FEDERAL COURT OF AUSTRALIA

SZIAI v Minister for Immigration and Citizenship [2008] FCA 1372

MIGRATION – application to raise ground of appeal abandoned below – jurisdiction or discretion – role of appellate court to correct error – public law – need for timely decisions – certificates filed by Appellant – inquiry initiated by Tribunal unearthed opposing evidence – certificates said to be "*fake & forged*" – further inquiry required – appeal allowed

Federal Court of Australia Act 1976 (Cth), s 24(1)(d)
Migration Act 1958 (Cth), ss 91R(3), 422B, 427(1)(d), 476A

Bunnag v Minister for Immigration and Citizenship [2008] FCA 357 followed
C A Henschke & Co v Rosemount Estates Pty Ltd [2000] FCA 1539, 52 IPR 42 considered
Coulton v Holcombe (1986) 162 CLR 1 followed
Foxtel Management Pty Ltd v Australian Competition and Consumer Commission [2000] FCA 589, 173 ALR 362 followed
Gomez v Minister for Immigration and Multicultural Affairs [2002] FCAFC 105, 190 ALR 543 followed
Iyer v Minister for Immigration and Multicultural Affairs [2001] FCA 929, 192 ALR 71 considered
Li v Minister for Immigration and Citizenship [2007] FCA 1098, 96 ALD 361 followed
Luu v Minister for Immigration and Multicultural Affairs [2002] FCAFC 369, 127 FCR 24 considered
Luu v Renevier (1989) 91 ALR 39 followed
Metwally v University of Wollongong (1985) 59 ALJR 481 followed
Minister for Immigration and Citizenship v Le [2007] FCA 1318, 164 FCR 151 followed
Minister for Immigration and Multicultural and Indigenous Affairs v SGLB [2004] HCA 32, 207 ALR 12 followed
Minister for Immigration and Ethnic Affairs v Singh (1997) 74 FCR 553 considered
NBKT v Minister for Immigration and Multicultural Affairs [2006] FCAFC 195, 93 ALD 333 followed
Ngaronoa v Minister for Immigration and Citizenship [2007] FCAFC 196, 244 ALR 119 followed
Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155 followed
Singh v Minister for Immigration and Ethnic Affairs (1985) 9 ALN N13 considered
SZIAI v Minister for Immigration [2008] FMCA 788 cited
SZITU v Minister for Immigration & Citizenship [2008] FCA 758 followed
SZJBA v Minister for Immigration and Citizenship [2007] FCA 1592, 164 FCR 14 followed
SZJGV v Minister for Immigration and Citizenship [2008] FCAFC 105, 102 ALD 226 followed
SZKMS v Minister for Immigration and Citizenship [2008] FCA 499 followed
Tickner v Bropho (1993) 40 FCR 183 followed
WAGJ v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 277 followed

Wecker v Secretary, Department of Education Science & Training [2008] FCAFC 108 followed

McMillan J, *Recent Themes in Judicial Review of Federal Executive Action* (1996) 24 FL Rev 347
Taylor S, *Informational Deficiencies Affecting Refugee Status Determination: Sources and Solutions* (1994) 13 U Tas LR 43

SZIAI v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND ANOR
NSD 1024 OF 2008

FLICK J
8 SEPTEMBER 2008
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NSW DISTRICT REGISTRY **NSD 1024 OF 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZIAI** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**FLICK J**
DATE OF ORDER:	**8 SEPTEMBER 2008**
WHERE MADE:	**SYDNEY**

THE ORDERS OF THE COURT ARE:

1. The appeal be allowed.
2. The orders of Scarlett FM in the Federal Magistrates Court of Australia on 18 June 2008 be set aside.
3. An order in the nature of a writ of *certiorari* quashing the decision of the Second Respondent.
4. An order in the nature of a writ of *prohibition* prohibiting the First Respondent from acting upon, giving effect to, or proceeding further on the basis of the decision of the Second Respondent.
5. The matter be remitted to the Second Respondent to be determined according to law.
6. The First Respondent is to pay the Appellant's costs of the proceeding before Scarlett FM and of this appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NSW DISTRICT REGISTRY **NSD 1024 OF 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZIAI** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**FLICK J**
DATE:	**8 SEPTEMBER 2008**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 The Appellant is a citizen of Bangladesh who arrived in Australia on 27 May 2005.

2 He applied for a Protection (Class XA) Visa on 22 June 2005. In a statement dated 21 June 2005 the Appellant set forth that he was born into a Sunni Muslim family but converted to Ahmadiyya Muslim Jamaat on 1 January 2000. He went on to state that as he had "*changed my religion faith, I am now disowned by family and close relatives*". The claim for the visa was refused on 18 August 2005.

3 There thereafter followed two hearings before the Refugee Review Tribunal, each of which was set aside by the Federal Magistrates Court. The decision of the Tribunal which was the subject of review by the Federal Magistrates Court now under appeal is that handed down on 19 February 2008. That decision affirmed the decision of the Minister's delegate not to grant a protection visa. The Federal Magistrates Court dismissed the application made to that Court: *SZIAI v Minister for Immigration* [2008] FMCA 788.

4 The *Notice of Appeal* as filed in this Court raises four *Grounds of Appeal*, being contentions that the learned Federal Magistrate:

(i) erred by failing to find that the Tribunal committed jurisdictional error in failing to take into account delays and/or the number of occasions on which the now Appellant was required to give evidence, caused by the number of occasions upon which the claim was remitted to the Tribunal, in making credibility findings based on alleged inconsistencies at different hearings;

(ii) further erred in finding that the Tribunal had provided a fair proceeding for the now Appellant when relying on evidence from a third-party questioning the authenticity of documents relied on by the Appellant to corroborate his claim to be a member of Ahmadiyya Muslim Jamaat;

(iii) further erred in finding that the Tribunal's decision was "*not unreasonable*", in circumstances where the decision was affected by apprehended bias;

(iv) further erred in finding that the decision of the Tribunal was a privative clause decision, in circumstances where the Tribunal failed to comply with the requirements of ss 424A and 424AA of the *Migration Act 1958* (Cth).

In addition to these *Grounds*, the Appellant now seeks leave to amend the existing *Notice of Appeal* to raise an additional ground, namely:

(v) a contravention of s 91R(3) of the *Migration Act 1958* (Cth).

5 When the appeal was called on for hearing, Counsel for the Appellant only sought to press the second and fifth *Grounds.* The remaining *Grounds* were abandoned.

6 Notwithstanding the terms in which the second *Ground of Appeal* is now expressed, it is understood that this *Ground* seeks to contend that the Tribunal should have made further inquiries and, in failing to make those further inquiries, there was a failure to make such inquiries as the Tribunal was authorised to make pursuant to s 427(1)(d) of the 1958 Act and that the decision of the Tribunal was unreasonable. This was an argument raised before the Federal Magistrates Court and resolved against the now Appellant.

7 The fifth *Ground of Appeal* was an argument raised before the Federal Magistrates Court by the form of *Application* as filed in that Court. The argument, however, was there abandoned by Counsel then appearing for the now Appellant**.**

APPELLATE JURISDICTION OF THIS COURT

8 In entertaining the current appeal, it is relevant to recall that this Court is exercising appellate jurisdiction, being the jurisdiction conferred by s 24(1)(d) of the *Federal Court of Australia Act 1976* (Cth) to hear an appeal from a decision of the Federal Magistrates Court. This Court is not exercising the original jurisdiction conferred by the Commonwealth legislature upon the Federal Magistrates Court by s 476 of the 1958 Act. The original jurisdiction of this Court conferred by s 476A of the 1958 Act is — and is expressed to be — a "*limited jurisdiction*". See: *SZITU v Minister for Immigration & Citizenship* [2008] FCA 758 at [32] per Greenwood J.

9 No argument was advanced, however, on behalf of the Respondent Minister denying the jurisdiction of this Court to entertain the fifth *Ground* sought to be advanced. The Respondent Minister's position was that this Court should decline to entertain the fresh ground — not as a matter of jurisdiction — but rather as a matter of discretion. No *Notice of Objection* to the competency of the appeal had been filed. Counsel for the Respondent Minister submitted that leave to raise an argument as to non-compliance with s 91R(3) should be refused in circumstances where that was an argument raised for resolution before the Federal Magistrates Court, where the now Appellant was there represented by Counsel, and where (for whatever reason) Counsel then appearing for the now Appellant expressly abandoned reliance upon any alleged non-compliance.

10 In the absence of submissions being advanced which properly addressed the concerns as to jurisdiction, and where ultimately it is unnecessary to do so, the present appeal has not been resolved on the basis that this Court does not have jurisdiction to entertain the proposed further *Ground of Appeal*. If the issue had been pursued, it is considered that it should have been resolved not by a single Judge of this Court but by the Full Court constituted by three Judges.

A FAILURE TO MAKE INQUIRIES?

11 As explained by Counsel for the Appellant, the second *Ground of Appeal* is understood to relate to two documents provided by the now Appellant to the Tribunal in support of his claim that he had changed his religion. Those documents were:

- a "*Certification*" provided by a Mr Nuruzzaman; and
- a "*Certification*" provided by a Mr Hossain.

These documents were provided in support of the now Appellant's claim that he had changed his religious faith. Each document provided an address and a mobile phone number whereby those providing the documents could be contacted.

12 Before the Tribunal the question as to whether the now Appellant had changed his religious faith was clearly raised as a central issue to be resolved. During the course of the hearing before the Tribunal, the Tribunal informed the now Appellant that the Ahmadiyya Muslim Association would inform the Tribunal whether a person was or was not an Ahmadi. He was asked whether he consented to an inquiry being made of the Association. As the Tribunal recorded, "*if he was telling the truth they would be well-qualified to comment*". If he did not consent, he was further advised that the Tribunal was "*minded to draw an adverse inference*". It was after the Tribunal hearing had concluded that the now Appellant's representatives advised the Tribunal that he consented to an inquiry being made.

13 On 15 November 2007 the Tribunal caused an inquiry to be made of the Ahmadiyya Muslim Association of Australia. On 10 January 2008 that Association replied to the Tribunal by annexing a letter received from the Ahmadiyya Muslim Jamaat, Bangladesh. That letter stated:

> I hope by the grace of Allah you are in good health.
>
> Please refer to your letter No. 386 dt. 25.11.07 regarding [SZIAI].
>
> For your kind information on enquiry our Khulna Jamaat informed me that they could not find out any such name in their record. Both the certificates submit by him are fake & forged. Moreover as you know local Ameer/Presidents can only issue certificates for transfer of a member from one local Jamaat to other Jamaats within the country. Only National Ameer can issue a certificate for international travel/transfer of a member.

14 The now Appellant was invited to respond to the information received by the Tribunal. The response provided by his legal representatives in their letter dated 29 January 2008 was in relevant part as follows:

> We are instructed to inform the RRT that the applicant disagrees with the information forwarded and states that he is an Ahmadi. He cannot, however, otherwise prove that to be so.

15 The Tribunal proceeded to accept the evidence provided by the Association.

16 The contention now advanced before this Court is that further inquiries should have been made by the Tribunal of:

- either Mr Nuruzzaman or Mr Hossain; and/or
- the Association itself.

17 It was understood that Counsel for the Appellant contended that the failure to make inquiries constituted a denial of procedural fairness. That submission was resisted by Counsel for the Respondent Minister. It was his contention that by reason of s 422B of the 1958 Act "*there is no scope for the operation of general requirements of procedural fairness outside the specific provisions of Div 4 of Pt 7 of the Act*": *NBKT v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 195 at [85], 93 ALD 333 at 353 per Young J (Gyles and Stone JJ agreeing).

18 There was, however, no opposition to advancing the submission as to a failure to make inquiries in terms of the decision being unreasonable. So structured, the dispute centred upon whether or not it was unreasonable not to have made further inquiries. No submission was advanced on behalf of the Appellant, nor could it have been advanced, that the power of the Tribunal to make further inquiries imposed upon it "*any duty or obligation to do so*": *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32 at [43], 207 ALR 12 at 21–2 per Gummow and Hayne JJ. See also: *SZJBA v Minister for Immigration and Citizenship* [2007] FCA 1592 at [46], 164 FCR 14 at 25 per Allsop J; *WAGJ v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 277 at [24]. Nor was any submission advanced on behalf of the Respondent Minister that there was not a line of inquiry which was readily available to the Tribunal and centrally relevant to the task being undertaken: eg, *Li v Minister for Immigration and Citizenship* [2007] FCA 1098 at

[28], 96 ALD 361 at 367 per Kenny J. The simple submission advanced on behalf of the Respondent Minister was that there was material upon which the Tribunal could justifiably have based its decision and there was, in those circumstances, no duty to inquire further. The response of the Association was disclosed to the now Appellant and he provided his response.

19 The position advanced by the Respondent Minister, that review is available where there has been a failure to make inquiries, is consistent with the proposition that jurisdictional error may be exposed by a failure to inquire and that such a failure may render a decision manifestly unreasonable: *Minister for Immigration and Citizenship v Le* [2007] FCA 1318 at [60], 164 FCR 151 at 172–3. Her Honour Justice Kenny there observed:

> [60] This takes me to the sixth of the Minister's grounds on the hearing of the appeal. On the one hand, the authorities establish that the Tribunal has no general obligation to initiate enquiries or to make out an applicant's case for him or her. These authorities stretch back over the life of the Tribunal… On the other hand, there is authority for the limited proposition that, in certain rare or exceptional circumstances, the Tribunal's failure to enquire may ground a finding of jurisdictional error because the failure may render the ensuing decision manifestly unreasonable in the sense used in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (*Wednesbury Corporation*).
>
> [61] In *Wednesbury Corporation* [1948] 1 KB at 230, Lord Greene MR summarised what he saw as a fundamental common law principle when he said "[i]t is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere". He added that "to prove a case of that kind would require something overwhelming". A finding of jurisdictional error on the ground of unreasonableness is rare compared with other grounds: see *Applicant M17 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1364 at [29] per North J. It is sometimes said that there must be something exceptional about the case to attract the ground.
>
> [62] Although the position in Australia may differ from that in England, the decision in *Wednesbury Corporation* [1948] 1 KB 223 would support the proposition that an exercise of power that is unreasonable in this sense may ground a finding of jurisdictional error. …
>
> [63] The concept of vitiating unreasonableness has been extended to the manner in which a decision was made. Thus, a failure by a decision-maker to obtain important information on a critical issue, which the decision-maker knows or ought reasonably to know is readily available, may be characterised as so unreasonable that no reasonable decision-maker would proceeded to make the decision without making the enquiry… In this circumstance what vitiates the decision is the manner in which it was made. Since this is a limited proposition, it does not conflict with the larger statement that the Tribunal is under no general duty with respect to making enquiries…

Appl'd: *Bunnag v Minister for Immigration and Citizenship* [2008] FCA 357 at [36] per McKerracher J. In circumstances where a migration agent forwards by way of facsimile a cover sheet together with a five page submission and where only the cover sheet is received, it has been held to be unreasonable for the Tribunal not to inquire about the missing pages:

SZJBA v Minister for Immigration and Citizenship [2007] FCA 1592, 164 FCR 14 per Allsop J.

20 In the present appeal, the January 2008 letter provided by the legal representatives of the now Appellant did not make any request for further inquiries to be made. The Tribunal itself, however, was alert to the prospect that a relevant inquiry could be made. The third Tribunal in its reasons thus stated:

> … The applicant referred to the letter he had produced from Md Nuruzzaman and he noted that it bore a telephone number which could be used to contact him. …

21 The learned Federal Magistrate reached the conclusion that it was not unreasonable for the Tribunal to make no further inquiries. That Federal Magistrate concluded:

> [69] The information that the documents purporting to be from Md. Nuruzzaman and Md. Millat Hossein were "fake & forged" was a very powerful piece of information from an obviously independent source, and the Tribunal was entitled to rely on that information as persuasive. When that information was put to the applicant for comment, all he could do was disagree and maintain that he was an Ahmadi.
>
> [70] Clearly, in the light of reliable information that the 'certifications' purporting to be from Md. Nuruzzaman and Md. Millat Hossein were fakes and forgeries, the Tribunal was not acting unreasonably when it decided not to telephone either of the authors of those documents. What would have been the point?

22 The independence of the source of information from the Association may readily be accepted. And the independence of the information so obtained may well be a reason why ultimately that information should prevail. But, in the absence of inquiries being made, the two diametrically opposed views remained untested. The "*point*" of making an inquiry of either Mr Nuruzzaman or Mr Hossain (or both), was to obtain their input into the views otherwise being expressed in apparently persuasive terms by the Ahmadiyya Muslim Jamaat in Bangladesh. They may or may not have been able to provide further assistance; but the failure to make an inquiry stripped the Tribunal of their input. It was an inquiry centrally relevant to the issues to be resolved and an inquiry which could readily have been made. An inquiry of the Association may have provided a basis upon which its conclusions as to the certificates being "*fake & forged*" could be accepted or rejected.

23 The fact that there was evidence which the Tribunal clearly regarded as "*reliable information*", namely the letter from the Association, did not absolve it of the requirement to

make further inquiries. Whether or not it was unreasonable for the Tribunal not to make further inquiries is not to be resolved by reference to whether there was evidence upon which a particular decision could have been made. Even if there was such evidence, as there was in the present proceeding, it may nevertheless remain unreasonable not to make further inquiries where a finding is to be made which is centrally relevant to the decision to be made and where there is readily available further information which is of immediate relevance to the decision to be made.

24 Nor is the fact that the now Appellant was shown the letter from the Association and extended the opportunity to respond considered sufficient to absolve the Tribunal of the requirement to inquire further. It would, perhaps, not have further advanced the case for the now Appellant to have responded by contending that he adhered to the *Certificates* previously provided; nor would it have advanced the Department's position to have contended that there was now information supporting its contention. Information immediately relevant to an assessment as to whether the "*certificates*" of Messrs Nuruzzaman and Hossain were "*faked*" or "*forged*" was not information in the possession or control of the now Appellant; information relevant to that assessment was presumably best able to be obtained from those providing the "*certificates*". If an inquiry is required to be undertaken, it must be an inquiry of those who can provide meaningful assistance. An opportunity for the Appellant to make submissions, in the circumstances of the present appeal, did not strip the Tribunal of its obligation to make inquiries. It could not reasonably have reached a conclusion either accepting the *Certificates* provided by the now Appellant or the Association's letter without further pursuing which documents were to be accepted.

25 The circumstances in which a decision of the Tribunal should be set aside by reason of a failure to make inquiries, it is acknowledged, may be a confined category of case: *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155. Wilcox J there observed at 169–70:

> … The circumstances under which a decision will be invalid for failure to inquire are, I think, strictly limited. It is no part of the duty of the decision-maker to make the applicant's case for him. It is not enough that the court find that the sounder course would have been to make inquiries. But, in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised it. …

This decision was subsequently endorsed by the Full Court: *Luu v Renevier* (1989) 91 ALR 39. See also: *Tickner v Bropho* (1993) 40 FCR 183 at 197–8 per Black CJ. Subsequently in *Foxtel Management Pty Ltd v Australian Competition and Consumer Commission* [2000] FCA 589, 173 ALR 362 at 417 Wilcox J returned to his earlier decision in *Prasad* and further observed:

> [214] … It will be a relatively rare case in which a statutory decision is vitiated because of the decision-maker's failure to make inquiries. It will need to be apparent that relevant material was readily available to the decision-maker, but ignored.

The circumstances in which an obligation may be imposed upon an administrator to make further inquiries is thus repeatedly said to be "*strictly limited*": *Wecker v Secretary, Department of Education Science & Training* [2008] FCAFC 108 at [109] per Greenwood J (Weinberg J agreeing). And the fact that it is no part of the task of the decision-maker to make out an applicant's case is also repeatedly recognised — it was referred to at the outset by Wilcox J in *Prasad* and subsequently emphasised: eg, *Luu v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 369 at [50], 127 FCR 24 at 40–1 per Gray, North and Mansfield JJ.

26 Whether or not it is unreasonable not to make further inquiries may well depend upon the availability of further information and its importance to the factual issues to be resolved. It may also depend upon the subject matter of inquiry and an assessment of the comparative ability of individuals to provide or to obtain relevant information. There may thus be little (if any) scope for a duty upon a decision-maker to inquire into facts well known to an applicant and facts within his power to adduce: eg, *Singh v Minister for Immigration and Ethnic Affairs* (1985) 9 ALN N13. In refugee cases, reference may also be made to the comparative difficulty in some circumstances confronted by an applicant seeking refugee status and the comparative ability of decision-makers to elicit further information: cf Taylor S, *Informational Deficiencies Affecting Refugee Status Determination: Sources and Solutions* (1994) 13 U Tas LR 43. And an assessment as to whether further inquiries should be undertaken may also take into account the importance of a decision upon an individual — an administrative decision-making process which impacts upon an individual's freedom or a claimed ability to live in freedom may warrant more extensive inquiries being undertaken than one, for example, where the imposition of a modest pecuniary penalty is under consideration.

27 Notwithstanding considerable reservation, it is considered that the Tribunal should have proceeded to make an inquiry of either Mr Nuruzzaman or Mr Hossain or the Association. The issue to which the *Certificates* were directed was properly accepted by Counsel for the Minister as being centrally relevant to the decision reached. The second *Ground of Appeal*, construed as it was argued as a contention that the Federal Magistrates Court erred in not concluding that the Tribunal's decision was vitiated by reason of a failure to make inquiries, thus prevails.

28 Any decision which requires a further inquiry to be made, it must be accepted, poses "*the risk that an inquiry could never be satisfactorily concluded in the knowledge that another unturned stone may be hiding additional relevant information*": McMillan J, *Recent Themes in Judicial Review of Federal Executive Action* (1996) 24 FL Rev 347 at 381. But, in the present appeal, a simple phone call may well have been all that was required. The importance of the decision to the Appellant and his family, it is considered, warranted at least such a simple step being undertaken.

29 The Tribunal, it may be noted, had no hesitation in suggesting that an inquiry should have been made of the Association and no hesitation in suggesting that an adverse inference could be drawn against the Appellant in the event that he did not consent to such a course. In the absence of any submission now being advanced that a reasonable apprehension of bias may have arisen on the part of the Tribunal by confronting the Appellant with such a choice, it is unnecessary to make any comment upon the course in fact pursued by the Tribunal. But, having embarked upon its preferred course of making an inquiry of the Association, the Tribunal was thereafter committed to making a further inquiry to resolve the diametrically opposed evidence exposed before it. There may be no general obligation to make inquiries to test the authenticity of documents produced to the Tribunal: eg, *Minister for Immigration and Ethnic Affairs v Singh* (1997) 74 FCR 553. But where an inquiry initiated by the Tribunal itself places the authenticity of documents otherwise before it in issue, further inquiries should be made to attempt to resolve the conflict that emerges. Having confronted the Appellant with the choice of consenting to an inquiry being made of the Association, or an adverse inference possibly being drawn, it was incumbent upon the Tribunal to at least make a further inquiry of the nature now advanced by the Appellant.

SECTION 91R(3)

30 In the present appeal, it is considered that, as a matter of discretion, leave to raise the argument previously abandoned should be refused. No reason has been advanced to explain why the argument now sought to be advanced was previously abandoned by the now Appellant. In any event, the fifth *Ground of Appeal* is considered to be without sufficient merit to now warrant the granting of leave.

31 The *Application* as filed in the Federal Magistrates Court stated the following as one of the grounds there relied upon:

> The Tribunal fell into jurisdictional error in its application of s 91R(3) of the Migration Act.

Before that Court the now Appellant was represented by Counsel. For whatever reason, that ground was there abandoned.

32 In the absence of some explanation as to why an argument which has previously been raised and abandoned should now be resurrected, it is difficult to see why leave should be given not only to raise the *Ground* on appeal but to raise it by way of an application to amend the *Notice of Appeal* as filed, that application being filed only shortly before the hearing of the appeal. The purpose of an appeal is to permit the correction of error, not to permit a fresh application to be brought on different grounds occasioned by a change of counsel: *Ngaronoa v Minister for Immigration and Citizenship* [2007] FCAFC 196 at [1] per Moore J, at [29]–[30] per Bennett and Buchanan JJ; 244 ALR 119.

33 A party is normally bound by the manner in which it has previously conducted its case: *Metwally v University of Wollongong* (1985) 59 ALJR 481. Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ there observed:

> It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.

Appl'd: *Gomez v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 105 at [18], 190 ALR 543 at 548–9 per Hill, O'Loughlin and Tamberlin JJ. Similarly, in *Coulton v Holcombe* (1986) 162 CLR 1 at 7 Gibbs CJ, Wilson, Brennan and Dawson JJ observed:

> It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.

The importance of litigants, especially in the present statutory context, raising all arguments in need of resolution in the Federal Magistrates Court cannot be underestimated. In *SZKMS v Minister for Immigration and Citizenship* [2008] FCA 499 Lander J referred to the appellate jurisdiction of this Court being exercised by a single judge pursuant to s 25(1AA) of the *Federal Court of Australia Act 1976* (Cth) and continued:

> [24] The appellate process is to correct error. If a party is entitled to raise issues for the first time on appeal, the appeal court will become de facto the primary court. That is undesirable. It is particularly undesirable where the appellate jurisdiction of the Court is being exercised by a single judge and any right of appeal from that single judge is to the High Court. If a party is entitled to raise an issue for the first time on appeal in this Court, the High Court will be burdened by applications for leave to appeal from judges sitting alone who have not had their decision reviewed. That must be particularly undesirable from the High Court's point of view.
>
> [25] Moreover, to allow new grounds of appeal is to defeat the purpose of the legislation which requires that judicial review of a decision of the Refugee Review Tribunal to be within solely the jurisdiction of the Federal Magistrates Court. If new grounds are advanced on appeal, it effectively means that the jurisdiction is being exercised by this Court.

34 More generally, there is a legitimate interest in public law matters being resolved in a timely and efficient manner: cf *Iyer v Minister for Immigration and Multicultural Affairs* [2001] FCA 929 at [62], 192 ALR 71 at 86 per Gyles J.

35 In some circumstances it may be accepted that an argument may be permitted to be raised even though it has been "*unequivocally disclaimed*" before the trial judge: eg, *C A Henschke & Co v Rosemount Estates Pty Ltd* [2000] FCA 1539 at [32]–[35], 52 IPR 42 at 57–61. The argument there sought to be raised on appeal was an argument important to trade mark law and one where it was conceded that no further evidence would have been relied upon had the argument been pursued at trial.

36 In the present appeal, if the s 91R(3) argument is to be pursued, no further evidence is required to be adduced on appeal. But, and whatever other difficulties would otherwise have been confronted, a fundamental difficulty is that the argument is one without substance.

37 Section 91R(3) provides as follows:

> (3) For the purposes of the application of this Act and the regulations to a particular person:
>
> (a) in determining whether the person has a well founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;
>
> disregard any conduct engaged in by the person in Australia unless:
>
> (b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.

This provision, it has been said, "*suffers from a lack of clarity*": *SZJGV v Minister for Immigration and Citizenship* [2008] FCAFC 105 at [10], 102 ALD 226 at 231 per Spender, Edmonds and Tracey JJ.

38 The contention sought to be raised concerns the fact that the Tribunal correctly concluded that the Appellant's conduct in attending the Ahmadi mosque in Australia was to be disregarded. The Tribunal thus relevantly concluded:

> Since I do not accept that the applicant is a genuine Ahmadi I am not satisfied that he has engaged in his conduct in attending the Ahmadi mosque here otherwise than for the purpose of strengthening his claim to be a refugee. I consider, therefore, that his conduct in attending the Ahmadi mosque here is to be disregarded in accordance with subsection 91R(3) of the Act.

39 Notwithstanding the assurance provided by the Tribunal that the attendance at the mosque was to be "*disregarded*", Counsel for the Appellant submitted that the Tribunal nevertheless went on to have regard to that attendance when it thereafter concluded:

> I note for the sake of completeness that, since I do not accept that the applicant has told the truth about his claimed conversion to the Ahmadi faith in Bangladesh, I do not accept that there is a real chance that he will be perceived as a convert to the Ahmadi faith if he returns to Bangladesh now or in the reasonably foreseeable future.

Such a "*perception*", it was contended, could only have been founded upon the Appellant's attendance at the mosque.

40 Why the source of the Tribunal's "*perception*" could only have been the attendance at the mosque was not satisfactorily explained. The perception may well have been founded upon the Tribunal's assessment as to whether the now Appellant was indeed "*a witness of truth*". In the face of the Tribunal's assurance that it disregarded the Appellant's attendance at the mosque, there is no reason to question that assurance.

41 Leave to raise this additional *Ground of Appeal* is refused and, even if leave had been granted, the *Ground* itself would have been dismissed.

ORDERS

42 The orders of the Court are:

1. The appeal be allowed.
2. The orders of Scarlett FM in the Federal Magistrates Court of Australia on 18 June 2008 be set aside.
3. An order in the nature of a writ of *certiorari* quashing the decision of the Second Respondent.
4. An order in the nature of a writ of *prohibition* prohibiting the First Respondent from acting upon, giving effect to, or proceeding further on the basis of the decision of the Second Respondent.
5. The matter be remitted to the Second Respondent to be determined according to law.
6. The First Respondent is to pay the Appellant's costs of the proceeding before Scarlett FM and of this appeal.

I certify that the preceding forty-two (42) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate:

Dated: 8 September 2008

Counsel for the Appellant: J Azzi

Counsel for the First Respondent: T Reilly

Solicitor for the First Respondent: B Rayment (Sparke Helmore)

Date of Hearing: 20 August 2008

Date of Judgment: 8 September 2008