HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

MINISTER FOR IMMIGRATION AND CITIZENSHIP APPELLANT

AND

SZIAI AND ANOR RESPONDENTS

Minister for Immigration and Citizenship v SZIAI
[2009] HCA 39
23 September 2009
S37/2009

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1 to 5 of the orders made by the Federal Court of Australia on 8 September 2008, and in lieu thereof order that:*

   (a) *order 2 of the orders made by the Federal Magistrates Court of Australia on 18 June 2008 be set aside; and*

   (b) *the appeal be otherwise dismissed.*

3. *Appellant to pay the costs of the first respondent's appeal to this Court.*

On appeal from the Federal Court of Australia

Representation

S J Gageler SC, Solicitor-General of the Commonwealth with G T Johnson and G R Kennett for the appellant and for the Attorney-General of the Commonwealth intervening (instructed by Australian Government Solicitor)

N J Williams SC with A M Mitchelmore for the first respondent (instructed by Dobbie and Devine Immigration Lawyers Pty Ltd)

Submitting appearance for the second respondent.

CATCHWORDS

Minister for Immigration and Citizenship v SZIAI

Immigration – Refugees – Review by Refugee Review Tribunal ("RRT") – Whether failure to make certain inquiries was unreasonable or constituted failure to conduct review within meaning of *Migration Act* 1958 (Cth), s 414 – Whether failure to inquire constituted jurisdictional error.

Immigration – Refugees – Review by RRT – Where RRT received allegation that documents provided by visa applicant were "fake & forged", invited applicant to comment in writing, but failed to invite him to further hearing – Whether such failure amounted to denial of procedural fairness, breach of *Migration Act* 1958, s 425, or failure to conduct review within meaning of *Migration Act* 1958, s 414 – Whether allegation of forgery raised new "issue" within meaning of *Migration Act* 1958, s 425.

Words and phrases – "failure to inquire", "inquisitorial", "issues", "procedural fairness", "review".

Migration Act 1958 (Cth), ss 414, 424, 424A, 425.

FRENCH CJ, GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ.

Introduction

1 The functions, powers and duties of the Refugee Review Tribunal ("the Tribunal") are set out in Pt 7 of the *Migration Act* 1958 (Cth) ("the Migration Act"). When the Tribunal receives a valid application for the review of an "RRT-reviewable decision" under the Migration Act, it must review that decision[1]. The class of "RRT-reviewable decisions" includes decisions by delegates of the Minister for Immigration and Citizenship ("the Minister") refusing the grant of protection visas[2]. In the exercise of its review function, the Tribunal may obtain such information as it considers relevant[3]. In this sense it has an inquisitorial function. That does not, however, impose upon it a general duty to undertake its own inquiries in addition to information provided to it by the applicant and otherwise under the Act[4].

2 In this case the Federal Court, on appeal from the Federal Magistrates Court, quashed a decision of the Tribunal on the erroneous basis that it had committed jurisdictional error by unreasonably failing to undertake its own inquiries into certain matters. Those matters related to the authenticity of documents, provided by the applicant for review, which had been impugned by third party information of which the applicant had been given notice, and to which he had replied in writing[5]. The Minister's appeal against the decision of the Federal Court must be allowed. A contention that the Tribunal had a duty to invite the applicant for review to an additional hearing to deal with the third party information is rejected.

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1 Migration Act, s 414.

2 Migration Act, s 411(1)(c).

3 Migration Act, s 424.

4 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 999 [43] per Gummow and Hayne JJ, Gleeson CJ agreeing at 992 [1]; 207 ALR 12 at 21-22, 13; [2004] HCA 32.

5 *SZIAI v Minister for Immigration and Citizenship* (2008) 104 ALD 22.

Factual and procedural history

3 On 11 February 2008, the Tribunal affirmed a decision of a delegate of the Minister to refuse a protection visa to SZIAI, a citizen of Bangladesh. SZIAI claimed to have converted from the Sunni Muslim faith to become an Ahmadiyya Muslim. He said he had been an active Ahmadi and had been the subject of threats, including threats to his life, from Sunni Muslims. He claimed to have a well-founded fear of persecution if he were to return to Bangladesh.

4 In coming to its decision, the Tribunal had regard to a letter from the Ahmadiyya Muslim Association Australia Inc ("the Association") responding to an inquiry from the Tribunal about whether SZIAI was known to the Ahmadiyya Muslim Jamaat in Bangladesh ("AMJ Bangladesh")[6]. The Tribunal had sent to the Association copies and translations of certificates produced to it by SZIAI and signed by persons purportedly associated with the Ahmadiyya Muslim Jamaat at Khulna. One of the certificates said that SZIAI had joined the Jamaat there on 1 January 2000. Both certificates said that he had taken a responsible role in the Jamaat and was always engaged in its activities. Both certificates bore mobile telephone numbers, apparently those of their authors.

5 The Association responded to the Tribunal by letter dated 10 January 2008 advising that it had received information from the AMJ Bangladesh. It enclosed a letter signed by Mobasherur Rahman, the National Ameer of the AMJ Bangladesh. That letter said, inter alia:

> "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."

6 On 14 January 2008 the Tribunal, acting under s 424A of the Migration Act, sent a lengthy letter to SZIAI's solicitors inviting him to "comment on information that the Tribunal considers would, subject to any comments you

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6 The term "Jamaat" is an Arabic word which means "Assembly".

make, be the reason, or a part of the reason, for affirming the decision under review." A number of matters were identified. One of those matters was the letter from the National Ameer. A copy was enclosed. The Tribunal said in its letter that the advice from the National Ameer might lead it to conclude that there was no truth to SZIAI's claims of fear of persecution by reason of his religion if he were to return to Bangladesh.

7 SZIAI's solicitors wrote back to the Tribunal on 29 January 2008 saying:

> "We refer to the RRT's recent correspondence, inviting comment in relation to information received that suggests that the applicant is not an Ahmadi.
>
> 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.
>
> If you have any enquiries please contact me."

8 In its reasons for decision the Tribunal referred to the correspondence from the Association and the letter from the National Ameer. It set out what it had said to SZIAI in its letter of 14 January 2008 and noted the response. Having regard to the information referred to in its letter of 14 January 2008, the Tribunal concluded that SZIAI was not a witness of the truth and that there was no truth to the claims he had made in support of his application for a protection visa.

9 An application for judicial review was dismissed by the Federal Magistrates Court on 18 June 2008[7]. SZIAI appealed to the Federal Court. On 8 September 2008, Flick J ordered that the appeal be allowed, the orders made in the Federal Magistrates Court be set aside, the decision of the Tribunal be quashed and the matter be remitted to the Tribunal to be determined according to law[8]. Special leave to appeal against his decision was granted by this Court on 13 February 2009. It was granted upon the undertaking by the Minister that he would not seek to displace the costs orders in favour of SZIAI in the Federal Court and that he would bear the reasonable costs of SZIAI of this appeal, including the costs of the special leave application.

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7 [2008] FMCA 788.

8 (2008) 104 ALD 22.

The reasoning in the Federal Court

10 Flick J correctly eschewed any suggestion that the power of the Tribunal to make inquiries imposed upon it any duty or obligation to do so[9]. However he also said that "jurisdictional error may be exposed by a failure to inquire and that such a failure may render a decision manifestly unreasonable"[10]. The circumstances in which a Tribunal decision would be set aside on such grounds might be "a confined category of case"[11].

11 His Honour was evidently satisfied that the case before him fell within such a category. The authenticity of the certificates had been placed in issue by the information which the Tribunal had obtained from the Association. The issue to which they were directed was "centrally relevant to the decision reached". He held with "considerable reservation" that the Tribunal should have made an inquiry of the authors of the certificates[12]. He concluded that the Federal Magistrates Court had erred in not holding that the Tribunal's decision was vitiated by reason of its failure to make inquiries.

The issues

12 The questions raised by the grounds of appeal and by a notice of contention filed on behalf of SZIAI were:

1. Whether the Tribunal had committed jurisdictional error by not making its own inquiries in relation to the allegation that the certificates provided by SZIAI were forgeries.

2. Whether the Tribunal denied procedural fairness, failed to comply with s 425 of the Migration Act, or failed to conduct the review required by s 414 in failing to invite SZIAI to a further hearing following receipt of

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9 (2008) 104 ALD 22 at 25 [18], referring to *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992; 207 ALR 12.

10 (2008) 104 ALD 22 at 25 [19].

11 (2008) 104 ALD 22 at 27 [25].

12 (2008) 104 ALD 22 at 28 [27].

the allegation that the two documents provided by him to the Tribunal were "fake & forged".

The jurisdiction of the Federal Magistrates Court

13 The statutory jurisdiction of the Federal Magistrates Court is "the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution"[13]. The Tribunal's decision was a "migration decision"[14]. The Federal Magistrates Court could therefore grant relief by way of prohibition or mandamus and, ancillary to such relief, could issue certiorari to quash the decision. However it could only do those things if the Tribunal was shown to have committed jurisdictional error[15].

14 The scope of judicial review in respect of the decision of the Tribunal thus differed from that provided by s 5 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act") where the grounds of review are laid out without confinement to "jurisdictional error". Some of the decisions relied upon in the Federal Court turned upon the application of s 5.

15 It has, however, been said in this Court[16] with reference to s 75(v) and jurisdictional error, that where a statutory power is conferred the legislature is taken to intend that the discretion be exercised reasonably. The argument in the

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13 Migration Act, s 476(1).

14 Migration Act, s 5 ("migration decision") read with s 474(2).

15 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 508 [82]; [2003] HCA 2; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57.

16 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 100-101 [40] per Gaudron and Gummow JJ; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 221 [30] per Gleeson CJ, Gummow and Heydon JJ; [2003] HCA 56; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1177-1178 [67]-[69] per McHugh and Gummow JJ, 1194 [174] per Callinan J; 198 ALR 59 at 75-76, 98-99; [2003] HCA 30.

present appeal proceeded on the footing that "Wednesbury unreasonableness"[17] could give rise to jurisdictional error.

Tribunal inquiry and jurisdictional error

16 SZIAI complained that failure by the Tribunal to inquire rendered its decision "manifestly unreasonable". That complaint involves several steps and assumptions. Was there an obligation or duty imposed by the Migration Act to make the inquiries in question? If so, was there deficiency in process which was so linked to the decision reached as to make it manifestly unreasonable?

17 It was not contended at any stage of this litigation that the Tribunal was obliged to exercise the power conferred by s 424 of the Migration Act to "get any information that it considers relevant" and no other specific source of such an obligation was identified. Rather, reliance was placed upon what was said to be the "inquisitorial" nature of proceedings in the Tribunal.

18 It has been said in this Court on more than one occasion that proceedings before the Tribunal are inquisitorial, rather than adversarial in their general character[18]. There is no joinder of issues as understood between parties to adversarial litigation. The word "inquisitorial" has been used to indicate that the Tribunal, which can exercise all the powers and discretions of the primary decision-maker,[19] is not itself a contradictor to the cause of the applicant for review. Nor does the primary decision-maker appear before the Tribunal as a contradictor. The relevant ordinary meaning of "inquisitorial" is "having or exercising the function of an inquisitor", that is to say "one whose official duty it is to inquire, examine or investigate"[20]. As applied to the Tribunal "inquisitorial"

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17 After *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

18 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 164 [40]; [2006] HCA 63; *Minister for Immigration and Citizenship v SZKTI* [2009] HCA 30 at [27], n 19.

19 Migration Act, s 415(1).

20 *Shorter Oxford English Dictionary*, 3rd ed (1973), vol 1 at 1079. See also "inquisitorial system" in *Black's Law Dictionary*, 8th ed (2004) at 809, defined as the civil law system of proof-taking "whereby the judge conducts the trial,

(Footnote continues on next page)

does not carry that full ordinary meaning. It merely delimits the nature of the Tribunal's functions. They are to be found in the provisions of the Migration Act. The core function, in the words of s 414 of the Act, is to "review the decision" which is the subject of a valid application made to the Tribunal under s 412 of the Act.

19 The observation in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[21] that the Tribunal was "bound to make its own inquiries and form its own views upon the claim which the appellant made"[22] was informed by the context, which concerned the requirements, in the circumstances, of procedural fairness. The Court held that procedural fairness had required the Tribunal to tell the applicant the substance of certain allegations made against him by a third party and to ask him to respond to them[23].

20 The failure of an administrative decision-maker to make inquiry into factual matters which can readily be determined and are of critical significance to a decision made under statutory authority, has sometimes been said to support characterisation of the decision as an exercise of power so unreasonable that no reasonable person would have so exercised it.

21 Observations by Wilcox J in *Prasad v Minister for Immigration and Ethnic Affairs*[24], which were said by his Honour to be tentative and unnecessary for the decision in the case, may support such a proposition. However, Wilcox J was dealing with the grounds of review provided by s 5 of the ADJR Act; in particular s 5(1)(e) and s 5(2)(g), which he described as concerned with the *manner* of exercise of the power in question. Nevertheless, the inquiry under these provisions, as he framed it, was ultimately directed to the unreasonable exercise of a power within the meaning of par (g) of s 5(2).

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determines what questions to ask, and defines the scope and the extent of the inquiry".

21 (2005) 225 CLR 88; [2005] HCA 72.

22 (2005) 225 CLR 88 at 99 [26].

23 (2005) 225 CLR 88 at 100 [29].

24 (1985) 6 FCR 155 at 167-170.

22 The discussion by Wilcox J in *Prasad* has been adopted or cited in a number of later cases in the Federal Court. The decisions, not all of which were founded upon the ADJR Act, were collected by Kenny J in *Minister for Immigration and Citizenship v Le*[25]. In the course of deciding to grant prohibition and certiorari in *Ex parte Helena Valley/Boya Association (Inc)*[26], the Full Court of the Supreme Court of Western Australia cited *Prasad* as authority for the necessity for a decision-maker to make inquiries in order to discover appropriate material if it be readily available.

23 The proposition which may emerge from *Prasad* has not been the subject of full consideration in this Court, whether in litigation under the ADJR Act, or any other statutory regime or under s 75(v) of the Constitution. Some observations by Mason CJ in *Chan v Minister for Immigration and Ethnic Affairs*[27] have been taken as an indication of a need for decision-makers to make inquiries in relation to claimed changes in the political circumstances in the home country of a person seeking protection as a refugee. However, the legal consequences of a failure to inquire were not discussed in that judgment. In *Minister for Immigration and Ethnic Affairs v Teoh*[28], Mason CJ and Deane J accepted the correctness of the approach in *Prasad* in "an appropriate case"[29]. *Teoh* was not such a case as reliance was not placed on the ground of review under the ADJR Act which was considered in *Prasad*. McHugh J also made reference to *Prasad* and other Federal Court decisions to similar effect. But, like Mason CJ and Deane J, he found them inapplicable in *Teoh*[30]. In *Abebe v The Commonwealth*[31], Gummow and Hayne JJ rejected a submission that the Tribunal in that case should have made further inquiries. They did so on the

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25 (2007) 164 FCR 151 at 174-176 [65]-[67].

26 (1989) 2 WAR 422 at 445. Cf *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd* [2008] 2 Qd R 495 at 511 [53]-[54]; *Love v State of Victoria* [2009] VSC 215 at [253]-[254].

27 (1989) 169 CLR 379 at 391; [1989] HCA 62.

28 (1995) 183 CLR 273; [1995] HCA 20.

29 (1995) 183 CLR 273 at 290.

30 (1995) 183 CLR 273 at 321.

31 (1999) 197 CLR 510; [1999] HCA 14.

basis that "[n]o plausible and possible line of inquiry was suggested"[32]. They did not think it necessary to consider the premise of the submission, namely that the Tribunal was under an obligation to make further inquiries. Nor was it necessary to consider the limits of so-called *Wednesbury* unreasonableness[33].

24 Mason CJ and Deane J in *Teoh* also rejected the proposition that failure by a decision-maker to initiate inquiries could constitute a departure from common law standards of natural justice or procedural fairness[34]. It is difficult to see any basis upon which a failure to inquire could constitute a breach of the requirements of procedural fairness at common law. The facts of this case, in any event, even considered without reference to s 422B of the Migration Act, do not show a basis for a complaint of want of procedural fairness.

25 Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a "duty to inquire", that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction[35]. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case. There are two reasons for that.

26 The first reason is that there was nothing on the record to indicate that any further inquiry by the Tribunal, directed to the authenticity of the certificates, could have yielded a useful result. There was nothing before the Federal Magistrates Court or the Federal Court to indicate what information might be

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32 (1999) 197 CLR 510 at 578 [194].

33 Their Honours were in dissent, but their observations were not relevant to the point of their dissent.

34 (1995) 183 CLR 273 at 290.

35 See authorities collected in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 453 [189], n 214; [2001] HCA 51.

elicited if the Tribunal were to undertake the inquiry which was said to be critical to the validity of its decision. The inquiry suggested was telephone contact with the persons whose mobile telephone numbers were shown on the certificates. But the question whether the certificates contained false statements as to authorship or otherwise would not be able to be determined by calls placed to those telephone numbers. If the respondents to the calls admitted to the Tribunal or its officers that the certificates contained false statements, then the grounds for a decision adverse to SZIAI would have been strengthened. If the respondents said that the contents were true, it would have added nothing to the statements effectively conveyed by the certificates themselves. The second reason is that the response made by SZIAI's solicitors to the Tribunal's letter of 14 January 2008 itself indicated the futility of further inquiry. There was nothing that SZIAI or his solicitors were able to add, beyond a bare denial of what appeared in the National Ameer's letter. For these reasons there is no factual basis for the conclusion that the failure to inquire constituted a failure to undertake the statutory duty of review or that it was otherwise so unreasonable as to support a finding that the Tribunal's decision was infected by jurisdictional error.

27 No issue of procedural fairness otherwise arises. SZIAI was given an opportunity to comment upon the National Ameer's letter and did so in the limited terms indicated. To invite SZIAI to a further hearing pursuant to s 425 of the Migration Act would have been an empty exercise. There was no such obligation in any event. The National Ameer's letter was by way of information that the Tribunal considered would be a reason, or part of a reason, for affirming the decision under review. It discharged its obligation, pursuant to s 424A of the Migration Act, by giving SZIAI the opportunity to comment on that information. The letter did not raise a new issue in the sense that that term is used in s 425.

Conclusion

28 For the preceding reasons this appeal should be allowed and the decision of the Federal Court set aside.

29 A constitutional point raised about the validity of s 422B of the Migration Act does not need to be considered, having regard to the conclusions reached above on the procedural fairness arguments.

30 HEYDON J. The crucial controversies between the parties in this Court turned on two arguments advanced by the first respondent ("the respondent").

The respondent's first argument: failure to make inquiries

31 The first argument related to a failure of the Refugee Review Tribunal ("the Tribunal") to make certain inquiries of Mr Nuruzzaman, Mr Hossain and the Ahmadiyya Muslim Association Australia Inc[36]. Mr Hossain signed a so-called "certification" dated 7 August 2006 produced to the Tribunal by the respondent as evidence of his involvement in the activities of an Ahmadiyya Muslim Jamaat in Bangladesh. Mr Nuruzzaman signed another so-called certification of the same date produced by the respondent for the same purpose. These certifications were frequently called "certificates" in argument, and that description will be employed below.

32 On 10 January 2008 the Ahmadiyya Muslim Association Australia Inc informed the Tribunal that it had received certain information about the respondent. The information was contained in a letter of 8 January 2008 from the National Ameer of the Ahmadiyya Muslim Jamaat, Bangladesh. The letter said: "our Khulna Jamaat informed me that they could not find out [the respondent's] name in their record." The letter also said: "Both the certificates submit by him are fake & forged." The respondent submitted that the failure of the Tribunal to make the inquiries was an error going to jurisdiction.

The respondent's second argument: new "issues"

33 The second argument of the respondent was that an alternative jurisdictional error had been committed by the Tribunal. The argument pointed to the Tribunal's duty under s 425(1) of the *Migration Act* 1958 (Cth) ("the Act"). It provides:

> "The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review."

In isolating the point of the respondent's second argument, it is necessary to bear in mind the procedural background.

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36 Some documents give the relevant body that title. Others call it the Ahmadiyya Muslim Association of Australia Inc. For consistency, the title in the text will be employed below.

The background

34 The original decision of the appellant's delegate refusing the respondent the protection visa he sought was made as long ago as 18 August 2005. This appeal is the culmination of the respondent's third attempt to have that decision reviewed in his favour. The first attempt was an application to the Tribunal followed by an oral hearing on 16 November 2005. It resulted in the Tribunal affirming the delegate's decision on 8 December 2005. However, that decision of the Tribunal was quashed by consent orders made by the Federal Magistrates Court. A second hearing then took place on 13 September 2006 before a differently constituted Tribunal. On 26 October 2006 that Tribunal affirmed the delegate's decision. However, the respondent again enjoyed success in the Federal Magistrates Court: the second Tribunal's decision was quashed. A third hearing then took place before a differently constituted Tribunal on 9 November 2007. On 19 February 2008 that Tribunal upheld the delegate's decision. In essence it rejected all the respondent's claims on credibility grounds. Although an application for judicial review to the Federal Magistrates Court failed, the respondent succeeded in obtaining an order from the Federal Court of Australia allowing an appeal. From that order this appeal is brought.

35 On what basis, then, did the respondent contend that the Tribunal should have given him a hearing additional to the third hearing he received on 9 November 2007? The basis is that a new "issue" arose after that hearing. At that hearing the Tribunal had before it Mr Nuruzzaman's certificate (sent on 25 August 2006) and Mr Hossain's certificate (handed over at the hearing). The Tribunal questioned the authenticity of the certificates. It questioned the failure of the respondent to produce a letter from the Ahmadiyya Muslim Association Australia Inc confirming his faith and practice as an Ahmadi. It requested the respondent's consent to its contacting that Association. Five days later, on 14 November 2007, the respondent's representatives conveyed that consent (although they also submitted that the Tribunal was biased – an allegation not now persisted in). Accordingly, on 15 November 2007 the Tribunal sent a letter to the Ahmadiyya Muslim Association Australia Inc enclosing the certificates and asking various questions. On 10 January 2008 that Association responded, enclosing the letter of 8 January 2008 from the National Ameer of the Ahmadiyya Muslim Jamaat, Bangladesh, alleging that Mr Nuruzzaman's certificate and Mr Hossain's certificate were "fake & forged". The new "issue", creating a duty on the Tribunal to invite the respondent to a further hearing, was said in written submissions to be whether the certificates were in truth "fake & forged". In oral argument it was submitted that another new "issue" had arisen from the 8 January 2008 letter – whether or not the respondent's name was in the Khulna Jamaat records.

Failure to make further inquiries of Mr Nuruzzaman, Mr Hossain or the Ahmadiyya Muslim Association Australia Inc

36 Whatever the general duty of the Tribunal to make inquiries, and whatever the impact of that duty might be on the conduct of the Tribunal in other circumstances, in the circumstances of this case there is no doubt that the Tribunal was not obliged to make any more inquiries than it did. Hence it is not necessary to seek to formulate that duty in terms capable of application in other circumstances.

37 *The third Tribunal decision.* The Tribunal was not obliged to make any more inquiries than it did for the following reasons. The third Tribunal decision occupied 28 closely typed pages. The operative part of it began by analysing in detail the way in which the respondent had put his case before the appellant's delegate. That case was that though he had been brought up as a Sunni Muslim, he had converted to the Ahmadi faith on 1 January 2000. He said he was a member of the Ahmadiyya Muslim Jamaat (Qadiani) and had "regularly followed all rituals performances with utmost respect". He was disowned by his family and close relatives. He and his family had been threatened with death. He had been badly injured by Sunni extremists. He had been subjected to false charges. An essential precondition to acceptance of the case so presented turned on the extent to which the respondent had practised his new faith.

38 The Tribunal then analysed in detail the respondent's evidence at the first and second hearings. It recorded one event before the second hearing which later assumed significance. The respondent produced an undated certificate from Mr Nuruzzaman "of the Ahmadiyya Muslim Jamaat in Khulna stating that he knew the [respondent], that the [respondent] had taken the *bai'at* (oath) at the Ahmadiyya Muslim Jamaat on 1 January 2000 'by my assistance' and that from that time he had 'engaged with all activities of our Jamaat'."

39 The third Tribunal decision then recorded that after the second hearing the Tribunal requested that the respondent provide the following:

> "A letter, preferably in the form of a Statutory Declaration, from the Imam or other senior person at the Ahmadiyya mosque which you attend. This letter should state that you are known to the writer of the letter as a practising member of the Ahmadiyya faith, and should also state how long you have been attending the mosque and/or other activities in connection with the Ahmadiyya religion."

On 12 October 2006 the respondent's solicitors replied in the following terms:

> "Our client has been unable to obtain the information requested in the RRT's letter dated 13 September 2006. We note our client's claim that the mosque is not in the practice of issuing such letters for persons who

> enter Australia however, merely because the mosque will not issue a letter does not mean that our client is not of the Ahmadiyya faith. The applicant has provided evidence that he was practising his Ahmadiyya faith in Bangladesh. Furthermore, a friend has confirmed that the applicant attends a mosque."

40 The Tribunal's reasons for decision then described in detail what had happened at the third hearing. In that hearing the Tribunal revealed considerable doubt about many aspects of the respondent's claims. It was sceptical about his failure to mention Mr Nuruzzaman in his original application to the delegate or in the first hearing. It inquired how his wife could have been ignorant of his faith if he had attended the Ahmadi mosque every Friday and other Ahmadi meetings. It told the respondent that he had told his story a number of times, and each time it was different. It commented on his failure to get a letter from the Ahmadi mosque he claimed to attend in Australia supporting his case even though it had verified that other applicants for refugee status were Ahmadis. In connection with Mr Nuruzzaman's certificate, it contended that forged or fraudulently obtained documents were readily available in Bangladesh.

41 *The respondent's criticisms of the letters of 8 and 10 January 2008.* In this Court, counsel for the respondent, in his customary careful way, contended that the Tribunal's conclusion that the respondent was not a genuine Ahmadi was based on its acceptance of what the National Ameer of the Ahmadiyya Muslim Jamaat, Bangladesh, said in his letter of 8 January 2008 enclosed with the Ahmadiyya Muslim Association Australia Inc's letter of 10 January 2008. It is certainly true that the Tribunal said in its reasons for decision more than once that it relied on "the information referred to in the Tribunal's letter dated 14 January 2008", and that letter referred to the National Ameer's letter of 8 January 2008. Counsel criticised the letters of 8 and 10 January 2008, and the Tribunal's reasoning, in several ways.

42 First, he said that the Tribunal's letter of 15 November 2007 to the Ahmadiyya Muslim Association Australia Inc had asked two questions. One was whether the respondent was "known to the *Ahmadiyya Muslim Jamaat Bangladesh*." The other was whether the respondent was known to the congregation of the Ahmadi mosque at Marsden Park, which the respondent claimed to attend every Friday. Counsel submitted to this Court that the Association's reply of 10 January 2008 did not answer either question.

43 Secondly, counsel said that the inability of the Khulna Jamaat in Bangladesh to find the respondent's name in its records had to be analysed in the light of such questions as whether records of attendance at prayers were kept, and whether they were kept well.

44 Thirdly, counsel contended that the 8 January 2008 letter revealed a misunderstanding about whether the certificates of Mr Nuruzzaman and

Mr Hossain were in para materia with the certificates mentioned in the letter which could be issued in order to effectuate a transfer of a member of a Bangladeshi Jamaat to a Jamaat outside Bangladesh.

45 Then counsel said that while a reference to the name of the respondent in the records of the Khulna Jamaat might establish that he was an Ahmadi, an absence of reference to his name did not establish that he was not. Counsel said that the Tribunal failed to understand this.

46 Finally, counsel submitted that "the material before the Tribunal standing alone did not provide a rational foundation for acceptance" of what it said were "two bare assertions", namely that the certificates were "fake & forged", and that since the respondent was not listed in the records of the Khulna Jamaat, he had not attended it.

47 *The criticisms considered.* It is convenient to start with the last criticism. The Tribunal's conclusions were not arrived at by reference to "the material before the Tribunal standing alone". They were arrived at by examination of what was said in the respondent's original application, as well as what happened at each of the three hearings. They were also arrived at in the light of the response given by the solicitors for the respondent to the Tribunal's letter of 14 January 2008. That letter was long and detailed: it filled seven closely typed pages and contained numerous material enclosures. It set out many alleged inconsistencies and difficulties in the respondent's position. It called for written comments on the problems identified. In particular, it drew attention to the letter of 8 January 2008, which was one of the enclosures. In the plainest terms it identified the damaging impact which that letter had on the respondent's overall credibility as well as his particular claim to have been converted. It set 29 January 2008 as the time by which the respondent's comments should be received, but it indicated that an extension could be requested.

48 The respondent's solicitors were experienced in the particular field. They did not complain of any shortage of time within which to reply. On 29 January 2008 they duly sent a response. But it was brief. The response merely conveyed the respondent's disagreement with the information forwarded. The response did not deal at all with the many points made which were distinct from the questions arising from the 8 January 2008 letter. Nor did it deal with that letter. In particular, although the arguments advanced by counsel for the respondent in this Court varied in their power, none of them were drawn to the Tribunal's attention. Counsel accepted that "some inference" was available from this circumstance. In truth, a very strong inference is available, when the circumstances of the three hearings and the many difficulties being experienced by the Tribunal are borne in mind. The inference is that the Tribunal's points were not answered because the respondent's representatives had been unable to obtain from the respondent any instructions enabling them to be answered, and because they were incapable of answer.

49 Further, the course which the respondent now says the Tribunal should have taken was not a course which his representatives asked the Tribunal to take in the letter of 29 January 2008. Although the respondent had noted at the 9 November 2007 hearing that Mr Nuruzzaman's certificate bore a telephone number which could be used to contact him, it did not seem that he urged that Mr Nuruzzaman actually be contacted. The correctness of the course which the respondent now advocates is diminished by the hindsight attached to it.

50 The respondent's contention that the Tribunal should have made a further inquiry of the Ahmadiyya Muslim Association Australia Inc is without merit. It is plain that the Association viewed itself as having nothing to add to what it said on 10 January 2008. Its letter of that date needs to be read in the light of what it said in an earlier letter to the Tribunal dated 12 December 2004. It said:

> "When any person approaches the National Ahmadiyya Association, for being attested as an Ahmadi, he is asked to provide his antecedents such as his name with parentage, his previous address, the name of 'Jamaat' (branch of the Association) to which he belonged, date of joining the Association – if not an Ahmadi by birth, and other information which he may like to supply to help verify his religious status. The information supplied by him is passed on to the National Amir of his country, who then obtains verification from the Amir/President of the local 'Jamaat' to which he claims to have belonged. A letter of verification of being an Ahmadi is issued by us, on the basis of information thus obtained. This procedure is followed in all cases unless I happen to know an applicant personally."

It then said: "There is no other way to have the claim of a person of being an Ahmadi verified." The letters of 8 and 10 January 2008 revealed that a process of that kind had come to a dead end. Perhaps someone could have asked the Ahmadiyya Muslim Jamaat in Bangladesh why it thought that the certificates were "fake & forged". But the respondent did not submit that the Tribunal should ask this, and in any event the respondent was in at least as good a position as the Tribunal to put the question. On his case, he was a victim of religious persecution, and he would have been seeking the assistance of senior office holders in the religious denomination being persecuted to avoid that persecution.

51 If the respondent thought that the Association's answer in its letter of 10 January 2008 was incomplete or rested on a misunderstanding of the Tribunal's letter of 15 November 2007, those thoughts were not conveyed to the Tribunal with a view to further action on its part. And the respondent's contention that the issue of whether Mr Nuruzzaman and Mr Hossain had forged their certificates could be resolved by asking them whether they had in fact done so must be rejected. Those questions would not have been likely to receive illuminating answers. The only useful way forward was for the respondent to

procure better material, from Bangladesh and Australia, demonstrating that his claims about his faith and practice were well-based. His representatives informed the Tribunal in their letter of 29 January 2008 that this was beyond his capacity.

52 The question of whether the Tribunal should have made further inquiries must be assessed bearing in mind that it was for the respondent to demonstrate that his claims were genuine; it was not for the Tribunal to try to achieve a demonstration that he had failed to achieve. The respondent had procured the certificates in the first place. Those certificates purported to be from gentlemen who knew the respondent. The respondent, it could be assumed, would know whether Mr Nuruzzaman or Mr Hossain could provide any useful information in relation to the letter of 8 January 2008. The respondent was in at least as good a position as the Tribunal to contact those gentlemen. He was represented by solicitors. Despite the letter of 8 January 2008, the respondent did not ask the Tribunal to contact either gentleman. It was not unreasonable for the Tribunal to proceed on the basis that if any further evidence was to be provided in support of the certificates, it would come from the respondent.

53 The failure of the Tribunal to make the inquiries of which the respondent complains was not a jurisdictional error.

Section 425

54 In relation to pleadings filed in conventional litigation, lawyers are familiar with the difficulties that arise in practice in distinguishing between allegations of material fact (which must be pleaded), some kinds of particulars of those allegations (which must be pleaded), other kinds of particulars (which need not be pleaded, but must be supplied in correspondence if requested), and evidence of the material facts so pleaded and particularised. It can be difficult to distinguish between the issues which disagreements about the relevant allegations throw up. Now a proceeding in the Tribunal seeking review of a decision by a delegate of the Minister refusing an application for a visa is not conventional litigation and is not subject to any rules of pleading. But similar difficulties can arise in distinguishing between sub-questions or sub-controversies within an issue and controversies about separate issues. In particular cases much debate could take place about how broadly or narrowly issues should have been, or were, perceived.

55 *The first "new" issue: forgery*. This appeal is not a suitable occasion on which to explore these problems in general or exhaustive terms. The question whether the certificates were "fake & forged" was not a new issue which arose in a distinct way after the third hearing. In one sense it was arguably only a sub-issue of the general question: was the respondent converted to the Ahmadi faith as he claimed? It was clear from at least the third hearing that the Tribunal had the utmost scepticism about the respondent's position on that question. But it

is not necessary to examine the proposition that forgery was only a sub-issue of the issue as to whether the respondent had been converted. That is because if it is assumed in the respondent's favour that a wholly unforeseen claim that the certificates were forged which emerged after the third hearing might raise a new issue triggering s 425 – a proposition open to debate – the claim that the certificates were forged in this case was not wholly unforeseen at that third hearing. At the third hearing the Tribunal drew attention to what it regarded as the belated emergence of Mr Nuruzzaman's asseverations – first in an undated certificate, then in the certificate dated 7 August 2006. The Tribunal also referred, while Mr Nuruzzaman's certificate and the fabrication of the respondent's claim to be Ahmadi were under debate, to the supposed ready availability of forged or fraudulently obtained documents in Bangladesh. The respondent in this Court appealed to a distinction between "a general proposition that in a particular country forged documents might be obtained and a specific proposition that these documents were fake and forged." But the context in which the Tribunal asserted the general proposition indicated that it had in mind the application of it to the particular certificates. It was to meet the supposed ready availability of forged or fraudulently obtained documents in Bangladesh that the Tribunal requested the respondent's consent to contacting the Ahmadiyya Muslim Association Australia Inc. That was because, as the Tribunal told the respondent, that Association "had told the Tribunal that they would verify a person's claims with the Ahmadiyya Jamaat to which he claimed to have belonged in Bangladesh so they were able to confirm whether someone was a genuine Ahmadi or not". That was a reference to the letter of 12 December 2004 quoted above[37].

56 Far from the forgery of the certificates being a fresh issue which arose after the third hearing, it was a live issue at that hearing. Indeed the material which eventually stated in terms that the certificates were forged came to light because of the Tribunal's concern to bypass the possibility of further forgeries being perpetrated to support the genuineness of the certificates which the Tribunal suspected had been forged.

57 *The second "new" issue: the presence of the respondent's name in the Khulna Jamaat records.* The second "new" issue which the respondent contended arose from the 8 January 2008 letter – whether or not the respondent's name was in the Khulna Jamaat records – was not a new issue. The Tribunal's reference during the third hearing to the letter of 12 December 2004 from the Ahmadiyya Muslim Association Australia Inc to the Tribunal makes it clear that the question of the status of the respondent with his Jamaat in Bangladesh, to which the Jamaat's records were relevant, was a live one at the third hearing. It was not a new issue raised after it.

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37 See above at [50].

58 The Tribunal was right to give the respondent particulars of the 8 January 2008 letter (pursuant to s 424A(1)(a) of the Act), right to ensure by its very detailed and frank letter of 14 January 2008 that the respondent understood why it was relevant (pursuant to s 424A(1)(b)), and right to invite the respondent to comment on the 8 January 2008 letter (pursuant to s 424A(1)(c)). But the Tribunal was never asked by the respondent to give a fourth oral hearing. Of course, if s 425 imposed a duty, the failure to demand compliance with it would not negate its existence. But that failure does suggest that the application of s 425 to the circumstances of this case was not obvious. And, in truth, no obligation to give a fourth oral hearing, as distinct from an invitation to supply a written response, arose under s 425.

Conclusion

59 The appeal should be allowed.