FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZIDR v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 1653*

MIGRATION – Persecution – review of Refugee Review Tribunal decision. Visa – protection visa – refusal – "independent country information" is a shorthand term for certain information sourced from disinterested parties, including media and journalistic sources – Tribunal failed to consider whether applicant member of a particular social group made up of Nigerian homosexuals.

Migration Act 1958, s.91X, 424A

VAF v Minister for Immigration & Multicultural & Indigenous Affairs [2004] 206 ALR 471
SZBYR v Minister for Immigration & Citizenship [2007] HCA 26

Applicant:	SZIDR
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1328 of 2007
Judgment of:	Cameron FM
Hearing date:	1 August 2007
Date of Last Submission:	1 August 2007
Delivered at:	Sydney
Delivered on:	5 October 2007

REPRESENTATION

Solicitor for the Applicant:	Mr. M. Jones
Counsel for the Respondents:	Mr. G. R. Kennett
Solicitors for the Respondents:	DLA Phillips Fox

ORDERS

(1) A writ of certiorari issue directed to the second respondent quashing the decision of the second respondent signed on 19 March 2007.

(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 12 July 2005.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1328 of 2007

SZIDR
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. By an amended application dated 1 August 2007, the applicant seeks review of the decision of the Refugee Review Tribunal ("Tribunal") which was signed on 19 March 2007 and which affirmed an earlier decision of the delegate of the Minister for Immigration and Multicultural Affairs ("Minister") dated 12 July 2005 refusing the applicant's application for a protection visa.

2. The Tribunal decision the subject of these proceedings is the second such decision relating to the applicant. There was a previous Tribunal decision signed on 2 December 2005 which was quashed by order of this Court dated 8 November 2006 (Court Book ("CB") page 110).

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

Background facts

4. The Tribunal described the applicant as follows:

> *... the applicant is a national of Nigeria born in March 1968. he identifies his ethnic group as Ibo and his religion as Anglican/Catholic. He has completed five years of education and describes his profession as "businessmen". [sic]* (CB 165).

5. The applicant claims to fear persecution in Nigeria because of his homosexuality.

6. The facts alleged in support of the applicant's claim for a protection visa are set out on pages 4-12 of the Tribunal's decision (CB 165-173). Relevantly, they are in summary:

Application for protection visa

a) the applicant was severely beaten and expelled from school at age fifteen and refused enrolment in other schools when he was discovered in the school toilets engaged in homosexual acts with another student. His father refused to pay for his further education, the applicant was disowned by his family and expelled from his village;

b) in Ibadan, the applicant's partner was "outed" and was subsequently arrested, molested and beaten in police custody. When the applicant heard the news, he travelled to Lagos, where he thought it would be safer for him to hide;

c) the applicant is a Christian. The Anglican Church turned against the applicant because they thought his association with "the gay and lesbian group" in Nigeria would harm their reputation. The applicant was not allowed to worship as an Anglican or as a Roman Catholic;

d) in March 2005, the applicant's partner was lynched by a mob in Lagos for showing affection in public. The applicant was able to escape and with the assistance of a friend was able to hide and then depart Nigeria;

Application for review by Tribunal

e) the applicant stated that he had dropped out of school because he was disowned by his father. For a brief period of time he became involved with motor parts before going to Ibadan in 1984 where he lived with an Anglican priest and his family. The priest was aware of the applicant's past problems at school. In 1998 the applicant fled Ibadan and went to Lagos because of his problems. In Lagos he worked at a friend's shop buying and selling motor parts;

f) in Ibadan the applicant made friends with another man. This friendship started in 1990 and ended in 1998 when they were attacked walking home from a club at about 4-5pm. The applicant and his friend were drunk and kissed each other goodbye. People saw this and began to attack them. The applicant was able to run away from the mob but his friend was not able to get away and was badly beaten and taken to the police. The applicant ran back to the church, packed his bags and then caught a bus to Lagos;

g) in 2003 the applicant developed another relationship. In March 2005 he went to meet his friend at a bus stop. His friend was very drunk when he arrived and they kissed in public. People attacked them. The applicant was able to get away because he was not drunk. But his friend was drunk and was caught by the mob. A tyre was put around his neck and set alight.

Tribunal hearing 14 February 2007

h) from 1998 until the beginning of March 2005, the applicant lived at a Catholic Church in Lagos. During that time he was employed at a bookshop. Prior to that he lived at St Paul Anglican Church in Ibadan for some 14 years;

i) the applicant had left school when he was between 10 and 13 years old. He continued to live in his village for about one year, feeling isolated and ostracised, before going to Onisha, where he lived for two years. The applicant went to Ibadan in 1984 and lived an incident free life there until November 1998 when he and his partner, with whom he was having a secret relationship for

some six years, were attacked and beaten in the street. He ran to the church, packed his bags and went to Lagos; and

j) in Lagos the applicant experienced no problems until the first week of March 2005. As he and his boyfriend were walking in public, his inebriated boyfriend insisted that the applicant kiss him; the applicant obliged. At that point they were seen by people and were attacked. The applicant was able to run away because he was not drunk. After this incident the applicant went to the church, packed his bags and went to a friend's house. He did not witness the necklacing but had heard about it from his friends.

7. The Tribunal also took evidence from a man purporting to be the applicant's partner in Australia.

8. At the first Tribunal hearing held on 21 November 2005, when asked whether he was involved with any homosexual groups in Australia, the applicant stated that because of the language barrier he was not. He stated that on one occasion he had visited Oxford Street with a partner but because of the language problem he has not had any contact with gay groups or attended gay activities.

The Tribunal's decision and reasons

9. After discussing the claims made by the applicant and the evidence before it, the Tribunal found that 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"). The Tribunal's decision was based on the following findings and reasons:

a) the Tribunal did not find the applicant's explanations of the contradictions between his evidence and that of his alleged Australian partner to be satisfactory on issues such as when they started "going out", when they became sexually involved, whether the applicant's partner shared a flat with another person, where the applicant and his partner spent private time together and how long they had known each other;

b) the Tribunal found:

> *... the inconsistencies between the evidence provided by the applicant and* [the applicant's alleged partner] *were numerous, significant and cast serious doubt on the applicant's credibility as well as the credibility of* [the applicant's alleged partner]. *The inconsistent nature of the evidence provided by the applicant and his witness suggests that the applicant is prepared to manufacture and tailor evidence in a manner which achieves his own purpose. The Tribunal is of the view that the evidence regarding a homosexual relationship between* [the applicant's alleged partner] *and the applicant is fabricated and designed to strengthen the applicant's claims against* [sic] *his protection visa application.* (CB 180);

c) the Tribunal did not accept a psychologist's report submitted by the applicant as evidence of the truth of the applicant's claims noting that the report was entirely based on what the applicant had himself told the psychologist, it did not provide any information on the current status of the applicant's allegedly post trauma symptoms or their presence in the applicant, and it was not clear to the Tribunal whether psychology was able to comment on the validity of the applicant's claim to have a homosexual sexual orientation;

d) the applicant's lack of involvement with homosexual groups in Australia and lack of attendance at gay activities, in the context that he had been a practising homosexual in Nigeria for most of his life and had actively sought sexual partners, cast doubt on the genuineness of his claims concerning his sexual orientation;

e) as to the applicant's involvement in "Acceptance Sydney for Gay and Lesbian Catholics Inc" of which the applicant was stated to be a financial member, no details of his involvement in that group was provided other than allegations that he attended the group's meetings. The Tribunal was of the view that the applicant's limited involvement with Acceptance was designed to overcome the concerns expressed by the first Tribunal and to strengthen his case. The Tribunal concluded that s.91R(3) required that the conduct be disregarded saying that, given the applicant's lack of credibility and the unreliability of his evidence, the Tribunal was

not satisfied that his conduct in Australia was undertaken otherwise than for the purpose of strengthening his claim to be a refugee within the meaning of the Convention;

f) an extensive search of available sources by the Tribunal found no information on the necklacing incident in Lagos in March 2005, In the Tribunal's view, it would have been reasonable to have expected that a violent incident of this sort in March 2005 would have been mentioned in local newspapers and the fact that it was not cast doubt on the veracity of the applicant's claims in this regard.

10. In essence the Tribunal found:

> *The totality of the applicant's oral evidence shows a propensity to exaggerate and tailor his evidence in a manner which achieves his own purpose. For all the above reasons the Tribunal did not find the applicant to be a credible and truthful witness. The Tribunal does not accept that the applicant is a practising homosexual and does not accept any of the applicant's claims that flow from his claim to be a practicing* [sic] *homosexual.* (CB 181)

Proceedings in this Court

11. The grounds of the application were pleaded as follows:

> *The Tribunal committed jurisdictional error of law by failing to notify the applicant, in the manner prescribed by s 424A of the Act, of information which it considered to be part of the reason for affirming the decision under review.*
>
> …
>
> *The Tribunal erred by limiting its consideration of the social group to which the applicant claimed to belong to "practising homosexuals" as opposed to homosexuals in general.*

12. Dealing with each of these grounds in turn:

The Tribunal breached s.424A of the Act

13. The applicant particularised this allegation in the following way:

The Tribunal took into account the results of what it called "an extensive search of the available sources, including a number of Nigerian news sources" which it said resulted in a finding of "no information on a necklacking [sic] *incident in Lagos in March 2005". The results of that search were information which the Tribunal considered to be a part of the reason for affirming the decision under review, and was not information of a type covered by subsection 424A(3).*

14. The applicant referred the Court to paragraph numbered 4 of the s.424A letter dated 19 February 2007 which stated:

No information on a necklacing incident in Lagos in March 2005 was found amongst the extensive sources consulted by the Tribunal. This is relevant because the Tribunal may draw an adverse credibility finding on the basis that the evidence is not supported by independent country information consulted by the Tribunal. (CB 139)

The applicant submitted that the Tribunal arrived at its decision based on information different from that which was set out in the s.424A notice. This new information, he submits, is found in the Tribunal's decision of CB 181 where it said:

Third, an extensive search of the available sources, including a number of Nigerian news sources, by the Tribunal found no information on a necklacking [sic] *incident in Lagos in March 2005. It is possible that the precise reasons for a necklacking* [sic] *incident or the sexual orientation of the victim involved might not be reported. It is also possible that as the applicant's adviser suggested such an incident "is not likely to attract widespread publicity". However, in the Tribunal's view it would be reasonable to expect that a violent incident involving necklacing in March 2005 would have been mentioned, even attentively, in the local newspapers. The absence of such information in the sources consulted casts doubt on the veracity of the applicants'* [sic] *claims in this regard.* (CB 181)

15. The applicant submitted that the Tribunal's reliance upon the absence of any mention in "local newspapers" of anything relating to the necklacing incident amounted to a breach of s.424A(1) because the applicant should have been put on notice that the Tribunal had looked for information in local news outlets but had found nothing

16. The first respondent submitted that what the applicant had identified was not "information" but a "gap" in the sense discussed in *VAF v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] 206 ALR 471 at 476-477 and by the High Court in *SZBYR v Minister for Immigration & Citizenship* [2007] HCA 26 at [18]. As Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ said in *SZBYR's case* at [18]:

> *However broadly "information" be defined, its meaning in this context is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence. The appellants were thus correct to concede that the relevant "information" was not to be found in inconsistencies or disbelief, as opposed to the text of the statutory declaration itself.*

17. I accept the first respondent's submissions on this element on this ground. The fact that information was not located amounts to an absence of evidence as identified by their Honours in *SZBYR's case*. Consequently, the Tribunal was under no obligation to put the applicant on notice of the specific fact that evidence corroborating his allegation had not be located in Nigerian media sources.

18. The applicant further submitted that when, in the s.424A(1) letter, the Tribunal made reference to extensive sources and the absence from independent country information of any evidence supporting the allegation of necklacing, the Tribunal was not referring to information sources such as local newspapers but, rather, to sources such as reports by the United States Department of State and similar entities. He submitted that local Nigerian sources did not fall within the class of material commonly described as independent country information and thus the reference to such information in paragraph 4 of the s.424A letter impliedly excluded material which might be found in local Nigerian news sources. The applicant's submission was that the Tribunal's failure to find any information in the local Nigerian news sources was itself information which ought to have been notified pursuant to s.424A(1) but was not.

19. The first respondent submitted, relying on what their Honours said at [17] in *SZBYR's case,* that the s.424A notice in this case was analogous to the prior inconsistent statement discussed in *SZBYR's case* which

was held not to be the reason, or part of the reason for affirming the decision under review" because those portions of the statutory declaration did not contain a rejection, denial or undermining of the appellants' claims to be persons to whom Australia owed protection obligations. Consequently, the first respondent submitted that the information in question was not something which triggered the operation of s.424A(1).

20. The first respondent also submitted that, were he wrong on that point, nevertheless, the reference to independent country information in s.424A(1) notice should be read as encompassing the Nigerian news sources referred to in the Tribunal's decision. The first respondent submitted that the s.424A(1) notice referred generally to the lack of support for the applicant's claim regarding the necklacing incident and the reference in the Tribunal's decision to the local Nigerian news sources was no more than reference to some of the information resources referred to in s.424A(1) notice. The first respondent submitted that where the notice referred to "independent country information", that term should not be interpreted as a term of art but as a general term which encompasses the product of research about a country. That is to say, the information referred to by the Tribunal in its decision was nothing more than a subset of the information it referred to within its s.424A(1) notice and to view the Tribunal's decision otherwise would be to subject it to unduly close scrutiny.

21. Having considered the arguments advanced by the parties on this subject I find that there has been no breach by the Tribunal of its obligations pursuant to s.424A(1) in the second respect advanced. Although I do not accept that the s.424A(1) notice is analogous to the prior inconsistent statement discussed in *SZBYR,* I am, nevertheless, of the view that information referred to by the Tribunal in its decision was simply a subset of the information referred to in the s.424A(1) letter.

22. The analogy with the *SZBYR* document is a false one because in that case the question was whether inconsistencies between the original statutory declaration and subsequent oral evidence at the Tribunal hearing meant that conclusions drawn from those inconsistencies made the information in the statutory declaration information attracting a s.424A(1) obligation simply because it differed from the evidence

subsequently given at the Tribunal hearing. In this case the s.424A notice was not itself information and neither was the fact that it did not state specifically that Nigerian media sources did not corroborate the applicant's allegations. Moreover, it could not be said that the s.424A(1) letter contained information supportive of the applicant's claim such as was seen in the statutory declaration in *SZBYR's case.*

23. In relation to the conclusion that the information referred to by the Tribunal in its decision was no more than a sub-set of the information referred to in the s.424A notice, it is important to compare the actual words used by the Tribunal in the two documents identified by the applicant. In the s.424A(1) letter, the Tribunal says that no information on a necklacing incident in Lagos in March 2005 was found "amongst the extensive sources consulted by the Tribunal". In its decision, the Tribunal refers to having made "an extensive search of the available sources, including a number of Nigerian news sources" where the Tribunal found no information on a necklacing incident in Lagos in March 2005. A comparison of these words indicates that the Tribunal was referring to the same thing. The fact that the Tribunal referred to "independent country information" in the s.424A(1) notice is no more than a shorthand term for certain information sourced from disinterested parties. Media and journalistic sources are included in that shorthand term and to narrow the range of sources falling within this class of documents to ones as such are produced by the United States Department of State, the United Kingdom Home Office or the Australian Department of Foreign Affairs and Trade would be impractical and artificial. Whatever may have been the applicant's subjective understanding of what the Tribunal was saying in its s.424A(1) notice, objectively, the term "independent country information" cannot be constrained in the way the applicant submits.

24. For these reasons, no breach of the Tribunal's s.424A(1) obligations has been demonstrated.

The Tribunal erred by wrongly characterising the relevant particular social group

25. The applicant submitted that the Tribunal's misunderstanding of the task before it was exemplified by the following passage in its decision record:

> *Based on the available evidence, the Tribunal accepts that the applicant is a national of Nigeria. The Tribunal also accepts that homosexuals constitute a particular social group in Nigeria for the purposes of the Convention. However, based on the impression the Tribunal has formed of the applicant's credibility, the Tribunal does not accept that he was a practising homosexual in Nigeria or that he practises homosexuality in Australia.* (CB 179)

26. The applicant submitted that the Tribunal was there identifying, and doing so correctly, that the particular social group of which the applicant claimed membership was homosexuals in Nigeria. However, he submitted, the Tribunal erred by testing the applicant's claim to fear persecution not against membership of that group but against a subset of that group, namely "practising homosexuals". The applicant submitted that the basis of his fear was his homosexuality, not whether he practised it.

26. The applicant referred to passages reproduced in the Court Book at CB 19 and 75 where the applicant articulates his fear in terms of his sexual orientation rather than in terms of him being a "practising homosexual". Further, in his statutory declaration dated 25 November 2005 submitted to the Tribunal, (CB 73-8) he says at paragraph 8 (CB 73-74):

> *I claim that I am outside my native country and I am unwilling to return to it because of a well founded fear of being persecuted for reasons of my sexual preference as a gay or homosexual man. My claim for refugee status on the basis of persecution is also based on my "membership of a particular social group", namely gay man* [sic] *in Nigeria.*

27. The applicant submits that the entirety of that statement stresses a claim based on sexual orientation rather than a fear of persecution based on being a "practising homosexual".

28. The applicant further submitted that at no part of the Tribunal's decision does it make a finding whether the applicant was, in fact, a homosexual. The limit of its finding on this category of issue was that he was not a "practising homosexual". The applicant submitted that by limiting its finding to whether the applicant was a "practising homosexual", the Tribunal failed to address the question of whether, were the applicant's claimed sexuality to become known, notwithstanding that he was found not to be a "practising homosexual", this would lead to persecution. The applicant submitted that having identified the relevant particular social group as homosexuals in Nigeria, to have failed to consider whether the applicant had a well-founded fear of persecution on the basis of his homosexuality *simpliciter* meant that the Tribunal had failed to discharge its function and that this amounted to jurisdictional error. The applicant submitted that this conclusion was open regardless of the fact that the Tribunal concluded that the applicant exaggerated and tailored his evidence and found him not to be a credible and truthful witness.

29. The first respondent submitted that, in fact, the applicant's claims did not distinguish between him being a homosexual and being a "practising homosexual" and that this was to be seen at paragraph 10 CB 19; at CB 74 where the applicant states "my claimed fear of persecution is based on being actively engaged in a same sex relationship with another man"; and at paragraphs 29 and 31 at CB 77 where the applicant talks of being attacked for his sexual desires and it not being reasonable to expect him to behave discreetly so as to reduce the risk of persecution as a homosexual.

30. The first respondent submitted that the applicant's identification of himself was as a man actively involved in homosexual relationships and that this was the context in which the claim was considered by the Tribunal. The first respondent further submitted that the totality of the applicant's claims were rejected by the Tribunal which, given the way the applicant articulated his claim, meant that what was being rejected was not only a claim to be a "practising homosexual" but included the underlying allegation that he was, in fact, a homosexual male. It was submitted that although the literal finding was that the relevant social group was homosexuals in Nigeria, in reality the ultimate finding went beyond that because the applicant was disbelieved generally.

31. The Tribunal's decision touches on the question of the applicant's homosexuality where it rejects the helpfulness or usefulness of the psychologist's report provided to it by the applicant. The Tribunal expressed itself unable to accept the report as evidence of the truth of the applicant's claims, some of which concerned his alleged homosexual orientation. The Tribunal also questioned the applicant's lack of active involvement in the Sydney gay community, expressing the view that his evidence on the subject cast doubt on the genuineness of his claims in relation to his sexual orientation. The Tribunal followed that observation with a conclusion that the applicant's involvement in Acceptance Sydney for Gay and Lesbian Catholics would be disregarded on the basis that it was not satisfied that this conduct had been undertaken otherwise than for the purpose of strengthening the protection visa claim.

32. It would be wrong to over-scrutinise the Tribunal's decision with a view to identifying nice distinctions in terminology but that does not alter the fact that the Tribunal failed to consider one element of the applicant's claim. Although it is apparent that the applicant's claimed fear of persecution was pressed in the context of him wishing to have a sexual life without fear of persecution, the passage from his statutory declaration quoted above at [26] indicates that the fact of his claimed homosexuality was also a basis of his claim. The materials submitted by him in support of his application for a protection visa included information indicating that sexual orientation alone could be the basis of persecution in Nigeria. However, this was not properly considered by the Tribunal.

33. The instances of persecution which the applicant claimed befell him in Nigeria all turned on him engaging publicly in sex or acts of affectation with other males. Because of this, what he claims to have suffered did arise out of him being a "practising homosexual". However, his stated fear was not limited in the same way and it extended to his membership of a particular social group which the Tribunal recognised, namely homosexuals.

34. Because the applicant's claim was principally made in terms of him wishing to lead a life as a "practising homosexual" the Tribunal seems

not to have considered it necessary to go further than considering this claim.

35. By failing to go beyond the applicant's claimed life as a "practising homosexual" to consider the potential for him having a well-founded fear of persecution by reason of his claimed membership of the particular social group made up of Nigerian homosexuals, the Tribunal erred.

Conclusion

36. Jurisdictional error on the part of the Tribunal has been demonstrated.

37. Consequently, the Tribunal's decision will be set aside and the matter remitted to it to be determined according to law.

I certify that the preceding thirty-seven (37) paragraphs are a true copy of the reasons for judgment of Cameron FM.

Associate:

Date: 5 October 2007