FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZGEO v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 81

MIGRATION – Application for review of Refugee Review Tribunal decision on the basis of jurisdictional error. Tribunal's decision did not meet requirements of s.424A of the *Migration Act 1958* – Tribunal decision affected by jurisdictional error – Appeal allowed.

Migration Act 1958 (Cth)
Federal Magistrates Court Rules 2001
Judiciary Act 1903 (Cth)

SAAP v Minister for Immigration and Multicultural & Indigenous Affairs [2005] 215 ALR 162
SZEEU v Minister for Immigration and Multicultural & Indigenous Affairs [2006] FCA FC 2
VAF v Minister for Immigration and Multicultural & Indigenous Affairs [2004] ALR 471

Applicant:	SZGEO
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1110 of 2005
Judgment of:	O'Sullivan FM
Hearing date:	31 October 2006
Date of Last Submission:	31 October 2006
Delivered at:	Sydney
Delivered on:	12 February 2007

REPRESENTATION

Counsel for the Applicant:	In person
Counsel for the Respondents:	Mr Wee
Solicitors for the Respondents:	Phillips Fox

ORDERS

(1) The name of the first respondent be amended to Minister for Immigration and Citizenship.

(2) The Refugee Review Tribunal is joined as the second respondent.

(3) A writ of certiorari issue directed to the second respondent, quashing the decision of the second respondent dated 11 March 2005 and handed down on 5 April 2005 in matter N05/50458.

(4) A writ of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent dated 13 December 2004.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1110 of 2005

SZGEO
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Background

1. The applicant is a male citizen of India who arrived in Australia on 5 November 2004. He applied for a protection visa on 29 November 2004. The application was refused by a delegate of the first respondent ("the delegate") on 20 December 2004. The applicant applied to the Refugee Review Tribunal ("the Tribunal") for review of the delegate's decision on 11 January 2005. The applicant gave oral evidence before the Tribunal on 2 March 2005. The Tribunal handed down its decision on 5 April 2005 affirming the delegate's decision.

2. This is an application under s.39B of the *Judiciary Act 1903* (Cth) filed 2 May 2005 to review the decision of the Tribunal. Pursuant to directions made on 18 May 2005 an amended application was filed on 1 September 2005 and the matter was listed for final hearing on 31 October 2006.

3. The respondent filed an outline of submissions on 24 October 2006 and a case book ("CB") which was taken into evidence.

4. At the hearing on 31 October 2006 the applicant confirmed he relied solely on the grounds contained in the amended application.

5. When the matter was called, Counsel for the respondent advised the Court that following the directions hearing in May 2005, the applicant had been advised incorrectly by the respondent's solicitors that the final hearing was listed for 31 December 2006.

6. Counsel for the respondent advised that as soon as this error was discovered it was corrected and the applicant was advised of the correct hearing date.

7. The applicant, who appeared with the assistance of an interpreter, indicated he did not receive the later correspondence from the respondent's solicitors.

8. It is clear from the Court file that correspondence from the Court dated 11 October 2006 was sent to the applicant's address for service.

9. The applicant advised that he had only received notice of the new hearing date from the Court on 30 October 2006.

10. Given this, the applicant was allowed 21 days to provide any written submissions after the hearing.

11. It was made clear, given the passage of time since the directions hearing in May 2005, that this was not an opportunity to raise new grounds. The applicant was also told should no submissions be received within 21 days from the date of the hearing, the Court would decide the matter on the basis of the material on the file and submissions made at the hearing. The applicant indicated he understood and agreed to this.

12. Unfortunately, and despite the applicant being given 21 days to do so, no written submissions were received from the applicant. Given this, and having confirmed with the applicant at the hearing that this would be the course of action, the Court will proceed to decide the matter on the basis of the material on the Court file and the submissions at the hearing.

13. Finally, the matter was stood down briefly on 31 October 2006 to allow the respondent's outline of submissions to be translated to the applicant.

14. Given the provisions of the *Migration Act 1958* (Cth) ("the Act") the Court cannot set aside the Tribunal decision and send the matter back for the Tribunal's reconsideration unless the Court is satisfied that the decision was affected by jurisdictional error.

Grounds in amended application

15. At the commencement of the hearing the applicant confirmed he relied only on his amended application. The amended application is extracted here verbatim. Typographical and grammatical errors in the amended application have not been corrected for the purposes of this judgement.

16. The amended application contained the following grounds:

> *"That the RRT Decision was affected to take into account relevant consideration when it assessed weather the delegate of the Minister raised reasonable grounds for not granting a protection visa."*
>
> **Particulars**
>
> *"The tribunal did not properly consider in assessing the chance of my persecution and persecuted on my return to India based on the member of a political party of BJP in India. I was persecuted because of my political opinion and religious believe. Because of my political popularity I was persecuted by the authority Muslim extremists. If I persecuted by the authority it is not possible for me to relocate any other place in India. I will be persecute if I return back to India because of my political opinion. It is a convention base persecution. I did not have documentary evidences to establish my persecution.*
>
> *I was persecuted because of my political popularity and religious believe. I refer statement CB 19-21. It is true I did not collect relevant documentary evidences to prove my persecution, because I had no one to help me collect more documents.*
>
> *The Tribunal's satisfaction that I am not a refugee was not based upon reasoning which provided a rational or logical foundation for this belief.*

The tribunal did not observe Migration Act 1958 properly to making the decision.

The Tribunal fail to consider my documentary evidences with the proper way which migration Act 1958 provided in my claims.

I refer recent High court decision ***SAAP v MIMIA (2005) HCA 24 (18 May 2005).***

I REFER Federal Court decision SZFKL v MIMIA [2005] FCA 931, the Refugee Review Tribunal be joined as a party to the proceedings.

I will provide more details to support my judicial review in my outline of submissions."

Particulars

"The Tribunal did not provide me adequate particulars of the independent information.

The Tribunal did not provide me adequate opportunity to respond to the substance of the information.

The Tribunal finding that the totality of the country information does not show that BJP politicians are persecuted in India.

I attend Tribunal hearing, I provided oral evidence to support my claims.

Without the proper consideration of my oral evidence if the tribunal made decision the decision effected by the procedural fairness. I refer High Court Judgment plaintiff S157 v Commonwealth of Australia (4 February 2002).

I also did not properly consider for my sickness."

17. Despite the amended application referring to the applicant providing more details in support of his judicial review application in an outline of submissions no such document was received. Nor for reasons dealt with in paragraph 11 were submissions received from the applicant after the hearing.

Approach to the amended application

18. In submissions the respondent summarised the grounds raised in the amended application as follows:

    i) the Tribunal's decision was not based on '*rational'* or '*logical'* belief;

    ii) the Tribunal did not observe the Act.

    iii) the Tribunal did not provide adequate particulars of, or give the applicant the opportunity to respond to independent information;

    iv) the Tribunal did not properly consider the applicant's evidence and therefore did not afford him procedural fairness;

    v) the Tribunal did not consider the applicant's sickness;

    vi) the Tribunal did not consider the claim that the applicant would be persecuted for his religious beliefs, political opinion and political popularity.

19. Given the nature of the amended application, the respondent's summary is a useful presentation of the applicant's claims. However, due to the error In the Tribunal's decision I explain below I have not addressed whether the Tribunal made further errors beyond the alleged error referred to in paragraph 18 (ii) above.

The Tribunal's decision

20. The Tribunal's decision indicates it addressed the requirements of the Act. The Tribunal's decision began by setting out the approach to determining whether the applicant was a person to whom Australia had protection obligations. The decision shows the Tribunal addressed the definition of "refugee" and how the Courts have approached this on previous occasions (CB 56-58).

21. The Tribunal's decision summarised the applicant's claims and evidence. At CB 58 the Tribunal's decision provides that:

"The Tribunal has before it the Department's file, which includes the protection visa application and the delegate's decision record. The Tribunal also has before it the application for review."

22. The Tribunal's decision then (at CB 58-59) goes on to summarise the applicant's claims as set out in the protection visa application:

> *"He states that he left his country India because of political riots in Gujarat, which resulted in thousands of Hindus and Muslims being killed. He states that he has been an active member of BJP for the past seven years and was also active in relief camps set up for victims of the riots. He states he was noticed by Muslim political parties and when in June 2004, the BJP lost the elections and the Congress Party came to power, he started to receive threats.*
>
> > "I was attacked a few times by the Congress supporters; they knocked on the doors and threatened to kill at will.
> >
> > Unable to bear the pressure, I ran from the country to save my life."
>
> *He states that riots are still continuing between Hindus and Muslims in the state of Gujarat and that BJP supporters are targeted and harassed. He states that he considered moving to other cities but the Congress Party 'is ruling in the centre as well and would be looking to get us.'*
>
> *He states that lodging a compliant with the police is of no use because the police always obey the government.*
>
> *No additional claims are set out in the application for review."*

23. Having outlined the claims in the protection visa application the Tribunal's decision then goes on to detail the claims "*as stated at the hearing*" (CB 59-61).

> *"The Applicant stated that he was married and had two children who currently resided in Kadi in the area of Ragpur. The Applicant was asked whether his family had any difficulties. He stated that since his shop was burnt down, his family have no income and that this has created difficulties for him. The Applicant was asked about the burning of his shop. The Applicant stated that the first time was in February 2002 and was burnt again in February 2004 and in April 2004. The Applicant stated that the burning of his shop had taken place as a result of riots between Hindus and Muslims. The Applicant stated that as he*

could no longer run his business so his sons were currently selling flowers in the marketplace. The Applicant stated although he still has his shop there is no stock in it and it is closed.

The Applicant stated that a person had been killed in the market place where he had owned his shop. The Tribunal asked about the circumstances surrounding the killing of this person. The Applicant stated that it happened during rioting in the markets. The Applicant stated his area is predominately Muslim and that it is something in the figure of ninety percent Muslim. The Applicant stated that as a result of this Hindus suffered when there was rioting. The Applicant stated that his shop is on a corner and that when ever there is a riot, it is his shop that is always destroyed. The Applicant stated that whenever there is a riot between Hindus and Muslims, in another part of India, then his area because it is predominately Muslim, Muslims set about destroying places belonging to Hindus in retaliation.

*The Applicant was asked whether he, himself had ever been attacked personally. The Applicant stated that he had been threatened by phone but not personally attacked. The Applicant was asked why he had been threatened by phone. The Applicant stated that he had he had (*sic*) been threatened because he is a Hindu and that also he was successful in his business and that they had threatened him to make him leave his shop. The Applicant stated that he is one of the few Hindus in the area.*

The Applicant was asked about the current circumstances of his wife, family and two sons. He stated that they are safe at the moment. The Applicant also stated they are currently still living in Kadi in the area of Ragpur.

The Applicant was asked why he thought he could not return to India. The Applicant stated that if he goes back he is scared that he will be killed. The Applicant was asked why he might be killed. The Applicant stated that he thought that he could be killed in a riot. He stated that a friend of his had been killed. The Applicant was asked about this. He stated that his friend was in the crowd during a riot and was killed. The Applicant was asked whether he was with the friend when this happened. He stated no, he was not but he had heard about it.

The Applicant was asked why he in particular would face harm on return to India. The Applicant stated that he did not wish to open his shop because he was in fear of further riots. The Applicant was then asked whether he thought he could locate to another part of India which is predominately Hindu rather than

reside in an area that is predominately Muslim. The Applicant stated that he did not have the money to do this. The Tribunal pointed out to the Applicant that he had come to Australia. The Applicant stated that all he needed to go to Australia was the airfare but that in the case of relocating in India he did not have the necessary money to set up another business in another part of India.

The Tribunal then pointed out to the Applicant that his family were currently living safely in India in the area that he comes from. The Applicant stated that he worries about his family. The applicant stated that he did not think it possible to relocate because of lack of money and that he had hoped to work in Australia for some time to acquire some money."

24. The respondent's outline of submissions dealt with the Tribunal's decision as follows:

"5. The RRT did not accept the applicant's claims that (sic) was faced persecution from Congress party supporters because he was a member of the BJP who supported riot victims in the relief camps. The RRT did not accept this claim because the applicant did not raise these claims at the RRT hearing.

6. The RRT accepted the applicant's shop was damaged and that he suffered economic loss from the communal violence between Muslims and Hindus. However, the RRT did not accept the claimed severity of his loss.

7. The RRT was not ultimately satisfied that the applicant had a genuine fear of persecution based on its findings that (CB 61-62):

7.1 The applicant's evidence about his past harm was ambiguous and uncertain.

7.2 The applicant had an equivocal and ambivalent attitude about the harm feared. He did not suggest he would be targeted in any particular way by any group. He simply suggested that if there were riots his shop may be damaged or he may be killed.

7.3 The applicant's 'modus operandi' *belied a genuine fear of communal violence. His family continued to reside safely in the (sic) his home village which was Muslim dominated and his sons sold flowers in the marketplace.*

7.4 When relocation was discussed, the applicant dismissed the possibility without giving any real consideration to the matter."

25. The Tribunal's findings and reasons at CB 61 said:

"The Applicant's claims as set out in his protection visa application and as stated at the hearing are somewhat different. In his protection visa application the Applicant claims that as a Hindu he was involved in relief works following the Muslim/Hindu riots and for this reason to have come to the attention of members of the Congress Party and Muslims who physically attacked him.

However at the hearing the Applicant made no claim to have had involvement in relief operations or to have been physically attacked. Rather the Applicant claimed that during riots his shop in the market place was destroyed by Muslims on a number of occasions and he fears that should there be further riots his business will again be destroyed or he may be killed. The Tribunal finds as follows:

Given that the Applicant made no claim during the hearing to have provided support to riot victims and as a consequence to have experienced harm from Congress supporters the Tribunal does not accept this claim.

The Tribunal does accept that Applicant in the past experienced a degree of harm, in terms of damage to his shop and economic loss, as a result of communal violence between Muslims and Hindus. However the Tribunal considers that the Applicant's oral evidence in respect to his claimed past harm was ambiguous and uncertain such that the Tribunal is unconvinced as to the severity of the Applicant's claimed economic loss as a result of riots.

In any event the Tribunal is not satisfied that the Applicant has a well-founded fear of serious harm for a Convention reason on his return to India. The Tribunal reasons to this finding as follows.

In the hearing the Applicant was equivocal and ambivalent in respect to the harm he feared on returning to India. The Applicant did not suggest that he himself would be targeted in any particular way by any particular group on his return to India. He simply suggested that if there were to be riots again in the future his shop in the marketplace may be damaged or may be killed. When asked about the basis for this latter fear, the

Applicant referred to a friend who was killed in the markets during riots.

Further the Tribunal considers that the Applicant's modus operandi *belies a genuine fear of serious harm from communal violence in his district. The Applicant's family have, since his arrival in Australia, continued to reside in the Applicant's home village, which he claims to be Muslim dominated, and on the Applicant's own evidence are currently safe. The Applicant further claimed that his sons are currently selling flowers at the marketplace.*

Further when the Tribunal raised with the Applicant that if he was in fear of future harm by way of communal violence, as he is a Hindu in a predominately Muslim area, he could relocate to another part of India, the Applicant dismissed this possibility without any evidence of having given the matter real consideration stating simply that he did not consider it to an economically viable option and that it was less expensive for him to come to Australia than to start up a business in another part if India.

Considered collectively, the points above lead the Tribunal to the finding that the Applicant is not in genuine fear of persecution nor is there a real chance of persecution for a Convention reason on his return to India."

Consideration of grounds in amended application

26. Having reviewed the material in the CB and the Tribunal's decision the Court now turns to consider of the grounds in the amended application as summarised in paragraph 18.

27. For the reasons referred to earlier it is necessary to begin with the ground identified in paragraph 18 (ii).

Ground 2: the Tribunal did not observe the Act.

28. This ground is not particularised.

29. The respondent submitted there was no evidence for the Court to sustain an allegation that the Tribunal had failed to follow the procedures set out in the Act. Material in the CB which was in evidence shows that the applicant was invited to a hearing before the Tribunal (CB 45), that the

applicant attended that hearing and that he had the opportunity to give evidence (CB 58-61).

30. Given the applicant was unrepresented and notwithstanding that the issue was not raised explicitly in his amended application I have considered whether the Tribunal complied with s.424A of the Act.

31. A failure to observe the mandatory requirements of the Act would mean that the Tribunal's decision was affected by jurisdictional error. *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162.

32. Section 424A of the Act provides as follows:

> *Applicant must be given certain information*
>
> *(1) Subject to subsection (3), the Tribunal must:*
>
> *(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, 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) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and*
>
> *(c) invite the applicant to comment on it.*
>
> *(2) The information and invitation must be given to the applicant:*
>
> *(a) except where paragraph (b) applies, by one of the methods specified in section 441A; or*
>
> *(b) if the applicant is in immigration detention, by a method prescribed for the purposes of giving documents to such a person.*
>
> *(3) This section does not apply to information:*
>
> *(a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or*

(b) that the applicant gave for the purpose of the application; or

(c) that is non-disclosable information

33. As set out in the amended application at paragraph 18 above the applicant claimed "*the Tribunal did not observe the Migration Act 1958 properly to making the decision*". Section 424A requires the Tribunal to give to the applicant:

> *"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."*

34. The Tribunal's decision was handed down before the Full Court decision in *SZEEU v Minister for Multicultural and Indigenous Affairs [2006] FCAFC 2* ("*SZEEU*"). However following the decision in *SZEEU* it is pellucidly clear that a failure by the Tribunal to comply with s.424A will give rise to a jurisdictional error.

35. During submissions the Court raised the issue of compliance by the Tribunal with s.424A with Counsel for the respondent. As was acknowledged by Counsel for the respondent the Tribunal's decision noted that different claims had been made by the applicant in his protection visa to those at the Tribunal's hearing.

36. The respondent submitted that there was no breach of s.424A as the Tribunal's decision was based on an absence of information. The respondent relied upon *VAF v Minister for Immigration and Multicultural & Indigenous Affairs* [2004] ALR 471.

37. There is no evidence (including in the CB) to suggest that the applicant gave the protection visa application to the Tribunal prior to or during the hearing.

38. The application to the Tribunal for review of the delegates' decision is at CB 39 – 42. There is no evidence that the information in the protection visa application or the protection visa itself was provided to the Tribunal for the purposes of the review. Therefore s.424A (3) (b) does not apply. Nor is there any basis for the Court to find that either s.424A (3) (a) or (c) applies.

39. A transcript of what was said at the Tribunal hearing is not in evidence. However, the Tribunal's decision at CB 58 – 59 summarises the applicant's claims in the protection visa application and then those as stated at the hearing at CB 59 – 61.

40. The Tribunal's findings and reasons at CB 61 begin as follows:

> *"**The Applicant's claims as set out in his protection visa application and as stated at the hearing are somewhat different**. In his protection visa application the Applicant claims that as a Hindu he was involved in relief works following the Muslim/Hindu riots and for this reason to have come to the attention of members of the Congress Party and Muslims who physically attacked him.*
>
> *However at the hearing the Applicant made no claim to have had involvement in relief operations or to have been physically attacked. Rather the Applicant claimed that during riots his shop in the market place was destroyed by Muslims on a number of occasions and he fears that should there be further riots his business will again be destroyed or he may be killed. The Tribunal finds as follows:*
>
> *Given that the Applicant made no claim during the hearing to have provided support to riot victims and as a consequence to have experienced harm from Congress supporters the Tribunal does not accept this claim.*
>
> *…" **(emphasis added)***

41. As set out in paragraph 25 above the Tribunal findings and reasons then go on to address the claims made by the applicant.

42. However, it is the Tribunal's initial finding that the applicant's claims "**as set out in his protection visa application and as stated at the hearing"** being **"somewhat different"** which informs the rest of the Tribunal's findings and reasons (CB 61).

43. The Tribunal's findings and reasons note that:

> "*…at the hearing the Applicant made no claim to have had involvement in relief operations or to have been physically attacked. Rather the Applicant claimed…" ;*

> *"[G]iven that the Applicant made no claim during the hearing to have provided support to riot victims and as a consequence to have experienced harm…";*
>
> *"[I]n the hearing the Applicant was equivocal and ambivalent…"*

44. The Tribunal's findings and reasons finish with the following paragraph:

> *"**Considered collectively**, the points above **lead the tribunal to the finding** that the applicant is not in genuine fear of persecution nor is there a chance of persecution for a convention reasons on his return to India." (**emphasis added**)*

45. In *SZEEU v Minister for Multicultural and Indigenous Affairs [2006] FCAFC 2* ("*SZEEU*") at paragraphs 223 to 224, His Honour Allsop J. dealt with the issue of absence of information as follows:

> *"Their Honours referred to WAGP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 124 FCR 276 at (26) – (29) in support of that proposition. Reference to those paragraphs of WAGP makes clear what was being decided in that case. The argument that was rejected in WAGP was that "information" encompassed what was not mentioned to the Tribunal as a matter of evidence. This was a clear application of distinction between information and mental process. The argument sought to manufacture "information" out of the consideration and assessment by the Tribunal of the applicant's oral evidence to the Tribunal. I do not see Finn J and Stone J in VAF in [24(iii)] of their reasons as requiring a formalistic analysis of information such as prior statements depending upon whether its or their relevance is from the text or from the absence of text. Where there are things such as a prior statement or a visa application form, the information for the purposes of s.424A will be that a document in that form was provided. That information may have relevance to the Tribunal for all sorts of reasons. Such relevance is not limited to whether the information leads to a positive factual finding based on its terms. It may be relevant because it plays some part (as here) in the conclusion as to the truthfulness of the applicant.*
>
> *I adhere to and adopt what I said in the above respects in* SZECF v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1200 *to which I would only add that, as I read her Honour's reasons, Branson J concluded as her Honour did in* NAIH of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 124 FCR 223

(discussed in WAGP *and* SZECF*) because of her Honour's view that it was the unsatisfactory nature of the oral evidence before the Tribunal,* ***alone,*** *that was the reason for affirming the decision.*

46. Whilst the respondent in this case submitted that the Tribunal's decision was based on an absence of information the majority in *SZEEU* held that if the Tribunal finds as relevant to its reasons some inconsistency or incompatibility between earlier information and evidence to it that may well enliven the obligation in section 424A.

47. In *SZEEU* Allsop J said at [225]:

> *"If the Tribunal finds relevant to its reasoning some inconsistency or incompatibility between the earlier information and evidence to it is relevant to its reasoning that may well engage section 424A if such inconsistency or incompatibility can be seen to be part of the reason to affirming the decision."*

48. Whilst on one view the Tribunal's findings and reasons could indicate that its decision was based on the absence of information for the reasons that follow I am not satisfied that this is so in the present case.

49. In *SZEEU* Weinberg J said at [179]:

> *"If any applicant makes a statement during the course of an airport interview which is inconsistent with later evidence at the hearing section 424A(1) requires that written notice be given of the possible use of that statement to draw inferences against the applicant."*

50. In this case the Tribunal's reasons indicate that its knowledge that the applicant made statements differing for the statements made during the hearing was at least "*a part*" of its reasons for rejecting the applicant's claims before the Tribunal. In SZEEU at [216] Allsop J said:

> *"One always needs to analyse and interpret the reason**s** of the Tribunal in order to understand the reason for the ultimate reason or conclusion of the lack of satisfaction of the existence of protection obligations. Merely because something is contained in the text of the reasons of the Tribunal which involves "information" does not conclude the question whether it was (and, in the relevant sense, would be) a part of the reason for affirming the decision. The whole of the written reasons must be*

analysed and interpreted in their context to assess why it was that the Tribunal acted as it did."

51. The Tribunal's findings and reasons begin with the statement that the applicant made different claims at the hearing as compared to these in his protection visa.

52. In my view this finding informed the rest of the Tribunal's findings and reasons. The Tribunal's finding that it was unable to be satisfied was at least in part informed by its knowledge that the applicant had made different claims in his protection visa.

53. In this case it was not simply that the Tribunal was unable to be satisfied given the gaps in the evidence or the absence of information. As the Tribunal's findings and reasons make clear it was that the applicant had made different claims in the protection visa application which is the information that was a reason of a part of the reason.

54. As long as the information derived from the protection visa application was even a part of the reason for the Tribunal's rejection of the applicant's application then a failure to comply with s.424A will amount to jurisdictional error; see *SZEEU* at [182] per Weinberg J and [215]-[216] per Allsop J.

55. Such a finding based on inconsistency will relevantly give rise to an obligation requiring the service of a s.424A notice.

56. In this case it was not the unsatisfactory nature of the evidence of the applicant before the Tribunal *"**alone"*** that was the reason for affirming the decision. In this case at least *"a part of the reason"* was the Tribunal's knowledge of the inconsistent statements made by the applicant.

57. The Tribunal's findings and reasons begin:

"The applicant's claims as set out in his protection visa application and as stated at the hearing are somewhat different."

58. In its decision the Tribunal's knowledge that the applicant had made statements in his protection visa application that were inconsistent with those made before the Tribunal forms the prism through which the

Tribunal approaches the claims made at the hearing. This information was "a part" of the Tribunal's reasons for rejecting the applicant's claim.

59. The Tribunal's findings and reasons begin with an adverse credibility finding against the applicant based on information the Tribunal had from the applicant's protection visa application.

60. In this case the Tribunal's findings and reasons finish with the conclusion that "*considered collectively the points above lead the Tribunal to the finding that the applicant is not in genuine fear of persecution nor is there a chance of persecution for a convention reason…*

61. Therefore in my view the finding means there can be no argument that there was an independent basis for the Tribunal's decision.

62. Accordingly, I consider that the Tribunal's decision is affected by jurisdictional error and the applicant is entitled to the orders he seeks.

Conclusion

63. In the circumstances given the conclusion that the Tribunal had not met the requirements of s.424A it is not necessary to consider the other grounds contained in the amended application.

64. For the above reasons I consider that the Tribunal's decision was effected by jurisdictional error and the applicant is entitled to relief by way of writs of certiorari and mandamus.

65. The respondent appropriately sought that an order should be made by adding the Tribunal as the second respondent. Consistent with *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] 215 ALR 162 I am satisfied it is appropriate to make such an order and will do so.

66. Finally, the application having been successful I will hear the parties on the appropriate order as to costs.

I certify that the preceding sixty-six (66) paragraphs are a true copy of the reasons for judgment of O'Sullivan FM

Deputy Associate: Rachelle Lombardo

Date: 6 February 2007