FEDERAL COURT OF AUSTRALIA

SZBYH v Minister for Immigration & Citizenship [2008] FCA 1157

SZBYH and SZBYI v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
NSD 574 OF 2008

SUNDBERG J
8 AUGUST 2008
SYDNEY

NO QUESTION OF PRINCIPLE

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 574 OF 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGE:	**SUNDBERG J**
DATE OF ORDER:	**8 AUGUST 2008**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellants pay the first respondent's costs of and incidental to the appeal fixed at $5,500.

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

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	SZBYI **Second Appellant**
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DATE:	**8 AUGUST 2008**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

BACKGROUND

1 The appellants are husband and wife. The procedural history of their application for protection visas, and the claims they have made in support thereof, are set out in the decision of the Federal Magistrates Court, which is the subject of this appeal, and in more detail in the decision of the Tribunal that was the subject of the appellants' unsuccessful application for review by the Magistrate. It is not necessary to recount that background or those claims.

GROUNDS OF APPEAL

2 There are three grounds, all relating to the Magistrate's treatment of the husband's alleged fear of persecution if he were to return to India, based on his conversion to Christianity. They assert errors by the Magistrate

(a) in failing to find that his claim to have converted was separate and distinct from his claim as to his experiences in Indian Kashmir and Pakistan;

(b) failure to admit into evidence an affidavit by David Grigor relating to the beliefs and practices of Jehovah's Witnesses, and

(c) finding that Mr Grigor's evidence did not establish that the Tribunal's basis for rejecting the husband's claim to have converted was infected by jurisdictional error, namely the absence of evidence to support facts assumed by the Tribunal.

TRIBUNAL'S REASONS

3 Although the grounds of appeal relate only to the husband's conversion to Christianity claim, it is necessary in order to understand the first ground of appeal to be acquainted with the Tribunal's approach to the appellants' claims as a whole.

4 Most of the appellants' claims were based on fear of persecution if they were returned to Pakistan for reason of nationality, religion, political opinion, membership of a particular social group, and possibly race. The conversion claim was a much later claim.

5 The Tribunal reached the following conclusions, amongst others, as to the initial claims at pages 32-36:

(a) it rejected all the claims, finding that the appellants and the witness they called were not truthful, and that their evidence was directed to a migration objective and not to a fear of persecution;

(b) it found that the history claimed by the husband was full of holes;

(c) there were inconsistencies in the husband's evidence as to the location of his home village, and it did not believe he could have been so vague as to the location of his village;

(d) there were significant discrepancies in the husband's evidence over time as to his departure from the village, and his evidence on this was not credible;

(e) it did not accept the husband's claim that as a result of superficial injuries he received at the hands of Indian soldiers, he was unconscious for two or three days, and found the entire story had been concocted;

(f) the husband's changing and conflicting characterisations of his working situation with his benefactor left the Tribunal unsatisfied as to what the working relationship was, assuming there was one;

(g) the husband's conflicting evidence about his relationship with his benefactor's sons was such that the Tribunal believed the husband "will say anything which seems convenient at the moment to advance his cause, without any regard for the truth";

(h) as to the husband's conflicting evidence as to his benefactor's children's behaviour towards their father, the Tribunal again said that he "will say anything, regardless of the truth, if it seems convenient at the moment";

(i) if, as the husband claimed, many Pakistani agencies had been after him, he would surely not have returned to Pakistan from Thailand; this was not the action of a person in fear for his life or liberty;

(j) the husband's claim that while he was in Thailand he "gave away his business without a fight" was implausible and was not accepted;

(k) it did not accept the husband's claim that his wife's brothers attempted to visit Australia so they could kill the husband's family.

6 The Tribunal then turned to the Christianity conversion claim, and rejected it at page 36:

> Here again, the evidence is contradictory. According to the applicant husband, his interest was aroused between one and two years ago. However, it only manifested itself in April this year, when he received a knock on the door from two Jehovahs Witnesses, who have supplied a letter of support. The letter states that his study began on 1 April. His own statement was different: 'Louise and Allan had knocked on his door in April and informed him about Jesus. The following week, they had brought more people.' His wife claims to have told her family of his conversion in April, yet the Carpenter's letter, dated October 2006, only states that 'He shows an interest in becoming one of

> Jehovah's Witnesses in the future, but this is entirely up to him.' The applicant appeared to see no problem in his son attending a Muslim school and his wife being a regular attendee at the local mosque, clearly being unaware or careless of the separation demanded of Jehovah's Witnesses from non-Witnesses. His acceptance of his wife and son's situation thus raises questions about his conviction. He was able to demonstrate at hearing that he has learned some of the doctrine of the Jehovah's witnesses, but I believe that his interest is purely intended to further his protection application. I will accordingly disregard it pursuant to s 91R(3) of the Migration Act 1958.

7 At pages 36-37 the Tribunal concluded as follows as to all the appellants' claims:

> In all the circumstances, I am not satisfied as to **anything** that the applicants have claimed relevant to their claim to protection. I do not accept that the applicant was born in Kashmir. I do not accept that he has any claim to Indian citizenship. I do not accept any part of the story of his benefactor and his sons. Neither do I accept that there exists any problem of any kind between the applicant and his wife's family. I simply do not believe the evidence of either the applicants or their witness on this point. I believe that their interest in pursuing this story is migratory only. I do not accept that they have been harassed in Pakistan by his benefactor's sons or by the Pakistani authorities or that there is any risk of their suffering any harm whatsoever from them should they return to Pakistan. Similarly, I do not accept that the applicant wife's family constitutes a threat to the family or to any member of it either here in Australia or in Pakistan. I do not accept that there is a real chance of the applicant suffering harm amounting to persecution because [he] is or is thought to be Indian, Christian or a spy. In short, since I find that the applicants' complete story is a work of fiction, I accept none of their claims, explicit or inherent, arising from this story.

8 Earlier in its reasons the Tribunal dealt at length with the oral evidence given by the husband and wife at a hearing. It had the benefit of seeing and hearing them give evidence and respond to the Tribunal's enquiries of them.

GROUNDS OF APPEAL

Conversion a separate and distinct claim

9 The Federal Magistrate rejected the appellants' claim that they made "essentially two claims": the first relating to Kashmir, Pakistan, and problems with the benefactor's family; the second being a separate and specific claim that arose "fairly late in the piece" that the husband had converted to become a Jehovah's Witness in Australia.

10 The Magistrate pointed out that the appellants' claim to fear persecution on the ground of religion had been put forward by them from the beginning (2000). All that was new was the conversion claim first put forward to the third-constituted Tribunal in 2006. His Honour said at [55] and [57]:

> I cannot accept Mr Karp's submission that the applicant husband made essentially only two claims. With respect, this ignores, or seeks to deflect, what is plainly open on the material contained in the Court Book that the applicants made a large number of claims which evolved and developed over time. The Tribunal dealt with each aspect of these claims, in my view, in a logical and comprehensive fashion. It is, in my view, a misrepresentation both of how the applicants' claims evolved over time, how they were ultimately presented to the Tribunal and how the Tribunal dealt with the claims, to seek to argue that the claimed conversion to Christianity in Australia was a separate and distinct claim to all other claims made by the applicants.
> …
> A holistic reading of the Tribunal's decision record reveals plainly that it rejected in their totality, the applicants' claims on the basis of their lack of credibility. That part of the Tribunal's decision complained of now must be read in the context of the paragraph in which it appears, and that paragraph must be read in the totality of the Tribunal's reasons. The applicant's claim to fear harm on grounds of religion did not fail solely on the basis that the Tribunal could be said to have formed a view that the adherents of Jehovah's Witnesses were required to be separate from non-Witnesses. The Tribunal rejected the claimed persecutory harm based on the grounds of religion for the same and only reason that it rejected the applicants' claims to fear harm on other Convention-related grounds. Namely, to put it bluntly, that the applicants had lied, and continued to lie, before the Tribunal … for the express and sole purpose of achieving a migration outcome ….

11 Although it was not made clear by the appellants, the point of the first ground of appeal is presumably to quarantine the conversion claim from the credibility findings attaching to the other claims. If so, that attempt fails, for the reasons given by the Magistrate, with which I agree. I can see no other reason for the claim that the conversion claim was separate and distinct. The first ground fails.

No evidence or other material

12 In the course of the oral hearing the Tribunal asked the husband whether he was aware that Jehovah's Witnesses "won't allow you to maintain a relationship with a person who is not a Jehovah's Witness". The husband's answer was non-responsive. The Tribunal

then asked him whether he was aware of a famous case in the United States, which it described, illustrative of the relationship rule. He replied

> Maybe I do not have to ask them that, why it happened and the, Jehovah's Witnesses are not allowed to see someone if he's Catholic or other religion.

13 The appellants drew attention to the observations of the Tribunal to the effect that the husband appeared to see no problem in his son attending a Muslim school and his wife the local mosque, "clearly being unaware or careless of the separate demands of Jehovah's Witnesses from non-Witnesses", and to the Tribunal's statement that the husband's acceptance of his wife's and son's situation "thus raises questions about his conviction".

14 The jurisdictional error claimed in the third ground of appeal is that there was no evidence or other material to support facts assumed by the Tribunal and integral to its decision, namely that Jehovah's Witnesses demand that members of a family who are witnesses remove themselves from members of their family who are not, and that Jehovah's Witnesses object to members of their family following other religions and attending schools and places of worship of other religions.

15 In *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 77 ALD 402 at [19] (*SFGB*) the Full Court said that if a finding by the Tribunal is a "critical step" in its ultimate conclusion and there is no evidence to support that finding, this may constitute jurisdictional error.

16 The Magistrate did not accept that the Tribunal's reference to the "separation" requirement of Jehovah's Witnesses was integral to its decision or a critical step in its ultimate conclusion. His Honour said at [57]-[58]:

> The Tribunal rejected the claimed persecutory harm based on the ground of religion for the same and only reason that it rejected the applicants' claims to fear harm on other Convention related grounds. Namely, to put it bluntly, that the applicants had lied, and continued to lie, before the Tribunal ("the applicants' complete story is a work of fiction") …, for the express and sole purpose of achieving a migration outcome ….
>
> … the Tribunal's rejection of all of the applicants' claims, and even the Tribunal's rejection of the applicants' claims, as they related only to the ground of religion, did not turn on its view of whether Jehovah's Witnesses

> required separation from other non-Witnesses or not. But turned on its overwhelming rejection of the credibility and truthfulness of what the applicants had said ….

Later at [60], referring to *SFGB* at [19], the Magistrate said that the critical "step" in the Tribunal's reasoning was its comprehensive rejection of the appellants' credibility.

17 The appellants have not persuaded me that his Honour was wrong in this respect. It is in my view clear that the Tribunal's rejection of their claimed fear of persecution on the ground of religion did not turn on its view that Jehovah's Witnesses required separation from other people. Rather it turned on the Tribunal's comprehensive rejection of the credibility of the appellants and their witness. That is clear from the passages I have set out at [6] and [7]. Its view about separation was neither integral to, nor a critical step in, its ultimate conclusion.

18 Even if the Tribunal's "separation" remarks were integral to its decision, the Magistrate was in my view correct to reject the claim that there was no evidence or other material that supported its remarks. In *SFGB* at [21], in the course of considering a "no evidence" submission, the Full Court said:

> it must be remembered that the Tribunal is not limited to the evidence that is formally put before it: see s 353(2) of the Act. Subject to the other provisions of the Act, including the implied and express requirements of procedural fairness, the Tribunal can inform itself as it thinks fit, including acting on information that is 'public'. Nor should it be forgotten in this context that in the course of their duties tribunal members may well come to have a relatively detailed understanding of the political and legal situation in various parts of the world. Within the limits imposed by the Act itself there is nothing to prevent members from using this information.

19 In *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 at [116] McHugh J said that the Tribunal members are expected to develop and build upon a body of expertise and general knowledge applicable to the cases that come before them.

20 In my view the Magistrate correctly said that the Tribunal member had drawn on his own accumulated knowledge and acted on information that he regarded as within the public domain, because he described it as the "famous case" on separation in the United States. The Tribunal drew this material to the appellants' attention at the hearing, thus satisfying any procedural fairness requirement. Indeed it may be, though it is not clear, that the husband's

answer to the "famous case" question acknowledged the existence of a separation requirement. See [12].

21 It is to be remembered that the Tribunal's consideration of the conversion claim arose in the context of s 91R(3) of the *Migration Act* 1958 (Cth) (the Act). The Tribunal was required to disregard this claim unless it was satisfied that the appellants engaged in the conduct otherwise than for the purpose of strengthening their claim to be refugees. The Tribunal was not so satisfied. It did not disregard the husband's conduct in Australia because of any finding that he had not in truth converted, but because of its view that the conduct was "purely intended to further his protection application". See [6].

22 For the above reasons, no error has been shown in the Magistrate's rejection of the no evidence ground.

Grigor affidavit

23 In this affidavit Mr Grigor says that there is no basis in fact for the Tribunal's finding that Jehovah's Witnesses are required to be separate from non-Witnesses whether family or not. He also says he is not aware of the famous American case to which the Tribunal referred, and adds that it is inconsistent with Jehovah's Witnesses' beliefs.

24 Mr Grigor's affidavit was tendered in support of the no evidence claim. The rejection of the affidavit was an interlocutory order, and the appellants require leave in order to appeal from it. Leave is refused, because the admission of the affidavit would have served no purpose. There was no point in admitting it into evidence, because the issue to which it went was neither critical to, nor a critical step in, the Tribunal's ultimate conclusion, as the Magistrate correctly held.

25 The Magistrate went on to say that even if Mr Grigor's affidavit had been admitted, it would not have established that there was no evidence before the Tribunal in relation to the issue arising under s 91R(3) which, as indicated at [21], was not whether the husband was a convert to Christianity, but whether he had satisfied the Tribunal that his conduct in Australia was engaged in otherwise than for the purpose of strengthening his claim to be a refugee.

APPLICATION TO RAISE ADDITIONAL GROUND

26 The appellants seek leave to raise an additional ground of appeal asserting that the Magistrate erred in failing to find that the Tribunal committed jurisdictional error by failing to comply with ss 424(2) and (3) of the Act. The particulars are as follows:

> The Tribunal failed to invite the second appellant's sister to give evidence by a method identified by s 424(2) … read with s 424(3) ….

27 This ground was not put to the Magistrate.

28 Section 424 is in part as follows:

> (1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.
> (2) Without limiting subsection (1), the Tribunal may invite a person to give additional information.
> (3) The invitation must be given to the person:
> (a) … by one of the methods specified in section 441A ….

29 Section 441A specifies the methods by which a document is to be given to a person. They are giving by hand, handing to the person at last residential or business address, dispatch by prepaid post or other prepaid means, and transmission by electronic means.

30 Failure by the Tribunal to comply with s 424(3) is a jurisdictional error: *SZKTI v Minister for Immigration and Citizenship* [2008] FCAFC 83; *SZKCQ v Minister for Immigration and Citizenship* [2008] FCAFC 119 (*SZKCQ*).

31 The facts relevant to the new ground are as follows. The Tribunal hearing was adjourned to enable the wife's sister to give evidence. On 25 July 2008 the Tribunal sent a letter to the husband in an envelope addressed to the appellants' solicitors. The letter said:

> The Tribunal has considered the material before it in relation to your application but is unable to make a decision in your favour on this information alone.
> …
> We now invite you and any persons listed below to come to a hearing of the Tribunal to give oral evidence and present arguments in support of your

> claims. You can also ask the Tribunal to obtain oral evidence from another person or persons.
>
> In this hearing the Tribunal also wishes to obtain oral evidence from your sister in law.

The "listed persons" were the wife and the appellants' son.

32 On the same day the appellants' lawyers replied by letter headed "Response to Invitation to Attend Resumed Hearing", in which they referred to the Tribunal's letter "inviting [the husband], his wife and son to attend the resumed hearing. When the hearing resumed, evidence was taken from the sister in relation to the wife's claim that her brothers had sought to come to Australia to kill her husband.

33 Section 424(2) empowers the Tribunal to invite a person to give additional information. It must give the invitation to the person by one of the methods in s 441A. Section 424(2) was not activated by the events that happened. The Tribunal did not invite the sister to give information. Rather it told the appellants' solicitors that it would like to hear evidence from her. She attended the hearing and gave an affirmation. In receiving her evidence and asking her questions, the Tribunal was exercising its power under s 427 of the Act.

34 In *SZKCQ* at [49] and [51] Buchanan J, with whom Stone and Tracey JJ agreed, said:

> It was submitted that upon the construction which I favour the RRT would be obliged to commit to writing every question which it wished to ask of an applicant (or presumably anybody else) during an oral hearing conducted in connection with a review. The prospect is certainly a troubling one. However, I think there are sufficient reasons to conclude that the obligation does not apply to information which is provided by way of evidence or argument in an oral hearing.
> …
> Section 427 sets out the powers of the RRT. Amongst its powers are a power to take evidence on oath or affirmation, to summon persons to appear before it to give evidence, to require a person appearing to give evidence and to administer an oath or affirmation. In my view the power to take evidence on oath or affirmation and to require evidence to be given on oath or affirmation necessarily carries with it the power to put questions and require answers. That power is not affected, much less limited, by s 424 which clearly operates outside the environment of the oral hearing itself.

35 In *SZKTI* at [43] the Full Court said:

> In our opinion in its natural and ordinary meaning s 424(2) provides a means by which a person may be invited to give additional information to the tribunal, that is, information which that person has not already provided to the tribunal or which the tribunal has not obtained in another way, such as pursuant to the use of its powers under s 427(3) to summon a person to give evidence.

36 In *SZGBI v Minister for Immigration and Citizenship* [2008] FCA 599 Middleton J drew attention to the various ways by which the Tribunal can gather information, s 424(2) and (3) being but one of them. The other methods to which his Honour referred, namely s 426 (witnesses called at applicant's request), s 427 (witnesses summoned by Tribunal) and those heard by resort to the Tribunal's general power to obtain and receive evidence without coercive force if a person is willing to give evidence. In those cases there are no formalities of the variety in s 424(2) and (3).

37 The facts in *SZKTI* and *SZKCQ* are quite different from those in the present case. In both the Tribunal invited a person to give information.

38 As there is no substance in the proposed new ground of appeal, leave to amend the notice of appeal is refused.

CONCLUSION

39 None of the grounds of appeal has been made out, and the appeal must be dismissed.

I certify that the preceding thirty-nine (39) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Sundberg.

Associate:

Dated: 8 August 2008

Counsel for the Appellants:	LJ Karp (pro bono)
Counsel for the First Respondent:	J Smith
Solicitor for the Respondents:	Clayton Utz
Date of Hearing:	4 August 2008
Date of Judgment:	8 August 2008