FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZFPA & ORS v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 550*

MIGRATION – Review of decision by Refugee Review Tribunal – whether Refugee Review Tribunal's decision affected by jurisdictional error – whether the Refugee Review Tribunal failed to comply with s.425 of the *Migration Act 1958* (Cth) – whether the Refugee Review Tribunal failed to warn the applicant that he was not obliged to give evidence of privileged communication.

Judiciary Act 1903 (Cth), s.39B
Migration Act 1958 (Cth), ss.5(1); 36(2); 65(1); 91R; 91S; 425; 425(1); 425A(1); 474; pt.8 div.2

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152
SZGUW v Minister for Immigration and Citizenship [2008] FCA 91
SZDFZ v Minister for Immigration and Citizenship [2008] FCA 390
SZHWY v Minister for Immigration and Citizenship (2007) 159 FCR 1

First Applicant:	SZFPA
Second Applicant:	SZFPB
Third Applicant:	SZFPC
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	SYG 1889 of 2007
Judgment of:	Emmett FM
Hearing date:	22 April 2008
Date of last submission:	22 April 2008

Delivered at:	Sydney
Delivered on:	2 May 2008

REPRESENTATION

Counsel for the Applicant:	Mr L. Karp
Counsel for the Respondent:	Mr S. Lloyd
Solicitors for the Respondent:	Ms M. Mafessanti, Clayton Utz

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1889 of 2007

SZFPA
First Applicant

SZFPB
Second Applicant

SZFPC
Third Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application pursuant to s.39B of the *Judiciary Act 1903* (Cth) and Part 8 Division 2 of the *Migration Act 1958* (Cth) ("**the Act**") for judicial review of a decision of the Refugee Review Tribunal dated 15 May 2007 and handed down on 24 May 2007.

2. The first-named applicant claims to be from Egypt and of Christian faith ("**the Applicant**"). The second and third-named applicants are the wife and daughter of the Applicant respectively. The claims of the applicant wife and daughter are wholly dependent on the claims of the Applicant.

3. The Applicant first arrived in Australia on 7 November 2002 and returned to Egypt on 28 November 2002. All of the applicants then arrived in Australia on 14 August 2003, having departed legally from Cairo on a passport issued in their own names and a visa issued on 10 July 2003. The Applicant then departed Australia on 8 November 2003 to travel to Fiji and subsequently returned to Australia on 12 November 2003.

4. On 6 February 2004, the applicants lodged an application for a protection (Class XA) visa with the Department of Immigration and Multicultural Affairs ("**the Department**") under the Act.

5. In his protection visa application, the Applicant claimed that he feared persecution by Islamic fundamentalists because of their belief of his involvement in the kidnap of the cousin of his wife, the second named applicant, ("**Susan**") from her Muslin husband ("**Hassan**") and the conversion back to Christianity of the second applicant's brother ("**Bassem**"). The Applicant claimed that Hassan had a senior position with the Attorney General's Department in Egypt.

6. On 26 February 2004, a delegate of the First Respondent ("**the Delegate**") refused the applicants' application for a protection visa on the basis that the applicants are not people to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol ("**the Convention**").

7. On 2 April 2004, the applicants lodged an application for review of the Delegate's decision by the Refugee Review Tribunal.

The Applicant's claims before the Refugee Review Tribunal and the Refugee Review Tribunal's decision

8. The Applicant's claims before the Refugee Review Tribunal and the Refugee Review Tribunal's decision are accurately summarised in the written submissions of counsel for the First Respondent, Mr Lloyd, as follows:

"2. The applicants are a husband and wife and their daughter.[1] *They are citizens of Egypt and Coptic Christians.*[2]

3. The applicant husband (hereafter "the applicant") first arrived in Australia on 7 November 2002. He returned to Egypt on 28 November 2002.

4. In April/May 2003, the applicant was accepted to be a student visa holder. However, he withdrew his visa application when he appreciated the cost of studying for two years in Australia.[3]

5. He then considered the option of skilled migration and sponsorship. He could not obtain a suitable sponsor. His skills assessment was unfavourable in December 2003.[4]

6. The applicants arrived in Australia together on 14 August 2003.[5]

7. On 6 February 2004, the applicants lodged their applications for protection visas.[6]

8. On 26 February 2004, a delegate of the Minister refused the application.[7]

9. On 2 April 2004, the applicants lodged their combined application for review with the Tribunal.[8] *They appointed Therese Nicolas as their authorised recipient.*[9]

10. By letter dated 22 April 2004, the applicants were invited to attend a hearing before the Tribunal.[10] *The invitation was accepted by facsimile transmission dated 6 May 2004.*[11] *The hearing was attended by the applicant husband, applicant wife and adviser (who was also their authorised recipient).*[12]

11. By letter dated 21 July 2004, the applicants were notified that a decision on their review application would be handed down on 10 August 2004.

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1 CB 445.2
2 CB 470.4
3 CB 457-458
4 CB 458.2
5 CB 445.3
6 CB 1-68
7 CB 71-81
8 CB 82-85
9 CB 83
10 CB 88-89
11 CB 112
12 CB 113

12. On 30 July 2004, the applicants provided a further submission to the Tribunal, with evidential material.[13]

13. On 5 August 2004, the Tribunal informed the applicants that the handing down would be postponed (presumably to give the Tribunal an opportunity to consider the new material).

14. It appears that at about this time the original member constituted as the Tribunal became unavailable and a new member was constituted as the Tribunal to determine the review.[14]

15. By letter dated 25 October 2004, the Tribunal requested additional information from the applicants in relation to three matters.[15] *The applicants' agent responded to that request by facsimile transmission dated 17 November 2004.*[16]

16. The Tribunal handed down a purported decision on 23 December 2004.[17]

17. At some stage, the applicants sought judicial review of that decision. It was set aside by consent order made on 11 July 2006.[18]

18. By facsimile transmission on 15 January 2007, the applicants were invited to attend a second hearing to be held on 22 February 2007.[19] *The invitation was accepted.*[20] *Again the applicant husband and applicant wife attended the hearing with their adviser.*[21]

19. By facsimile transmission dated 22 March 2007, the applicant made a post-hearing submission.[22]

20. By facsimile transmission sent on 4 April 2007, the applicant was invited to comment on information that was perceived as being adverse to his credibility.[23] *A response was made on 26 April 2007.*[24]

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13 CB 161-177
14 CB 180
15 CB 180-181
16 CB 182-184
17 CB 187-224
18 CB 377
19 CB 388-389
20 CB 390
21 CB 427
22 CB 429-431
23 CB 433-434
24 CB 435-436

21. The Tribunal handed down its decision on 24 May 2007.[25] *The Tribunal made the following findings:*

a) The applicant lacks credibility and his claims cannot be accepted.[26]

b) The Tribunal was not satisfied that the applicant has suffered any persecution in Egypt.[27]

c) The following matters led the Tribunal to conclude that the applicant is not truthful or credible:

i) The applicant contended that Hassan (the person whom he feared) was in a senior government position. It was implausible that, having regard to this position, it would have taken Hassan 5 or 6 months to locate Bassem (the applicant wife's brother, who it was claimed had kidnapped the applicant wife's cousin to save her from Hassan, the cousin's husband, who it was claimed had forcibly converted the cousin to Islam).[28]

ii) It was implausible that Hassan would have been ignorant of Bassem's eventual departure from Egypt.[29]

iii) The Tribunal did not accept the applicant's evidence that Hassan could have reported the kidnapping of his wife to the authorities (who would have helped him) but had chosen not to do so.[30]

iv) Given that the applicant worked for the same company until he left, if he were being pursued by Hassan, he could have been found and persecuted prior to his departure.[31]

v) The Tribunal was not satisfied that, if the applicant had been attacked as claimed, he would not have reported the attacks to the police.[32]

vi) The applicant had originally claimed that in June 2003 his apartment had been invaded by Hassan's

[25] CB 443ff
[26] CB 471.4
[27] CB 471.4
[28] CB 471.6
[29] CB 471.8
[30] CB 472.2; 473.1
[31] CB 472.3
[32] CB 472.4

friends and that he had been held 'like a hostage all night'. At the 2007 hearing, the applicant claimed that he had been held for half an hour. The Tribunal was concerned by the inconsistency in the claims as well as the inadequacy of the applicant's explanation for that inconsistency.[33]

vii) The independent country information does not support the claim that Christian women are forcibly converted to Islam by Muslim men.[34]

viii) The independent country information is not consistent with the applicant's claims that the Egyptian authorities are not interested in helping Christians who are the victims of Muslim attacks.[35]

d) The Tribunal was not satisfied that the events relating to Hassan, his wife and Bassem had occurred.[36]

e) The Tribunal did not accept that the applicants were the subject of the physical attacks or threats claimed.[37]

f) The Tribunal was not satisfied that the applicants would be persecuted by reason of their faith per se.[38]

g) The Tribunal was not satisfied that the applicants have a well-founded fear of persecution.[39]"

Legislative framework

9. Section 65(1) of the Act authorises the decision-maker to grant a visa if satisfied that the prescribed criteria have been met. However, if the decision-maker is not so satisfied then the visa application is to be refused.

10. Section 36(2) of the Act relevantly provides that a criterion for a protection visa is that an applicant is a non-citizen in Australia to whom the Minister is satisfied that Australia has a protection obligation under the Refugees Convention as amended by the Refugees Protocol.

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33 CB 472.7
34 CB 473.3
35 CB 473.6
36 CB 473.3
37 CB 473.5
38 CB 473.8
39 CB 474.4

Section 5(1) of the Act defines "Refugees Convention" and "Refugees Protocol" as meaning the 1951 Convention relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees.

11. Australia has protection obligations to a refugee on Australian territory.

12. Article 1A(2) of the Convention relevantly defines a refugee as a person who:

> *"owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."*

13. Section 91R and s.91S of the Act refer to persecution and membership of a particular social group when considering Article 1A(2) of the Convention.

The proceeding before this Court

14. On 12 June 2007, the applicants filed an application in this Court seeking judicial review of the decision of the Refugee Review Tribunal dated 24 May 2007 ("**the Second Tribunal**").

15. The applicants were represented before this Court by Mr Karp, of counsel.

16. By consent, the applicants were granted leave to file in Court and rely upon an amended application. Ground 1(b)(v) was not relied upon and was withdrawn.

17. Counsel for the applicants read the affidavits of Therese Nicholas, sworn 7 April 2008, and the Applicant, affirmed 4 April 2007, which annexed transcripts of the hearings of the earlier constituted Refugee Review Tribunal ("**the First Tribunal**") and the Second Tribunal respectively.

18. The grounds of the amended application are as follows:

> *"1. The Tribunal breached the requirements of s 425 Migration Act.*
>
> *Particulars*
>
> *(a) Failure to provide the second applicant with a hearing as required by that section.*
>
> *(b) Failure to disclosed issues that arose in relation to the review that were required to be disclosed, those being,*
>
> > *i Whether it was implausible that the second applicant's cousin's husband (Hassan) would have taken six months to locate and assault the applicant's brother in law (Bassem).*
> >
> > *ii Whether it was implausible that Hassan, as a high ranking official, would be ignorant of Bassem's departure from Egypt in Easter 2001.*
> >
> > *iii. Whether Hassan would have involved the authorities if he really suspected that the applicant was involved in the disappearance of Hassan's wife.*
> >
> > *iv Whether Hassan could have easily located the applicant at his workplace had he wanted to harass him.*
>
> *2. The Tribunal breached the requirements of natural justice, and otherwise exceeded its powers.*
>
> *Particulars*
>
> *(a) The Tribunal received evidence of privileged communications between the applicant and a solicitor acting for him in the capacity of a migration agent and failed to caution the applicant that he need not give such evidence."*

Ground 1(a)

19. At the heart of ground 1(a) is the contention by counsel for the applicants that the Second Tribunal did not give the second applicant an opportunity to give evidence about issues relevant to the review. Counsel for the applicants contended that such conduct on the part of the Second Tribunal disclosed a failure to comply with s.425(1) of the Act.

20. In support of this contention, counsel for the applicants made the following written submissions:

> *"24. It may be observed from the transcripts of the two Tribunal hearings that at the first hearing the wife, apparently voluntarily, did not give evidence, and at the second hearing she only gave evidence very briefly, about a minor aspect of the claims, at page 94 of the 2007 transcript.*
>
> *25. Each applicant for a Protection Visa is an applicant in his or her own right. (see s 36(2) Migration Act, SZBWJ v Minister for Immigration [2006] FCAFC 13 at [43]-[45]). Each is entitled to a hearing pursuant to s 425(1) Migration Act. In this case, although the applicant wife apparently chose not to give evidence at the first hearing she was available to give evidence at the second. It is quite clear that the second Tribunal was not satisfied that it could make a decision in the applicant's favour on the evidence and materials before it. Having decided to call another hearing it was incumbent upon the Tribunal give all applicant's an opportunity, "... to give evidence and present arguments relating to the issues arising in relation to the decision under review." This was especially so in a situation where, as here, such issues concerned all applicants.*
>
> *26. In my submission the very few questions asked of the second applicant at the 2007 hearing do not constitute a hearing, "... to give evidence and present arguments relating to the issues arising in relation to the decision under review", as is required by s 425(1). At most, the second applicant was given a truncated hearing about a part of one issue."*

21. Counsel for the applicants referred the Court to a transcript of the Second Tribunal hearing where the following exchange among the Second Tribunal, the adviser and the second named applicant took place at the commencement of the hearing:

> *"TRIBUNAL MEMBER*
>
> *Q3 O.K. Now, the applicant.*
>
> *APPLICANT SWORN*
>
> *TRIBUNAL MEMBER*
>
> *Q4 Thank you. And I may want to speak to you so could you please come forward and take an affirmation or swear an oath on the Bible. You are an applicant in this matter and if I*

wish I can ask you some questions about this matter. If you, if you don't wish to give any evidence then it may be viewed in a negative way. Do you want to explain to her.

ADVISER

o.k. If you don't mind I would like to have a word to her about that because she's saying she doesn't remember all dates and things like that.

TRIBUNAL MEMBER

Q5 Mmm.

ADVISER

But as long as she remembers general dates will be ---

A(I) Yes, I'll talk but I can't remember all the dates or most of the evidences because I tried to forget about this, about and I left everything for my husband to talk about.

ADVISER

You would want her to leave the room. Is that correct, Member?

TRIBUNAL MEMBER

Q6 I will, yes.

ADVISER

Yes.

TRIBUNAL MEMBER

Q7 If I don't wish to hear from you after I've spoken to your husband I, I will let you know and you can come in and sit at the back of the room. But please come forward and make your affirmation and/or swear on the Bible.

[SECOND APPLICANT] *AFFIRMED*

TRIBUNAL MEMBER

Q8 Now, just initially before I ask you to wait outside, I'm not going to go through the usual explanation about the convention because you would have heard that on the last occasion and I'm sure your adviser has explained to you what is required. What I will say is that the proceedings are

> *strictly confidential and this means that anything said here today or anything to do with your matter will not be disclosed. The interpreter has also agreed not to divulge anything that is said here today or anything about this matter. What is also important is that the interpreter is here to assist the Tribunal and that means that I have to be sure that we all understand one another, O.K., and if you have any problems at all in understanding what I'm saying or what I'm asking, please tell Madam Interpreter to ask me to repeat or rephrase. Now, I have the departmental file, I also have the first Tribunal file and I will be going through the whole case again. I will make a fresh decision. And your adviser will have an opportunity, as you will, to make any comments you wish about the matter. O.K. Now, if you would kindly wait outside until we're in touch with you I will be, I'd appreciate that."*

22. Counsel for the First Respondent, Mr Lloyd, contended that the second named applicant had been invited to appear before the First Tribunal and had elected not to give evidence. Counsel for the First Respondent contended that the Second Tribunal was not obliged to offer the second named applicant a further hearing after the First Tribunal decision had been set aside and that, in the circumstances, it had complied with s.425 of the Act.

23. Moreover, counsel for the First Respondent contended that, in any event, the second named applicant was invited to a further hearing by the Second Tribunal which she attended. Counsel for the First Respondent contended that a fair reading of the transcript of the hearing before the First Tribunal discloses that the second named applicant did not seek to give evidence herself on that occasion because she could not *"remember all the dates or most of the evidences because she tried to forget about this"* and that she had *"left everything for her husband to talk about"*.

24. Counsel for the First Respondent contended that the Second Tribunal was not obliged to ask questions of the second named applicant. Further, counsel for the First Respondent contended that because the claims of the second named applicant depended on those of the Applicant, unless the Second Tribunal made an error that affected its decision in relation to the first named applicant, it would be futile to

remit a decision in respect of the second named applicant to the Refugee Review Tribunal for further determination according to law.

25. A fair reading of the Second Tribunal's decision and the transcript of the second hearing, makes clear that at no stage of the hearing did either of the applicants or their adviser raise with the Second Tribunal that the second named applicant had further evidence she would like to give in support of the review application. A fair reading of the Second Tribunal's decision makes clear that the second named applicant was prepared to answer questions from the Second Tribunal, however, was unable to remember *"all of the dates or most of the evidences"* and that she left everything to the Applicant.

26. The conversation among the Second Tribunal, the applicants' adviser and second named applicant, quoted at paragraph 27 above in these Reasons, took place at the commencement of the hearing. Towards the end of the hearing the Second Tribunal invited the second named applicant back, into the hearing although indicated that the Second Tribunal did not intend to ask her any questions. However, in fact, the Second Tribunal did ask the second named applicant how long after her brother Bassem had left did the authorities come around to speak with her. The second named applicant responded *"months and months"*. The Second Tribunal asked the second named applicant what they said to her and she responded she did not know.

27. A fair reading of the transcript does not suggest there was any attempt by the Second Tribunal to prevent the second named applicant giving evidence, presenting oral argument or making submissions. A fair reading of the Second Tribunal's decision and the transcript of the hearing before the Second Tribunal makes clear that the second named applicant relied the Applicant and their adviser in providing all evidence in support of the review application to the Second Tribunal.

28. In the circumstances, there was no failure to comply with s.425 of the Act by the Second Tribunal.

29. Accordingly, ground 1(a) is not made out.

Ground 1(b)

30. Counsel for the applicants submitted that the Second Tribunal failed to disclose issues that arose in relation to the review as required by s.425 of the Act.

31. The written submission of counsel for the applicants in respect of ground 1(b) are as follows:

> *"34. The Tribunal is required to disclose to the applicant the issues that arise in relation to the review (s 425(1) Migration Act). What must be disclosed are those issues which are, "dispositive" of the review (SZBEL v Minister for Immigration (2006) 228 CLR 152 at [35], or important to it (SZBEL at [47]), which have not been disclosed in the delegate's decision.*
>
> *35. In SZGUW v Minister for Immigration [2008] FCA 91, Jacobson J said,*
>
> > *37. It seems to me that the effect of the High Court's explanation of the statutory scheme is that the issues to which s 425 referred are particular factual aspects of an applicant's claim in respect of which the Tribunal is not persuaded when it extends to an applicant an invitation to attend the hearing: SZBEL at [34] – [40].*
>
> *36. It is also clear, from SZILQ v Minister for Immigration [2007] FCA 942 [35], that an issue that arises after the hearing has to be put to the applicant.*
>
> *37. It may be conceded that both the first and second Tribunals made it clear that they had doubts about the applicant's claims because his family did not accompany him to Australia in 2002. That issue did not arise in the second Tribunal decision, possibly because the second Tribunal was satisfied with the applicant's responses. The second Tribunal also disclosed its difficulties with the inconsistency in the duration of the home invasion (T 82-3).*
>
> *38. What the second Tribunal did then was to raise further issues – those summarised at paragraph 22(a)-(e) above – which had not been disclosed in earlier hearings, or indeed in delegate's decision. For the Tribunal to have made adverse findings on such issues, without disclosing them to the applicants is jurisdictional error."*

32. Counsel for the applicants submitted that by the Second Tribunal informing the applicants that it was intending to go through the whole case again and make a "*fresh decision*", the applicants were entitled to assume their credibility was no longer an issue and that the issues would become known to the applicants by the questions put to the applicants by the Second Tribunal.

33. Counsel for the First Respondent contended that *"the applicant was on notice that his entire story was liable to be disbelieved by the Tribunal, given that the Tribunal had disbelieved it in its first decision."*

34. Counsel for the First Respondent referred to the following exchange between the Applicant and the Second Tribunal which counsel for the First Respondent submits makes clear that the Applicant was aware that his credibility was at issue:

> *"… I was thinking a little bit logically and maybe this is one of my mistakes, but I've been, a lot I've been misunderstand, I've been, been made, here there were a lot of mistakes. They said I am not, what they saying is I am not honest enough to say the truth, ok, and there is a lot of things…"*

35. A fair reading of the transcript of the Second Tribunal's hearing makes clear that the Second Tribunal was exploring with the Applicant his evidence about the detail of attacks in order to satisfy itself as to what happened. Indeed, the Second Tribunal stated the following:

> *"So tell me about this. See, I need to get the details about these attacks. I'm sorry for you to have to go through all of this again but I have to get the details to satisfy myself as to what happened."*

36. In asking the Applicant to expand upon his evidence, the Second Tribunal was making clear that it needed to be satisfied about his claims of attacks by Islamic fundamentalists. In the circumstances, the details of the attacks were plainly issues in respect of which the Applicant was on notice.

37. Counsel for the First Respondent submitted that inviting the Applicant to expand upon his evidence and exploring it with him the Second Tribunal met the requirements referred to in *SZBEL v Minister for*

Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152 ("***SZBEL***") at [47] as follows:

> *"First, there may well be cases, perhaps many cases, where either the delegate's decision, or the Tribunal's statements or questions during a hearing, sufficiently indicate to an applicant that everything he or she says in support of the application is in issue, That indication may be given in many ways. It is not necessary (and often would be inappropriate) for the Tribunal to put to an applicant, in so many words, that he or she is lying, that he or she may not be accepted as a witness of truth, or that he or she may be thought to be embellishing the account that is given of certain events. The proceedings are not adversarial and the Tribunal is not, and is not to adopt the position of, a contradictor. But where, as here, there are specific aspects of an applicant's account, that the Tribunal considers may be important to the decision and may be open to doubt, the Tribunal must at least ask the applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted."*

38. It is clear that in *"some cases everything may be in issue; in others, the issues may be specific aspects of the material that is before the Tribunal: SZBEL at [36], [47]."* (*SZGUW v Minister for Immigration and Citizenship* [2008] FCA 91 ("***SZGUW***")). In *SZGUW* Jacobson J at [37] said that he understood *SZBEL* to be authority for the proposition that *"the issues to which s425 refers are particular factual aspects of an applicant's claim in respect of which the Tribunal is not persuaded when it extends to an applicant an invitation to attend the hearing: SZBEL at [34] – [40]"*.

39. Counsel for the First Respondent also referred to the Second Tribunal's questions to the Applicants about his claim of Bassem's conversion to Islam. The Second Tribunal framed its questions in terms of the Applicant's *"allegations"* of Bassem's conversion to Islam, thereby indicating that the Second Tribunal did not regard the allegation of Susan's conversion as a fact about which it was satisfied.

40. Counsel for the First Respondent referred the Court to *SZDFZ v Minister for Immigration and Citizenship* [2008] FCA 390 ("***SZDFZ***") where Flick J of the Federal Court of Australia stated at [20]:

> *"Issues may arise out of the initial decision of a delegate; they may also arise out of a decision of an intervening tribunal that*

has been set aside by the Federal Magistrates Court with the consequence that a reconstituted tribunal is thereafter called upon to resolve afresh the claims made. A decision of any such intervening tribunal may resolve some factual issues adversely to an applicant but nevertheless proceed to uphold his claim. Just as those adverse factual findings of the intervening tribunal would need to be addressed before any subsequent tribunal, as "issues arising in relation to the decision under review", so too would favourable findings made by the intervening tribunal be issues arising in a like manner."

41. Counsel for the First Respondent contended that, in accordance with the principle referred to above in *SZDFZ*, the Applicant must be taken to be on notice of the comprehensive nature of the adverse findings made against him by the First Tribunal. Counsel for the First Respondent submitted that, in those circumstances, any subset of factual assertions made by the Applicant must also form part of the overall issue of the Applicant's credibility where there was a total rejection of all his claims.

42. I accept as correct the contentions and submissions of the First Respondent for the reasons given by the First Respondent.

43. In particular I accept the submissions of counsel for the First Respondent that the Second Tribunal can have regard to the findings of the First Tribunal.

44. In the circumstances, it was open to the Second Tribunal to make the findings that it made referred to in ground 1(b)(i)-(iv) based on the evidence and material before it and for which it provided reasons.

45. Accordingly, ground 1(b) is not made out.

Ground 2

46. Counsel for the applicants contended that the Second Tribunal failed to warn the Applicant that he was not obliged to give evidence of privileged communications that he had with his migration adviser who was at the time a solicitor. The exchange relied upon in support of this contention is as follows:

> *"TRIBUNAL MEMBER*

Q136 In November 2002 things weren't looking very optimistic about you coming to live in Australia.

A No, it was good …… I spoke to two guys, that migration lawyer ---

Q137 Ah hmm.

A --- and the agent ---

Q138 Ah hmm.

A --- and these, both of them … three different ways ---

Q139 Mmm.

A --- they said they give me an assurance that it's a good way to come to Australia, the things … through a student visa or a skilled migration or um, the third one was sponsorship.

Q140 Ah hmm.

A And they give me assurance about that.

Q141 So the skills, sponsorship and student.

A Yes.

Q142 So you went, you went back to Egypt thinking, I've got a chance here of being successful in obtaining a visa.

A No."

47. Counsel for the applicants made the following written submissions in support of ground 2:

> *"27. Evidence given by the applicant (T 15, 23-25) indicates that at the second Tribunal hearing,*
>
> > *(a) The applicant offered information about advice given to him by Mr Rigas, and,*
> >
> > *(b) The Tribunal made no attempt to warn or advise him that he need not give evidence about such advice.*
>
> *28. Legal advice given by a solicitor to a client is privileged, and for the Tribunal to ask for or permit such evidence to be given in the absence of the informed consent of the applicant is*

jurisdictional error (SZHWY v Minister for Immigration [2007] FCAFC 64; SZHLO v Minister for Immigration [2007] FMCA 1837).

29. Two issues arise from this submission. The first is that Mr Rigas, although a solicitor, gave advice as a migration agent acting outside his legal practice.

30. The answer to this is that no matter in what capacity the advice was given, Mr Rigas was a solicitor and was giving advice about a visa application which is properly the subject of legal advice. This is so even though,

> *(a) Non legally qualified people who are registered as Migration Agents are entitled to give such advice, and*
>
> *(b) Solicitors who are not so registered are not entitled to give such advice.*

31. The second issue is whether a remedy should be withheld despite any error which the tribunal may have committed.

32. The answer is that in SZHWY, Lander J said, at [80],

> *"In considering whether the writs should issue the Court will keep in mind 'the high purpose of vindicating the public law of the Commonwealth of upholding the lawful conduct on the part of the officers of the Commonwealth (and) defending the rights of third parties under that law …" Re Refugee Review Tribunal: Ex parte Aala (2000) 204 CLR 82 per Kirby J at 137.""*

48. Counsel for the First Respondent did not concede that the subject of questioning was covered by legal professional privilege. Counsel for the First Respondent referred to evidence given by Mr Rigas at the hearing before this Court that the advice he gave the applicants was as a migration agent, although he did conduct a separate practice as a solicitor.

49. Further, counsel for the First Respondent referred to the fact that the applicants had given correspondence from Mr Rigas to the First Tribunal in support of their review application, and therefore any privilege that may have attached was waived. The correspondence was given to the Tribunal by the Applicant in order to explain the applicants' delay in lodging protection visa applications on 6 February

2004. The Applicant had first arrived in Australia on 7 November 2002 and returned to Egypt on 28 November 2002. All of the applicants then arrived in Australia on 14 August 2003 with the Applicant departing Australia on 8 November 2003 to travel to Fiji. The Applicant subsequently returned to Australia on 12 November 2003. In those circumstances, counsel for the First Respondent submitted that, if there was any legal professional privilege that attached to the communications between the Applicant and Mr Rigas, which was denied by the First Respondent, it had been waived by the Applicant when he tendered the advice of Mr Rigas to the First Tribunal in support of his own case.

50. A fair reading of this exchange in context relates to the Applicant seeking to explain to the Second Tribunal the delay in lodging his application for a protection visa from when he arrived in Australia.

51. Even if such privilege did attach, I am not satisfied that there was a relevant disclosure of professional advice to the Second Tribunal in response to questions by the Second Tribunal that reasonably sought that advice.

52. In any event, I am satisfied that in the circumstances where the Applicant gave to the First Tribunal his correspondence with the migration agent in order to meet the First Tribunal's concerns about his delay in lodging his protection visa application, there is a waiver by him of information in those communications. Nothing in the evidence given by the Applicant to the Second Tribunal at the hearing goes beyond matters that were referred to in that letter.

53. Moreover, and perhaps or greatest relevance, even if the Second Tribunal had failed to warn the Applicant that he was not obliged to give evidence of privileged communication, the disclosure of the alleged privileged communication did not form any part of the Second Tribunal's reasons for affirming the decision under review.

54. Counsel for the First Respondent also made a formal submission to this Court that *SZHWY v Minister for Immigration and Citizenship* (2007) 159 FCR 1 ("***SZHWY***") is wrongly decided in that *"It is premised upon the mistaken view that persons appearing before the tribunal pursuant to an invitation under s 425(1) are required to answer any*

question asked by the tribunal. There is no justification of that in the Migration Act."

55. In *SZHWY* the Refugee Review Tribunal had a discussion with the applicant where the applicant informed the Refugee Review Tribunal that he had had a meeting with a solicitor in Lakemba. The Refugee Review Tribunal then asked the applicant *"what did you talk to him about"* and a further question *"what did he advise you to do"*. The Full Court of the Federal Court per Lander J in *SZHWY* stated at [75]:

> *"… the Tribunal was under an obligation to advise the appellant that he was entitled to refuse the questions which the Tribunal asked of him if they were to disclose the contents of a confidential communication with his lawyer had for the purpose of obtaining or giving legal advice or assistance or for use in the proceedings before the Tribunal."*

56. Lander J went on to say that, "*the Tribunal, when conducting its inquiry and in the exercise of its inquisitorial function, should advise a person of their right to claim privilege against self-incrimination or legal professional privilege if it appears that a question asked of the person may give rise to a legitimate claim of that privilege."*

57. This Court is bound by the Full Court of the Federal Court in *SZHWY*.

58. However, it is my view that a fair reading of the exchange between the Second Tribunal and the Applicant does not support the contention that there was an uninformed disclosure of a privileged communication by the Applicant to the Second Tribunal. Indeed, a fair reading of the Second Tribunal's question does not suggest that the Second Tribunal was in any way seeking to illicit from the Applicant information that may be the subject of legal professional privilege. The Applicant's reference to what Mr Rigas had said to him was in answer to the Tribunal commenting that, *"In November 2002 things weren't looking very optimistic about you coming to live in Australia."* Again, the Applicant was seeking to explain to the Second Tribunal, as he had to the First Tribunal, his conduct in the applicants' delay in lodging applications for protection visas.

59. Accordingly, ground 2 is not made out.

Conclusion

60. A fair reading of the Tribunal's decision makes it clear that the Tribunal understood the claims being made by the applicants; explored those claims with the Applicant and the second named applicant; had regard to all material provided in support; and, made findings based on the evidence and material before it. As stated above in these Reasons, those findings of fact were open to the Tribunal on the evidence and material before it and for which it provided reasons. A fair reading of the Tribunal's decision makes clear that the Tribunal reached conclusions based on the findings made by it and applied the correct law in reaching those conclusions.

61. In the circumstances, the Tribunal complied with its obligations under the statutory regime in the making of its decision, including the conduct of its review.

62. The Tribunal's decision is not affected by jurisdictional error and is therefore a privative clause decision. Accordingly, pursuant to s.474 of the Act, this Court has no jurisdiction to interfere.

63. The proceeding before this Court is dismissed with costs.

I certify that the preceding sixty-three (63) paragraphs are a true copy of the reasons for judgment of Emmett FM

Associate: S. Kwong

Date: 2 May 2008