FEDERAL COURT OF AUSTRALIA

SZPZJ v Minister for Immigration and Citizenship [2012] FCA 18

Citation:	SZPZJ v Minister for Immigration and Citizenship [2012] FCA 18
Appeal from:	SZPZJ v Minister for Immigration and Citizenship [2011] FMCA 338
Parties:	**SZPZJ v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL**
File number:	NSD 2054 of 2011
Judge:	**NICHOLAS J**
Date of judgment:	20 January 2012
Catchwords:	**PRACTICE AND PROCEDURE** – application for an extension of time to file notice of appeal – lengthy delay – proposed grounds of appeal raise points not argued below – consideration of proposed grounds of appeal – no reasonable prospects – application dismissed
Legislation:	*Migration Act 1958* (Cth) ss 422B(3), 424(1), 424AA, 425 *Federal Court Rules 2011* (Cth) r 36.05
Cases cited:	*NABE v Minister for Immigration and Multicultural Affairs (No 2)* (2004) 144 FCR 1
Date of hearing:	14 December 2011
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	70
Counsel for the Applicant:	Mr SEJ Prince (Pro Bono)
Solicitor for the Applicant:	Surry Partners
Counsel for the First Respondent:	Dr MA Perry QC and Mr T Reilly

Solicitor for the First Respondent:	Australian Government Solicitor
Counsel for the Second Respondent:	The Second Respondent did not appear

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2054 of 2011**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZPZJ** **Applicant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**NICHOLAS J**
DATE OF ORDER:	**20 JANUARY 2012**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The application for an extension of time be dismissed.

2. The applicant pay the first respondent's costs.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2054 of 2011**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZPZJ** **Applicant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**NICHOLAS J**
DATE:	**20 JANUARY 2012**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

Background

1 This is an application under r 36.05 of the *Federal Court Rules 2011* (Cth) for an extension of time in which to file a notice of appeal. The applicant wishes to appeal the judgment of a Federal Magistrate (Nicholls FM) who, on 19 April 2011, dismissed the applicant's application for judicial review of a decision of the Refugee Review Tribunal (**the Tribunal**) affirming the decision of the first respondent's delegate not to grant the applicant a protection visa. The application for an extension of time was filed on 18 November 2011.

2 The applicant, who arrived in Australia on 16 February 2010, was born in Afghanistan. The Tribunal accepted that the applicant is a Hazara and that he may therefore be perceived to be of the Shi'a faith. It also accepted that his father was killed by the Taliban in 1998. However, the Tribunal did not accept that the applicant was a Christian as he also claimed. Nor was it satisfied that if the applicant was to return to Afghanistan that there was a real chance that he would be harmed for the reason of his race, religion, nationality, political opinion, or his membership of any social group.

Evidence in support of the application

3 In support of his application for an extension of time the applicant relied on an affidavit of Mr Ian Rintoul, a "volunteer refugee supporter", who regularly visits the detention centre where the applicant has been held.

4 Mr Rintoul explained that he met the applicant at the detention centre a few months ago at which time the applicant informed Mr Rintoul that after his application for a protection visa had been refused, he had written to the Minister requesting intervention on humanitarian grounds.

5 Mr Rintoul also explained that on 10 November 2011 he had a telephone conversation with the applicant in which the applicant advised Mr Rintoul that he had been given a notice of removal. When questioned by Mr Rintoul, the applicant told him that he had previously brought a proceeding in the Federal Magistrates Court but that this had been unsuccessful. According to Mr Rintoul, he asked the applicant whether he had been to the Full Federal Court. The applicant replied that he did not know that he could appeal from the Federal Magistrates Court to the Full Federal Court.

6 Mr Rintoul then told the applicant that he needed to get legal advice. Soon after that conversation Mr Prince of counsel became involved on a pro bono basis and provided Mr Rintoul with a draft notice of appeal. The application for an extension of time was filed soon after.

7 Mr Rintoul was not cross examined. I accept Mr Rintoul's evidence in its entirety. Even so, it is important to recognise its limitations. There is no evidence from the applicant himself. I am instead invited to draw inferences as to the applicant's state of knowledge as to his rights of appeal from statements made by him to Mr Rintoul. This, it seems to me, is less than satisfactory, but on the view I have come to concerning the prospects of the proposed appeal, it is not necessary for me to say more about it.

Background to the Tribunal's decision

8 Before turning to the proposed notice of appeal, I should say something more by way of background to the Tribunal's decision.

9 In its reasons for affirming the Minister's decision the Tribunal referred in detail to the applicant's entry interview, the written statement prepared by him attached to his application for a protection visa, his first interview with a delegate of the Minister in March 2010, and his second interview with a delegate of the Minister in August 2011.

10 During the entry interview the applicant stated that he was born in the Wardak province, but lived in Qarabagh, in the Ghazni province. He stated that he was of Hazara ethnicity, that although he did not have any particular occupation he most recently sold car parts, that "he was a Muslim 'before the Taliban', but he has no religion now." He also stated that he had walked over the border into Pakistan on 11 January 2010 and that he had stayed there with his uncle for two weeks. His uncle contacted "an agent" who organised the applicant's travel to Australia. The applicant stated that the agent took him to Dubai on an Iranian passport where he remained for another two weeks before travelling to Australia via Abu Dhabi on a Japanese passport. Asked if he had lived in any country other than his country of nationality, the applicant said that he had not.

11 In his application for a protection visa the applicant stated that he was born in Wardak in 1984 and lived there until 2002 when he moved to Qarabagh, in the Ghazni province. He stated that he belongs to the Hazara ethnic group, described his religion as "agnostic" and also claimed that he had never held a genuine passport, had never applied to migrate to any country other than Australia, and had never applied for refugee status in any country other than Australia.

12 In the written statement attached to his application the applicant stated that his father operated a successful business in Wardak selling spare parts. He stated that it became increasingly difficult to operate the business after the Taliban came to power. They also had problems in the area because they were Hazaras.

13 He stated that in 1998 the Taliban came to his house, took his father away and killed him. His family and he survived on savings until 2002. They then left Wardak, moved to Mirak, Qarabagh in the Ghazni province and, with the help of an uncle living in Pakistan, the applicant established a spare parts shop in Ghanzni City, about 40 minutes from his home.

14 The applicant stated he had gone to the Mosque when he was young, but after his father was killed, he lost his faith. He stated that in 2008, after deciding to study English, he began to attend an English school near his home. He stated that most of the students were Pashtuns, and that there were only two Hazaras in his class.

15 The applicant stated that he did not have any trouble at school until 7 January 2010. He stated that on that day it became apparent to him that many of his classmates were sympathetic to the Taliban, that in response to classmates' suggestions that they should join the Taliban he had spoken out against both the Taliban and the Prophet Mohammad, and that he was ordered to leave.

16 The applicant stated that after leaving the school he had gone to his shop. He stated that he was then called by his brother who told him that another brother had been taken away by the police and that the house was surrounded by people. After his brother told him that it was dangerous to return to the house, the applicant stayed away. He kept in touch with his family by phone and was told that his brother had been beaten while in police custody and questioned by them about the applicant.

17 The applicant stated that he contacted his uncle in Pakistan who told him that he could not stay in Afghanistan. He then met up with his uncle and travelled to Pakistan where his uncle contacted a people smuggler who provided him with an Iranian passport which he used to travel to Dubai where another people smuggler gave him a Japanese passport that he used to travel to Australia.

18 In his application for a protection visa the applicant expressed fear that he would be harmed or killed by the Taliban or Pashtuns if he returned to Afghanistan because he has been labelled an infidel. The situation was made worse, according to the applicant, by the fact that he is a Hazara.

19 At the first of the applicant's interviews with the delegate of the Minister, the applicant stated that, apart from his short stays in Pakistan and the United Arab Emirates, he had only ever lived in Afghanistan. It was suggested to him by the delegate that, based upon the delegate's observations, it appeared that the applicant had lived outside Afghanistan for a

considerable period of time. This was "strongly denied" by the applicant who repeated his previous claims.

20 At the second of the applicant's interviews with the delegate of the Minister, the applicant initially confirmed the accuracy of his application for a protection visa. In particular, he claimed that although he used to be a Muslim, he was no longer a follower of any religion. He also confirmed his previous account of how he came to Australia. However, the delegate put to the applicant that the department had obtained information concerning his identity which revealed that he had applied for asylum in the United Kingdom in 2002 under another name. This was accepted by the applicant. He said that after his asylum application was rejected he travelled to Ireland in 2004 where he made a further application for asylum. Before his status in Ireland was finally determined, he travelled to Abu Dhabi and then to Australia.

21 The applicant was then asked what religion he followed in the United Kingdom and Ireland. He told the delegate that he did not follow any religion in those countries. He also told the delegate that his family now live in Kabul. When asked by the delegate whom he feared in Afghanistan, the applicant stated that he feared the Taliban because his father fought with Hezbe-Wahdat against them.

22 The delegate also asked the applicant why he would be unable to live in Kabul. The applicant referred to the fact that he had lived in a western country, which would make people inquisitive and which would lead them to discover that he does not attend mosque and does not subscribe to their way.

23 Shortly before the Tribunal hearing the applicant's migration agent submitted various documents aimed at establishing that the applicant was a committed Christian. These included a statement of Reverend Warren who had baptized the applicant on 14 December 2010. In that statement Reverend Warren stated that he was "quite assured [the applicant] had been a Christian even back in Afghanistan ...".

24 In his letter to the Tribunal the migration agent also advised the Tribunal that, although the applicant's Christianity was not the main reason why he is afraid to return to Afghanistan, it was an obvious factor. I will return to this letter again later in these reasons.

25 At the commencement of the oral hearing before the Tribunal, the applicant's migration agent submitted to the Tribunal a letter from Ms Sonia Woo who observed that the applicant became a Christian about five years ago and that she had witnessed his commitment to the Christian faith firsthand over a period of seven months while participating in church services at the detention centre where the applicant was held.

THE PROPOSED GROUNDS OF APPEAL

26 There are four grounds of appeal. The first of these is not a proper ground of appeal because it merely asserts in general terms that the Federal Magistrate erred in finding that no jurisdictional error could be discerned on the part of the Tribunal "either as a result of the applicant's grounds in the application or otherwise". Despite the reference to the grounds in the applicant's application, it was not suggested that the Federal Magistrate erred in his treatment of any issue raised by the applicant before his Honour. The three remaining grounds of appeal all concern issues that were not raised before the Federal Magistrate.

27 The applicant submitted that each of the grounds of appeal he wished to rely upon in his proposed appeal has reasonable prospects of success. The first respondent, on the other hand, submitted that none of the grounds relied upon by the applicant has reasonable prospects of success. An extension of time to appeal should only be granted in this case if I am satisfied that the proposed appeal has reasonable prospects of success. I say this because there has been a substantial delay in filing the application for an extension of time, and also because none of the points sought to be raised in the proposed appeal was raised before the Federal Magistrate. It is therefore necessary to consider the strength of the various grounds of appeal upon which the applicant will rely if he is given an extension of time that he seeks.

Ground 2

28 I begin with the second ground of appeal which alleges that the Tribunal committed jurisdictional error by failing to comply with s 424AA of the *Migration Act 1958* (Cth) (**the Act**). This ground of appeal is in the following terms:

> His Honour failed to find that the Tribunal's decision was affected by jurisdictional error in that the Tribunal failed to comply with the provisions of s424AA in respect of certain information which it put to the appellant at the hearing and consequently breached s424A in respect of that information.
>
> Particulars

(a) At the hearing, the Tribunal purported to provide oral particulars of the following information which is information otherwise within the scope of s424A(1):

(i) Information identified at paragraphs [84]-[89] of the Tribunal's decision

(ii) Information identified at paragraphs [92] of the Tribunal's decision;

(iii) Information identified at paragraph [95] of the Tribunal's decision.

(b) The Tribunal did not ensure, as far as is reasonably practicable, that the appellant understood why the information was relevant to the review, and the consequences of the information being relied on in affirming the decision that was under review in that it did not inform him that the information would be used to discount or ignore the statements by Reverend Warren and or Ms Woo concerning their opinions as to the length of time the appellant had been a Christian;

(c) Further and in the alternative, the Tribunal did not, after having put each of the pieces of information described in paragraph (a) above, advise the appellant that he may seek additional time to comment on or provide additional information as put;

(d) Further and in the alternative, to the extent that the appellant was invited to seek additional time to comment on or provide further information, the Tribunal failed to adjourn the review in circumstances where the Tribunal clearly accepted that the appellant should be given further time to respond by reason of its acceptance that written submissions could be provided after the hearing. Section 424AA(b)(iv) requires that the hearing of the review must be adjourned and it was not.

29 There is no evidence before me apart from the Tribunal's own record of its decision as to what occurred during the course of the Tribunal hearing. I shall proceed on the basis that the Tribunal has accurately recorded in its written reasons what was said at the oral hearing.

30 Those parts of the Tribunal's reasons which are referred to in the particulars to the second ground of appeal as well as some other closely connected parts which provide the necessary context are found at paras [83] to [96] of the Tribunal's reasons which I shall set out:

83. The Tribunal explained to the applicant that it wished to discuss with him information that would be a reason for affirming the decision to refuse him a protection visa. The Tribunal explained that he would be asked to respond to this information and would be entitled to seek additional time to comment on, or to respond to, the information the Tribunal was about to put to him.

84. It was put to the applicant that he had stated in his application for a protection visa and the accompanying statement that he was born in Wardak Province,

where he had lived until 2002. He then moved to Ghazni in 2002 and remained there until he came to Australia. He operated a spare parts business in Wardak from 2002 until 2010. He had claimed that in January 2010, as a result of expressing opinions adverse to the Taliban, the Prophet Mohammad and Islam in his English language class, which he had been attending since 2008, the community and the police moved against him. When the police was unable to find him at home, they took away, detained and mistreated his brother for three days. Four days after this incident he departed Afghanistan and came to Australia via Pakistan and the UAE using false Iranian and Japanese passports. He had replied "no" to questions asking him if he had travelled to, resided in or sought asylum in any other country.

85. It was put to him that he was interviewed by the Department [in] February 2010 at Sydney Airport. The written record of this interview is contained in the applicant's Departmental file and according to this record you made claims similar or identical to what is contained in his application for a protection visa and the accompanying statement. He again reiterated these claims when he was first interviewed by the delegate in connection with his protection visa [in] March 2010. He stated that he had not travelled outside of Afghanistan prior to 2010.

86. Subsequently, further identity investigations by the Department including fingerprint checks revealed that he had sought asylum in the UK [in] June 2002 under [an alias]. He was refused asylum [in] July 2003 and exhausted his appeal rights.

87. The applicant was interviewed again by a delegate of the Minister [in] August 2010. At that interview the applicant initially confirmed and/or reiterated the claims he had put forward in his application for a protection visa and at previous interviews. He also produced a copy of a Taskira, claiming to have obtained the document in Afghanistan four years ago. However, when the results of the identity investigation were put to him, he stated that he had made up the claims previously put forward to the Department; that he had travelled to and sought asylum in the UK in 2002; and that he had also travelled to and sought asylum in the Republic of Ireland in 2005 [sic]. He stated that he had not lived in Afghanistan since 2002. The applicant then put forward new claims, stating that he was unable to return to Afghanistan for safety reasons and would not be able to fit into Afghan society.

88. Following the lodgement of his application for review, the applicant claimed for the first time that he had converted to Christianity at the VIDC and that some of his fears related to this fact.

89. The Tribunal explained that the information he put forward to the Department at various stages is relevant because on the basis of the inconsistencies, shifts and changes in his evidence the Tribunal may disbelieve his claims and find that he has not been truthful and or reliable as a witness. It was put to him that the Tribunal may also find that [he] has manufactured claims to strengthen his case for a protection visa and achieve an immigration outcome; that he has manufactured false documents to strengthen his case for a protection visa and achieve an immigration outcome. The Tribunal explained that the information is also relevant because, on the basis of delays in informing the Department of his true circumstances the Tribunal may disbelieve his claims and find that he is not a credible witness.

90. He was asked if he wished to comment or respond. He stated he had repeated whatever the smuggler had told him to say. He had run away from danger and if he was safe he would not have left the country. Hazaras continue to be in danger and are killed by the Taliban. He now realises the mistake he has made by fabricating claims and would like to apologise for it. The situation in Afghanistan is worsening and his village is unsafe because Hazaras are attacked by Kuchis.

91. The Tribunal put to the applicant that has [sic] put forward evidence to the Tribunal and at the hearing claiming to be Christian. This evidence indicates that he began attending religious ceremonies in October or November 2010 and was baptised in December 2010. According to a letter by Reverend Warren he is "quite assured" that the applicant has been a Christian even back in Afghanistan". In addition, according to Ms Woo's letter he had been a Christian for five years

92. However, in his application for a protection visa he had described his religion as "agnostic" At his entry interview, as well as the first and the second interviews in connection with his application for a protection visa, he had claimed that he had [sic] did not believe in religion and/or did not consider himself to be the follower of any religion. At no point he had indicated to the Department, even tentatively, that he was a Christian had an interest in or pursued Christianity at any stage of his life.

93. The Tribunal explained to the applicant that his evidence to the Department is relevant because it may lead the Tribunal to conclude that he is not a Christian; his conversion to Christianity is not genuine and that he has put himself through this process in order to strengthen his case for a protection visa and achieve an immigration outcome. The Tribunal may also find that he had expressed interest in Christianity, has attended religious ceremonies, participated in religious activities and has undergone baptism in order to manufacture evidence to strengthen his case for a protection visa and achieve an immigration outcome.

94. He was asked if he wished to comment or respond. The applicant stated that he had told Reverend Warren that he was interested in Christianity in Ireland and not Afghanistan. In relation to Ms Woo's letter, he stated that he had spoken to Ms Woo over the telephone and had responded to her questions. He said his case was not about his Christianity. His fears related to the Taliban. Religion is something that is in his heart and he never wanted to use this as a reason for seeking asylum and he never thought about mentioning it to the delegate.

95. The Tribunal put to the applicant that in his pre-hearing submission and at the hearing he claimed that his main fear related to his Hazara ethnicity and impute [sic] Shi'a faith. However, at his first Departmental interview he had stated that he had no fears in Afghanistan because he is a Hazara. Rather, he was fearful because he was accused of being an atheist/infidel. The Tribunal explained that the information he had put forward to the Department is relevant because on the basis of the inconsistencies, shifts and changes in his evidence, the Tribunal may disbelieve his claims and find that he has not been truthful and or reliable as a witness. He was asked if he wished to comment or respond. He said this was what he was told to say by the smuggler. The reality is that the Taliban targeted him and his family in the area.

> 96. The Tribunal put to the applicant that it appeared that he had converted to Christianity solely for the purpose of strengthening his claims. It was put to him that if the Tribunal were to reach this conclusion, the Tribunal may disregard his conduct in Australia. He said he never wanted to use his religion to strengthen his case, but if he were to go back people will find out and kill him.

31 It is apparent that the focus of the Tribunal's inquiries as recorded in this part of its reasons was upon various inconsistencies in the applicant's version of relevant events. By the time of the Tribunal hearing the applicant claimed that he was a Christian and that this explained, at least in part, his fear of persecution should he be forced to return to Afghanistan. He also asserted that he was not agnostic as he had claimed in his application for a protection visa and in each of his departmental interviews.

32 The Tribunal clearly informed the applicant and the migration agent who represented the applicant that the applicant would be entitled to respond to the information that the Tribunal was proposing to put to him and that he would be entitled to seek additional time to comment on, or respond to, that information.

33 Further, there is no suggestion in the Tribunal's reasons for decision or any other evidence before me that the applicant did not understand that it was open to him to respond to the information that the Tribunal was proposing to put to him with a request for additional time in which to comment or respond. In the absence of such evidence, I infer that at relevant times the applicant understood that he was entitled to seek additional time in which to comment on or respond to the information that the Tribunal put to him.

34 Section 424AA of the Act provides:

> If an applicant is appearing before the Tribunal because of an invitation under section 425:
>
> (a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
>
> (b) if the Tribunal does so--the Tribunal must:
>
> (i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and
>
> (ii) orally invite the applicant to comment on or respond to the

information; and

(iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and

(iv) if the applicant seeks additional time to comment on or respond to the information--adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.

35 There was an issue between the parties as to whether or not s 424AA applied to the information identified in the particulars to the second ground of appeal. There was no dispute that the applicant appeared before the Tribunal because of an invitation given under s 425 of the Act. It is convenient to proceed for the moment on the assumption that, in the language of s 424AA(a), the information in question was "…information that the Tribunal considers would be the reason or part of the reason, for affirming the decision that is under review…".

36 The first point raised by the applicant in relation to s 424AA (see ground 2 particular (b)) concerns the alleged failure of the Tribunal to inform the applicant that the relevant information would be used by the Tribunal to ignore or discount the statements by Reverend Warren and Ms Woo concerning their opinion as to the length of time the applicant had been a Christian. For reasons which I shall now explain, I think this point has no reasonable prospects of success.

37 Contrary to the terms in which the ground of appeal has been expressed, it is clear that s 424AA(b)(i) did not require the Tribunal to inform the applicant of what use it would make of the relevant information. In particular, s 424AA(b)(i) did not require the Tribunal to inform the applicant that statements made by him following his entry into Australia concerning his previous movements and his religion would be used by it to ignore or discount the statements of Reverend Warren and Ms Woo. Whether or not the information was to be used for that purpose was a matter for the Tribunal. In saying this I should make clear that I do not accept that the Tribunal ignored the statements of Reverend Warren and Ms Woo. As I later explain, the Tribunal had regard to both statements which it referred to at various points in its reasons for decision.

38 What the Tribunal was required to do was to take reasonable steps to ensure that the applicant understood that the information was relevant to the review because it might lead the Tribunal to conclude that the applicant had never been a Christian with the self evident

consequence that the decision under review would be affirmed unless there was some other relevant basis for the applicant to fear persecution if he was to return to Afghanistan.

39 The various statements made by the applicant as to his agnosticism were of obvious relevance to an evaluation of the genuineness of the applicant's assertions that he became a Christian while living in Ireland and before coming to Australia. As the Tribunal explained to the applicant, such statements were relevant because they might lead the Tribunal to conclude that the applicant was not a Christian, that his conversion to Christianity was not genuine and that he had instead participated in religious activities and undergone his baptism merely in order to strengthen his case for a protection visa. It would have been obvious to the applicant given the context in which this explanation was provided that if the Tribunal was to conclude that the applicant had never been a Christian, the decision under review would be affirmed unless there was some other relevant basis for the applicant to fear persecution if he was to return to Afghanistan.

40 The second point raised by the applicant in relation to s 424AA (see ground 2 particular (c)) concerns the requirements of sub-para (b)(iii) of that section which obliges the Tribunal to advise the applicant that he or she may seek additional time to comment on or respond to the information.

41 It is accepted by the applicant that the Tribunal explained to him that it wished to discuss information with him that would be a reason for affirming the decision to refuse the applicant a protection visa, that the applicant would be asked to respond to that information and that he would be entitled to seek additional time to comment on or respond to the information that would be put to him.

42 However, the applicant submitted that s 424AA(b)(iii) required the Tribunal to go further and that it was obliged to repeat its advice to the applicant that it was open to him to seek additional time to comment or respond each time it put to him a piece of information to which the section applied.

43 If the applicant's submission is accepted, it might be open to infer that there had been a failure to comply with s 424AA(b)(iii) because the Tribunal's reasons do tend to suggest that only once did it advise the applicant that he had the opportunity to seek additional time to

comment on or respond to the information that it was about to put to him. However, in my view the applicant's submission lacks substance and should not be accepted.

44 I do not think there is any doubt that it was open to the Tribunal to advise the applicant before putting to him various pieces of information that he could seek additional time to comment on or respond to any of it. That is how the advice, as recorded in the Tribunal's reasons, would have been understood. What is significant, in my view, is that the advice given by the Tribunal to the applicant concerning his entitlement to seek extra time was expressed in terms that made clear that it extended to all the information that the Tribunal was about to put to the applicant.

45 The applicant's submission that there had been a failure to comply with the requirements of s 424AA(b)(iii) is not supported by any authority to which I was referred or of which I am otherwise aware. Nor is it supported by the language of the section, which merely requires that the applicant be advised that he or she may seek additional time to comment on or respond to the information the subject of particulars given to the applicant. It does not expressly or impliedly require that such advice be given separately in relation to each such piece of information.

46 I am satisfied that the second point raised by the applicant has no reasonable prospects of success.

47 The third point raised by the applicant (see ground 2 particular (d)) concerns the failure of the Tribunal to adjourn the review. The applicant argued that s 424AA(b)(iv) required the Tribunal to adjourn the hearing and that it did not do so. In particular, the applicant submitted that the Tribunal's only option, when it considers that additional time should be given to an applicant to comment on or respond to information to which s 424AA applies, is to adjourn the hearing.

48 Each time the applicant was asked by the Tribunal whether the applicant wished to comment on or respond to information that was put to him by the Tribunal, the applicant usually did so. At no stage did he say in response to such an invitation that he wanted more time to comment or respond. However, it appears from the Tribunal's reasons that toward the end of the hearing the applicant's migration agent, who had apparently made some brief

oral submissions, requested further time to provide written submissions. This request was allowed and the Tribunal subsequently received a written submission from the migration agent and a letter apparently written by the applicant.

49 I am prepared to assume that the migration agent's request that the applicant be given the opportunity to provide written submissions was an application for additional time to comment on or respond to the information the subject of particulars given in accordance with s 424AA. But I do not agree with the applicant's submission that, if the Tribunal was to grant additional time in accordance with such a request, it had no option but to adjourn the hearing to another date to give the applicant an opportunity to comment on or respond to the relevant information.

50 Section 424AA(b)(iv) requires the Tribunal to "adjourn the review" if the Tribunal considers that there is a reasonable need to do so in order to give the applicant extra time in which to comment on or respond to the information. The reference to "the review" is significant because those words refer to a process that extends beyond any oral hearing that takes place in accordance with s 425(1) of the Act.

51 There is nothing in the language of s 424AA(b)(iv), or s 424AA generally, that requires the Tribunal to adjourn the oral hearing in the circumstances where it considers that the applicant should be given extra time. In some circumstances the Tribunal may be required to adjourn the oral hearing if not to do so would be unfair or unjust: see s 422B(3) of the Act. However, there is no reason to think that the legislature intended that the Tribunal should have no option other than to adjourn the oral hearing particularly if, as in this case, no such adjournment was sought.

52 I am satisfied that the applicant's third point has no prospects of success.

Ground 3

53 I turn now to the third of the applicant's proposed grounds of appeal which is in the following terms:

> His Honour failed to find that the Tribunal breached s424 of the Act by not having regard to information which was provided in response to a request for information by it, namely the statements of Reverend Warren and Ms Woo.

Section 424(1) of the Act provides:

> 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.

54 The statement of Reverend Warren was submitted to the Tribunal by the applicant, through his migration agent, some days prior to the oral hearing taking place. The statement of Ms Woo was submitted to the Tribunal at the commencement of the oral hearing.

55 While it was accepted by the applicant that the Tribunal had regard to the statements of Reverend Warren and Ms Woo in the sense that they were referred to by the Tribunal, it was submitted that the Tribunal used them merely in connection with its evaluation of the applicant's credit instead of treating them as evidence of the applicant's Christianity. The applicant placed particular emphasis upon para [119] of the Tribunal's reasons where it said:

> The Tribunal has considered the various letters and documents submitted in support of the applicant's interest and involvement in and conversion to Christianity, including his baptismal certificate. However, having regard to the matters outlined above and the applicant's overall credibility, the Tribunal is not satisfied that the letters cure its concerns in relation to the truthfulness of the applicant's evidence and the sincerity of his actions.

56 The applicant submitted that this approach was impermissible and that the Tribunal failed to have regard to these statements, particularly that of Reverend Warren, as reliable and independent evidence that the applicant had been a Christian for some years prior to his arrival in Australia. I do not accept that submission.

57 It was the Tribunal's view that if the applicant had been a Christian prior to his arrival in Australia, he would not have neglected to make mention of that fact at some point before the lodgement of his application for review. A fair reading of the Tribunal's reasons reveals that, although it had regard to the contents of Reverend Warren's and Ms Woo's statements, the contention that the applicant had been a Christian for some years prior to his arrival in Australia was fundamentally inconsistent with various statements made by him prior to the filing of his application for review and that the Tribunal was not satisfied, on the basis of the statements of Reverend Warren and Ms Woo, or otherwise, that the applicant had ever had a genuine interest in Christianity.

58 I should note that it was argued on behalf of the first respondent that s 424(1) of the Act did not apply to the information in the statements of Reverend Warren and Ms Woo because the sub-section only extends to information which the Tribunal "may get…that it considers relevant" and that the information in their statements had not been obtained by the Tribunal pursuant to s 424(1). It is not necessary for me to resolve this argument because it is clear that the Tribunal had regard to both the statement of Reverend Warren and the statement of Ms Woo.

59 I am satisfied that this proposed ground of appeal has no prospect of success.

Ground 4

60 This brings me to the last of the applicant's proposed grounds of appeal. It is in the following terms:

> His Honour failed to find that the Tribunal's decision was affected by jurisdictional error in that it did not consider the claims of the appellant because it failed to consider whether there was a well founded fear of persecution from the Taliban either in Kabul or on route to Beshud in Afghanistan by reason of his relationship with his Hazara father (who was murdered by the Taliban).

61 There are two limbs to this proposed ground of appeal. The first is that the Tribunal, in finding that the applicant could safely return to Kabul, failed to consider whether the applicant had a well founded fear of persecution by the Taliban in Kabul by reason of his relationship with his father. The second is that, in finding that the applicant could safely settle in Beshud, the Tribunal failed to consider whether the applicant had a well founded fear of being persecuted by the Taliban while travelling from Kabul to Beshud by reason of his relationship with his father. It is apparent from the Tribunal's reasons that Beshud is the region of Wardak province that the applicant claimed to be from.

62 It is accepted by the first respondent that the Tribunal is obliged to consider claims which, while not expressly advanced, are apparent on the face of the material before the Tribunal: *NABE v Minister for Immigration and Multicultural Affairs (No 2)* (2004) 144 FCR 1 at [58]. However, the first respondent argued that the first limb of ground 4 was bound to fail because there was nothing before the Tribunal capable of giving rise to a claim that the applicant might be the subject of persecution by the Taliban in Kabul by reason of his relationship with his father. I think this is correct.

63 The applicant's statement accompanying his application for a protection visa referred to the killing of his father by the Taliban in 1998 at which time the applicant, his father and other members of his family were living in Wardak. After the death of his father, the applicant and his family stayed in Wardak until 2002 when they moved to Mirak, Qarabagh, in Ghanzi Province, where there were more Hazaras. According to his written statement, he lived in Mirak until 2010. It is unnecessary to again recount what the applicant said in his written statement concerning the events which led him to leave Mirak. What is significant is that the persecution that the applicant claimed to fear at this time had had nothing to do with his relationship with his father, and was attributed by him in his written statement to views expressed by him to others that led to him being labelled an "infidel". The situation was made worse, according to the applicant, by the fact that he was a Hazara.

64 The letter from the applicant's migration agent to the Tribunal dated 14 January 2011 included the following explanation of the reasons why the applicant feared that he would be persecuted in Afghanistan if made to return there:

> [The applicant] has instructed us to submit that his Christianity is not the main reason why he is afraid to return to Afghanistan although it is an obvious factor. The main reason was also the reason for his departure from Afghanistan in the first place and continues in effect to this time. This reason is the persecution suffered by Hazaras throughout the country on account of their race and their religion (the Shi'a branch of Islam). Although [the applicant] has converted to Christianity, the Islamic elements of the Afghan community will not take this into account as a reason not to persecute him. So far as they are concerned, he remains a Hazara and a Shia and liable to persecution within his homeland for that reason.
>
> However, if members of the Afghan Islamic community were to accept that he has converted to Christianity, this would simply provide an additional reason for persecuting him over and above his Hazara ethnicity. This would be his apostasy from Islam.

Nothing was said in the migration agent's letter concerning any fear of persecution by reason of the applicant's relationship with his father.

65 In the written submission forwarded to the Tribunal after the conclusion of the oral hearing, the applicant's migration agent canvassed various matters which had been raised by the Tribunal. As to the possibility of relocation to Kabul, the following submissions were made:

> 25. The Presiding Member asked [the applicant] why he could not move to Kabul, where approximately 1,000,000 Hazaras live, to avoid persecution in his

> home region. In essence, the Tribunal was raising the issue of internal relocation. It may be conceded that [the applicant] is now well travelled and shows every indication of being a capable resilient person. Nevertheless, the question of internal relocation raises the issue whether it is reasonable in all the circumstance to expect him to move from Behsood to Kabul to avoid persecution.
>
> 26. In this context, [the applicant] has never lived in Kabul and his family for the most part do not live there any longer with his mother's move with his siblings to Pakistan. Moreover, although Hazaras in Kabul appeared to have access to education and are not deliberately targeted, conditions for them and particularly individuals such as [the applicant] are far from satisfactory.

66 The question then is whether the Tribunal was required to consider whether or not the applicant would have a well founded fear of persecution in Kabul by reason of his relationship to his father who, as the Tribunal accepted, was killed by the Taliban in 1998. The Tribunal was obliged to consider such a claim if it was apparent on the face of the material before the Tribunal. However, there was nothing in the material before the Tribunal to make such a claim apparent.

67 I turn finally to the second limb of ground 4 of the proposed notice of appeal. The Tribunal was not satisfied that the applicant had reason to fear persecution in the Beshud district of Wardak (his home region) by the Taliban or Pushtun Kuchis who migrated to these areas between April and September. The point now raised by the applicant is that the Tribunal should have considered the question whether the applicant had a well founded fear of persecution by the Taliban when travelling from Kabul to Beshud by reason of his relationship with his father.

68 It is apparent from the Tribunal's reasons that it raised the matter of his possible return to Beshud with the applicant directly in the course of the oral hearing. In responding to the Tribunal, the applicant "acknowledged that Beshud is a safe area, but he had heard that Kuchis attack the locals when they come to the area to graze their cattle". There was a further response provided on this particular topic in the migration agent's letter of 28 January 2011. But at no stage did the applicant or his migration agent suggest that the applicant might be at risk of persecution by the Taliban while en route from Kabul to Beshud by reason of his relationship to his father. The Tribunal was required to consider the applicant's claims against the background of the material and the claims before it. It was not required to consider theoretical possibilities that were not adverted to by the applicant and which had no support in any of the material before it.

69 I am satisfied that ground 4 of the applicant's proposed notice of appeal has no reasonable prospects of success.

Disposition

70 For the above reasons I consider that the proposed appeal has no reasonable prospects of success and that the extension of time sought should be refused on that basis. The application for an extension of time will be dismissed with costs.

I certify that the preceding seventy (70) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Nicholas.

Associate:

Dated: 20 January 2012