

# FEDERAL COURT OF AUSTRALIA

**SZJHL v Minister for Immigration and Citizenship [2007] FCA 1713**

**MIGRATION** – appeal from Federal Magistrate refusing application for review – inconsistencies between oral hearing at RRT and response to s 424A letter – whether procedural fairness required the RRT to invite comment on those inconsistencies – whether all issues, including credibility already in issue

*Migration Act 1958* (Cth) ss 424, 424A, 425

*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 81 ALJR 515 cited

*SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26 cited

**SZJHL v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND REFUGEE  
REVIEW TRIBUNAL**

**No NSD 1450 of 2007**

**FINN J  
9 NOVEMBER 2007  
SYDNEY**

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY**

**NSD 1450 OF 2007**

**ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA**

**BETWEEN:               SZJHL  
                                  Appellant**

**AND:                     MINISTER FOR IMMIGRATION AND CITIZENSHIP  
                                  First Respondent**

**REFUGEE REVIEW TRIBUNAL  
Second Respondent**

**JUDGE:                 FINN J**

**DATE OF ORDER:     9 NOVEMBER 2007**

**WHERE MADE:        SYDNEY**

**THE COURT ORDERS THAT:**

1.     Leave be given to raise the ground of appeal not raised below.
2.     The appeal be dismissed.
3.     The appellant pay the first respondent's costs of the appeal.

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

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**DATE:              9 NOVEMBER 2007**

**PLACE:             SYDNEY**

### **REASONS FOR JUDGMENT**

1           The sole ground in the notice of appeal in this matter raises a question not advanced in the court below. The preliminary issue to which this gives rise is whether leave ought be given for the ground to be raised. For the purposes of the prompt disposition of this matter, I have decided to hear together the arguments both for leave and on the substantive ground itself.

2           The ground of appeal is cast as involving a denial of procedural fairness, this being particularised as follows:

- “(a)   The Tribunal conducted a hearing on 2 June 2006.
- (b)   The Tribunal sent the applicant and [sic] ‘Invitation to Comment’ on Information on 9 June 2006.
- (c)   The Tribunal’s decision was made on 19 July 2006 and handed down on 8 August 2006.
- (d)   The Tribunal’s decision was based, in part, on the inconsistencies between the appellant’s evidence at the hearing and his response to the ‘Invitation to Comment on Information’. In those circumstances, the Tribunal was required, by the rules of procedural fairness, to give the

Appellant an opportunity to comment on those inconsistencies.”

I would add that the obligation to give this opportunity is sourced in the appellant’s submissions to s 425(1) of the *Migration Act 1958* (Cth). That subsection requires the Tribunal to invite the applicant to appear before the Tribunal to give evidence and to present argument “relating to the issues arising in relation to the decision under review”: and see *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 81 ALJR 515 at [34]-[35].

### **THE APPEAL**

3           The appeal is from a judgment of Emmett FM dismissing an application for judicial review of a decision of the Refugee Review Tribunal affirming the delegate’s decision not to grant the appellant a Protection visa. The appellant is a Pakistani national whose original refugee application based his alleged fear of persecution on his being a homosexual in Pakistan.

4           Given the course now sought to be taken by the appellant, it is appropriate to refer initially to the delegate’s decision which was for s 425 purposes “the decision under review”. In rejecting the application the delegate observed:

“In considering all of these matters, I do not accept the unsubstantiated claims as feasible and I do not accept that the applicant has provided an honest account of his personal circumstances prior to his departure from Pakistan. The claims relating to his homosexuality are confused and inconsistent with other information he has provided. This leads me to find that he has fabricated a set of claims for himself for the sole purpose of engaging Australia’s protection obligations.”

5           What needs to be emphasised about this is that the delegate put the credibility of the appellant squarely in issue and questioned the veracity of the claims he had made. The appellant could have been left in no doubt that if the application for review to the Tribunal was to have any prospects of success he would have to surmount a challenge to his credibility and a critical scepticism about his claims, save if the Tribunal expressly indicated to the contrary. At the hearing before the Refugee Review Tribunal that challenge to his credibility was made quite explicit by the Tribunal itself. It was also indicated that inconsistencies between his oral evidence, or documents produced at the hearing (which raised new matters) and evidence previously given, provided possible bases for the Tribunal concluding that his

evidence or the documents were fabricated. This in turn led to the Tribunal, after the hearing, sending a s 424 letter to the appellant which drew attention to the significance of inconsistencies or fresh evidence and invited his comment upon them. The appellant's response to the letter in turn produced the further inconsistencies between the appellant's oral testimony and specific responses made which inform the ground of appeal.

## **THE TRIBUNAL PROCEEDINGS**

6 Federal Magistrate Emmett adopted the following as an accurate summary of the appellant's claims before the Tribunal and the Tribunal's decision. I do likewise:

- “3.1 The Applicant claimed that he feared persecution because:
- (a) he was homosexual;
  - (b) he had converted from being a Sunni Muslim to a Shia Muslim; and
  - (c) he was a member of the Jaffria Youth Pakistan (“JYP”).
- 3.2 He claimed that he had been harassed, kidnapped and beaten in 2005.
- 3.3 The Tribunal did not accept the Applicant's claims. It gave the following reasons for rejecting his claims:
- (a) There were inconsistencies between his oral testimony before the Tribunal and his response to the 424A Letter. Specifically:
    - (i) He claimed in his oral testimony that he had been assisted in preparing his application for protection visa and then stated in his response to the 424A Letter that he had prepared the application without assistance.
    - (ii) He claimed in his oral testimony that he had left his employment in November 2005 because he had a chest infection and then claimed in response to the 424A Letter that he had left because his fellow workers knew he was gay.
  - (b) There were inconsistencies between his application for protection visa and his oral testimony before the Tribunal. Specifically:
    - (i) He variously claimed that the date of his conversion to the Shia faith occurred on 9 March 2005 and 12 March. The claim to have converted on 9 March was inconsistent with the dates of other significant events in

other material before the Tribunal.

- (ii) He claimed that his parents had been beaten by members of a Sunni organization on 1 May 2006 and his mother was in a critical condition yet he claimed elsewhere that his mother had died on 6 March 2006.
- (c) His claims that he had converted from being a Sunni Muslim to a Shia Muslim, that he was a member of the JYP and that he had been kidnapped were not referred to in his application for protection visa.
- (d) He had been able to live in the same location in Taxila from 1991 to 2005, the Lashkar-e-Taiba had come to know he was gay in 1995 and his partner left Taxila only in 2003. This cast doubt on whether he had a well-founded fear of being persecuted if he returned to Pakistan.
- (e) His evidence regarding his homosexuality was unimpressive.

3.4 The Tribunal was not satisfied that he had a well-founded fear of persecution for a Convention reason and accordingly affirmed the decision under review.”

7 Because of their significance to the ground of appeal, it is appropriate that I set out the passages from the Tribunal’s reasons that, (i) refer to the sending of a s 424A letter after the Tribunal hearing and (ii) deal with the Tribunal’s treatment of the responses made to the letter.

(i) ***Sending the letter***

8 The Tribunal made the following reference to this:

“I foreshadowed that I would be writing to the Applicant in accordance with section 424A of the Act. I asked him if there was anything further he wished to add before I closed the hearing. The Applicant said that he had not told any lies in the course of the hearing. He said that I could contact people in Pakistan if I wanted to check what had happened. He suggested that I could check with the newspapers in which the articles had appeared which he had produced. I noted again that there had been no mention of his kidnapping, of his conversion to the Shia faith or of his membership in the JYP in his original application. The Applicant said that he had been mentally upset when he had prepared his original application. *I asked him if he understood that I could conclude that he had changed his evidence in light of the documents he had received from Pakistan.* The Applicant said that he had been kidnapped and he had not known that he had to put this in his application. He repeated that he had converted to the Shia faith for his own security. He said that the police

had failed to protect him.

On 9 June 2006 the Tribunal wrote to the Applicant in accordance with section 424A of the Act indicating that it had information that would, subject to any comments he might make, be the reason, or part of the reason, for deciding that he was not entitled to a protection visa. The Tribunal stated that the information was as follows. The Tribunal noted that in his original application the Applicant had said that he had worked at Dewan Salman Fibre Ltd in Hattar from June 1993 until November 2005 and that he had lived in District Haripur from August 1993 until November 2005. The Tribunal noted that at the hearing before me the Applicant had said that he had lived in Taxila while working for Dewan Salman Fibre Ltd and that Hattar was the name of the road but the factory was located in the Taxila area. He had said that he had begun working for Dewan Salman Fibre Ltd in 1991, not 1993, and that he had ceased working at the factory approximately a year before he had left Pakistan at the end of November 2005 to come to Australia because he had had a chest infection and he had been advised to have a rest. He had said that he had subsequently been appointed as the General Secretary of the Human Development Welfare Society in Taxila and he had continued to hold this position until he had left Pakistan at the end of November 2005.

The Tribunal noted that the Applicant had said that he had been living together with his partner Mohsin in Taxila from 1991 until Mohsin had left Pakistan to go to Italy in around 2003. The Tribunal noted that he had said that people in his village had known that he was gay before he had moved to Taxila in 1991 and that the Lashkar-e-Taiba had come to know of his relationship with Mohsin after 1995. The Tribunal stated that, *as I had put to the Applicant in the course of the hearing*, the fact that he had been able to continue living and working in Taxila from 1991 until he had left Pakistan at the end of November 2005 was relevant because it cast doubt on whether he had a well-founded fear of being persecuted for a Convention reason if he returned to Pakistan now.

The Tribunal noted that at the hearing before me the Applicant had mentioned for the first time that he claimed he had been kidnapped by 'boys' belonging to the Lashkar-e-Taiba in 2005. He had produced a newspaper article which he had said mentioned that he had been kidnapped and an FIR which he had said he had lodged with the police in relation to the kidnapping. He had said that he had been kidnapped because he had been a member of the JYP which he had said stood for 'Jaffria Youth Pakistan' and was a Shia organisation. The Tribunal noted that the Applicant had produced a card and a letter from the JYP and he had mentioned for the first time that he claimed to have converted from the Sunni faith to the Shia faith on 12 March 2005 in Pakistan. The Tribunal noted that the Applicant had also produced a letter purporting to be from a lawyer stating that he had been forced to leave Pakistan due to religious sectarianism and a newspaper article which he had said referred to the fact that he was in Australia. The Tribunal noted that the Applicant had said that his younger brother in Pakistan had sent him all these documents a month before the hearing.

The Tribunal stated that, *as I had put to the Applicant in the course of the*

*hearing*, the fact that there was no mention of his claimed conversion to the Shia faith, his membership of the JYP or his claimed kidnapping in his original application or in the statement accompanying his original application might lead me to conclude that he had fabricated these claims on the basis of the documents which he had received from Pakistan. The Tribunal stated that I might conclude that there was no truth in his claims that he had converted from the Sunni faith to the Shia faith, that he was a member of an organisation called the JYP or that he had been kidnapped by the Lashkar-e-Taiba in 2005 because he was a member of the JYP. *The Tribunal stated that I might conclude that the documents the Applicant had produced in support of these claims were likewise fabrications.*" (Emphasis added.)

**(ii) *The treatment of the responses***

9 In its "Findings and Reasons", having referred to decided authority on the making of an adverse credibility assessment, the Tribunal went on to observe:

"In the present case the Applicant's response to the Tribunal's section 424A letter simply compounds the problems with his credibility. He states in his response that he did not ask for help from anybody in relation to his case and that he had been scared that if he told any Pakistani that he was gay he would be hurt by them. However at the hearing before me he said that the manager of the convenience store where he was working in Australia, Mr Akbar Ali, had assisted him in preparing his application. Moreover it was his claim that he was homosexual which he mentioned in that application and it was his claims relating to his conversion to the Shia faith which were omitted. Whereas at the hearing before me he said that he had ceased working for Dewan Salman Fibre Ltd approximately a year before he had left Pakistan at the end of November 2005 to come to Australia because he had had a chest infection and he had been advised to have a rest, in his response to the section 424A letter he said that he had left his job there in November 2005 because everybody in the factory had known that he was gay.

The Applicant said at the hearing before me that he claimed to have converted from the Sunni faith to the Shia faith on 12 March 2005 but in his response to the Tribunal's section 424A letter he said that his kidnapping, which he claimed had occurred because he was a member of a Shia organisation, the JYP, had occurred on 9 March 2005. The FIR a translation of which he produced suggests he reported the kidnapping to the police on 11 March and the translation of a newspaper article which he produced in relation to the kidnapping is said to have appeared on 12 March 2005. The Applicant said that a friend had telephoned him on 1 May (sic) 2006 and had told him that members of a Sunni organisation had come to his home and had beaten his parents and that his mother was in a critical situation in hospital. However he said that his mother had died on 6 March (sic) 2006 and the translation of a death certificate which he produced likewise gives this date. However the translation of a newspaper article which he produced in relation to this incident is said to have been published on 2 May 2006 which would be



consistent with the Applicant's claim that his friend telephoned him on 1 May 2006 but not with his claim that his friend told him that his mother was in a critical situation in hospital if his mother had in fact died on 6 March 2006.

As I put to the Applicant in the course of the hearing and again in the section 424A letter, I consider that the Applicant has fabricated his claims with regard to his conversion to the Shia faith, his membership of the JYP and the kidnapping on the basis of the documents he has received from Pakistan. Given that there was no mention of these claims in his original application and given the problems with the dates of events outlined in the preceding paragraph I do not accept that there is any truth in the Applicant's claims in this regard nor do I accept that the documents which he has produced are genuine. I do not accept that the Applicant has converted to the Shia faith, that he was a member of a Shia organisation called the 'Jaffria Youth Pakistan' or JYP, nor that he was kidnapped because of his conversion or his membership of the JYP.

I likewise do not accept that his family have been harassed since he has left Pakistan because of his supposed conversion, his membership of the JYP or his connection with an organisation of eunuchs (as mentioned in the translation of a press article which the Applicant produced). As indicated above I do not accept that the documents which the Applicant produced at the hearing before me or the documents in respect of which he subsequently produced translations are genuine. I accept that the Applicant's mother died around two months before the date of the hearing before me (as the Applicant mentioned in the course of the hearing) but not that her death had anything to do with the Applicant's claimed conversion, his membership of the JYP or his connection with an organisation of eunuchs. Having regard to my findings of fact I do not accept that the Applicant has a well-founded fear of being persecuted for reasons of his religion or his membership of any particular social group such as the JYP or the organisation of eunuchs if he returns to Pakistan now or in the reasonably foreseeable future.

As the Tribunal noted in its section 424A letter, the Applicant said in the course of the hearing before me that he had been living together with his partner Mohsin in Taxila from 1991 until Mohsin had left Pakistan to go to Italy in around 2003. He said that people in his village had known that he was gay before he had moved to Taxila in 1991 and that the Lashkar-e-Taiba had come to know of his relationship with Mohsin after 1995. As I put to the Applicant in the course of the hearing before me and again in the section 424A letter, I consider that the fact that he was able to continue living and working in Taxila from 1991 until he left Pakistan at the end of November 2005 casts doubt on whether he has a well-founded fear of being persecuted for a Convention reason if he returns to Pakistan now. As referred to above, in his response to the section 424A letter the Applicant said that he had left his job at Dewan Salman Fibre Ltd in November 2005 because everybody in the factory had known that he was gay but this contradicts his evidence at the hearing before me that he had ceased working there approximately a year before he left Pakistan at the end of November 2005 to come to Australia because he had had a chest infection."

## THE NEW GROUND

10           The basis upon which the appellant puts his case if leave is granted is that, because the Tribunal relied upon the responses to the s 424A letter as disclosing further inconsistencies in the appellant's evidence, "the credibility of the Appellant from the inconsistencies between the oral evidence and the response to the 's. 424A letter' was, therefore, an issue arising in relation to the decision under review" (emphasis in original) for s 425 purposes: written submissions. Implicit in this is the proposition that the issue so raised was a new issue.

11           In support of the claimed basis of the Tribunal's obligation to disclose this "issue" to the appellant for s 425 purposes, reliance is placed on the concluding sentence of [47] of the High Court's reasons in *SZBEL*. For convenience I have set out the entirety of [47] because the sentence relied upon can only properly be understood in the context of the paragraph as a whole. The Court observed:

"... there may well be cases, perhaps many cases, where either the delegate's decision, or the Tribunal's statements or questions during a hearing, sufficiently indicate to an applicant that everything he or she says in support of the application is in issue. That indication may be given in many ways. It is not necessary (and often would be inappropriate) for the Tribunal to put to an applicant, in so many words, that he or she is lying, that he or she may not be accepted as a witness of truth, or that he or she may be thought to be embellishing the account that is given of certain events. The proceedings are not adversarial and the Tribunal is not, and is not to adopt the position of, a contradictor. But where, as here, there are specific aspects of an applicant's account, that the Tribunal considers *may* be important to the decision and may be open to doubt, the Tribunal must at least ask the applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted."  
(Emphasis in original.)

12           To anticipate matters, while the appellant contends the present matter is one falling within the final sentence of the quotation, the respondent Minister contends that the first sentence aptly describes this case.

13           The Minister both opposes the grant of leave because the new ground lacks substantive merit and contends as well that the appeal would fail in any event. As I am satisfied that the ground is without merit, I will deal with the substantive ground and grant leave accordingly.

14 Before indicating the reasons for my view, it is appropriate to make an additional reference to the reasons in *SZBEL* as they enlarge upon the burden of s 425. The Court said (at [33]-[35]) that:

“[33] The Act defines the nature of the opportunity to be heard that is to be given to an applicant for review by the Tribunal. The applicant is to be invited ‘to give evidence and present arguments relating to *the issues arising in relation to the decision under review*’. The reference to ‘the issues arising in relation to the decision under review’ is important.

[34] Those issues will not be sufficiently identified in every case by describing them simply as whether the applicant is entitled to a protection visa. The statutory language ‘arising in relation to the decision under review’ is more particular. The issues arising in relation to a decision under review are to be identified having regard not only to the fact that the Tribunal may exercise all the powers and discretions conferred by the Act on the original decision-maker (here, the Minister’s delegate), but also to the fact that the Tribunal is to review that *particular* decision, for which the decision-maker will have given reasons.

[35] The Tribunal is not confined to whatever may have been the issues that the delegate considered. The issues that arise in relation to the decision are to be identified by the Tribunal. But if the Tribunal takes no step to identify some issue other than those that the delegate considered dispositive, and does not tell the applicant what that other issue is, the applicant is entitled to assume that the issues the delegate considered dispositive are ‘the issues arising in relation to the decision under review’. That is why the point at which to begin the identification of issues arising in relation to the decision under review will usually be the reasons given for that decision. And unless some other additional issues are identified by the Tribunal (as they may be), it would ordinarily follow that, on review by the Tribunal, the issues arising in relation to the decision under review would be those which the original decision-maker identified as determinative against the applicant.”

(Emphasis in original, footnotes omitted)

15 There is, in my view, no room whatever for doubt, as I earlier indicated, that the delegate’s reasons put in issue all of the claims that by that stage had been made as to why the appellant had a well founded fear of persecution and moreover that his credibility in relation to his claims was equally in issue. Not only did the Tribunal do nothing to engender any expectation that these were no longer operative issues in the review, the Tribunal in turn accentuated their centrality to it both in the questions it asked of the appellant at the hearing (as recorded in its reasons) and in its s 424A letter which referred (inter alia) to inconsistencies in the evidence he had given, questions asked at the hearing the answers to

which cast doubt on his claim to having a well founded fear of persecution, to the veracity of fresh claims made at the hearing and to the authenticity of documents there produced.

16           It was, in my view, perfectly plain – and should have been such to the appellant – that the entirety of his claims and his credibility generally were in issue in the review. Against this background it cannot properly be said that any further inconsistencies exposed in his s 424A answers relating to his claims or any greater doubts his answers engendered about his credibility raised new or unexpected issues for which, in fairness, a further opportunity for comment ought to have been provided. 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 circulus inextricabilis” of invitation and comment: see *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26 at [20].

17           What I have said is sufficient to warrant the dismissal of this appeal. I will order that (i) leave be given to raise the ground of appeal not raised below; (ii) the appeal be dismissed; and (iii) the appellant pay the first respondent’s costs of the appeal.

I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finn.

Associate:

Dated:     9 November 2007

Counsel for the Appellant:     Mr R Turner

Solicitor for the Appellant:     Parish Patience Immigration Lawyers

Counsel for the Respondent:     Mr S Lloyd

Solicitor for the Respondent:     Australian Government Solicitor

Date of Hearing:                 8 November 2007

Date of Judgment:                 9 November 2007

