FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZJDY v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 1760*

MIGRATION – RRT decision – Russian businesswoman claiming political persecution – disbelieved by Tribunal – information obtained from Moscow embassy – not sufficiently revealed to applicant in s.424A notice – jurisdictional error found – matter remitted.

Migration Act 1958 (Cth), ss.414, 420(1), 422B(3), 424A, 424(1), 424A(1)(a), 424A(1)(b), 425, 427(1)(c), 438

Applicant NAFF of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 221 CLR 1
Elrifai v Minister for Immigration [2005] FMCA 1484, (2005) 225 ALR 307
Minister for Immigration & Multicultural Affairs v SZGMF [2006] FCAFC 138
NADH of 2001 v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 214 ALR 264
Re Refugee Review Tribunal & Anor; Ex parte H (2001) 179 ALR 425
SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs (2006) 231 ALR 592
SZBYR v Minister for Immigration & Citizenship [2007] HCA 26
SZELA v Minister for Immigration & Anor [2005] FMCA 1068
SZEEU v Minister for Immigration & Multicultural & Indigenous Affairs (2006) 150 FCR 214
SZFDE v Minister for Immigration & Citizenship [2007] HCA 35

Applicant:	SZJDY
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2164 of 2006
Judgment of:	Smith FM
Hearing date:	27 June 2007
Date of Last Submission:	3 September 2007

Delivered at: Sydney

Delivered on: 2 November 2007

REPRESENTATION

Counsel for the Applicant: Applicant in person

Counsel for the First Respondent: Mr G 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 handed down on 25 July 2006 in matter N05/52186.

(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 22 August 2005.

(3) The first respondent pay the applicant's costs as agreed or taxed under r.21.02(2)(c) and O.62 of the Federal Court Rules.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG2164 of 2006

SZJDY
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The applicant came to Australia in 2005, and applied for a protection visa on the ground that she feared persecution if she returned to Russia. She claimed she was subject to oppression by the Russian government, especially through its taxation department, due to her association with a prominent company E, which had supported an opposition party in the 2004 elections.

2. A delegate refused the visa on 22 August 2005, and her decision was affirmed by the Refugee Review Tribunal in a decision handed down on 25 July 2006.

3. The Tribunal rejected the credibility of the applicant's claims, partly upon findings based upon its investigations into her claimed business association with company E. The Tribunal accepted that the applicant was a proprietor of a company B, which she claimed had operated as a franchisee or business associate of company E. However, it concluded that she "*had no business arrangement with E or any type of*

employment with E, as claimed", and did not accept that *"the applicant had any business dealings with E"*. It accepted that some high profile businesses who financially supported political parties in Russia suffered harm by being charged with *"fabricated offences"*. However, it concluded that *"the applicant is neither a high profile business person nor a person with an imputed anti-government profile"*.

4. The applicant now asks the Court to set aside the Tribunal's decision, and to order it to reconsider her refugee claims. I can only make these orders if I am satisfied that the decision was affected by jurisdictional error. I do not have authority to decide whether the applicant's refugee claims are true, nor whether she should be granted a protection visa or any other permission to stay in Australia.

5. The applicant has represented herself, and is unfamiliar with the principles of jurisdictional error. Her application and submissions criticised the Tribunal for "fabricating" the evidence upon which it found against her credibility, and suggested that it showed bias against her claims. In part, her arguments relied upon evidence corroborating her claims which was not before the Tribunal, but this was inadmissible for establishing jurisdictional error. She also argued that she was never told the full contents of information obtained by the Tribunal from the Department of Foreign Affairs and Trade ("DFAT"), in particular, information which supported her claimed associations with companies E and B. Moreover, this information was not properly taken into account by the Tribunal when it decided the case.

6. In the course of the hearing, I identified three issues raised by her arguments, and invited further written submissions from the parties on them. They were:

    i) whether the Tribunal made a jurisdictional error by failing to take into account evidence favouring the applicant's credibility, being the evidence from DFAT shown at CB 367, and annexure G to the affidavit of Zoe McDonald sworn 20 June 2007.

    ii) whether the Tribunal failed to comply with obligations under s.424A(1)(b) in its letters at CB 337 and/or CB 356,

by failing to explain or draw to the applicant's attention the favourable information received from DFAT.

iii) whether the Tribunal's reasoning was so unreasonable as to lead to a reasonable apprehension that the Tribunal did not address the applicant's claims with an open mind.

The Tribunal's inquiries

7. The claims accompanying the visa application were narrated in a covering submission by the applicant's migration agent. This was imprecise as to the applicant's business background in Russia, and was not accompanied by any corroborative documents. He said that she *"worked as a project manager in a company"* E which *"consisted of a number of department stores"*. It had a complex structure with *"some parallels with Australian 'franchise' system"*. The top management of E supported an opposition party, as did the applicant. Businesses which made substantial contributions were subject to government oppression. After the 2004 election the applicant's "franchise" had been visited by taxation officers and harassed, and she had been pressured to testify against *"the owner of the business"*. The agent said:

> *Considering that the small business is a part of the large establishment and the fact that such small business (run by a woman) would be more easy target the authorities started fabricating a criminal case to frighten and to force the applicant to give false evidence against the parent company's owner. … The applicant saw no other options but to close her business and flee Russia.*

8. On appeal, the applicant attended a hearing held by the Tribunal on 25 October 2005. She gave the Tribunal a document confirming that E was among the largest retailers in Russia, and a business card naming the applicant as *"project manager"* for business B, described as *"home appliances and electronics"*. She told the Tribunal that E consisted of *"semi-industry subsidiaries"*. She owned *"a B subsidiary"*, which was registered as a company in Berlin. It sold home appliances at its own store in Russia and also supplied B brand products to the E chain of stores. She gave details of financial support given to an opposition party by the director of E and other top management. She organised the

monthly contributions, and made her own donation. She gave more details of the subsequent harassment by tax police.

9. After the hearing, the Tribunal obtained from the Moscow Embassy copies of the applicant's application for a business visitor's visa. In this she had described herself as *"employed"* by E as *"project manager"*. She had attached correspondence from an Australian company addressed to her at E, which proposed meetings *"to discuss the Australian Market and also to explore future mutually beneficial arrangements between E and [the Australian company]"*. Certificates in Russian on E letterhead, had also been submitted.

10. In a letter dated 2 November 2005 ("the first s.424A notice"), the Tribunal invited the applicant to comment upon this information, and also upon information discovered by it on internet sites for E and B. According to the Tribunal's letter, this showed that B *"is a wholesaler of electrical home appliances. B sells its appliances to E and to a number of other retail outlets. It also has a number of service centres. E at its own internet site states that it is dealer of such known manufacturers as "Electrolux", "B…", "LG" and "Dyson"."* The letter also said that a director of E who was contacted by the Moscow Embassy said that *"there is no-one by your name in the company and that he did not sign the certificates you provided to the Department"*. The letter said that the B internet site did not give the addresses shown on the applicant's business card and business visa application. The Tribunal's letter put to the applicant:

> *This information is relevant as it indicates that you were not the franchisee of E trading under the name of B as claimed. It indicates that you were not employed by either B or E. It indicates that you are not a witness of truth. It indicates you have created a number of documents in order to obtain the visa sought.*

11. The Tribunal did not reveal to the applicant the full text of the information which it had received in an email from the Moscow Embassy compliance officer on 20 July 2005. As well as the information put to the applicant, the email made the serious assertion that *"both employment references in her two applications are counterfeit"*. It also said that *"the applicant's bank statements are genuine – this has been confirmed by the respective banks in Moscow"*.

Neither pieces of additional information are referred to in the Tribunal's reasons.

12. The applicant's agent responded to the first s.424A notice on 16 November 2005. As well as answering other points raised in the letter, he said: *"the applicant will provide you with evidence that she was an owner of B"*. In relation to the business structure, he said*: "I wish to note that it was not a typical franchise … The applicant worked as a project manager in a business structure (trading chain) called 'E' but not as a person but as a director/owner of the company B"*.

13. The applicant also wrote to the Tribunal on 13 January 2006. She clarified a misspelling by her agent of "B", maintaining the spelling on her business card. She said that E was *"not operational any longer"*, and because it did not exist, she was unable to obtain evidence from it to confirm that she was the owner of B. She suggested that inquiries could be made in Germany, where it was registered.

14. The Tribunal's second s.424A notice was given to the applicant's agent on 3 February 2006. It said:

> *The Tribunal has information that would, subject to any comments you make, be the reason, or part of the reason, for deciding that you are not entitled to a protection visa.*
>
> *The information is as follows:*
>
> *The Tribunal has contacted the Australian Embassy in Moscow. The Embassy has made enquiries that reveal*
>
> *1. E has a chain of pavilions selling household equipment. The information is relevant as it does not suggest E had franchisees*
>
> *2. E has been recently rebranded to T*
>
> *The information is relevant as it indicates it has not been targeted by the Russian authorities*
>
> *3. There are no reports / indications on the internet that E warehouse was raided by police or closed*
>
> *The information is relevant as it contradicts your claims.*

You are invited to comment on this information. Your comments are to be in writing and in English. They are to be received at the Tribunal by Friday 17 February 2006.

15. Before this letter was sent, emails from compliance officers in Moscow had given the Tribunal significantly more information about E and B, which was never disclosed to the applicant before the Tribunal made its decision. An email sent on 29 December 2005, included the statements:

> *- E has a chain of pavilions selling household equipment in Moscow and other cities in Russia;*
>
> *- Unofficial information on E activities is much more adverse. For example, there is a warning on the website of the Russian representation office of S Co (www. …) saying that "E Co is NOT an official dealer of S as indicated on the E website" (apparently, this information has now been deleted from the E site);*
>
> *- Some Internet fora where people discuss brands represented in Russia have (unofficially) blacklisted both E and B. They say that B brand was made up by E and registered in Germany (maybe Berlin). In reality E buys cheap household equipment of poor quality from China and South-East Asia and sell it in Russia under 'respected' brands such as B (this sounds quite possible to me as there are a number of 'brands' like that in the local market).*

16. A supplementary email sent on 19 January 2006, responded to a series of questions from the Tribunal. It provided further supporting evidence of a known association between E and a B brand of electrical products, and of an association with German registration. Its responses were:

> *Could you please contact E.*
>
> *1. Confirm she was not employed by them.*
>
> *A: This was completed on two occasions. When Moscow 1st became aware that the applicant applied for PV we contacted the firm and they stated by telephone the applicant did not work for the firm. We again contacted the firm due to the Member's enquiry and after one week we could not speak to the person who signed the work reference. Two other employees stated they could not recall the applicant having worked at the firm.*

2. Ask them if they have franchises and if she was one of their franchises.

A: There is no information on the internet that the firm has franchises and the two employees that have been spoken to stated they did not know if the firm has franchises.

3. If she was a franchisee, ask them what contact franchisees have with management in Moscow.

A: Not asked due to answer at question 2.

4. Ask them if her franchise was called B.

A: Not asked due to answer at question 2. Please note that the website for E (www. …) states "is an internet branch of a large trading company and is a dealer of such well known manufacturers as Electrolux, B…, LG and Dyson."

5. Ask them if there was raid in November 2004 of the E warehouse by the police or taxation police and if their warehouse was closed for a short time in November 2004 / December 2004 and the reasons for the closure.

A: This question was not asked of the employees as in Russia employees refuse to answer these 'type' of questions. Post has no other way of checking this claim apart from open source material ie the internet.

Could you please contact B in Moscow.

1. Ask them if she was ever employed by them as a project manager.

A: No contact has been possible as the telephone numbers called and never answered. Please note we searched the internet site and cannot find a site for B. Note: there is a German Freight carrying company called B but this is not connected to electrical products as far as we can research on the internet.

2. Ask them if she had a franchise with them.

A: see question 1.

3. Ask them if her franchise was registered in Berlin.

A: see question 1.

5. Ask them if they are connected to B in Berlin or if indeed B is in Berlin.

A: see question 1.

Do you have any information about whether or not E is a financial donor to Y party, or of there are any reports about Y party's financial donors?

A: We have no information. Donations from companies or individuals to political parties is not public information with the Russian Federation.

Comment: The internet fora where people discuss brands represented in Russia have (unofficially) black-listed both E and B. These fora state the B brand was "made up" by E and registered in Germany. In reality E buys cheap household equipment of poor quality from China and South-East Asia and sells the products in Russian under 'respected' brands such as B. If true you may conclude from this that E owns the B brand. B appears not to be an operating entity just a brand name.

The [misspelt B name] is unknown to post and locally engaged employees. Please note that I have personally seen an electric product (TV) with the brand name B.

17. The applicant responded to the second s.424A notice on 16 February 2006. She denied ever claiming that her company was a *"franchisee"*, and said that she had only ever claimed "*some parallels"* with Australian franchise system. She said that she could not comprehend the Tribunal's assertion that if a business has "pavilions" it could not have "subsidiaries" or "franchisees". She said that her own searches on the internet showed that E's recent "re-branding" had been caused by difficulties which might well have been *"persecution/prosecution of owners of the business"*.

18. Before it made its decision, the Tribunal made further investigations, which it did not reveal to the applicant. In June 2006, the Tribunal received information from the Australian Embassy in Berlin concerning B. This gave clear corroboration from the records of the Berlin Chamber of Commerce that the applicant was the sole proprietor and a general manager of B since its registration in 2003. The Tribunal appears to have thought that it did not need to tell the applicant that it had received information from Berlin about B, and ultimately it made

the favourable finding that *"I accept that the applicant was a proprietor of a company called B that was registered in Germany"*.

19. The applicant complains that the Tribunal's omission to show her all of its information from the Moscow and Berlin Embassies was unfair. She argues that she was denied an opportunity to make submissions pointing out the support given by the information from both sources for her claims overall, and for her general credibility. She argues that her inability to do this could have led to the Tribunal overlooking the significance of the information which was not shown to her.

20. She argues that the Tribunal failed to take account of the favourable evidence before disbelieving her claims. In particular, nowhere did the Tribunal examine the evidence of her established connection with B, and of B's reputed association with E, before it arrived at a key factual conclusion:

> *On the evidence before me, I am satisfied that the applicant had no business arrangement with E or [sic: nor] any type of employment with E, as claimed. … I do not accept the applicant had any business dealings with E ….*

21. She also argues that the Tribunal's secret investigations, its failure to disclose significant information which it obtained, and its ignoring of the favourable information in its statement of reasons, supports her apprehension that it conducted its review and decided her case with a closed mind.

Discussion

22. I consider that there is some substance in the applicant's contention that the secrecy which the Tribunal gave to its inquiries, and its selective disclosure of their outcome, might cause a fair-minded lay observer to reasonably apprehend that the Tribunal might not bring an impartial mind to the resolution of the question to be decided (cf. *Re Refugee Review Tribunal & Anor; Ex parte H* (2001) 179 ALR 425 at [27]-[32]). Some support for this conclusion might also be found in its selective use of that information when assessing the applicant's credibility (cf. *NADH of 2001 v Minister for Immigration &*

Multicultural & Indigenous Affairs (2004) 214 ALR 264 at [115]-[116]).

23. There was nothing intrinsically confidential in the information contained in the emails from the Embassy compliance officers, and there is no suggestion that it was covered by s.438 of the *Migration Act 1958* (Cth). Under s.424(1) the Tribunal was bound to have regard to all the relevant information which it obtained. Full disclosure of the information to the applicant would, in my opinion, appear to be consistent with the Tribunal's obligations under s.425 to allow the applicant a meaningful opportunity to address the evidentiary issues arising in the review, especially where they changed their complexion after the applicant's attendance at a hearing (cf. *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 231 ALR 592, also *SZFDE v Minister for Immigration & Citizenship* [2007] HCA 35 at [30]-[35], [48]-[53], and *Applicant NAFF of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 221 CLR 1 at [27] and [32]). Although the Tribunal appears to have thought that only some parts of the Embassy emails were required to be put to the applicant under s.424A(1), as I shall explain, I consider that this too narrowly understood its obligations under that section. Even if it did not, s.424A(1) leaves a discretion in the Tribunal as to what additional relevant material should be given to an applicant to ensure that its proceedings are *"fair and just"* (cf ss.420(1) and 427(1)(c), noting that the current obligation in these terms in s.422B(3) did not apply). In this context, the procedures followed by the Tribunal when informing the applicant about its inquiries might appear to give rise to a reasonable apprehension that it was not conducting its review with an open mind.

24. However, I prefer to address my concerns as to the procedure followed by the Tribunal upon a narrower basis than apprehended bias, or the rights of procedural fairness to be implied from ss.414 and 425 of the Migration Act.

25. In my opinion, the Tribunal's second s.424A notice was, in the absence of full disclosure to the applicant of the contents of the Moscow Embassy's emails, deficient in its compliance with the requirements of that provision. Section 424A(1) required:

SECT 424A

Applicant must be given certain information

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

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

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

(c) invite the applicant to comment on it.

26. I accept that disclosure under this provision is required of "information", and not reasoning processes about evidence. I also accept that it is only information which itself *"would be the reason, or a part of the reason"* for affirming the delegate's decision, which gives rise to the obligation to invite written comments. Information from the Embassy emails which might not be regarded as adverse to an acceptance of the applicant's claims would not, therefore, come directly within the information required to be particularised under s.424A(1)(a).

27. However, the Tribunal's obligations extend beyond a narrow particularisation of adverse information, but require it under s.424A(1)(b) to *"ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review"*. I have in other cases, found in this obligation a need for a Tribunal to reveal the whole contents of information coming to it as a result of its independently conducted inquiries, in circumstances where a partial or vague disclosure to an applicant would not *"allow him to appreciate its potential significance in the case and to allow him a real, rather than a token, opportunity to prepare a response"* (see *SZELA v Minister for Immigration & Anor* [2005] FMCA 1068 at [51], also *Elrifai v Minister for Immigration* [2005] FMCA 1484, (2005) 225 ALR 307 at [34] and ff., and *Minister for Immigration & Multicultural Affairs v SZGMF* [2006] FCAFC 138).

28. In the present case, the second s.424A notice informed the applicant that it had information from the Australian Embassy in Moscow which *"contradicts your claims"*. Only three pieces of the information received from the Embassy were disclosed. The applicant was not told, nor given the opportunity to consider and address, those pieces of information in the context in which they were conveyed by the Embassy officials. Nor was she allowed to become aware of other, significantly supportive pieces of information, contained in the information received from the Embassy. In these circumstances, I do not consider that the Tribunal ensured that the applicant was sufficiently able to respond to the s.424A(1) notice, by understanding the full import and relevance of the selectively identified pieces of information. It was obviously "practicable" for the Tribunal to improve the applicant's understanding in that respect, by a better disclosure of what it was told by the officers at the Moscow Embassy.

29. I therefore find that the Tribunal's second s.424A notice did not comply with the requirements of s.424A(1). It is very well established that such a failure provides jurisdictional error which vitiated the Tribunal's decision.

30. In this respect, I note that it was not argued by the Minister that the Tribunal was not obliged to put any information from the Embassy emails to the applicant under s.424A(1), nor that ultimately its reasons do not confirm that information from that source was part of the Tribunal's reasons for affirming the delegate's decision. In view of the Tribunal's unqualified reference to *"the evidence before me"*, which caused it to find that the applicant had no business dealings with E, I could not be so satisfied (cf. *SZEEU v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 150 FCR 214 at [163]). Nor would I find independent reasons which supported the Tribunal's decision (cf. *SZBYR v Minister for Immigration & Citizenship* [2007] HCA 26 at [28], [55]-[59], [91]).

31. My above conclusions mean that I do not need to consider whether the Tribunal, in fact, failed properly to take into account the favourable information given to it by the Moscow and Berlin embassies, before making its adverse assessment of the applicant's credibility.

32. I consider that the applicant is entitled to the relief she claims. She is also entitled to any costs which might be payable on taxation.

I certify that the preceding thirty-two (32) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 2 November 2007