FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZKTQ v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 91*

MIGRATION – Persecution – review of Refugee Review Tribunal decision – visa – protection visa – refusal – Tribunal decision had been delivered to agent not to applicant – proceedings not out of time – Tribunal breached ss.425, 425A and 441G by addressing s.425A notice to applicant rather than to authorised recipient – breach did not affect the outcome of the case and applicant suffered no injustice – relief refused in exercise of discretion – migration agent's duty of confidentiality to applicant not analogous to legal professional privilege.

Migration Act 1958, ss.314, 433, 425, 425A, 426, 441A, 441C, 441G, 477, 486A
Migration Agents Regulations 1998, sch.2

Minister for Immigration & Citizenship v SZKKC [2007] FCAFC 105
WACB v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 79 ALJR 94
SZFOH v Minister for Immigration & Citizenship (2007) 159 FCR 199
M v Minister for Immigration & Multicultural Affairs (2006) 155 FCR 333
Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82
Muin v Refugee Review Tribunal (2002) 190 ALR 601
SZHWY v Minister for Immigration & Citizenship [2007] FCAFC 64

Applicant:	SZKTQ
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1849 of 2007
Judgment of:	Cameron FM
Hearing date:	6 November 2007
Date of Last Submission:	6 November 2007

Delivered at: Sydney

Delivered on: 29 January 2008

REPRESENTATION

Solicitor for the Applicant: Michael Jones

Counsel for the Respondents: Mr. T. Reilly

Solicitors for the Respondents: Sparke Helmore

ORDERS

(1) The application be dismissed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1849 of 2007

SZKTQ
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant is a citizen of Georgia where, he claims, he became involved with opponents of the Georgian government. He alleges that while in Georgia he was implicated in the distribution of anti-government political material in October 1996 and that this subsequently led to him being investigated and his son beaten during a search of the family home in 2000. The applicant left Georgia for Australia where, he alleges, he was baptised in the Baptist church in December 2002.

2. The applicant claims to fear persecution in Georgia because of his political and religious beliefs.

3. After his arrival in Australia, the applicant lodged an application for a protection visa. This was refused by the Minister's delegate on

4 February 1999. The applicant then applied to the Refugee Review Tribunal ("Tribunal") for a review of that departmental decision. The applicant was unsuccessful before the Tribunal and has applied to this Court for judicial review of the Tribunal's decision.

4. The Tribunal decision the subject of these proceedings is the second such decision relating to the applicant. There was a previous Tribunal decision dated 9 November 1999 in which the Tribunal found that it did not have jurisdiction to determine the application (Court Book ("CB") pages 48 – 49). The applicant sought a re-opening of the case on the basis that the Tribunal had mistakenly decided that the application was out of date. The Tribunal subsequently held a hearing which led to its second determination. It is that determination which is the subject of these proceedings.

5. For the reasons which follow, the application will be dismissed.

Background facts

6. The facts alleged in support of the applicant's claim for a protection visa are set out on pages 5 – 19 of the Tribunal's decision (CB 392 – 406).

Protection visa application

7. In his visa application the applicant:

   a) alleged that human rights in Georgia were violated and people were persecuted for their political opinions;

   b) made no claims about his own political opinions and cited no significant instance of individual harassment or repression;

   c) alleged he came to know a "few refugees" from Georgia and heard their stories of repression by the authorities;

   d) did not want to be named as an enemy of the state;

   e) alleged he feared being mistreated by the former USSR's KGB; and

f) claimed that the Department failed to notify him about the delegate's decision.

Applicant's submission to the Tribunal dated 10 August 2004

8. In the applicant's submissions dated 10 August 2004 he claimed that:

a) one unspecified night in Georgia, four men dressed in military uniforms stopped him on the road and demanded that he deliver an unspecified load to a place in the town to which he was heading. When he delivered some of the "packages" he was told to go to a certain bridge and wait there for two hours but there was no pick-up. He eventually drove on and kept the packages, which were full of "political literature";

b) the police in Georgia regarded him as having distributed anti-government political material in October 1996. They investigated him in January 1997 and apparently were able to describe in detail the occasion on which he had offloaded the suspicious packages;

c) in May 1998 the police delivered a letter to his home asking him to present himself for interrogation;

d) police visited his home on several occasions and continued to do so after he left Georgia;

e) his son was beaten by police during a search of the family home on 5 October 2000;

f) the police found anti-government material in his basement;

g) on 14 October 2000 the police put out a "Wanted" notice for him. He faces certain arrest if he returns to Georgia;

h) he was baptised in a Baptist church in Sydney in December 2002. He provided a copy of his baptismal certificate to the Tribunal; and

i) the Baptist church is a minority church in Georgia. Police allowed Baptists to be harassed and repressed in Georgia.

The Tribunal's decision and reasons

9. After discussing the claims made by the applicant and the evidence before it, the Tribunal found that it was not satisfied that the applicant is a person to whom Australia has protection obligations under the *United Nations Convention relating to the Status of Refugees 1951*, amended by the *Protocol relating to the Status of Refugees 1967* ("Convention"). The Tribunal's decision was based on the following findings and reasons:

   a) the Tribunal found that the applicant made a baseless application for a protection visa in the first instance, noting that:

      i) its substance derived generally from the undemocratic and authoritarian conditions in Georgia at the time; and

      ii) the applicant made no claims about himself;

   b) the Tribunal did not accept that the applicant's initial adviser misadvised him by saying, in relation to the protection visa application form, that the applicant should not talk about himself but should focus instead on what he had heard from other asylum seekers about their experiences;

   c) as to the claims which were subsequently made by the applicant in the submissions dated 10 August 2004 after he engaged a new adviser, the Tribunal noted that:

      i) the applicant's claims were far-fetched;

      ii) the evidence supporting his account of his application history was unreliable and inconsistent; and

      iii) his claims about the package delivery and subsequent investigations were implausible, inconsistent and supported by documents the Tribunal concluded to be false;

   d) in relation to the documents submitted by the applicant, the Tribunal concluded that:

      i) the "Wanted" notice was a concoction solicited from amateurs for use by the applicant in the present application;

ii) the doctor's certificate tendered by the applicant was a false account of the implication of the applicant's son in the claimed events;

iii) it had no confidence in the authority of the purported summons or in the purported inventory of goods seized after an alleged search of the applicant's home;

iv) the applicant's claims regarding the "political opinion" imputed to him were fabrications; and

v) although the applicant could be identified as a Baptist in Georgia it was not satisfied that the applicant faced a real chance of persecution in Georgia on religious grounds. The Tribunal noted that it had considered the independent evidence of examples of occasional discrimination against members of non-traditional churches (including Baptist churches) in some parts of Georgia but found on the evidence before it that the Baptist church is permitted to operate in Georgia.

Proceedings in this Court

10. The grounds of the application are as follows:

> *1. The Tribunal failed to exercise its jurisdiction because it failed to comply with ss.425A and 426 of the* Migration Act 1958 *("the Act").*
>
> *2. The Tribunal exceeded its jurisdiction by questioning the applicant about confidential communications without warning him that he need not answer.*

11. However, before considering the issues raised by the applicant, it is necessary first to consider a preliminary jurisdictional issue raised by the first respondent.

Jurisdiction of the Court

12. The first respondent submits that by virtue of s.477 of the Act the Court has no jurisdiction to entertain this application. That section provides:

> *(1) An application to the Federal Magistrates Court for a remedy to be granted in exercise of the court's original jurisdiction under section 476 in relation to a migration decision must be made to the court within 28 days of the actual (as opposed to deemed) notification of the decision.*
>
> *(2) The Federal Magistrates Court may, by order, extend that 28 day period by up to 56 days if:*
>
> > *(a) an application for that order is made within 84 days of the actual (as opposed to deemed) notification of the decision; and*
> >
> > *(b) the Federal Magistrates Court is satisfied that it is in the interests of the administration of justice to do so.*
>
> *(3) Except as provided by subsection (2), the Federal Magistrates Court must not make an order allowing, or which has the effect of allowing, an applicant to make an application mentioned in subsection (1) outside that 28 day period ...*

13. In *Minister for Immigration & Citizenship v SZKKC* [2007] FCAFC 105 the Full Court of the Federal Court made it clear that s.477(1) requires that notification of the Tribunal's decision to the applicant to be actual, rather than deemed. This means that the Tribunal's decision must be personally served upon the applicant. As Gyles J said:

> *It follows that, otherwise than where the applicant appears at the handing down of the decision, the only means of the Tribunal satisfying the notification requirement in s.477(1) is if it engages staff or process servers to personally serve the decision statement upon an applicant.* (at [1])

14. Buchanan J gave the leading judgment in *SZKKC*. Of particular significance for these proceedings is his Honour's consideration of s.441G which requires the Tribunal to give its decision to the applicant's "authorised recipient" instead of to the applicant. The issue which that section presented was that if the Tribunal was required by s.441G to provide its decision to the authorised representative rather than to the applicant then the applicant would never receive actual notification of the Tribunal's decision and s.477 would never be satisfied. In such circumstances, Buchanan J said:

> *I see no alternative but to treat s.441G as incorporating, as an integral part of its arrangements, a deeming provision which (apart from s.477) operates to modify the requirement in s.430B(6) that a decision be notified to an applicant by giving a written statement to the applicant. Instead (apart from s.477) the applicant is deemed to be notified when the written statement is given to an authorised recipient. Section 477 prevents reliance on that facility. In my view it is impossible to divorce s.441G(1) from the operation of subs (2). They must be read together. Section 441G is, properly construed and read as a whole, a deemed notification provision within the meaning of s.477. It is not effective for the purpose of s.477. That is not to say that it ceases to require delivery of documents to an authorised recipient. The effect of the analysis is that, for the purpose of the time limits in s.477, the applicant also must be given the written statement containing the decision.*
>
> *The result is that so far as the limitation periods in s.477 are concerned applicants with authorised recipients will be treated in the same fashion as applicants without authorised recipients. Before their right to apply for judicial review of a decision of the RRT which is alleged to be beyond jurisdiction is extinguished it will be necessary for the periods of time prescribed by s.477 to pass after the applicant is given personally the written statement required by s.430(1) of the Act to be prepared by the RRT.* (at [46] – [47]).

15. In this case, the Tribunal's decision was signed on 6 April 2005 and handed down on 26 April 2005 and as these proceedings were not commenced until 13 June 2007 they are, ostensibly, out of time. However, a determination of that issue turns on whether the applicant was properly notified of the Tribunal's decision in accordance with the requirements of s.477.

16. A document appearing at CB 385 and described as a "Checklist for handing down: 26 April 2005" relates to the handing down of the Tribunal's decision in this case. The document is set out in table form and in boxes adjacent to the following questions are the words "Yes" and "No". In relation to each of the following question the "Yes" box was circled:

    - *Did the applicant attend the handing down?*

    - *Has the decision, etc been given to the applicant?*

- *Did an authorised recipient attend the handing down?*
- *Had the decision, etc been given to the authorised recipient?*

Those entries were counter-signed as a group, rather than individually, and dated.

17. Reproduced at CB 386 is a document entitled "Handing down information form". This document does not identify who attended the handing down but it contains a box which provides as follows:

    ACKNOWLEDGEMENT OF RECEIPT OF DOCUMENTS

    I acknowledge receipt of the decision and reasons for decision and notification letter.

    Applicant: ………………………… Date: / /

    Authorised recipient: …………………… Date: / /

18. A signature was inserted against the words "authorised recipient" and it was dated "26/4/05". Based on a comparison of the signature appearing on a letter from the applicant's then agent, reproduced at CB 50, the signature appears to be that of the applicant's agent. I am satisfied that the signature is not the applicant's signature but that of his then agent.

19. The applicant's case is that the Tribunal's decision was provided to the applicant's "authorised recipient" rather than to him and thus the reasoning of *SZKKC* requires the conclusion that the Court has jurisdiction to entertain these proceedings. As was pointed out in *WACB v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 79 ALJR 94, it is only once the decision is properly notified to the applicant that time begins to run for the purposes of s.477 (per Gleeson CJ, McHugh, Gummow and Heydon JJ at 101 [37]).

20. Although the "Handing down information form" shows that a copy of the decision was given to the applicant's agent, the fact that the applicant's signature does not also appear on that document is not proof that he was not given a copy of it. On the other hand, the "Checklist for handing down: 26 April 2005" is evidence that the decision had been given to the applicant as well as to his agent.

21. In his affidavit sworn 30 October 2007 the applicant says that on 26 April 2005 he attended the offices of the Tribunal with his solicitor, they were taken into a hearing room, a person from the Tribunal said some things which the applicant did not fully understand, a document was then given to the applicant's solicitor who signed a paper and the pair departed. In cross-examination on his affidavit the applicant gave evidence that, at a later time, he was supplied with a copy of the Tribunal decision by his solicitor who, by that time, was no longer acting for him. The impression I formed of the applicant during the course of his evidence was that he was endeavouring to give an accurate and truthful account of the events in question, notwithstanding that translation difficulties caused misunderstandings from time to time during the course of his cross-examination.

22. I find that on 26 April 2005 the Tribunal provided a copy of its decision to the applicant's representative and not to the applicant. It would not be surprising that only one copy of the Tribunal decision was made for the applicant or those appearing in his interest. Further, as the "Handing down information form" does not disclose that an interpreter was present, there is every reason to believe that the Tribunal communicated with the English-speaking authorised representative rather than with the applicant, as the applicant implies in his affidavit sworn 30 October 2007.

23. It is not the Minister's case that the Tribunal attempted to provide the applicant with a copy of its decision at any time subsequent to 26 April 2005. Further, the applicant says, and I accept, that when he did receive a copy of the Tribunal's decision it was from the solicitor who had appeared for and with him on 26 April 2005.

24. As a result, I find that the Tribunal's decision was not given to the applicant in accordance with s.441A(2) by it being handed to him at the Tribunal hearing. Consequently, the requirements of s.477 have not been satisfied and time has not commenced to run. The Court has jurisdiction to hear these proceedings.

25. However, that does not dispose of this aspect of the matter entirely. The Minister has invited the Court to exercise its discretion to refuse the applicant such relief to which he might otherwise be entitled on the basis of his delay in bringing these proceedings. The applicant's

evidence was to the effect that the solicitor who had acted for him at the time the Tribunal's decision was handed down told the applicant that he would file an application in this Court but failed to do so and subsequently suggested an application be filed in the High Court, which the applicant could not afford. The applicant then sought a positive exercise of discretion from the Minister but was unsuccessful, not long thereafter learning that he might not, after all, have been out of time to bring proceedings in this Court which he then proceeded to do. Although it might be said that the applicant had deliberately chosen to eschew a High Court application, given that the events in question occurred at a time when s.486A had not yet been found to be invalid his preference for a direct appeal to the Minister was hardly unreasonable. The applicant's evidence was that after he received the response from the Minister he was advised that he could still pursue proceedings in this Court which he then did.

26. Taking all these factors into consideration I am not convinced that the delay by the applicant in seeking relief in this Court is of such a nature that the Court should exercise its discretion to refuse his application on the basis of that delay.

27. Consequently, I now turn to the grounds raised by the applicant in his amended application.

Breaches of ss.425A and 426

28. By letter of 30 April 2004 the Tribunal invited the applicant to attend a hearing on 31 May 2004 (CB 63 – 64). The letter was addressed to the applicant at the residential address identified in the document "Appointment of migration agent" reproduced at CB 51–52. Notwithstanding the way it was addressed, at the end of the letter underneath the signature and the note of enclosures, the following appears:

> *Sent to:* *Ivan Rados*
> *I Rados & Associates*
> *8/84 Pitt Street*
> *SYDNEY NSW 2000*
>
> *cc:* *Applicant as addressed*

There is no dispute that a copy of the letter was sent to the applicant and a copy also sent to his agent. The Tribunal hearing was subsequently postponed and letters advising the postponed date, dated 26 May 2004 (Exhibit 1), 4 June 2004 (Exhibit 1), 18 June 2004 (Exhibit 1), 1 July 2004 (CB 69) and 14 July 2004 (Exhibit 1) were all sent to the applicant and his agent addressed in terms the same as the first letter.

29. The applicant submits that all of these invitations failed to meet the requirements of s.441G in that they were addressed to the applicant rather than to the authorised recipient. Section 441G(1) provides:

> *If:*
>
> *(a) a person (the applicant) applies for review of an RRT-reviewable decision; and*
>
> *(b) the applicant gives the Tribunal written notice of the name and address of another person (the authorised recipient) authorised by the applicant to do things on behalf of the applicant that consist of, or include, receiving documents in connection with the review;*
>
> *the Tribunal must give the authorised recipient, instead of the applicant, any document that it would otherwise have given to the applicant.*

30. That is to say, where an authorised recipient has been notified to the Tribunal, as in this case, s.441G requires that communications be addressed to that person. The requirement that the communication is to be given to the authorised representative is reinforced by the structure of the Act which makes it clear that if an authorised recipient has been appointed then that is the person referred to as the "recipient" in s.441A, which sets out the methods by which documents may be given to a person, and s.441C, which sets out when documents given by one of the methods specified by s.441A are taken to have been received. The authorised recipient, once appointed, becomes the s.441A "recipient" and it is to that "recipient" that notification must be given. Although s.441G(2) provides that that section does not prevent the Tribunal from giving the applicant a copy of a document given to the authorised recipient, sending a document to the applicant instead will not satisfy the requirements of the Act: *SZFOH v Minister for*

Immigration & Citizenship (2007) 159 FCR 199 at 208 [29] per Besanko J, Moore J agreeing at 200 [1].

31. Buchanan J said in *SZFOH* at 212 [59] that the failure to send the s.425A notice to the authorised recipient was a fatal failure to comply with the statutory regime resulting in the Tribunal's decision being made without jurisdiction and therefore being invalid, but it should also be noted that the Court's judgment in *SZFOH* was made in circumstances where the applicant did not appear at the hearing to which that s.425A notice invited him.

32. In this case, it is abundantly clear that none of the letters was addressed to the authorised recipient although, similarly, there appears no doubt that they were sent to him. That being so, a necessary condition precedent to the Tribunal conducting the hearing was not fulfilled and by proceeding to conduct the hearing in those circumstances, the Tribunal exceeded its jurisdiction.

33. However, the applicant did not submit that he had been disadvantaged by the way the letters in question were addressed and it is to be noted that he did attend the Tribunal hearing when it was finally held. In circumstances where the applicant has suffered no injustice by reason of the erroneous way in which the s.425A notices were drawn, relief may be refused in the exercise of the Court's discretion: *M v Minister for Immigration & Multicultural Affairs* (2006) 155 FCR 333 per Tracey J at 343 [38]. In this case, notwithstanding the failure to meet the strict terms of the statute, there has been no failure by the Tribunal to accord common law procedural fairness to the applicant: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 109 [59] per Gaudron and Gummow JJ, Gleeson CJ agreeing at 89 [5].

34. Even so, jurisdictional error having been shown, a decision to refuse relief in the exercise of discretion, should not be made lightly. As was said by Gaudron and Gummow JJ in *Aala's case:*

> *Some guidance, though it cannot be exhaustive, as to the circumstances which may attract an exercise of discretion adverse to an applicant is indicated in the following passage from the judgment of Latham CJ, Rich, Dixon, McTiernan and Webb JJ in a mandamus case,* R v Commonwealth Court of Conciliation and

Arbitration; Ex parte Ozone Theatres (Aust) Ltd. *Their Honours said:*

> *"For example the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. The court's discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld."* (at [55]) (footnotes omitted).

35. In this respect, what McHugh J said in *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 is also relevant:

> *Nevertheless, once a breach of natural justice is proved, a court should refuse relief only when it is confident that the breach could not have affected the outcome of the case.* (at 635 [140])

36. Here the applicant has not submitted that he suffered any disadvantage by reason of the way the five letters were addressed. In the circumstances, that does not seem surprising. It is also significant that no complaint was made by the applicant or his agent prior to the Tribunal hearing that any one of the letters was mis-addressed, although it is unlikely that they were aware that, strictly, they were. It seems equally unlikely that the Tribunal was aware that it was not complying with the requirements of the Act. In circumstances where, in all probability, both parties believed the s.425A notices were formally valid and acted on them as if they were, where no disadvantage has been alleged by the applicant, and where I am confident that the breaches of ss.425, 425A and 441G could not have affected the outcome of the case, on this occasion the Court will exercise its discretion to refuse relief to the applicant in respect of the Tribunal's failure to observe the requirements of those sections.

Questioning the applicant about confidential communications

37. The applicant refers to the following passage in the Tribunal's decision:

> *The Applicant said his adviser was based in Sydney and that he first discussed his claims with him in September 1998. It was*

another two months before his protection visa application was lodged. He claimed he retained the same adviser the following year. He claimed that his adviser told him not to provide any details. The Tribunal considered this claim, which suggests that the lack of detail in the Applicant's protection visa application was a result of obeying an instruction not to talk at all about himself. The Tribunal questioned this claim at the RRT hearing. The Tribunal asked the Applicant if he ever told his adviser that he had specific information about himself and he said he told the adviser he had general information which the adviser put in the application. The Tribunal asked him if he ever said to his adviser that he had more information about himself, and he said that his adviser told him to save that information to tell DIMIA in person. (CB 398).

The applicant also referred to that part of the transcript of the hearing before the Tribunal at pp.13 – 15 where the Tribunal asks and the applicant answers questions about discussions he had with his initial migration agent.

38. The applicant submitted that the Tribunal should have informed the applicant that he could refuse to divulge the communications he had had with his agent without any adverse inference being drawn. He submits that the relationship between the applicant and his migration agent was akin to the relationship between a legal adviser and his or her client and created a situation similar to legal professional privilege. In making this submission the applicant referred to s.314 of the Act which provides that a code of conduct for migration agents may be prescribed under the Act. The *Migration Agents Regulations 1998*, made under the Act, provide for a code of conduct which is found in sch.2 to the Regulations. Items 3.1 and 3.2 of that code provide:

> *3.1 A registered migration agent has a duty to preserve the confidentiality of his or her clients.*
>
> *3.2 A registered migration agent must not disclose, or allow to be disclosed, confidential information about a client or a client's business without the client's written consent, unless required by law.*

39. In drawing an analogy with legal professional privilege, the applicant made reference to *SZHWY v Minister for Immigration & Citizenship* [2007] FCAFC 64. However, in my view, the attempted analogy with

legal professional privilege is misconceived. First, legal professional privilege is a substantive right which, absent specific statutory abrogation, can be enforced by its possessor against all parties. By contrast, to the extent that it is not already an incident of the relationship of principal and agent, the confidentiality required of migration agents is only a creature of the *Migration Agents Regulations* and is no more than a duty owed by an agent to his or her client. Just as in the common law of agency, it is not a substantive right enforceable by the client against third parties. Consequently, and unlike the client of a solicitor or barrister, an applicant is not, absent a reasonable excuse, permitted to refuse or fail to answer a question that the Tribunal requires him or her to answer: s.433. This includes questions dealing with communications with his or her migration agent. Consequently, the Tribunal had no duty to give the warning which the applicant says should have been given.

40. For these reasons, this asserted ground of review is not made out.

Conclusion

41. Although jurisdictional error on the part of the Tribunal has been demonstrated, in the exercise of the Court's discretion, the application will be dismissed.

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

Associate:

Date: 29 January 2008