FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZBQS v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 812*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming religious persecution in Bangladesh – whether the Tribunal breached ss.424 or 425 of the *Migration Act 1958* (Cth) considered – whether any other jurisdictional error considered.

Evidence Act 1995 (Cth), s.160
Migration Act 1958 (Cth), ss.420, 424, 424A, 422B, 424B, 425, 426, 429A, 441A, 441C
Migration Regulations 1994 (Cth)

SZAYW v Minister for Immigration (2006) 230 CLR 486
SZKTI v Minister for Immigration [2008] FCAFC 83

Applicant:	SZBQS
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 698 of 2008
Judgment of:	Driver FM
Hearing date:	17 June 2008
Date of Last Submission:	6 August 2008
Delivered at:	Sydney
Delivered on:	22 August 2008

REPRESENTATION

The Applicant appeared in person

Counsel for the Applicant providing post hearing submissions: Mr J R Young

Counsel for the Respondents: Ms S Sirtes

Solicitors for the Respondents: Sparke Helmore

ORDERS

(1) The application is dismissed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 698 of 2008

SZBQS
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. This is an application to review a decision of the Refugee Review Tribunal ("the Tribunal"). The decision was handed down on 26 February 2008. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa. The applicant is from Bangladesh and had made claims of religious persecution based on his Ahmadi or Qadiani faith. Background facts relating to the applicant's protection visa claims and the various decisions on them[1] are set out below. These facts are derived from written submissions filed on behalf of the applicant and the Minister.

2. On 13 April 2004 the applicant, a (now) 34 year old citizen of Bangladesh arrived in Australia (court book ("CB") page 16). On 24 May 2000 he applied to the (then) Department of Immigration and Multicultural Affairs

[1] There have been four Tribunal decisions in this matter

("Department") pursuant to the *Migration Act 1958* (Cth) ("the Migration Act") for a Protection (Class XA) visa (CB 1 to 36).

3. On 25 August 2000, a delegate of the first respondent refused the grant of a protection visa (CB 37 to 43). On 25 September 2000 the applicant applied for a review of the delegate's decision by the Tribunal (CB 44 to 47). On 3 October 2000, the Tribunal invited the applicant to a hearing (CB 48 to 49). The Tribunal affirmed the delegate's decision.

4. On review, the matter was remitted to the Tribunal by consent on 29 April 2003 by his Honour Jacobson J of the Federal Court of Australia (CB 73). Following remission of the matter the (newly constituted) Tribunal made a decision on 23 September 2003 (CB 79-90) which was remitted by consent on 23 March 2006 by his Honour Moore J of the Federal Court of Australia (CB 91 to 92).

5. Following remission of the matter the (newly constituted) Tribunal made a decision on 22 June 2006 (CB 186 to 203) which was remitted by Federal Magistrate Scarlett on review on 22 June 2007 (CB 204).

6. On 26 February 2008 a fourth (differently constituted) Tribunal handed down its decision made on 4 February 2008, affirmed the delegate's decision (CB 335 to 359).

The Tribunal's decision

7. The Tribunal:

   a) Found that there were good reasons not to accept much of the applicant's evidence on credibility grounds, having discussed that eventuality with the applicant at hearing and put the credibility concerns to the applicant by way of s.424A letter, particularly in regard to the letters from the Ahmadiyya Muslim Jamat Bangladesh (CB 351.7 to 352.5).

   b) Found there were "*numerous inconsistencies in the applicant's evidence*" as given to the various Tribunals (the applicant having attended four hearings corresponding with each of the reviews) (CB 352.5 to 356.8.).

c) Summarised the matters in respect of which the applicant gave inconsistent evidence (CB 356.9 to 356.6). The Tribunal found that the inconsistencies had a double impact on the applicant's claims namely they cast doubt on the veracity of the claims themselves and simultaneously cast doubt on his credibility by reason of the fact the Tribunal considered him not to be telling the truth (CB 356.6).

d) Noted that the applicant had not responded to the Tribunal's s.424A letter within the extended period granted to him, which left the Tribunal without any explanation other than those proffered at hearing, namely that he was not mentally well and had difficulty remembering certain dates and events (CB 357.7). The Tribunal found it had no evidence before it to support the assertion the applicant had not been well at the hearing. Moreover, the Tribunal noted (and put to the applicant at hearing) that he seemed to be able to remember dates and events when it suited him (CB 357.8).

e) Noted that the fact the applicant's parents were still at the address at which they had resided throughout all the material events of the applicant's claims, cast doubt on his claims that his family were being persecuted in Bangladesh by reason of their religion (CB 358.3).

f) Did not accept the applicant's claims that he was an adherent of the Qadiani or Ahmadi faiths, based upon the information in the letter from the Ahmadiyya Muslim Jamaat Bangladesh and the parents' address (CB 358.5).

g) Did not accept there was a real chance that the applicant would be persecuted for reasons of his or his family's real or perceived religious adherence or political views.

h) Did not accept there was a real chance that the applicant would be persecuted by reason of his membership of a particular social group comprised of various permutations of being a shopkeeper/businessman/prosperous/Qadiani or Ahmadi/SNP supporters (CB 358.8).

i) Did not accept there was a real chance that the applicant would be persecuted in Bangladesh in the reasonably foreseeable future by reason of his real or perceived opposition to the caretaker government (CB 358.9 to 359.3)

The application

8. The applicant relies upon a show cause application filed on 25 March 2008. That application sets out the following grounds:

> *1. The Second Respondent did not consider an integer of the applicant's claims namely that a number of occasions he was attacked by the extreme Sunni Muslims in Bangladesh.*
>
> *2. The Second Respondent failed to allow the applicant further time to produce documents and these documents were determining factor of the applicant's matter. The Second Respondent made an error not providing an opportunity to file relevant documents.*
>
> *3. The Second Respondent failed not considering the current situation prevailing in Bangladesh.*

Submissions

9. Both the applicant and the Minister filed written submissions. Those of the applicant were filed on 16 June 2008 and those of the Minister were filed on 10 June 2008. In relation to ground 1, the applicant refers to an alleged incident in 1998 when he says he was kidnapped by activists of the Awami League, an incident on 18 March 1999 when he says he was beaten while returning home from a mosque and an incident on 20 January 2000 when he was returning home. The applicant asserts that the Tribunal failed to consider those incidents. Secondly, the applicant submits that the Tribunal erred in failing to give him additional time requested to respond to the letter sent to him by the Tribunal pursuant to s.424A of the Migration Act. Thirdly (and somewhat confusingly), the applicant asserts that the Tribunal failed to consider the current situation in Bangladesh and refers to the military coup which took place on 11 January 2007. Strangely, the applicant also asserts that the Tribunal erred in not limiting its consideration to his religious and social group claims.

10. In relation to ground 1, the Minister makes the following submissions:

> *The applicant's religious claims centred around his alleged adherence to the Qadiani/Ahmadi faiths. He claimed to have been attacked on a number of occasions by Sunni Muslims and Sunni Muslim groups under the auspices of Jamaat-e-Islami.*
>
> *A plain reading of the Tribunal's decision shows that the Tribunal considered these claims at length. Ultimately, it found there to be multiple inconsistencies in the applicant's evidence relating to the claims (CB 356.9 to 357.5) and found that he:*
>
> *a) was not a religious adherent as claimed; and*
>
> *b) had not been perceived to be such and/or persecuted by any persons in Bangladesh for that reason.*
>
> *If the applicant's complaint is that the Tribunal did not make specific findings in relation to every claimed attack by Sunni Muslims, then such a complaint does not give rise to a jurisdictional error.*
>
> *In* WAEE v Minister for Immigration and Multicultural and Indigenous Affairs *(2003) 75 ALD 630 at [46] the Full Court made plain that the Tribunal is not required to refer to every piece of evidence, and went on to state the following at [47]:*
>
> > The inference that the tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected.
>
> *Clearly, it is implicit in the findings referred to in sub-paragraphs [10(a)] & [10(b)] above, that if the applicant was neither an adherent, nor perceived to be, nor persecuted by reason of his religion in Bangladesh, that the Tribunal has also rejected the sub-species of claim that he was attacked by Sunni Muslims.*

11. In relation to ground 2, the Minister submits:

> *On 20 November 2007 the Tribunal wrote to the applicant pursuant to section 424A of the Act (CB 320 to 326), requesting that the response be received by 4 December 2007. On 3*

December 2007 the applicant wrote to the Tribunal requesting 3 further weeks to respond (CB 327).

On 4 December 2007 the Tribunal responded and granted an extension to 10 January 2008 (CB 329).

A further request for an extension of time was made on 8 January 2008 (CB 330), which the Tribunal declined (CB 331). Moreover, the Tribunal's decision was not handed down until 26 February 2008 which in essence means that had the applicant forwarded anything to the Tribunal, it would have been obliged to consider the information. Nothing was received.

In the circumstances, the first respondent submits that:

a) The times and extension granted were more than reasonable;

b) The Tribunal was, in fact, under no obligation to have granted one extension to the applicant, let alone two; and

c) The applicant in fact did not seek any further time to provide documents. Neither extension request made reference to time to obtain documents, rather they simply asked for further time to comment. The second letter made reference to offices being closed in Bangladesh and the applicant not having obtained a migration agent.

12. In relation to ground 3, the Minister submits:

That being so, the bare allegation that is made cannot be born out. The main aspect of the applicant's claim which turned upon the social/political climate in Bangladesh was clearly the claim to fear persecution by reason of the applicant's opposition to the caretaker government. The Tribunal consulted independent country information in order to consider the political landscape in Bangladesh.

Otherwise the decision turned upon the veracity of the applicant's own claims and the Tribunal's view in relation to his credibility.

13. At the trial of this matter on 17 June 2008 the applicant declined to make oral submissions and relied upon his written submissions. Counsel for the Minister, while relying on her written submissions, drew attention to the recent decision of the Full Court in *SZKTI v Minister for Immigration & Citizenship* [2008] FCAFC 83 and sought the opportunity to make additional written submissions concerning the

possible application of that decision to this case. I gave leave for the parties to file additional written submissions on that subject by 31 July 2008. At the request of the parties, I also granted an extension of time for the filing of the submissions.

14. The applicant, through counsel, made additional written submissions on 1 August 2008. By reference to the decision of the Full Federal Court in *SZKTI* and later decisions of the Federal Court that have commented on it, the applicant submits that the Tribunal breached s.424(2) of the Migration Act because there is no evidence that the approach to the Bangladesh National Ameer (through the Ahmadiyya Muslim Association Australia) was in writing. The applicant also asserts a breach of s.425 of the Migration Act by reference to the decision of the High Court in *SZBEL v Minister for Immigration* (2006) 228 CLR 152.

15. Additional written submissions were filed by the Minister on 6 August 2008. Relevantly, the Minister submits as follows:

    a) there is no substance to the asserted breach of s.425 and the submissions made are outside the scope of the leave granted;

    b) in relation to ss.424, 424A and 424B, this case can be distinguished from *SZKTI* (and *SZKCQ*[2]) because:

        i) the Ahmadiyya Association is not a "person" for the purposes of s.424B(1);

        ii) the Tribunal has an implied power to gather information in addition to the powers conferred by s.424;

        iii) if s.424 applies, notwithstanding that the Tribunal did not comply with all elements of s.424B the circumstances of the present case are distinguishable; and

    c) if s.424B was breached giving rise to jurisdictional error, relief should nevertheless be refused in the exercise of discretion.

[2] *SZKCQ v Minister for Immigration* [2008] FCAFC 119

Reasoning

16. There is no substance to the grounds of review in the application. It is plain from the Tribunal decision[3] that the Tribunal considered each of the alleged attacks or kidnapping referred to by the applicant. Further, even if that were not so, the Tribunal rejected the applicant's fundamental claim to be an adherent to the Ahmadi or Qadiani sect based upon inconsistencies in the applicant's evidence and the information received from the National Ameer of the Ahmadiyya Muslim Jamaat Bangladesh that a document purportedly from the Ameer in support of his claim to be a member of the sect was a fabrication. Having rejected the applicant's fundamental claim to be an Ahmadiyya, it was unnecessary for the Tribunal to deal with each and every assertion of harm suffered by the applicant because he was an Ahmadiyya.

17. In relation to the second ground, the applicant was given ample time to respond to the s.424A invitation. The repeated requests for more time from the applicant were on their face not very convincing and the Tribunal adopted a generous attitude. In any event, the applicant made no attempt to deal with the issues raised in the s.424A letter up to the time the Tribunal decision was handed down. Neither has the applicant put forward anything to indicate what response he might have made.

18. The third ground has no substance. The Tribunal decision records that the applicant's representative at the hearing submitted that the caretaker government in Bangladesh was illegal and that it was violating various human rights. The applicant himself said that the caretaker government was an illegitimate government, that there was no safety for the people there and that if you opened a newspaper you would see that everyone was killing and murdering everyone there[4]. The issue having been raised by the applicant, it was necessary and appropriate for the Tribunal to deal with it. The Tribunal was entitled to have regard to country information from the Australian Department of Foreign Affairs and Trade about the situation in Bangladesh in dealing with that issue. The Tribunal cannot be criticised for dealing with any potential

[3] CB 352-356
[4] CB 358

Convention nexus in relation to the applicant's claims, not limited as specifically raised by the applicant.

19. I reject the contention in the post hearing submissions by counsel for the applicant that s.425 was breached in this case. I accept the submissions of counsel for the Minister that it is sufficiently clear from the record in the Tribunal decision of what occurred at the hearing conducted by the Tribunal that the applicant was put on notice that his claim to be an Ahmadi was subject to question. The Tribunal decision records[5]:

> ***I asked the applicant if he had any objection to the Tribunal checking with the Ahmadiyya Muslim Association Australia to ascertain whether he was in fact an Ahmadi as he claimed.*** *The applicant's representative suggested that the Tribunal should contact the National Amir in Bangladesh. I noted that this was what the Ahmadiyya Muslim Association Australia would do: they would check with the National Amir in Bangladesh and they would also be able to check if the letter which the applicant had produced to the Tribunal purporting to be from the National Amir was genuine.* ***The applicant said that he did want the Tribunal to check because the Tribunal would find out that he was an Ahmadi.*** (counsel's emphasis retained)

20. The significant issue in this case is whether the Tribunal decision is vitiated by a failure to comply with the requirements of s.424B of the Migration Act. I agree with, and adopt for the purposes of this judgment, counsel for the Minister's submissions dealing with the reasoning of the Full Federal Court in *SZKTI*:

> *In* SZKTI *the Tribunal sought comment on certain information and asked that the applicant provide additional information. The request was made 3 months after the Tribunal hearing. In response the appellant provided,* inter alia, *a letter from two elders of a Local Church in Sydney, which included a telephone number for one of the elders. In forwarding the letter to the Tribunal, the appellant told the member that the Tribunal should contact the elders if it had any questions about his religious activities in Sydney. The Tribunal waited another two months before calling one of the elders. Part of the information obtained by questioning the elder by telephone formed part of the Tribunal's decision in affirming the delegate's decision.*

[5] CB 346

In considering the statutory construction of section 424 of the Act, the Court summarised (see SZKTI *at [35]) the question before it as being whether:*

> the *[T]*ribunal could simply telephone [the elder] and ask him questions without having followed the procedures in ss 424(2), (3) and 424B of the Act.

The Full Court concluded that the Tribunal is empowered to obtain information from various sources in addition to any material or evidence it obtains at a section 425 hearing: see SZKTI *at [37]. However, when section 424(2) is engaged the Tribunal is bound to follow the procedures in sections 424(3) and 424B: see* SZKTI *at [3]. Accordingly, the Full Court found that the telephoning of the church elder constituted an invitation to provide information and, therefore, section 424(2) was engaged by the Tribunal.*

The Full Court went on to reject the Minister's contention that section 424(2) was an alternative method for obtaining information to that contained in section 424(1) of the Act: see SZKTI *at [41]*.

The Court emphasised the rationale for its construction of the section was that:

> The formality of compliance with ss.424(3) and 424B, ensures that the information that the *[T]*ribunal receives from such a person is given by him or her in the knowledge that he or she has been formally invited to give it. One reason why a person may want such a formal invitation is that he or she may have an adverse comment to make about the applicant for review and wish to have the protection of an occasion of a formal statutory enquiry, as opposed to a casual telephone call.[6]

Facts potentially engaging SZKTI

In the present case, the Tribunals wrote to the Ahmadiyya Association (CB 316) seeking particular information.

In so writing, the Tribunal arguably did not comply with the requirements of sections 424B(1) or 424B(2), which provide:

> (1) If a person is:

[6] *SZKTI* at [4]

(a) invited under section 424 to give additional information; or

(b) invited under section 424A to comment on or respond to information;

the invitation is to specify the way in which the additional information, or the comments or the response, may be given, being the way the Tribunal considers is appropriate in the circumstances.

(2) If the invitation is to give additional information, or comments or a response, otherwise than at an interview, the information, or the comments or the response, are to be given within a period specified in the invitation, being a prescribed period or, if no period is prescribed, a reasonable period.

21. The invitation issued by the Tribunal was in the following terms:

Wednesday, 12 September 2007

Mahmood Ahmed
Amir & Missionary In-Charge
Ahmadiyya Muslim Association of Australia
Al Masjid Baitul Huda
Lot 20 Hollingsworth Road
Marsden Park NSW 2765

Ref. Country Information Request BGD32360

Dear Mr Mahmood Ahmed,

A Member of the Australian Refugee Review Tribunal (RRT) has requested your assistance in regard to the claim of an Applicant to the Tribunal who claims to be a member of the Ahmadiyya faith. As you know, the RRT is an independent Tribunal set up by legislation to undertake merit review of applications for refugee status of persons in Australia; the Tribunal would be grateful for the assistance of the AMAA in verifying the claim of the Applicant with the office of the national Amir in his country of origin.

Please receive this letter as a request for advice on whether the following individual is known to the Ahmadiyya Muslim Jamaat Bangladesh.

Name: [applicant's name]

Date of birth: [applicant's date of birth]

Address: [applicant's address]

Father's name: [applicant's father's name]

Grandfather's name: [applicant's grandfather's name]

Additional query: The Applicant has supplied two letters from the office of the National Amir of the Ahmadiyya Muslim Jamaat Bangladesh confirming the Applicant's membership of the Ahmadi faith (the first was issued in July 2000 and the other in September 2007). Please ask the office of the Bangladesh National Amir to confirm the authenticity of these letters.

If you have any questions about this request, please do not hesitate to contact me, either by Email (matthew.tubridy@mrt-rrt.gov.au) or by telephone (+61 2 9276 5461) or fax (+61 2 9276 5599).

Please be aware that any information you provide may form part of the information used by the Tribunal to review applications for refugee status. Through use of the information, your identity and that of your organisation may be disclosed to applicants, their advisers, the Australian Department of Immigration and Multicultural Affairs, or otherwise become publicly available.

Thank you very much for your time and I hope you are able to provide some assistance.

Yours sincerely,

Matthew Tubridy, Senior Researcher, Refugee Review Tribunal

22. I reject the Minister's contention that s.424B(1) does not apply because the Ahmadiyya Association is neither a body corporate nor a body politic nor a natural person. First, it may be an unincorporated association under State law. More importantly, it is obvious that the Tribunal was seeking information from persons with authority to respond on behalf of the Association. It was to those "persons" that the request was directed. In particular, the request was directed to Mr Mahmood Ahmed, the Amir and Missionary In-Charge of the Ahmadiyya Muslim Association of Australia.

23. I accept that the Tribunal has power to gather information additional to that conferred by s.424. Division 4 of Part 7 of the Migration Act

provides additional means, for example in ss.424A, 426 and 429A. Further, I accept the Minister's submission that in *SZAYW v Minister for Immigration* (2006) 230 CLR 486 the High Court accepted at [7] and [23] that the Tribunal possessed implied powers to regulate its proceedings in addition to its statutory powers. However, the High Court did not in that case say that those implied powers extended the operation of the statutory powers to obtain information bearing upon the outcome of an application. In my view, the request to the Australian Ahmadiyya Association was a request falling within the purview of s.424 and, on the authority of *SZKTI* and *SZKCQ* the Tribunal was bound to meet the requirements of s.424B in making that request.

24. Importantly, in this case the request was made in writing. That is a considerable distinguishing feature of this case. While it is true that the letter did not explicitly specify the way in which the information requested was to be given, the request implicitly required a written response, given that the request was a formal one in writing. Of course, the request had to be in writing, but it was expressed as a formal request for information on advice, which in my view could have no interpretation other than as a request for a written response. The scheme of s.424B is to distinguish between invitations calling for a written response and invitations calling for an oral response at an interview. In the absence of an invitation to attend an interview, it is in my view clear from the letter that a written response was called for. The obligation to "specify" the manner of the response contained in s.424B(1) is not in my view breached when it is obvious from the invitation what manner of response was called for. A written response was given[7]. Further, the letter specifically asked Mr Ahmed to make inquiries about the applicant to the Office of the Bangladesh National Amir to confirm the authenticity of letters purportedly from that body furnished by the applicant. I reject counsel for the applicant's contention that the approach by the Australian Association to the Amir in Bangladesh was itself a s.424 request that was required to be in writing. In my view, it is sufficiently clear from the Tribunal's letter that the response called for was a written response providing information gathered from the Ahmadiyya organisation in Bangladesh

[7] CB 317-318

about the authenticity of the applicant's documents and about the accuracy of his claim to have been an Ahmadi in Bangladesh.

25. The second issue concerns the absence in the letter to Mr Ahmed of any specified time for a response. Section 424(3) relevantly requires the invitation to be given by one of the methods specified in s.441A. The prescribed methods of giving documents include hand delivery and dispatch by pre-paid post or other pre-paid means. In the case of postal dispatch, the document must be dispatched within three working days of the date of the document to the last address for service, or residential or business address, **provided to the Tribunal by the recipient in connection with the review**. In the present case the request was sent by post. There is nothing to indicate that the Australian Ahmadiyya Association provided its address to the Tribunal in connection with this review. That result might give rise to the question whether the Tribunal breached its obligations by not requesting the address of the Association from it prior to the despatch of the letter. That obligation makes little sense when the address was almost certainly already known to the Tribunal. In my view s.441A(4) was drafted to impose an obligation in relation to persons identified specifically in relation to a review – not persons regularly contacted by the Tribunal in a range of reviews. The difficulty is that the subsection is not expressed to be so limited. Further, there may be good reason for the Tribunal to periodically confirm an address of a body or person with whom it regularly corresponds. On the other hand, Parliament could not have intended to leave the Tribunal unable to communicate at all except by hand delivery or by the charade of requesting the recipient in each case to confirm the recipient's known address so that a letter could be sent to that address consistently with s.441A(4). That would be absurd.

26. On one view, the absurdity of the application of s.441A to correspondence to persons regularly contacted by the Tribunal suggests that a request for information in such circumstances is not made pursuant to s.424 at all. However, I do not consider that that interpretation is open to me on the basis of the Full Court's decision in *SZKTI* in particular at [52]-[53]. The request for advice went to the heart of the applicant's claims and was a formal step falling within the purview of s.424. Before sending its request to the Association, s.441A(4) relevantly required that the Tribunal confirm the address of

the Association with the Association for the purposes of that review. In the absence of any evidence that that was done I infer that it was not.

27. A consequence of s.441A not being followed is that s.441C(4) does not apply and neither does regulation 4.35 of the *Migration Regulations 1994* (Cth) providing the prescribed periods for the purposes of s.424B(2) of the Migration Act. The prescribed time periods in regulation 4.35 could not, in my view, have any relevant application in the absence of knowledge of when the letter from the Tribunal was received by the Ahmadiyya Association. In the absence of the application of the deemed receipt provision in s.441C(4) the date of receipt was unknown[8]. In those circumstances, there was no prescribed period for a response and there was no obligation on the Tribunal to specify a prescribed period for a response. The non application of a prescribed period for a response is consistent with the Tribunal's silence in its letter to the Ahmadiyya Association about any period for a response. It is also consistent with the fact that the response was awaited until well after the only potentially applicable period of 28 days[9] would be expected to have expired. The response did not reach the Tribunal until three to four weeks after the 28 day period would have expired[10]. In my view, the facts that the Tribunal did not specify any period for a response, and waited until well after any potentially relevant period would have expired in order to get the response, suggest that the Tribunal (correctly) took the view that no period for a response was prescribed and the response was to be given within a "reasonable period" for the purposes of s.424B(2).

28. The final question is whether the non application of s.441C and the prescribed time limits was the only consequence of the failure to follow s.441A(4)? Was that failure itself a jurisdictional error? A jurisdictional error is a breach of an imperative requirement or precondition to the exercise of the power conferred by the statute. The direction of a request under s.424 to an address different from an address given by a recipient for the purposes of the review would in my view be a serious breach of the code of procedure established by the Migration Act, constituting jurisdictional error. But a failure to confirm a previously

[8] I leave out of consideration s.160 of the *Evidence Act 1995* (Cth), which does not bind the Tribunal (s.420(2) of the Migration Act)
[9] see subregulation 4.35(5)
[10] assuming receipt within a week of despatch

known and correct address for the purposes of a particular review, in the knowledge that the recipient will in consequence not be bound by the prescribed time limits for a response, is of a different order altogether. While Parliament intended that the Tribunal must use an address given by a recipient for the purposes of a review, I do not think Parliament intended to deprive the Tribunal of the ability to write to a recipient at an address already known to it, subject to the proviso that the recipient could not be deemed to have received the correspondence, and must be given a reasonable time to respond.

29. I find that, on the facts of this matter, the Tribunal did not commit jurisdictional error by its failure to follow s.424B of the Migration Act in relation to the request to the Ahmadiyya Muslim Association of Australia. It is unnecessary to consider the question of the exercise of the Court's discretion in the event that jurisdictional error had been identified. I find that the decision of the Tribunal is free from jurisdictional error. The decision is therefore a privative clause decision and the application must, therefore, be dismissed. I will so order.

30. As to costs, I will hear the parties, given that they have been put to additional time and expense in the provision of post hearing submissions.

I certify that the preceding thirty (30) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 22 August 2008