

# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*SZHAI v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 49*

MIGRATION – Persecution – review of Refugee Review Tribunal decision – visa – protection visa – refusal – if the Tribunal dissuades an applicant from giving evidence or making arguments on a relevant issue then it has failed to comply with its obligations under s.425 – such comments have the effect of withdrawing part of the s.425 invitation – foreshadowing that a matter will not be an issue when it subsequently becomes part of the reasons for decision is a breach by the Tribunal of its obligations under s.425 – discussion of evidence “relating to” s.425 issues.

*Migration Act 1958, s.425*

*VBAB v Minister for Immigration & Multicultural & Indigenous Affairs (2002)*  
121 FCR 100

*NAQF v Minister for Immigration & Multicultural & Indigenous Affairs (2003)*  
130 FCR 456

Applicant:	SZHAI
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 435 of 2007
Judgment of:	Cameron FM
Hearing date:	16 October 2007
Date of Last Submission:	16 October 2007
Delivered at:	Sydney
Delivered on:	29 January 2008

## **REPRESENTATION**

Counsel for the Applicant: Mr D. Godwin

Counsel for the Respondents: Ms S. Kaur-Bains

Solicitors for the Respondents: Blake Dawson Waldron

## **ORDERS**

- (1) A writ of certiorari issue directed to the second respondent quashing the decision of the second respondent signed on 9 January 2007.
- (2) A writ of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent dated 29 March 2005.

**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA AT  
SYDNEY**

**SYG 435 of 2007**

**SZHAI**  
Applicant

And

**MINISTER FOR IMMIGRATION & CITIZENSHIP**  
First Respondent

**REFUGEE REVIEW TRIBUNAL**  
Second Respondent

**REASONS FOR JUDGMENT**

**Introduction**

1. The applicant is a citizen of Malaysia where, he claims, he fears persecution by the authorities. He alleges that while in Malaysia he began campaigning to promote a better understanding of human values among different races by reproducing the works of great authors and that this subsequently led to him being arrested and being in fear of his life from fundamentalist forces in Malaysia. The applicant left Malaysia and arrived in Australia on 26 January 2005.
2. The applicant claims to fear persecution in Malaysia because of his political and religious activities.
3. After his arrival in Australia, the applicant lodged an application for a protection visa. This was refused by the Minister's delegate on 29 March 2005. 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 signed on 22 July 2005 which was quashed by order of this Court dated 14 August 2006 (Court Book (“CB”) page 88).
5. For the reasons which follow, the Tribunal’s decision will be set aside and the matter remitted to be determined according to law.

### **Background facts**

6. The facts alleged in support of the applicant’s claim for a protection visa are set out on pages 5 – 10 of the Tribunal’s decision (CB 82, 81, 80, 79, 78 and 77 [sic]). Relevantly, they are in summary:
  - a) the applicant was born on 23 November 1976 in Kuala Lumpur. He is a Hindu of Tamil ethnicity;
  - b) the applicant was a qualified audio engineer and devoted most of his time working for temples during festivals by setting up the audio systems in the temples;
  - c) the applicant conducted yoga classes which attracted protest from Malay Muslims;
  - d) the applicant and some of his Tamil colleagues started an organisation called the Tamil Awareness Centre to create awareness among the community members and to engage in social activities;
  - e) the centre undertook campaigns by distributing leaflets in public places, including leaflets illustrating the problems concerning a well-known Hindu temple in Kuala Lumpur;
  - f) as a result of protest activities concerning the temple, the applicant was arrested by the police but was released with a warning;

- g) the applicant was asked by a senior member of the Centre to translate *The Satanic Verses* into Malay;
- h) the applicant read the book and tried to translate a few interesting passages from it. The committee then decided to extract a few aphorisms from his translation to use in their campaign. A senior member of the committee undertook the printing and distribution of the pamphlets containing the applicant's translation. In November 2004 a decision was made to distribute the pamphlets in the community. The applicant's name appeared on the pamphlet as translator;
- i) after the pamphlets had been distributed for two or three days the police required him to report to the police station; and
- j) the applicant claims that after he left Malaysia for Australia the police came to his home and started making enquires from his parents concerning his whereabouts.

### **The Tribunal's decision and reasons**

7. 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) there was no organisation called the Tamil Awareness Centre to which the applicant could have belonged and the applicant fabricated its existence to enhance his claim for protection, noting that:
  - i) the applicant claimed he helped found the Tamil Awareness Centre in 2003, but he did not provide any credible evidence to corroborate his claim about the existence of such an organisation;

- ii) the applicant provided volumes of material relating to human rights abuses in Malaysia and the activities of Islamic fundamentalists in the country but nothing to substantiate the existence of the Tamil Awareness Centre;
  - iii) the Tribunal found it astonishing that as an active member of such an organisation the applicant was unable to provide a letterhead or any indication through the internet, newspapers or community newspapers that such an organisation existed;
- b) as the Tribunal found that the Tamil Awareness Centre did not exist it did not accept that the applicant was involved in any protest activity against the authorities through the Centre;
  - c) the Tribunal did not find the applicant's claims that Islamic fundamentalists targeted him because of his activities in teaching yoga classes to be credible. The Tribunal noted that yoga and meditation are very common practices in many countries including Malaysia;
  - d) since the Tribunal found that there was no credible evidence that the Tamil Awareness Centre existed, the Tribunal rejected the applicant's claim that he translated extracts from *The Satanic Verses* as part of the activities of the Centre. The Tribunal also rejected the applicant's claim that the Centre arranged for the distribution of the alleged pamphlets to Tamil youth in Malaysia;
  - e) although the Tribunal found that the photocopied pamphlet in the Malay language which the applicant submitted to it contained passages from *The Satanic Verses*, it also found that there was no credible evidence to corroborate the applicant's claims that the pamphlet was translated and printed in Malaysia for distribution;
  - f) the Tribunal tested the applicant's knowledge of the contents of *The Satanic Verses* but he was unable to display any detailed knowledge of the text; and
  - g) the Tribunal was not satisfied that the police authorities visited the applicant's home or that his family was subject to any form of interference by the police. The Tribunal was also not satisfied that

the applicant was compelled to hide from the police by moving into a friend's house.

### **Proceedings in this Court**

8. The grounds of the amended application were that the Tribunal breached s.425 of the Act because although it discouraged the applicant from presenting evidence that the pamphlet in question had been printed in Malaysia, it then went on to find that there was no credible evidence of its having been printed in Malaysia.
9. The essence of the applicant's allegation is that he was denied an opportunity to address properly the question of where the pamphlet had been printed because he was discouraged from doing so.
10. Relevant portions of the dialogue at the Tribunal hearing drawn from the transcript annexed to the applicant's affidavit affirmed 30 May 2007 were reproduced in the applicant's written outline of submissions. Taking into account transcript corrections identified in the affidavit of Parisa Golchi sworn 12 October 2007, the relevant exchange at the Tribunal hearing was:

*J.K (the applicant's adviser): I just wanted to tell that if you have the real original copy than we can submit this one to the printing expert they will find out ah.. This is a printing locally made*

*Member: Whether it came from Malaysia or not is that what you mean?*

*J.K: I can get the printer expert from our*

*Member: I'm not basing a lot on that, the reason why not going to make it a issue is that even if it is printed in Malaysia that itself doesn't actually mean that you have not asked someone print it and send it anyway*

*J.K: Ya*

*Member: But my predecessor was saying that, it could have been printed in Sydney, but to me its neither here or there. The central issue of the documents is why*

*would have Bahasa Malaysian document have*

*J.K: Have English*

*Member: Mm... Mm... Why? Unless of course whoever was printing it wanted to make sure that we knew why it was being done, but as I said, I haven't seen a copy yet so, I'm only foreshadowing some difficulties I have but doesn't matter at this stage I'll see a copy if I can get it one day*

*J.K: He will send*

*Member: When I see a copy I might then write to you if I have any question about it as usual respond it accordingly*

An original copy of the pamphlet was produced to the Tribunal as constituted on the first occasion (CB 74, Transcript 23.1) and a photocopy was supplied to the Tribunal as constituted on this occasion (CB 74 [sic], p.13 of its decision). The transcript of the Tribunal hearing reveals that the photocopy was requested because the Tribunal could not find the original copy which had previously been given to it (T27.4, T30.3) and which had been the only original copy sent to the applicant by his father (T23.2).

11. Contrary to what it had foreshadowed at its hearing, the Tribunal based its finding, in part, on the question of whether the pamphlet had been printed in Malaysia. At p.14 of its decision record the Tribunal said:

*As the Tribunal pointed out to the applicant in the course of the hearing, the substance of what is contained in the pamphlet may be found easily on the internet wherever one has access to the internet. There is no credible information or evidence to corroborate the applicant's claims that the pamphlet was indeed translated and printed in Malaysia for distribution. As the Tribunal noted to the applicant in the course of the hearing, the contents of the pamphlet could have been written and printed in Australia. (CB 73)*

12. The applicant submits that the passage of transcript quoted at [10] above reveals that the Tribunal discouraged the applicant from putting evidence before it corroborating his allegation that the pamphlet was printed in Malaysia. However, the first part of that passage makes it



clear that the suggestion by the applicant's representative at the Tribunal hearing that a printing expert might be obtained was in the context of the original copy of the pamphlet re-appearing. There is no evidence that the original pamphlet was ever discovered, with the consequence that there was no call to consider the merits of qualifying a printing expert to examine that particular document.

13. However, the second part of the passage quoted at [10] above does amount to the Tribunal telling the applicant that the provenance of the original pamphlet was neither here nor there, the principal issue being why a document in Malaysian would contain passages in English. This reflects a statement made by the Tribunal earlier in the hearing:

*Now, because the issue was raised before is, that this could have been produced in Sydney, in any case I'm sure you remember that. That's an issue that was raised earlier and I have similar reservations however I have not seen the paper and so that I can hardly make an issue out of it a right to see what is it and not to examine it from my ah... Forensic perspective but at least see the contents. (T32)*

14. If the Tribunal cannot make a decision in favour of an applicant on the papers, s.425 requires it to invite that applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review. Consequently, it is necessary to identify what, in relation to the matters raised in these proceedings, the relevant issue was. The first respondent submitted that the relevant issue was whether the applicant had translated and distributed portions of *The Satanic Verses* in Malaysia, on the basis that it was only if the pamphlet had been distributed in Malaysia that the applicant could have had a fear of persecution.
15. It is not necessary to decide whether the s.425 issue was the alleged distribution of the pamphlet in Malaysia or the printing of the pamphlet in Malaysia because the two are unavoidably related. Although proof that the pamphlet had been printed in Malaysia would not necessarily prove that it was distributed there too, nevertheless, such evidence would be corroborative of the allegation that it had been. Section 425 requires the Tribunal to invite the applicant to give evidence and present arguments "relating to" the relevant issues. In the context of this application, the question of whether the pamphlet had been printed

in Malaysia was related to whether the pamphlet had been distributed in Malaysia.

16. If the Tribunal's conduct has the effect of dissuading an applicant from giving the evidence or making the arguments he or she wishes to make relating to relevant issues, then the Tribunal has failed to comply with its obligations under s.425: *VBAB v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 121 FCR 100 at 124 [62]; *NAQF v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 130 FCR 456 at 476 [86] and [87].
17. In this case, there is no evidence that the applicant was in fact dissuaded from giving evidence or presenting arguments. Although the applicant's submissions identify a potential consequence of the comments made by the Tribunal, he has failed to lead evidence that the Tribunal's comments had that consequence. As a result, to the extent that the applicant's submission depends on the subjective effect on him of the Tribunal's comments, it is unsuccessful.
18. Nevertheless, the Tribunal's comments had the effect of withdrawing its invitation to give evidence and present arguments on this particular aspect of the case. The comments may also be characterized as an indication by the Tribunal that the question of where the pamphlet was printed was not an issue, in the sense that word is used in s.425. If it is accepted that the provenance of the pamphlet is an issue in its own right, and not simply a matter subsidiary to the question of whether the applicant had translated and distributed portions of *The Satanic Verses* in Malaysia, such an indication is as significant as the partial withdrawal of the s.425 invitation.
19. Whether the Tribunal's comments amounted to a partial withdrawal of the invitation or an indication that a live issue was not really an issue at all, this aspect of the applicant's review application was, indeed, significant. This is because the Tribunal's conclusion, that it was not satisfied that the applicant had translated or published extracts from *The Satanic Verses* in Malaysia, was partly based on there being no evidence that the pamphlet was printed in Malaysia for distribution.
20. In the circumstances, evidence on whether the pamphlet was printed in Malaysia was, or was related to, one of the issues which was

determinative of the claim. Because the Tribunal indicated to the applicant that it was not such an issue or not a question on which evidence or arguments would be useful, its decision is affected by jurisdictional error.

## **Conclusion**

21. As jurisdictional error on the part of the Tribunal has been demonstrated, its decision will be set aside and the matter remitted to it to be determined according to law.

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**I certify that the preceding twenty-one (21) paragraphs are a true copy of the reasons for judgment of Cameron FM**

Associate:

Date: 29 January 2008