FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZGZH v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 219

MIGRATION – Review of decision by Refugee Review Tribunal – whether Refugee Review Tribunal's decision affected by jurisdictional error – whether the Refugee Review Tribunal made "*demeanour*" findings – whether a differently constituted Refugee Review Tribunal was required to invite the applicant to a further hearing before making adverse credibility findings – whether the Refugee Review Tribunal was required to obtain medical information about the applicant only in accordance with s.427(1) of the *Migration Act 1958* (Cth).

Judiciary Act 1903 (Cth), s.39B
Migration Act 1958 (Cth), ss.5(1); 36(2); 65(1); 91R; 91S; 420; 424(1); 424A; 424A(1); 425; 427; 427(1); 427(1)(d); 427(3); 427(6); 429A; 474; pt.8 div.2

SZHLM v Minister for Immigration and Citizenship [2007] FCA 1100
SZEQX v Minister for Immigration and Citizenship [2007] FMCA 2091
SZEPZ v Minister for Immigration and Multicultural Affairs [2006] FCAFC 107
NBKM v Minister for Immigration and Citizenship [2007] FCA 1413
Liu v Minister for Immigration and Multicultural Affairs (2001) 113 FCR 541
SZJHL v Minister for Immigration and Citizenship [2007] FCA 1713
SZBYR v Minister for Immigration and Citizenship [2007] HCA 26
SZGZH v Minister for Immigration & Citizenship [2007] FCA 486
Anshun v Port of Melbourne Authority (1981) 147 CLR 589

Applicant:	SZGZH
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	SYG 2332 of 2007
Judgment of:	Emmett FM
Hearing date:	11 February 2008

Date of last submission:	15 February 2008
Delivered at:	Sydney
Delivered on:	29 February 2008

REPRESENTATION

Counsel for the applicant:	Mr J. Spinak
Counsel for the respondent:	Mr G. T. Johnson
Solicitors for the respondent:	Ms Z. McDonald, DLA Phillips Fox

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2332 of 2007

SZGZH
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application pursuant to s.39B of the *Judiciary Act 1903* (Cth) and Part 8 Division 2 of the *Migration Act 1958* (Cth) ("**the Act**") for judicial review of a decision of the Refugee Review Tribunal dated 26 June 2007 and handed down on 5 July 2007.

2. The Applicant claims to be from Bangladesh and an activist in the student wing of the Awami League ("**the Applicant**").

3. The Applicant arrived in Australia on 4 November 2004 having departed legally from Osmani International Airport on a passport issued in his own name and a visa issued on 11 October 2004.

4. On 14 December 2004, the Applicant lodged an application for a protection (Class XA) visa with the Department of Immigration and

Multicultural and Indigenous Affairs ("**the Department**") under the Act.

5. In his protection visa application, the Applicant claimed that he feared persecution by the Bangladesh Nationalist Party ("**the BNP**"), the "*current*" coalition government, fundamentalist Muslims and the police by reason of his political opinion or imputed political opinion arising from his political beliefs and activism.

6. On 31 May 2005, a delegate of the First Respondent ("**the Delegate**") refused the Applicant's application for a protection visa on the basis that the Applicant is not a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol ("**the Convention**"). The Delegate accepted that the Applicant was a member of the Awami League in Bangladesh but did not accept that he "*had gained the adverse attention of the police*" nor that he "*was subjected to persecutory action by the leaders of the BNP when he was in Bangladesh*".

7. On 2 March 2005, the Applicant lodged an application for review of the Delegate's decision by the Refugee Review Tribunal. The Applicant provided no further material in support of the review application. On 29 June 2005, an earlier constituted Refugee Review Tribunal affirmed the decision of the Delegate not to grant a protection visa.

8. On 29 November 2006 Federal Magistrate Nicholls dismissed an application for judicial review of the Refugee Review Tribunal's decision dated 29 June 2005.

9. On 4 April 2007, Graham J of the Federal Court of Australia upheld an appeal from the orders of the Federal Magistrates Court of Australia and remitted the matter to the Refugee Review Tribunal for determination according to law on the basis that the Refugee Review Tribunal had not complied with s.424A(1) of the Act.

10. On 26 June 2007, the Refugee Review Tribunal differently constituted ("**the Tribunal**") affirmed the decision of the Delegate not to grant a protection visa. This is the decision currently under review.

11. On 27 July 2007, the Applicant filed an application in this Court seeking judicial review of the Tribunal's decision.

Legislative framework

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

13. Section 36(2) of the Act relevantly provides that a criterion for a protection visa is that an applicant is a non-citizen in Australia to whom the Minister is satisfied that Australia has a protection obligation under the Refugees Convention as amended by the Refugees Protocol. Section 5(1) of the Act defines "Refugees Convention" and "Refugees Protocol" as meaning the 1951 Convention relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees.

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

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

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

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

The Tribunal decision

17. The Tribunal had detailed regard to the decision of the earlier constituted Refugee Review Tribunal. In particular it noted that the earlier constituted Refugee Review Tribunal had conducted a hearing

with the Applicant on 2 June 2005. The Applicant attended that hearing and gave oral evidence.

18. The Tribunal noted that, at the hearing on 2 June 2005, the Applicant expanded upon his written claims of false arrest, protest marching, going into hiding and his past in Bangladesh. The Applicant provided documentation in support of his claims.

19. In particular, the Tribunal noted that the earlier constituted Refugee Review Tribunal stated in its decision dated 29 June 2005 that, when the earlier constituted Refugee Review Tribunal pointed out inconsistencies in his evidence, the Applicant repeatedly claimed he was unable to answer questions accurately because of back and chest pain.

20. The Tribunal also noted in its decision dated 26 June 2006 that the Applicant claimed to have been mentally unwell at the time he submitted his original application.

21. On 21 May 2007, the Tribunal wrote to the Applicant identifying information that may form part of the reason for affirming the decision under review, explaining its relevance and inviting the Applicant to comment upon it ("**the s.424A Letter**").

22. On 13 June 2007, the Applicant's representative responded to the Tribunal's s.424A Letter.

23. The Tribunal found the Applicant was not a witness of truth and comprehensively rejected all his factual claims. The Tribunal affirmed the decision under review.

24. The decision of the Tribunal is accurately summarised by counsel for the first respondent in his written submissions as follows:

> *"6. The Tribunal was not satisfied that the applicant had a well founded fear of persecution for a Convention reason now, or in the reasonably foreseeable future (CB 178.9), and its reasons for so finding were based upon its assessment of the credibility of the applicant's evidence, its findings that certain documents produced by him were fabrications and matters raised in s.424A letters (as described at CB 174-178). Based on these matters, the Tribunal did not accept the applicant as*

a witness of truth (CB 177.9). It did not accept that he was mentally upset, either when he prepared his original application, or on the day of the hearing, or that, besides back pain, he was suffering from chest pain and a runny nose on the day of the hearing (CB 177.9-178.1). Having regard to information from Dr Deva, the Tribunal considered that, even if the back pain was genuine, it would not have affected the applicant's ability to appear before the Tribunal on 2 June 2005 (CB 178.1). The Tribunal also gave weight to the applicant's inability at the hearing to describe the Awami League or to correctly name or identify the aims or objects of the Awami League (CB 178.2). It also found, for reasons given at CB 175-176, that documents produced in purported corroboration of the applicant's claims were fabrications (CB 178.2) and, by reason of the inconsistency described at CB 178.25, the Tribunal did not accept that the applicant ever attended Beanibazar Government College or that he was ever the Organising Secretary of the Chhatra League at that college (CB 178.25). By reason of the adverse view that the Tribunal formed of the applicant's credibility and the fact that he remained in Bangladesh until leaving in January 2003 to work in the United Arab Emirates, the Tribunal did not accept that the applicant was forced to leave Bangladesh (as he had claimed) because he was targeted by the BNP coalition government then in power or by Muslim fundamentalists – either because he was an activist in the student wing of the Awami League, or the Chhatra, or because he was a "secular and free thinker" (CB 178.4). Indeed, because of its view of the applicant's credibility and the applicant's inability to correctly describe at the hearing either the Awami League flag or the aims or objectives of the Awami League, the Tribunal did not accept that the applicant was ever an activist of the Chhatra League, or associated with the Awami League (CB 178.5).

7. *Further, the Tribunal did not accept, given its view of the applicant's credibility, that the applicant:*

    a) *had ever been wanted by the police on false charges in Bangladesh or, in particular, that he was ever charged with offences arising out of an incident on 14 August 2001, or that he was arrested, or that he was released on bail, or that a warrant was subsequently issued for his arrest (CB 178.5-178.6); or*

    b) *was hospitalised for a week after the supposed incident on 14 August 2001 (CB 178.6); or*

c) was ever targeted by the caretaker government, the BNP coalition government, members of the BNP or the Jamaat-e-Islami, or Muslim fundamentalists, or terrorists for reason of his political or religious views (CB 178.7); or

d) had a real chance of being be arrested, tortured or killed by the police, the Rapid Action Battalion, or any other law enforcement agency if he returned to Bangladesh now or in the reasonably foreseeable future (CB 178.7); or

e) would be persecuted (by anyone), for reason of his political opinion or his religion, if he returns to Bangladesh, now or in the reasonably foreseeable future (CB 178.8); or

f) needed / had alteration of the profession shown in his passport (before he went to the United Arab Emirates), because of any inability to get out of the country otherwise, by reason of his claimed political problems (CB 178.9).

The proceeding before this Court

25. The Applicant was represented by Mr Spinak, of counsel, before this Court.

26. Mr Spinak confirmed that the Applicant relied on grounds 1 and 3 of the Further Amended Application filed on 6 November 2007. Ground 2 of that application was withdrawn and leave to amend ground 2 was refused. Reasons for the refusal are contained in a separate judgment.

27. The grounds relied upon are as follows:

"1.) The Applicant claims that the decision of the Refugee Review Tribunal ("the Tribunal") dated 26 June 2007 received by the Applicant on 5 July 2007 ("the Decision") was void for jurisdictional error for the reason that the Tribunal did not conduct a review of the decision under review as required under s 425 of the Migration Act 1958 (Cth) ("the Act").

Particulars

(a) The Tribunal that made the Decision had not seen the Applicant gave evidence in person.

(b) The Tribunal that made the Decision based the Decision, in part, on an adverse view of the Applicant's credibility, namely on a finding that he was not a witness of truth because:

a. he could not describe to the Tribunal (differently constituted) the Awami League flag or four aims or objectives of the Awami League;

b. documents produced to the Tribunal had been fabricated;

c. he was not "mentally upset", of suffering back pain, chest pain and a running nose, at the time he gave his evidence to the Tribunal (differently constituted) on 2 June 2005 which would have affected his capacity to participate in the hearing;

(c) Each of the findings made (at (b) above) were demeanor findings which could not be reached unless the Applicant had been invited to appear before the Tribunal in person.

(d) It was a denial of procedural fairness, and hence contrary to the requirement to conduct a 'hearing' under s 425 of the Act, for the Tribunal to make demeanor findings without having seen the evidence given by the Applicant in person.

3.) The Decision was void for jurisdictional error for the reason that the Tribunal relied, in part, on a medical examination obtained contrary to s 427(1)(d) of the Act by the Tribunal (differently constituted) on 2 June 2005.

Particulars

a. The Tribunal as constituted on 2 June 2005 rang the Applicant's consultant doctor by telephone during a break in the Applicant's evidence on that day and purported to investigate the Applicant's medical condition;

b. The Tribunal did not request the Secretary arrange for a medical examination contrary to s 427(1)(d) of the Act;

c. The Tribunal did not receive a report of that medical examination contrary to s 427(1)(d) of the Act;

d. The use of material obtained contrary to the Act was procedurally unfair and a failure by the Tribunal to conduct a hearing of the decision under review under s 425 of the Act."

Ground 1 – whether Tribunal was obliged to invite Applicant to a further hearing

28. Counsel for the Applicant contended that the Tribunal's adverse credibility findings in respect of the Applicant were based on *"demeanour findings"*. Counsel for the Applicant submitted that it was not open to the Tribunal to make adverse credibility findings based on demeanour findings of the Applicant without having seen the Applicant give evidence in person and to do otherwise was a denial of procedural fairness. Counsel for the Applicant submitted that, in the circumstances, the Tribunal should have invited the Applicant to come to a further hearing and give evidence pursuant to s.425 of the Act.

29. The Tribunal did not accept that the Applicant was a witness of truth. The Tribunal noted that it discussed the information given to the Applicant in the Tribunal s.424A Letter.

30. In particular, the s.424A Letter stated that:

a) the Applicant had been unable to describe the Awami League flag correctly or to identify the four objectives of the Awami League to the earlier constituted Refugee Review Tribunal;

b) the Applicant stated he was mentally upset and produced documents indicating that he had consulted a Dr Deva on the morning of the hearing and had been referred for a lumbar spine x-ray because of his history of backache, and that Dr Deva had also prescribed pain relief;

c) the Applicant had claimed before the earlier constituted Refugee Review Tribunal that, besides back pain, he was suffering from chest pain and a runny nose;

d) at the earlier constituted Refugee Review Tribunal telephoned Dr Deva during a break in the hearing and informed the Applicant that Dr Deva had told the Tribunal member that the doctor was

not convinced about whether the Applicant's pain was genuine or not but that, even if it was genuine, it would not have affected the Applicant's thinking.

31. The s.424A Letter informed the Applicant that the information obtained from Dr Deva was relevant because it suggested that, even if the Applicant's back pain was genuine, it would not have affected his capacity to participate in a hearing before the Tribunal.

32. The s.424A Letter went on to state that the fact that there was no medical evidence corroborating the Applicant's claim to have been mentally upset also cast out on his claims that his ability to fill in the original application correctly or to answer questions at the hearing on 2 June 2005 was affected by a medical condition.

33. The s.424A Letter informed the Applicant that this information was relevant to his overall credibility and invited the Applicant to comment upon it.

34. The Tribunal noted with particularity the contents of the s.424A Letter and quoted the Applicant's migration agent's response, dated 13 June 2007, as follows:

> *"The applicant said that he was ill with various complications which affected his ability to concentrate with the questions of the Tribunal. For those reasons there should not be the question of credibility."*

35. The Tribunal noted that the Applicant produced no further medical evidence in response to the information obtained by the earlier constituted Refugee Review Tribunal from Dr Deva that if the Applicant's back pain was genuine it would not have affected its capacity to participate in a hearing before the Tribunal.

36. In accordance with concerns expressed by the Tribunal in the s.424A letter, the Tribunal found that the fact that there was no medical evidence corroborating the Applicant's claims to be medically upset, either when he prepared his original application or on the day of the earlier constituted Refugee Review Tribunal hearing, cast doubt on his claims that he was in fact affected by a medical condition.

37. The Tribunal did not accept that the Applicant was mentally upset either when he prepared his original application or on the day of the hearing or that he was suffering from chest pain or a runny nose on the day of the hearing. The Tribunal found that even if the Applicant's back pain was genuine, it would not have affected his capacity to participate in the hearing before the Tribunal on 2 June 2005.

38. The Tribunal was entitled to make findings in accordance with concerns it expressed in the s.424A Letter and was not bound to accept the Applicant's response.

39. In the circumstances, the Tribunal gave weight to the fact that, at the hearing on 2 June 2005, the Applicant was unable to describe the Awami League flag correctly or to identify correctly the four aims or objectives of the Awami League.

40. Those findings of the Tribunal are not *"demeanour"* findings. The Tribunal made findings of fact based on the evidence and material before the Tribunal and in respect of which it gave reasons. The Tribunal gave to the Applicant the information that it considered may be part of the reason for affirming the decision under review by way of the s.424A Letter.

41. The Tribunal then evaluated the Applicant's evidence to the earlier constituted Refugee Review Tribunal as to his knowledge of the Awami League.

42. The Tribunal found the Applicant's knowledge to be inadequate to satisfy the Tribunal that the Applicant was or had been a member of the Awami League. That was evidence given by the Applicant to the Refugee Review Tribunal for the purposes of its review. It was not information that enlivened the obligations of s.424A of the Act. In the circumstances, it was open to the Tribunal to find that it was not satisfied on the evidence and material before it that the Applicant was or had been a member of the Awami League.

43. However, counsel for the Applicant also submitted that, in any event, in *SZHLM v Minister for Immigration and Citizenship* [2007] FCA 1100 ("***SZHLM***") Cowdroy J held that a reconstituted Tribunal was required to carry out its function as if the first hearing had not taken place.

Counsel for the Applicant submitted that the Tribunal therefore was bound to give the Applicant a fresh invitation to come to a hearing pursuant to s.425 of the Act.

44. Counsel for the First Respondent referred the Court to *SZEQX v Minister for Immigration and Citizenship* [2007] FMCA 2091 ("***SZEQX***") in which I considered *SZHLM* and other relevant authorities in relation to the issue. There is authority to suggest that the Act requires the Tribunal to conduct a valid review and make a decision according to law; and, until the Tribunal has made a valid decision, the review is continuing (*SZEPZ v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 107 ("***SZEPZ***"); *NBKM v Minister for Immigration and Citizenship* [2007] FCA 1413 ("***NBKM***"); *Liu v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 541 ("***LIU***")).

45. Relevantly, in *NBKM* Siopis J stated at [25] *"there is no absolute right to a second hearing when a matter is remitted to the tribunal for hearing according to law"*. Nor is there any right to a hearing before the Refugee Review Tribunal member who decides the review (*Liu*; *NBKM* at [23]-[24]).

46. In *SZJHL v Minister for Immigration and Citizenship* [2007] FCA 1713, dated 9 November 2007 ("***SZJHL***"), Finn J at [16] stated that, where the entirety of an applicant's claims and his credibility were generally at issue in the review then any greater doubts that a second Refugee Review Tribunal may have about an applicant's credibility does not raise new or unexpected issues for which in fairness a further opportunity for comment ought to be provided. Finn J held that *"To hold otherwise in the present case would be to give rise to what in a s.424A context, the High Court has described as a "a circulus inextricabilis" of invitation and comment: see SZBYR v Minister for Immigration and Citizenship [2007] HCA 26 at [20]"*.

47. However, in *SZHLM* dated 23 October 2007, Cowdroy J at [34] found that a *"reconstituted Tribunal was required to carry out its statutory functions as if the first hearing had not taken place."* Cowdroy J is the only authority for the proposition that a reconstituted Refugee Review Tribunal is required to invite an applicant to a hearing. There is no

reference in Cowdroy J's decision to *NBKM*, although *SZHLM* was decided after *NBKM*.

48. In the circumstances, I do not propose to follow *SZHLM*. This is the same view I expressed in *SZEQX*.

49. In the case before this Court, the Tribunal gave the Applicant information that may be part of its reason for affirming the decision under review pursuant to s.424A of the Act. The Tribunal noted the Applicant's response and made findings in accordance with those it had foreshadowed in its s.424A Letter.

50. In the circumstances, there was no obligation on the Tribunal to invite the Applicant to come to a further hearing.

51. Accordingly, ground 1 is not made out.

Ground 3 – whether Tribunal was obliged to obtain medical evidence only in accordance with s.427 of the Act

52. Counsel for the Applicant submitted that the Tribunal was obliged to follow the procedure in s.427 of the Act to obtain further evidence from Dr Deva and that, if the Tribunal did not follow the procedure in s.427 of the Act, it could not take into account what the doctor had said.

53. In relation to ground 3, s.427of the Act is in the following terms:

> *"**(1) For the purpose of the review of a decision, the Tribunal may**:*
>
> *(a) take evidence on oath or affirmation; or*
>
> *(b) adjourn the review from time to time; or*
>
> *(c) subject to sections 483 and440, give information to the applicant and to the Secretary; or*
>
> ***(d) require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination.***

(2) The Tribunal must combine the reviews of 2 or more RRT-reviewable decisions made in respect of the same non-citizen.

(3) Subject to subsection (4), the Tribunal in relation to a review may:

(a) summon a person to appear before the Tribunal to give evidence; and

(b) summon a person to produce to the Tribunal such documents as are referred to in the summons; and

(c) require a person appearing before the Tribunal to give evidence either to take an oath or affirmation; and

(d) administer an oath or affirmation to a person so appearing.

(4) The Tribunal must not summon a person under paragraph (3)(a) or (b) unless the person is in Australia.

(5) The oath or affirmation to be taken or made by a person for the purposes of this section is an oath or affirmation that the evidence that the person will give will be true.

(6) A person appearing before the Tribunal to give evidence is not entitled:

(a) to be represented before the Tribunal by any other person; or

(b) to examine or cross-examine any other person appearing before the Tribunal to give evidence.

(7) If a person appearing before the Tribunal to give evidence is not proficient in English, the Tribunal may direct that communication with that person during his or her appearance proceed through an interpreter."

54. Counsel for the Applicant submitted that s.427(1) of the Act is a more specific provision and therefore prevails over the general provisions in the Act that enable the Tribunal to obtain information.

55. The other sections within the Act that assist the Refugee Review Tribunal obtaining further evidence are as follows:

a) Section 420 states that:

"*Refugee Review Tribunal's way of operating*

(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

(2) The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case."

b) Section 424(1) states that :

"*(1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.*"

c) Section 427(3) states that:

"*(3) Subject to subsection (4), the Tribunal in relation to a review may:*

(a) summon a person to appear before the Tribunal to give evidence; and

(b) summon a person to produce to the Tribunal such documents as are referred to in the summons; and

(c) require a person appearing before the Tribunal to give evidence either to take an oath or affirmation; and

(d) administer an oath or affirmation to a person so appearing."

d) Section 429A states that:

For the purposes of the review of a decision, the Tribunal may allow the appearance by the applicant before the Tribunal, or the giving of evidence by the applicant or any other person, to be by:

(a) telephone; or

(b) closed-circuit television; or

(c) any other means of communication.

56. Of course, such information can only be used by the Refugee Review Tribunal in accordance with the legislative regime, including s.424A of the Act.

57. Section 427(1)(d) of the Act does no more than empower the Refugee Review Tribunal to require the Department to arrange for medical examination. It imposes no obligation either expressly or by implication.

58. Further, s.427(6) of the Act states that there is no right for any person before the Tribunal to be able to ask questions of a witness before the Tribunal. In the circumstances, the Applicant had no entitlement to ask questions of Dr Deva.

59. However, the Applicant was entitled to be given any information not provided by him to the Tribunal and which may be part of the reason for affirming the decision under review in accordance with s.424A of the Act. Graham J held that the information obtained by the Tribunal from Dr Deva was information that enlivened the obligations of s.424A of the Act *SZGZH v Minister for Immigration & Citizenship* [2007] FCA 486.

60. In relation to Dr Deva, the Tribunal became aware of his details from the Applicant, who informed the Tribunal that he had met with Dr Deva on the morning of the hearing and that Dr Deva had prescribed him medication. The Tribunal was entitled to make the enquiries that it did of Dr Deva and to use the information obtained from Dr Deva, provided the Tribunal did so in a way that complied with the Act.

61. The Tribunal accepted the information obtained from Dr Deva that, even if the Applicant was in pain, it would not affect his ability to think or participate in the Tribunal hearing. Having accepted that information, the Tribunal found that the Applicant's lack of knowledge about the Awami League was not explained by any medical condition from which the Applicant may be suffering. That information, and its relevance was put to the Applicant by the Tribunal in accordance with s.424A(1) of the Act. In the circumstances, the Tribunal was entitled to have regard to that information in evaluating the evidence given by the Applicant to the earlier constituted Refugee Review Tribunal hearing on 2 June 2005.

62. Section 424(1) of the Act requires the Tribunal to have regard to any information it obtains in making the decision on the review. A fair reading of the Tribunal's decision makes it clear that the Tribunal indeed had regard to the information it obtained from Dr Deva in making the decision on the review.

63. In the circumstances there was no obligation on the Tribunal to obtain a medical examination of the Applicant from Dr Deva in accordance with s.427(1)(d) of the Act.

64. Accordingly, ground 3 of the further amended application is not made out.

65. During submissions on this ground, counsel for the First Respondent made, for the first time, a submission that the Applicant was estopped from being allowed to rely on ground 3 on the basis that the issue was not raised by the Applicant in the prior judicial review proceeding of the decision of the earlier constituted Refugee Review Tribunal. In support of the submission, counsel for the First Respondent referred to the principles enunciated in *Anshun v Port of Melbourne Authority* (1981) 147 CLR 589 ("***Anshun***").

66. Counsel for the Applicant submitted that either the *Anshun* principle had no application or that special circumstances apply such that the Court should exercise its discretion to allow the Applicant to raise for the first time the issue before this Court.

67. Both parties were given leave to file and serve written submissions on the issue of whether or not the *Anshun* principle should operate to preclude the Applicant from raising ground 3. Counsel for each party provided helpful and cogent submissions on the issue of the application of the *Anshun* principle in such circumstances. However, in light of the findings that I have made in respect of this ground, it is not necessary for this Court to determine that issue.

Conclusion

68. A fair reading of the Tribunal's decision makes it clear that the Tribunal understood the claims being made by the applicant; explored those claims with the applicant; had regard to all material provided in

support, and, made findings based on the evidence and material before it. Those findings of fact were open to the Tribunal on the evidence and material before it and for which it provided reasons. A fair reading of the Tribunal's decision makes clear that the Tribunal applied the correct law to those findings and made conclusions based on the findings made by it on the evidence and material before it.

69. The Tribunal complied with the statutory regime of the Act in making its decision, including its review process.

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

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

I certify that the preceding seventy-one (71) paragraphs are a true copy of the reasons for judgment of Emmett FM

Associate: S. Kwong

Date: 29 February 2008