FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZIYR v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 357*

MIGRATION – RRT decision – Columbian child with claims from membership of family group – parents' claims previously rejected by Tribunal – reference to material in parents' decisions – failure to particularise in s.424A invitation – matter remitted.

Migration Act 1958 (Cth), ss.424A, 424A(1), 424A(1)(a), 425, 476

SAAG v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 547
SZIAY v Minister for Immigration & Anor [2006] FMCA 1680

Applicant:	SZIYR
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG1764 of 2006
Judgment of:	Smith FM
Hearing date:	16 March 2007
Delivered at:	Sydney
Delivered on:	16 March 2007

REPRESENTATION

Counsel for the Applicant:	Mr R Turner
Solicitors for the Applicant:	McMahons National Lawyers
Counsel for the First Respondent:	Mr G Kennett
Solicitors for the Respondents:	Australian Government Solicitor

ORDERS

(1) A writ of certiorari issue directed to the second respondent, quashing the decision of the second respondent handed down on 16 May 2006 in matter N06/53046.

(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 27 August 2005.

(3) The first respondent pay the applicant's costs in the sum of $5,000.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG1764 of 2006

SZIYR
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. This is an application filed on 22 June 2006 seeking orders by way of judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") dated 27 April 2006 and handed down on 16 May 2006. The Tribunal affirmed a decision of the delegate made on 27 August 2005, refusing to grant the applicant a protection visa.

2. The Court's jurisdiction under s.476 of the *Migration Act 1958* (Cth) ("the Migration Act"), does not allow me to set aside the Tribunal's decision and send the matter back to the Tribunal unless I am satisfied that the decision was affected by jurisdictional error. In the present case, the ground of error which I propose to uphold is a failure by the Tribunal to follow procedures required by s.424A(1). It is very well established that this amounts to a jurisdictional error.

3. The applicant is an infant boy who was born in Australia on 6 March 2004, with parents of Columbian nationality. His present application is but one step in a convoluted process which he and his parents have been required to follow, in order to get the claims of all members of the family to be refugees considered and determined according to law. Separate judicial review proceedings were brought in relation to three separate Tribunal decisions, taken by different Tribunal members on different dates concerning his father, his mother and himself. The three judicial review applications were brought into my docket, and were listed for a concurrent hearing on 20 October 2006. Until shortly before the hearing, none of the applicants was legally represented. The mother withdrew her application before the hearing. At the hearing, the father had the assistance of a solicitor, Mr Turner, whom he had recently instructed. The hearing proceeded only in relation to the legality of the Tribunal's decision in relation to the father's entitlement to a protection visa, and I adjourned the hearing of the present application until I had given judgment in that matter.

4. In *SZIAY v Minister for Immigration & Anor* [2006] FMCA 1680, I held that the decision of the Tribunal concerning the father's entitlement was affected by jurisdictional error. I concluded that the Tribunal had drawn unwarranted adverse conclusions from country information, conducted illogical and perverse reasoning concerning the father's evidence, failed to assess the favourable evidence concerning his refugee claims, and conducted its review proceeding recklessly - in the sense of not making a genuine attempt to assess the refugee claims according to its jurisdictional duty. Indeed, I arrived at a conclusion, which I have not previously arrived at in any of the hundreds of such cases which I have reviewed in this Court, that the Tribunal as constituted in the father's matter had *"approached its review of the applicant's claims on the basis that it should look for reasons why it could reject those claims"* (cf. Mansfield J in *SAAG v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 547 at [36]). No appeal was brought from my judgment.

5. The fragmentation of the refugee claims of the family during the administrative processes is recounted in my previous judgment

including at [16], and I shall not explore it further except as necessary to explain the course of the present matter.

6. The applicant's father arrived in Australia in 1996, and his mother and a sibling arrived in 1997. The father's application for a protection visa was made and determined by a delegate in 1996. The Tribunal's review of that decision was ultimately decided on 8 December 2005, in the decision which was set aside in my judgment.

7. The present applicant was born in 2004, at a time when his father was still attempting to obtain ministerial discretionary intervention, and when there was uncertainty about whether his mother had claims which could be pursued separately by her. In May 2005, the father was informed that the Department would accept that he still had a right of appeal to the Tribunal, and he lodged his application for review to the Tribunal on 1 June 2005. Shortly before his agent did this, the agent lodged a protection visa application on behalf of the applicant.

8. The agent's covering letter to the Department referred to the father being: *"in a process to apply to the Refugee Review Tribunal"*, and said: *"the applicant's parents wish to join this application for Protection Visa to [the father's] Application for Protection which is in a process to sought review at the Refugee Review Tribunal. His file number is … "*. In the body of the application there was also a request: *"please join this application with the applicant's father application for protection visa"*, with a reference to the Departmental file number.

9. It should have become plain to both the Department and Tribunal in 2005 that the parents wished to allege that the child had protection rights arising from the same circumstances which they had presented in their own protection visa claims, and wished to have these determined concurrently with the proceedings being conducted in the Tribunal. However, it seems that either the Migration Act, or the administrative procedures both in the Department and the Tribunal, prevented such a sensible course being taken.

10. On 13 August 2005 the Department requested the agent to *"provide any claims that [the applicant] may have"*, regarding his need for protection in Australia. In response the agent said:

As you were mentioned in your email, you have the applicant parents' applications details for protection visas however due to the applicant is a little child he has been affected by his parents' claims of persecution therefore he is seeking for protection under one of five reasons of the Convention, member of particular social group: family member.

The applicant's parents claimed that they had suffered persecution due to their active participation in the Revolutionary Independent Workers Movement (MOIR), their involvement with others political groups, activities with the Agro-Industry Workers Union (SINTRAINAGRO) and supporting the left wing revolutionary group EPL (Hope, Peace and Freedom).

The applicant's father also had claimed in his protection visa application that two of his brothers were killed due to the same reasons of persecution and similar involvement in the political groups.

The applicant's father and his family in Colombia are concerned about the safety/life of his father [name] who has been disappeared since March 2003. After of sequential of threatens by the paramilitaries over [the] family in Colombia. The family believes that the paramilitaries are the responsible for forced disappearance of [the applicant's grandfather].

The family claimed that they cannot come back to Colombia because they have strong fear of the safety of their lives due to the ongoing persecution over [the applicant's] family in Colombia.

They argued that in their original country the authorities/state cannot provide protection on the contrary the authorities are the perpetrators which imply the violence. On top of this statement the applicant's and his family are afraid that on their arrived to Colombia to be without judicial warrant arrested tortured, disappeared and then killed.

Please find enclosed some evidence that confirmed the worries of the applicant and his family.

The applicant's father [name] is worry about the future of his children due to the forced and involuntary recruitment of children by armed groups.

11. The agent referred to general information concerning the situation in Columbia, including a reference to a report by the United Nations Commission on Human Rights in 2005, referring to *"armed opposition*

groups continue the recruitment of children, hostage-taking, abduction and killings of civilians".

12. A delegate refused the applicant's application on 27 August 2005 giving reasons which are poor, but do not need to be analysed by me.

13. On 1 September 2005 the applicant's agent wrote a letter to the Tribunal:

> *Please find enclosed two different documents related with the same family unit:*
>
> *[the applicant's father], response to hearing invitation,*
>
> *And*
>
> *Master [the applicant], application for review.*
>
> *They wish that both applicants could be at the same hearing day.*

A copy of the letter and the applicant's own application for review was placed on the father's file, as well as in the applicant's file.

14. At that time, there was an outstanding invitation from the Tribunal to the father to attend a hearing appointed for 14 September 2005. However, on 7 September 2005 the agent was informed that the presiding Member in the father's matter *"has made a decision to postpone the hearing with the applicant … in order to give him an opportunity to comment on a number of issues arising from his claims"*. The Tribunal then presented the applicant's father with a s.424A letter to comment on adverse material information taken from the father's file. The father was subsequently sent a new invitation to attend a hearing on 17 November 2005, and he attended that on that day with his adviser.

15. However, on the material before me which encompasses material from both files, the request that the infant applicant's application to the Tribunal should be assessed with his father's application, in a jointly conducted hearing, appears to have been ignored within the Tribunal. Instead, as with the mother's application, the Tribunal was differently constituted. The member dealing with the applicant's appeal appears to have decided to wait until a decision was made on the father's

application. As I have indicated, that decision was adverse, and was published on 8 December 2005.

16. Following that decision, the infant applicant was on 16 February 2006 invited to a hearing on 20 March 2006. According to the Tribunal, there was no response to that invitation.

17. On 22 March 2006, a letter was sent to the agent inviting comment by the infant applicant on adverse information. The letter 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:*
>
> *It has been claimed that [the applicant] needs protection from persecution for the reason of his membership of his family. It has been claimed that they were persecuted because of their leftist political activities in Colombia, and that his grandfather has disappeared and his uncles killed by paramilitaries. The Tribunal has considered the evidence given by [the applicant's] parents to other Members of this Tribunal (set out in RRT files N98/25004 and N05/51412) and the evidence given by them in their applications to the Department, which include a number of inconsistencies relating to [the applicant's father's] reason for leaving Colombia, his involvement with MOIR (to which he did not refer initially), the death of one of his brothers, and his failure to participate in any human rights or leftist activities during his many years in Australia.*
>
> *It has also been claimed that [the applicant] might be forced to join an armed group. The Tribunal has before it no evidence that very young children are being forced to do this.*
>
> *This information is relevant because:*
>
> *The information provided by [the applicant's] parents casts doubt on the plausibility of the claim that [the applicant's father] or his family were targeted for harm in Colombia because of their political opinions or activities, and the Tribunal could infer that any difficulties the family (and so [the applicant]) might face on return would be unrelated to the Refugees Convention.*
>
> *As to the lack of evidence that young children are being forced to join armed groups, the Tribunal could infer that from this that*

[the applicant] would not face a risk of this happening in the reasonably foreseeable future.

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 14 April 2006.

IF YOU DO NOT GIVE COMMENTS BY 14 APRIL 2006 THE TRIBUNAL MAY MAKE A DECISION ON THE REVIEW OF YOUR CASE WITHOUT FURTHER NOTICE.

18. The applicant's agent responded to the Tribunal on 18 April 2006:

I am sending this fax regarding to the letter received addressed to my above named client dated 22nd March 2006 by the RRT; due to master [the applicant] is a young child his father [name] has been dealing with his son case.

I informed about the letter, its content and the information required by the RRT to [the applicant's father] and he answered he is very depressed all about the process and he would not respond to the letter.

Previous to this letter I informed [the applicant's father] about the hearing invitation (2 times) but he did not respond to me as well.

I feel so sorry for [the applicant's father] and his son about the attitude adopted by [the applicant's father] to this sort of process.

I believe I can't do more at this stage for the process of this application.

If you have any matter in regard to the above issue, do not hesitate to contact me to my above details.

19. I should note that there was before the Tribunal, on the file of the father's matter, evidence that he was suffering from a diagnosed psychiatric anxiety condition, and it is not difficult to imagine that this might have been exacerbated by the decision which I described in my judgment.

20. The present Tribunal then proceeded to make a decision on the infant applicant's claims.

21. Under the heading "*Claims and Evidence*", the Tribunal commenced by referring to the "decision records" of the Tribunal in relation to the parents' claims:

> *The Tribunal has before it the Department's file, which includes the protection visa application and the delegate's decision record. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources. It is apparent from the Department's file that the claims made on the applicant's behalf essentially derive from the claims made by his parents in their protection visa applications. The applicant has not provided those applications to the Tribunal, or invited the Tribunal to refer to them; however the Tribunal does have before it the decision records of the two Tribunals, differently constituted, relating to them (N05/51412 and N98/25004 respectively), which set out in detail the claims made and evidence given in relation to those applications.*
>
> *On 25 August 2005 [the applicant's agent] of DLP Migration Services, [the applicant's] authorised recipient and migration agent, provided a written statement to the Department in support of the application for the protection visa. She stated that [the applicant] was seeking protection on the basis of his membership of a particular social group – his family. It was claimed that his father, [name], had been persecuted in Colombia because of his and the applicant's mother's political activities with various leftist groups. (As noted above, in relation to their own applications the Tribunal affirmed the decisions not to grant [the applicant's father] and [the applicant's mother] protection visas).*

22. The Tribunal referred to the applicant's claims as set out in the agent's letter extracted above. It continued:

> *Of the decisions relating to [the applicant's] parents, the Tribunal as previously constituted found [the applicant's father's] claims to be generally implausible and concluded that his claims of harm and threats of harm by militaries were "a fabrication". Of [the applicant's mother], whose claims relied on those of [the applicant's father], the Tribunal, differently constituted, found it implausible that she was targeted for reasons associated with him, and noted that there was no other evidence to suggest that she herself was of interest to those who may have been interested in him in the past. The Tribunal was not satisfied that she had a well-founded fear of persecution within the meaning of the Convention if she returned to Colombia, adding that there*

> *appeared to be no ongoing interest in either [the applicant's mother] or [the applicant's father] from any source for any reason.*

23. The Tribunal referred to its invitations to the applicant to attend a hearing and the s.424A letter addressed to the applicant which I have extracted above. It gave no description nor analysis of the parents' claims and evidence as shown in the RRT files which were referred to in the s.424A letter.

24. The Tribunal then provided short reasons for not being satisfied that *"any fear held by or on behalf of [the applicant] is a well-founded fear of persecution within the meaning of the Convention"*.

25. The claim that the applicant had a real chance of persecution by reason of belonging to his family group was addressed in one paragraph:

> *I have considered the claim that [the applicant] needs protection from persecution for the reason of his membership of his family. It was claimed by [the applicant's agent] that [the applicant] would be persecuted "due to his parent's [sic] involvement with union trades groups and political opinion". However, as the Tribunal has not been able to explore with his parents the details of the claims relating to their activities and the persecution they suffered, or test the accuracy of those claims at a hearing, it is unable to establish the relevant facts. Furthermore, whether or not it is the case that his parents were involved in political activities as claimed, no details have been provided by [the applicant's agent] or [the applicant's] parents as to how the latter's political profile, and any consequent risk to them, might adversely affect [the applicant]. While there has been a claim that [the applicant's father's] father disappeared in 2003 after threats to the family by people believed to be paramilitaries, so little evidence about this has been provided that the Tribunal is unable to establish the relevant facts about this incident, or the current situation in relation to it, and thus cannot be satisfied that [the applicant's father's] father did disappear or if he did, that his disappearance was because of his membership of this family. For these reasons I am not satisfied that [the applicant] faces a real chance of serious harm for the reason of his membership of his family.* ***I have considered the additional material set out in the Tribunal's decision records in relation to [the applicant's] parents' applications (N98/25004 and N05/51412), but am unable to be satisfied on the basis of that material that***

[the applicant] [sic: has] a real chance of serious harm for the reason of his membership of his family. (emphasis added)

26. The Tribunal also shortly dealt with the claim that the applicant might be forced to join an armed group in Columbia while he was still a minor. I do not need to examine its brief reasons, although I note that they were the subject of a ground of review in this Court which I have not addressed.

27. The issue raised by the ground of review which I propose to uphold, is whether the last sentence in the reasons extracted above indicates the use by the Tribunal of information which was *"the reason, or a part of the reason, for affirming the decision that is under review"*, and which was not particularised and explained in an invitation served under s.424A(1). In particular, whether such information was taken from the decision records in relation to the applicant's parents' applications.

28. It is undoubted that, before it made its decision, the Tribunal thought that there might be such information found in the RRT files in relation to the applicant's parents, since it in fact served a purported s.424A invitation suggesting the presence of adverse information on those files. It will be recalled that this included an unparticularised reference to *"… a number of inconsistencies relating to [the applicant's father's] reason for leaving Columbia, his involvement with MOIR (to which he did not refer initially), the death of one of his brother's, and his failure to participate in any human rights or leftist activities during his many years in Australia"*.

29. If I decide that such information, whether taken from the other files or only from the decision records of the Tribunal concerning the parents, subsequently did provide a reason for affirming the delegate's decision, then this invitation did not sufficiently answer the Tribunal's obligations under s.424A(1). In my opinion, the invitation's unparticularised references to *"the evidence given by [the applicant's] parents"* and to the *"number of inconsistencies"* plainly did not provide *"particulars of any information"* as required by s.424A(1)(a). I did not understand the Minister's counsel to have made a submission to the contrary.

30. Reading the whole of the reasons of the Tribunal, it is difficult not to form the view that the Tribunal's reference in its last sentence to *"the additional material set out in the Tribunal's decision records"* must include a reference to unparticularised adverse information taken from the parents' files which was identified in their decision records. Further, the sentence expressly suggests that the Tribunal's consideration of *"the additional material"* containing that adverse information left it *"unable to be satisfied"* as to a real chance of serious harm to the applicant. The sentence therefore may be read as indicating that the adverse information played a part in the Tribunal's reasons for arriving at its ultimate adverse conclusion. In my opinion, the Tribunal's reasoning should be read in that way.

31. Moreover, even if the Tribunal's reference to *"the additional material set out in the Tribunal's decision records in relation to [the applicant's] parents' applications"*, is not read as a reference to the adverse material which the Tribunal had purported to put to the applicant previously, it must at least be read as an unparticularised reference to information found in the decision records which contributed to its inability to be satisfied as to the applicant's refugee status. In my opinion, this is enough to establish a failure under s.424A.

32. In my opinion, on any reading of the sentence, it indicates that the Tribunal's absence of satisfaction as to the applicant's refugee claims has been informed by unparticularised information referred to in the earlier Tribunal decisions. The Tribunal's failure to particularise, explain and invite comment on that information establishes a breach of s.424A(1).

33. A reading of the Tribunal's reference to *"the additional material"* as encompassing adverse information found in the two previous Tribunal decisions is also suggested by the Tribunal's earlier references to the two previous decisions. It is plain from its narrative of the *"claims and evidence"*, and from the brevity of its *"findings and reasons"*, that the Tribunal has placed substantial reliance upon the content and outcome of those decisions.

34. Moreover, the surrounding circumstances of the Tribunal's decision also point to a conclusion that the Tribunal probably relied upon the adverse findings of the previous Tribunals, when assessing the

applicant's refugee claims. The Tribunal had before it serious claims presented on behalf of an infant applicant. I cannot imagine a Tribunal dealing with the relevant evidence known to exist on Tribunal files in such a cursory manner as the present Tribunal decision, if it did not consider that the facts have been sufficiently explored by previous decisions of the Tribunal. The complete lack of any analysis of the evidence on the parents' files when assessing the child's situation confirms that this must have been the real reasoning of the Tribunal.

35. In this respect, I would comment that it appears difficult for the Tribunal to have earlier said: *"the Tribunal has not been able to explore with his parents the details of the claims relating to their activities"*, particularly where the applicant's own file clearly indicated that his parents had requested a hearing in which the applicant's situation could be considered concurrently with the father's claims. The Tribunal's observation might reveal a separate jurisdictional error, but this has not been raised as a ground in the present application to this Court.

36. Counsel for the Minister sought to explain the Tribunal's reference to the additional material in the parents' decisions on the basis that it did no more than explain the earlier finding that *"no details have been provided by [the applicant's agent] or [the applicant's] parents as to how the latter's political profile, and any consequent risk to them, might adversely affect [the applicant]"*. He argued that the only reason for the Tribunal affirming the delegate's decision was the absence of *"details provided"*, so that nothing adverse could have been taken from *"the additional material"* to form a part of its reasons.

37. However, I cannot read the sentence in such a limited fashion. In my opinion, the sentence was provided by the Tribunal to indicate that it has taken into consideration as part of its reasoning to its ultimate conclusion all of the information about the applicant's claims that it could glean from the two previous decisions of the Tribunal concerning the parents. As is obvious from my earlier judgment, much of the *"material set out"* in the Tribunal's decision concerning the father was presented as adverse information showing *"fabrication"* of the family's claims. In my opinion, the sentence confirms what is obvious from the whole of the present Tribunal's statement of reasons – that it

has taken all or some of the contents of the earlier decisions into account as a reason for not being satisfied as to the present applicant's refugee status.

38. For the above reasons I uphold the ground of review which has been argued before me, and I consider the applicant is entitled to writs of certiorari and mandamus.

Postscript

39. As a result of my earlier judgment, and the absence of any appeal, the father's matter is currently before the Tribunal for reconsideration. Today's listing was made on an expedited basis in the hope that the fragmentation which occurred in the Tribunal in relation to the applicant's family members could be avoided if the applicant succeeded in his present application.

40. However, I am advised today that the Tribunal has appointed a hearing for Tuesday next week in the father's matter, notwithstanding his application for an adjournment to await the outcome of the present matter.

41. I have today made an order remitting the infant son's matter to the Tribunal for reconsideration, and have given my *ex tempore* reasons to the parties, including the legal representative of the Tribunal. In the light of what I have said, I consider it would be desirable, and possibly essential under s.425 of the Migration Act, for the applicant's refugee claims now to be reconsidered concurrently with his father's. I would very much hope that this could be achieved by the Tribunal, even if this may require an adjournment of the re-hearing appointed for the father's application. I have requested that these observations should be conveyed to the Tribunal urgently.

I certify that the preceding forty-one (41) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 27 March 2007