the Tribunal on the information previously given to the Department (which may have been repeated in answers to the Tribunal) is not merely the facts disclosed, but arises from the context or circumstances of it being given earlier, then s.424A(3)(b) may not prevent the requirement of a notice under s.424A(1) and (2). For instance, if the Tribunal says: he said X + Y at the hearing, but with the aid of a lawyer or migration agent, under no pressure and closer to the events he only said X in his statement, this being a consideration as to why Y is not accepted, then the fact that at the hearing the applicant stated that the content of his earlier statement was true may not prevent an obligation under s.424A(1) and (2) arising. The information is the knowledge by the Tribunal of the earlier statement being created in the form it was in circumstances of having a migration agent, under no pressure and closer to the time of the events.*

31. As Allsop J also said in *SZECF v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1200 at [30]:

> *To say that there is no information here because the statement (which is information) lacked the aspect now being adduced would be to fail to recognize that the information that is central to the reason for the decision is that the appellant said so much and no more on an earlier occasion. That is the relevant information.*

32. In *SZEEU v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 150 FCR 214 at 263 [223], his Honour also said:

> *Where there are things such as a prior statement or a visa application form, the information for the purposes of s.424A will be that a document in that form was provided. That information may have relevance to the Tribunal for all sorts of reasons. Such relevance is not limited to whether the information leads to a positive factual finding based on its terms. It may be relevant because it plays some part (as here) in the conclusion as to the truthfulness of the applicant.*

33. In *SZGGT v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 435, Rares J agreed with the reasoning of Allsop J in *SZECF* and *SZEEU* saying at [72]:

> *The later provision of some material fact to support a claim is often, if not usually, able to be characterized as an 'omission' from the initial claim only because the initial claim conveys a representation, by implication or inference, that it is itself a complete account. And, in such a case it will be that latter representation which, in my opinion, is 'information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision which is under review' within the meaning of s.424A(1)(a).*

34. The Minister submitted that what was said by the Full Court of the Federal Court in *Applicant S301/2003 v Minister for Immigration & Multicultural Affairs* [2006] FCAFC 155 is determinative of this aspect of the proceedings.

35. In *Applicant S301/2003*, the applicant supported his protection visa application form with a statutory declaration dated 4 April 1997 ("1997 declaration"). His solicitors provided a further declaration to the Tribunal dated 20 May 1998 ("1998 declaration"). The applicant claimed in the 1998 declaration that he had been the subject of false charges. He had not made this claim previously. In the appeal to the Full Court of the Federal Court, Applicant S301/2003 argued that the Tribunal's rejection of his claim about the charges, because he had not made this claim until the 1998 declaration given to the Tribunal and other related documents were only

provided to the Tribunal on the day before its hearing, amounted to a breach of s.424A(1).

36. Rejecting this argument, the Full Court said in a joint judgment at [19]:

> *In the circumstances, the fact that the appellant failed to make this allegation at some earlier date is not "information" within the meaning of s 424A(1). The word "information" does not encompass a failure to mention a matter to the Tribunal:* WAGP *(2002) 124 FCR 276 at [26]. It was open to the Tribunal to comment on the bare fact of the lateness of this particular allegation as part of its process of reasoning towards the conclusion it reached* (Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd *(1994) 49 FCR 576 at 592), this being a fact of which the appellant was equally aware.*

37. By contrast, four weeks later a differently constituted Full Court took a different view on a similar issue. In *NBKS v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCAFC 174 one of the issues before the Court was whether the Tribunal's reliance on the absence from a psychologist's report of information (concerning the likely behaviour of the applicant were he to return to his country of nationality and be put in a confrontational situation) as evidence that the applicant would not act in a particular way, was information which attracted a s.424A(1) obligation.

38. In *NBKS* the relevant facts were summarised in the reasons for judgment of Weinberg J at [12] in the following terms:

> *Dealing firstly with Dr Nair's report, it appears that an issue arose at the Tribunal hearing as to how the appellant might react if returned to Iran. In particular it was submitted on his behalf that he might retaliate during a confrontation with Iranian authorities. It was suggested that, if put under pressure, while being questioned, he would be likely to become agitated to such a degree that he might seem threatening to the authorities. It was also suggested that if he were in a confrontational situation, he would be likely to "express his views against the regime …". It was submitted that this might lead to his being imputed with an anti-regime opinion.*

39. The Tribunal wrote to the psychologist asking the following question:

> *How likely would [NBKS] be to act appropriately (that is, to act with moderation, in his own best interests) in a stressful or confrontational situation?*

40. The psychologist responded in general terms and spoke merely of the applicant's general psychological condition and his ability to cope with stressful situations. It did not address the question of how the psychologist believed the applicant would respond if placed under pressure by authorities in his country of nationality, such as through interrogation. The Tribunal's decision included the following passage quoted in the reasons for judgment of Weinberg J at [21]:

> *"As to whether he might be imputed with a political opinion as a result, it was further argued that, if he were in a confrontational situation, he would be likely to "express views against the regime …". **However Dr. Nair's report of 23 November 2004 does not state that he might react in this way** and, in light of my other findings about his past political activity, I cannot be satisfied that he might."*
>
> (Emphasis added by Weinberg J).

41. It was held by Weinberg and Allsop JJ that the omission from the psychologist's report was "information" which, when relied on by the Tribunal, attracted a s.424A obligation.

42. Weinberg J expressed the following view at [39]:

> *… There is no reason in principle why an omission (which the Tribunal views as important, and which is plainly adverse to the applicant's case) should be treated any differently, when it comes to s.424A, than a positive statement. That is particularly so when, as the Tribunal seems to have done here, it treats the omission as though it provides implicit support for a positive assertion that is detrimental to an applicant's case. It makes no difference whether the omission is to be found in a prior statement of an applicant or, as in this case, in a statement provided by a third party.*

43. Allsop J expressed his views in these terms at [74] and [75]:

> *In my respectful view, both his Honour's approach and the Minister's submissions do not deal with how the Tribunal dealt with the issue.*

> *As part of its reasons for not being satisfied that the appellant might react in a confrontational way upon his return to Iran, the Tribunal cited the fact that Dr Nair's report did not state that he might. This was not in answer to a proposition that Dr Nair's report did say that. Rather, it was a statement that the form of Dr Nair's report and its failure to say that the appellant would behave in this way was of assistance in concluding that he would not. That is, the absence of such a statement in Dr Nair's report was taken by the Tribunal as supportive of the conclusion that he would not behave in that way, implicitly a relevant proposition as to how the appellant would behave upon return to Iran was being extracted from the form of Dr Nair's report. As I said in* SZEEU v Minister for Immigration and Multicultural Affairs and Indigenous Affairs *(2006) 150 FCR 214 at [221]-[225], care needs to be exercised in applying [24(iii)] of* VAF. *Here, the absence of something in Dr Nair's report was not merely taken as a gap, but was implicitly probative of Dr Nair's view that there was no such danger. If the form of Dr Nair's report (including what it did not say) did not have this significance for the Tribunal there would have been no point in mentioning it.*
>
> *In my view, the information which should have been the subject of a letter in compliance with s 424A was that Dr Nair had reported and did not state that the appellant might react in a way to express his views against the regime. The letter should have pointed out why this was relevant to the review – that it tended against the proposition that he might so behave.*

44. Faced with two decisions of the Full Federal Court which apparently arrive at different conclusions on whether reliance by the Tribunal on an omission from a document amounts to reliance on "information" which attracts an obligation under s.424A(1) I am bound by the more recent of those judgments. Consequently, the omission from the protection visa application form of the applicant's move to Kathmandu in August 2001 will be "information" and will attract an obligation under s.424A(1) if it was the reason or part of the reason for the Tribunal's affirmation of the delegate's decision.

45. Counsel for the Minister submitted that general comments by the Tribunal along the lines of "this claim has been raised very recently, it wasn't raised earlier by you and I think if it was true you would have raised it earlier" cannot be said to make the omission from the protection visa application

form “information”. Counsel also stressed that the protection visa application form was not explicitly mentioned by the Tribunal in the context of this issue.

46. Counsel for the Minister is correct that the protection visa application form is not referred to in so many words. However, the reference by the Tribunal to the applicant having “first mentioned” his move to Kathmandu at the first Tribunal hearing involved an unavoidable implication that information was omitted from the application for a protection visa. The Tribunal’s conclusion that the version of events recounted to the first Tribunal hearing was invented to assist the claim for protection involves an implication that, had the version of events advanced at the first Tribunal hearing been true, it would have been mentioned earlier than it was. Its omission from the protection visa application form was, in some way, significant.

47. As Allsop J said in *SZEEU* the fact that the protection visa application form was submitted in the form that it was was relevant because it played some part in the conclusion as to the truthfulness of the applicant.

48. Alternatively, to use the formulation of Rares J in *SZGGT*, the protection visa application form contained a representation that it was a complete account whereas, at a later point, this representation was contradicted by a different version of events which supplied supplementary detail.

49. In this case one item of information on which the Tribunal relied when reaching its decision was the absence, from the protection visa application form, of the applicant’s claim to have left his home in August 2001. The Tribunal relied on the omission to conclude that when the applicant did state that he left his home for Kathmandu prior to coming to Australia, he was lying. This conclusion was echoed in later comments by the Tribunal when rejecting the reliability of documents tendered by the applicant:

> *In the circumstances of this case, where the Tribunal finds that the applicant has not always been honest in his evidence before the Tribunal, it does not consider that the various documents produced by the applicant from Nepal to support his claims are reliable evidence of the facts in those documents.*

> *In the Tribunal's view there is no plausible evidence before it that the applicant has suffered persecution in his country because of his political opinion, his imputed political opinion, his membership of a particular social group, his religion or for any other Convention reason.* (CB 130).

50. The Tribunal's decision relied, at least in part, on its view of the applicant's credibility which was, in turn, affected by the dishonesty perceived by the Tribunal in the different versions of events in August 2001 which had been advanced by the applicant.

51. The omission from the protection visa application form of the applicant's claim to have left his home in August 2001 was information which should have been dealt with in accordance with s.424A(1). There is no evidence that the Tribunal complied with its obligations under s.424A(1) concerning the absence from the protection visa application form of a reference to the August 2001 departure and I find that it did not.

52. The fact that it did not means that the Tribunal's decision is affected by jurisdictional error.

Conclusion

53. By reason of my conclusion that the decision of the Tribunal is affected by jurisdictional error, it must be set aside and the matter remitted to the Tribunal to be decided according to law.

I certify that the preceding fifty-three (53) paragraphs are a true copy of the reasons for judgment of Cameron FM.

Associate: Parisra Thongsiri

Date: 8 March 2007