FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v Applicant A125 of 2003 [2007] FCAFC 162

MIGRATION LAW — appeal from decision of Federal Magistrates Court quashing decision of Refugee Review Tribunal — whether Tribunal complied with requirements of ss 424A and 425 of the *Migration Act 1958* (Cth)

MIGRATION LAW — whether evidence given at hearing regarding answers in visa application constituted "information" for purposes of s 424A(1) — whether answers in visa application were "the reason, or a part of the reason" for Tribunal's decision — whether the exception in s 424A(3)(b) applied — unnecessary to consider whether "omission" can constitute "information" for purposes of s 424A — answers in visa application were not a part of the Tribunal's reasons for decision

MIGRATION LAW — whether s 425 required Tribunal to identify the significance of questions put to visa applicant

Migration Act 1958 (Cth), ss 424A, 424A(1)(a), 424A(3), 424A(3)(b), 425

Applicant S301/2003 v Minister for Immigration and Multicultural Affairs [2006] FCAFC 155 discussed
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 referred to
NBKS v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 156 FCR 205 discussed
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152 discussed
SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609 discussed
SZDPY v Minister for Immigration and Multicultural Affairs [2006] FCA 627 discussed
SZECF v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1200 discussed
SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 150 FCR 214 discussed
SZGGT v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 435 discussed
SZHFC v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 1359 discussed
SZKFQ v Minister for Immigration and Citizenship [2007] FCA 1432 referred to
VAF v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 206 ALR 471 referred to

MINISTER FOR IMMIGRATION AND CITIZENSHIP v APPLICANT A125 OF 2003 AND ANOR

NSD510 OF 2007

EMMETT, WEINBERG AND LANDER JJ
22 OCTOBER 2007
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD510 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Appellant**
AND:	**APPLICANT A125 OF 2003** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGES:	**EMMETT, WEINBERG AND LANDER JJ**
DATE OF ORDER:	**22 OCTOBER 2007**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The first respondent have leave to amend his application to the Federal Magistrates Court further to raise the following additional grounds:

   (2) The Tribunal committed jurisdictional error by breaching section 425 of the Migration Act in that it failed to alert the applicant to the fact that the manner and timing of his flight from Nepal was an issue in the proceedings and failed to allow the applicant to appear before the Tribunal to give evidence and present arguments in relation to that issue.

   (3) The Tribunal committed jurisdictional error in that it misconstrued and misconceived the nature of the applicant's claims in particular as contained in the applicant's answers to questions 33 and 36 of Form C of his visa application.

2. The first respondent have leave to amend his notice of contention to raise as grounds upon which the decision of the Federal Magistrates Court should be affirmed that the Federal Magistrates Court erred in not upholding the additional grounds in the further amended application to the Federal Magistrates Court.

3. The appeal be upheld.

4. The orders of the Federal Magistrates Court made on 8 March 2007 be set aside and in lieu thereof there be orders that:

   (1) The application be dismissed.

   (2) The applicant pay the first respondent's costs of the proceeding.

5. The first respondent pay the appellant's costs of the appeal.

6. The appellant have leave to apply in relation to the terms of order 4 (2).

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

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AND:	**APPLICANT A125 OF 2003** **First Respondent**
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JUDGES:	**EMMETT, WEINBERG AND LANDER JJ**
DATE:	**22 OCTOBER 2007**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

THE COURT

1 This is an appeal by the Minister for Immigration and Citizenship from orders of the Federal Magistrates Court made on 8 March 2007: *A125 of 2003 v Minister for Immigration* [2007] FMCA 250. By those orders, the Federal Magistrates Court set aside a decision of the Refugee Review Tribunal ("the RRT") rejecting the first respondent's application for a protection visa. He ordered that the matter be remitted to the RRT to be determined according to law.

PROCEDURAL BACKGROUND

2 The first respondent (hereafter described for convenience as "the applicant") is a citizen of Nepal. He arrived in Australia on 26 September 2001, having travelled on a passport issued in his own name. On 9 October 2001 he applied for a protection (class XA) visa. On 20 June 2002 a delegate of the Minister refused that application. On 11 July 2002 the applicant applied to the RRT for review of that decision. On 15 January 2003 the RRT affirmed the decision of the delegate.

3 The applicant then sought judicial review of the RRT's decision in the Federal Court. On 12 March 2004 a single judge of this Court dismissed that proceeding. However, the applicant appealed to the Full Court. On 12 August 2005 the Full Court made orders, by consent, allowing the appeal, setting aside the RRT's decision, and remitting the matter for reconsideration.

4 On 29 November 2005 the RRT, differently constituted, again affirmed the delegate's decision not to grant a protection visa. It was that second RRT decision that was the subject of a further application for judicial review by the applicant. That in turn led to the decision of the Federal Magistrates Court quashing the second decision of the RRT which is the subject of the Minister's appeal to this Court.

THE PROCEEDINGS BEFORE THE SECOND RRT

5 In his original application for a protection visa ("the visa application") the applicant claimed that he would face persecution if required to return to Nepal. In particular, he claimed that he had previously been persecuted by Maoists, and others, by reason of his political opinion, imputed political opinion and membership of a particular social group.

6 The applicant's claim in relation to political opinion was based on his having been a member of the Nepalese Democratic Party ("NDP"). His claims in relation to imputed political opinion and his membership of a particular social group were based upon his having been a teacher and principal at a private school in Nepal.

7 Initially, the applicant made no claim based upon his religion. However, at a later stage, prior to the matter being heard by the second RRT he added a claim based upon his having become, while still in Nepal, a Christian evangelist.

8 In relation to all these claims, the applicant submitted that neither the police nor the authorities in Nepal would protect him from the harm that he feared.

9 The RRT accepted that the applicant was a national of Nepal. It accepted that his occupation or profession before coming to Australia had been principal or teacher at a private school, which he had founded in Nepal. It accepted that he was married, that his wife and child still lived in Nepal and that his wife was involved in running the school that he had established. It also accepted that he had been a member of the NDP.

10 The RRT noted that the applicant had described himself in the visa application as an ethnic Brahmin and claimed that his religion was Hindu. Despite the fact that he had not originally mentioned having become a Christian, it found that he had actively practised evangelical Christianity in Nepal from 1991 until he left in 2001 to come to Australia. It also accepted that he had continued to practise evangelical Christianity in Australia.

11 The RRT accepted that the political situation in Nepal was marked by violence. It accepted that Maoists in that country had threatened and committed acts of violence and human rights abuses against those whom they considered to be their enemies. It also accepted that there had been human rights abuses by the Nepalese army and security forces. Moreover, it accepted that evangelical Christians were, from time to time, targeted in Nepal.

12 However, the RRT concluded that there was no plausible evidence that the applicant had suffered persecution in Nepal, at least by reason of any of the matters upon which he relied. It found that the evidence did not establish that there was a real chance that he would suffer persecution for a Convention reason if required to return to that country. Accordingly, it was not satisfied that the applicant had a well-founded fear of persecution within the meaning of art 1A(2) of the *Convention relating to the Status of Refugees*.

13 A critical aspect of the RRT's reasons concerned evidence that the applicant gave during the course of a hearing on 24 November 2005. That evidence concerned his place of residence in Nepal just before he came to Australia.

14 The matter arose in this way. The applicant claimed that he had been attacked by Maoists in August 2001. The RRT concluded that that claim had been fabricated. It subsequently used that finding as the basis for a further finding that various documents from Nepal that the applicant had produced, ostensibly in support of his claims, were not reliable evidence of the facts stated in those documents.

15 The basis upon which the RRT disbelieved the applicant regarding the August 2001 attack was as follows. At the hearing, the applicant told the RRT that prior to coming to Australia he had been a teacher, principal and founder of a school in Nepal. He said that he had established the school, which was a private boarding school, in 1993. He said that the school was still functioning, years later, though with difficulty. He said that his wife would not be able to continue her involvement in the school in the future.

16 In answer to a question from the RRT about how the school could still function if there were threats, and other harassment against him, as he claimed, the applicant replied that the school remained open only with the help of donations. At that point the RRT suggested to the applicant that it was not consistent with his claims of persecution that his family continued to live in the family home, and that the school continued to function. The applicant was then asked where he was living just before he came to Australia. As will be seen, he gave a series of seemingly inconsistent answers to that question.

17 The RRT asked the applicant about the response that he had given to question 33 in the visa application. Question 33 was in the following terms:

> *"**Previous addresses***
>
> *Give details of all addresses OUTSIDE AUSTRALIA where you have lived for 12 months or more in the last ten years"*

18 In answer to that question, the applicant had stated that from January 1990 until September 2001 he had resided at a particular address, which was in fact the address of his family home in Nepal. In his response to question 36, concerning past employment, the applicant had declared that he had been self-employed at the school that he had established from January 1993 to September 2001.

19 The RRT noted that when asked what the applicant thought would happen to him if he went back to Nepal, he had stated in the visa application that, in recent times, private schools, such as his own, had been targeted by Maoist insurgents. He had also stated that prior to his departure from Nepal, he had received many threatening telephone calls demanding large sums of money, failing which his school would be destroyed. He had added that the principal of one private school had been murdered, and claimed that he had no alternative but to flee the country.

20 All of this became important because during the course of the hearing the applicant submitted a number of documents in support of his claims about Maoist violence in Nepal which, as previously indicated, the RRT ultimately regarded as unreliable.

21 One document which assumed particular significance was a newspaper clipping dated 19 August 2001. That clipping referred in terms to an attack upon the applicant on the previous day. The applicant also submitted two other documents dated 28 May 2001 and 4 July 2001 respectively. Each was described as being from the Communist Party of Nepal, and stated the he must leave the NDP and join the "people's war". He was told that he must provide a "donation" within a month, or physical action would be taken.

22 The applicant explained that he had signed the visa application without having read it, having relied entirely upon his migration agent to answer the questions that were posed accurately. According to the applicant, his migration agent had filled out the form on his behalf. He said that his migration agent had not, at that stage, asked him about his religion. He explained that his application recorded him as Hindu, although he was in fact a Christian, simply because he had told his migration agent that he was ethnically Brahmin. The agent had inferred that he was Hindu because he believed that all Brahmins were Hindu.

23 The RRT, in its reasons for decision, made it plain that it had been influenced in its finding that the applicant had been untruthful during the course of the hearing by what he had said, in answer to the RRT's questions, regarding where he had been living immediately prior to his departure for Australia. The RRT found it difficult to accept that he would have continued to reside at his family home had he in fact been attacked by Maoists in August 2001, as he claimed. Importantly, when pressed about this matter, the applicant had told the RRT that, in fact, immediately after he had been attacked, he had gone to stay with a friend in Kathmandu. Indeed, he added that he had obtained his visa to enter Australia by post, from the Australian High Commission in Delhi, while staying with his friend.

24 Ultimately, the RRT found that, until he left Nepal, the applicant had continued living at his family home and continued to run the school as a business. It rejected his claim to have gone to Kathmandu to avoid harm. It found that he had first mentioned having gone to Kathmandu at the first RRT hearing, and that this had been a recent invention to assist his claim for protection.

25 The RRT eventually stated its findings in the following terms:

> *"The Tribunal does not accept that the applicant suffered harm from Maoists or anyone else in Nepal because of his political opinion, his imputed political opinion or because he was a member of a particular social group. It does not accept as true that he was attacked by Maoists in August 2001. It does not accept that there have been threats to close down his school/do damage to the school unless donations are given to those whom the applicant claims are threatening him. The Tribunal does not accept that the applicant and/or his wife have had to provide donations to Maoists as [t]he applicant claims so that the school will not be closed/damaged.* ***It is not consistent with the applicant's claims that he was persecuted as he claims by Maoists-and his evidence is that this commenced from about April 2001-that he continued to live at the family home in Nepal and run the school as his business until he left to come to Australia.*** *The Tribunal does not accept that he moved to Kathmandu in August 2001 to avoid harm. It is also not consistent with his claims that there have been threats to close the school and other threats to his family and the applicant himself, that the school remains in operation running as a business in which his wife is involved, and that his wife and children remain living in the family home."* (Emphasis added.)

26 As previously indicated, the RRT regarded a number of the various documents upon which the applicant relied as spurious, and declined to act upon them. It did so primarily because of its earlier finding that he had "not always been honest in his evidence". That finding, in turn, was based essentially upon what he told the RRT about having gone to Kathmandu, after being attacked. Everything flowed from the RRT's rejection of that claim.

THE FEDERAL MAGISTRATE'S DECISION

27 Before the Federal Magistrates Court, the applicant challenged the decision of the RRT on one ground only, namely a breach of the requirements of s 424A of the *Migration Act 1958* (Cth) ("the Act"). That section has recently been significantly amended. The amendments came into force on 29 June 2007. However, they do not apply to this case.

28 As is well known, at the time of the RRT decision s 424A relevantly provided:

> *"(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) …*
>
> *(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."*

29 The applicant submitted that the RRT had failed to disclose to him, in writing, as s 424A(1)(a) required, that the entry in the visa application to the effect that he had continued to reside at his family home until he left Nepal, was or would be a part of the reason for affirming the decision under review. He further submitted that the RRT had failed to ensure, as s 424A(1)(b) required, that as far as was reasonably practicable he understood why that information was relevant to the decision under review.

30 In essence, the applicant's case was that the RRT's conclusion that he had remained in his family home until he left Nepal in September 2001 had been used to rebut his claim that he had been attacked by Maoists in August 2001. That conclusion derived from what was recorded in the visa application. That meant that the RRT had been required, pursuant to s 424A(1)(a), to give him particulars of that "information". In addition, it meant that the RRT had been obliged, pursuant to s 424A(1)(b), to ensure that he understood why that information was relevant to the review.

31 The applicant submitted that the exclusion in s 424A(3)(b) did not apply. That was because the "information" came from his visa application, and had not therefore been given for the purpose of the application for review. He contended that, to the extent that this same information had been canvassed in the evidence before the RRT, that did not amount to "adoption" of the information of a kind that would bring it within the exclusion.

32 The Minister, on the other hand, submitted that the information contained in the visa application, which coincided with what he told the RRT during the course of the hearing, fell

squarely within s 424A(3)(b), having been given by the applicant "for the purpose of the application". The Minister submitted that to ask whether the information had been adopted was to ask the wrong question. The Minister said that the real question was whether the information had been provided to the RRT by means of the evidence given at the hearing, rather than by means of the visa application. The Minister relied generally upon *SZHFC v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 1359 at [24] per Allsop J.

33 The Federal Magistrate resolved these competing submissions regarding s 424A(3)(b) in favour of the Minister. His Honour's reasoning requires careful consideration.

34 The Federal Magistrate was satisfied that the finding by the RRT that the applicant had continued to live at his family home prior to departing for Australia, and had not, as he claimed, escaped to Kathmandu, contributed to its conclusion that he had not been attacked by Maoists. His Honour was also satisfied that the fact that the alleged escape to Kathmandu was not mentioned in the visa application had also contributed to the RRT's decision because it was used to support a negative view of the applicant's truthfulness.

35 His Honour extracted several lengthy passages from the transcript of the proceedings before the RRT. In those passages, the applicant was asked repeatedly about where he had been living immediately prior to his departure from Nepal.

36 The extracts of the transcript relevant to the appeal before this Court are as follows:

> *"Q. Just before you came to Australia, which was a while ago now, where were you living, Mr [A125 of 2003]?*
> *A. I used to live in [B (which is the town at which the family home was located)].*
>
> *Q. Going back to the application again that we have just been talking about, it says from 1990 till September 2001 you were living in [B] Nepal; is that correct?*
> *A. Yes, it is.*
>
> *Q. And so right up until the time you left Nepal you were living-that's the family home, is it?*
> *A. Yes.*
>
> *Q. So that's where you were living right up until you left; is that correct?*

A. No, I used to not live there.

Q. This form, which you have just agreed is correct, says you were living at that address from January 1990 till September 2001, okay?
A. I don't know about the exact date. It is the best (inaudible). Maybe it was July, August - maybe August.

Q. I will ask you again. Where were you living just before you came to Australia?
A. I used to live in [B].

Q. What was your address?
A. (Not interpreted)

Q. So that is the address in the application form that I have just read you out?
A. Yeah.

…

Q. So just before you came to Australia you were living at the address which is noted in your application --
A. Yes."

37 After several exchanges concerning the running of the applicant's school, the questioning continued as follows:

"Q. What was the main reason you left your country?
A. The main reason of me leaving Nepal was the Maoists were after me, they wanted to kill me.

Q. When did you first start having trouble from the Maoists in Nepal?
A. It started from about 2001 - from mid-April 2001.

Q. Any trouble before April 2001?
A. Yeah, just not serious, but little bit - not too much.

Q. What happened in April 2001?
A. They asked me for donation.

Q. What happened?
A. I refused.

Q. And what happened as a result of your refusal?
A. Nothing happened at the moment.

Q. Nothing happened?
A. At that moment.

Q. Did something happen later?
A. Later.

Q. Tell me what happened?
A. After that moment the women Maoists committee restricted the alcohol - ban on the alcohol all over the country, restricted alcohol.

…

Q. I will ask you again, sir. This incident that you are talking about with the alcohol, about how long was it before you left Nepal; about how long did it happen before you left Nepal?
A. May, June - June, July, August, September. About four and a half months ago.

Q. Before you left?
A. Yeah, about May maybe - approximately the end of May maybe, 2001 maybe.

…

Q. I understand you are saying there was trouble from the Maoist women at the shop, but why did you leave your country, your family, your business to come to Australia in September 2001?
A. I had to protect my life.

Q. Was there a threat to your life? What actually happened, what events happened that caused you to leave?
A. They gave me threats, they sent me letters.

Q. And who is "they"?
A. The Maoist group."

38 After an exchange concerning the letters to which the applicant referred, the transcript continued as follows:

"Q. Certainly. If you were having all this trouble, these threats to your life and the letters from April, May - from the Maoists how did you manage to survive safely in Nepal, running your school, living at your usual address; how did you manage that?
A. At the moment I still have to run the school because the education of the children is very important but I ran the school with fear.

Q. What caused you to actually leave in September? What happened? Did something happen in September to cause you to leave?
A. It was not September, it was during August that happened to me.

Q. What happened?
A. They came to the school and attacked me.

Q. What happened to you?
A. I ran after that.

Q. How did you get away?
A It was like this seat which I'm sitting, and there was a window at the back of the chair, and then I ran from the window.

Q. Was this the attack that you say is reported in these documents? I think there's an article in here, in these documents?
A. Yes, that was the incident.

Q. But after that you still managed to – you were still living at your home?
A. No.

Q. Well, you told me earlier that you were.
A. No, I did not live there in the home.

Q. I'm sorry, but you didn't live at your home then?
A. No.

Q. But you told me earlier that you were living at your home just before you came to Australia?
A. I have already told earlier that after that incident I left my home.

Q. You didn't tell me this morning?
A. I already told you earlier that before coming here I left the school.

Q. Sir, this morning I asked you where you were living just before you came to Australia. We spent a bit of time on it.
A. I was about (inaudible) as well. I left in September.

Q. Where did you go?
A. I broke the glass at the back of my chair.

Q. Are you telling me that after that incident with the glass you left the family home to live somewhere else; is that what you are saying?
A. Yes, I left my family home.

Q. Where did you go; where did you go to live?
A. I went to Katmandu.

Q. When did you go to Katmandu? Can you translate that for him, please: when did you go to Katmandu?
A. I went to Katmandu the same night I was attacked.

Q. What night was that? Just from your memory, sir, when was that; when were you attacked?
A. August 18, 2001.

Q. Where did you live in Katmandu?
A. I was living with my friend's place.

Q. And where was your friend's place?
A. I used to live in ….
…

Q. Is today the first time you've told anyone that you were living in Katmandu from August 18, or around that time, until you left Australia; is today the first time you have told someone about that?
A. Yes, I've told some people.

Q. Have you told your adviser?
A. No, I have not.

Q. Did you tell the last tribunal?"
A. Yes
…

Q. You told the last tribunal that you went to Katmandu in August 18, and lived, did you?
A. Yeah."

39 In the Federal Magistrate's view, it was clear that the RRT had placed considerable reliance on "information" concerning the applicant's residence immediately prior to his departure from Nepal. That "information" was contained in the visa application, but had also been provided by the applicant in his oral evidence to the RRT. His Honour posed the question whether that oral evidence amounted to a giving of the same information to the RRT in a way which brought it within the scope of s 424A(3)(b).

40 His Honour concluded, on the basis of the transcript extracts quoted above, that the applicant had not relevantly adopted the contents of the visa application. However, he went on to say that even if there had been such an adoption, that would not of itself have been sufficient to bring the information within the scope of the exclusion.

41 Notwithstanding that finding, his Honour went on to say that this did not conclude the matter. Rather, the issue to be determined was whether the evidence given at the hearing was

of a nature which made any information imparted on that occasion separate information falling, in its own right, within the exception in s 424A(3)(b).

42 In concluding that this issue should be resolved in favour of the Minister, his Honour relied specifically upon the reasoning in *SZDPY v Minister for Immigration and Multicultural Affairs* [2006] FCA 627 at [35] and in *SZHFC* at [24]–[25].

43 In *SZDPY* Kenny J rejected an argument that information provided by an applicant in response to questions from the RRT did not fall within s 424A(3)(b). This was despite the fact that, in the case before her Honour, the questions had arisen out of information provided by the applicant in his original visa application. Her Honour held that where an applicant affirmed a specific fact before the RRT, that information would be covered by the exclusion in s 424A(3)(b). She cited *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at [91] per Moore J (with whom Weinberg and Allsop JJ relevantly agreed) in support of that proposition.

44 Similarly, in *SZHFC,* Allsop J held that if the RRT put an earlier statement made in a visa application to the applicant and asked questions about it, the answers given to those questions would be subject to the exclusion in s 424A(3)(b). In other words, if facts were given to the RRT in answer to questions, they constituted information for the purposes of the exclusion. His Honour held that the subsection was not limited to volunteered or unprompted information. However, he also stated that if the importance placed by the RRT on the information previously given to the Department (which may have been repeated in answers to the RRT) was not merely the facts disclosed, but arose from the context or circumstances of it having been given earlier, then s 424A(3)(b) may not prevent the requirement of a notice under s 424A(1) and (2).

45 The Federal Magistrate found that *SZDPY* and *SZHFC* both stood for the proposition that a response to a question by the RRT which goes to information contained in a prior document, rather than the adoption of the entirety of that document itself, will amount to the giving of information which falls within s 424A(3)(b).

46 Based upon these two authorities, his Honour concluded that a consideration of the relevant portions of the transcript of the RRT hearing indicated that the applicant had, at

various points, acknowledged that he lived at home until he left Nepal for Australia. He added that the fact that the applicant's oral evidence contained the same information as that which was contained in his visa application made no difference. The exclusion in s 424A(3)(b) applied to that information. Accordingly, there had been no breach of s 424A(1)(a) or (b) in respect of that information.

47 Having found in favour of the Minister's primary submission, regarding the exclusion, his Honour observed that this was not the end of the matter. He identified a second issue in the case, which had not been pleaded by the applicant, namely whether the RRT's reliance on the information that the escape to Kathmandu had been omitted from the visa application amounted to a separate breach of s 424A.

48 The particular passage from the RRT's reasons for decision which his Honour described as having given rise to this second issue was in the following terms:

> *"The Tribunal does not accept that the applicant went to Kathmandu in August 2001 to avoid harm that he feared in his area [from Maoists]. He gave evidence to the Tribunal that he first mentioned this at the last Tribunal hearing and the present Tribunal finds that this claim was invented by the applicant to assist his claim for protection."*

49 Ultimately, his Honour held that this second issue should be resolved in favour of the applicant. It was for that reason that he set aside the RRT's decision on the basis that there had been a breach of s 424A.

50 In arriving at that conclusion, the Federal Magistrate relied upon the observations of Allsop J in *SZHFC* at [24] and *SZECF v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1200 at [30]. As indicated above at [44], in *SZHFC* Allsop J said that s 424A(3)(b) may not apply in circumstances where the RRT placed importance on information previously given to the Department by the applicant (even if it was subsequently repeated at an RRT hearing) because of the context or circumstances in which that information was originally given. Allsop J stated (at [24]):

> *"For instance, if the Tribunal says: he said X + Y at the hearing, but with the aid of a lawyer or migration agent, under no pressure and closer to the events he only said X in his statement, this being a consideration as to why Y is not accepted, then the fact that at the hearing the applicant stated that the content*

> *of his earlier statement was true may not prevent an obligation under s 424A(1) and (2) arising. The information is the knowledge by the Tribunal of the earlier statement being created in the form it was in circumstances of having a migration agent, under no pressure and closer to the time of the events. On the other hand, if fact Y as a raw fact is the relevant information it can be seen to have been given at the hearing. The question is, what is the information."*

51 In the earlier case of *SZECF* Allsop J had found a breach of s 424A in circumstances where the RRT had relied on omissions and inconsistencies in the original protection visa application. In his Honour's view, the "information" central to the reason for decision was that the appellant said "so much *and no more*" on an earlier occasion. The knowledge of the RRT of the content of the earlier statement, including the limits of its content, was instrumental in it reaching a conclusion that the oral evidence of the applicant was false and the documents he was propounding were fraudulent. Although his Honour noted that the RRT had, at the hearing, questioned the applicant about the relevant inconsistencies there was still a failure to follow the mandatory procedure under s 424A which led to the decision making process being vitiated.

52 The Federal Magistrate also referred to the judgment of Allsop J in *SZEEU* at [223]. There, his Honour discussed the effect of Finn and Stone JJ's statement in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 at [24(iii)] that the word information does not:

> *"extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the Tribunal in weighing up the evidence by reference to those gaps, etc".*

Allsop J said in *SZEEU* that he did not see this statement as requiring a formalistic analysis of information (such as prior statements) depending upon whether its relevance was from the text, or from the absence of text. In his Honour's view, where there were prior statements such as statutory declarations and statements contained in an original visa application, the information for the purposes of s 424A would be those documents in the form in which they were provided. That "information" could have relevance to the RRT for all sorts of reasons and would not be limited to whether it led to a positive factual finding based on its terms. It could also be relevant because it played some part in the RRT's conclusion regarding the applicant's truthfulness.

53 The Federal Magistrate noted that in *SZGGT v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 435 at [65]–[72] Rares J had expressly agreed with the reasoning of Allsop J in both *SZECF* and *SZEEU*. In that case, his Honour held that the RRT had committed jurisdictional error because it had not provided particulars to the appellant in accordance with s 424A(1) in relation to his initial visa application. He held that the RRT was required to particularise that that initial application contained or conveyed an implication or inference that it was a complete account of his claim. He stated (at [72]):

> *"The later provision of some material fact to support a claim is often, if not usually, able to be characterized as an 'omission' from the initial claim only because the initial claim conveys a representation, by implication or inference, that it is itself a complete account. And, in such a case it will be that latter representation which, in my opinion, is 'information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision which is under review' within the meaning of s 424A(1)(a)."*

54 Having concluded that the omission from the visa application of the applicant's move to Kathmandu in August 2001 was relevantly "information", and that it would attract an obligation under s 424A(1), the only question for the Federal Magistrate to determine was whether that information had been "the reason or part of the reason" for the RRT's affirmation of the decision under review. His Honour held that although the RRT had not referred to the visa application "in so many words", its reference to the applicant having "first mentioned" his move to Kathmandu at the first RRT hearing "involved an unavoidable implication that information was omitted from the application for a protection visa". Its omission from the visa application "was, in some way, significant" because the RRT's decision relied, at least in part, on its view of the applicant's credibility. That view was, in turn, affected by the dishonesty which it perceived in the different versions of events advanced by him. Accordingly, the Federal Magistrate found that there had been a failure to comply with s 424A(1).

THE APPEAL TO THIS COURT

55 With one exception, the submissions on the appeal to this Court were the same as those advanced before the Federal Magistrate.

56 In substance the Minister contends that the Federal Magistrate erred in holding that the omission from the visa application of any reference to a move by the applicant to Kathmandu in August 2001 was information that formed the reason, or part of the reason, for the RRT's decision to affirm the delegate's decision.

57 The Minister submits that the Federal Magistrate ought to have held that the information that relevantly formed part of the RRT's reasons for affirming the decision under review was its finding that the applicant told the RRT that he first mentioned his move to Kathmandu at the hearing before the RRT as originally constituted. That information fell within the scope of s 424A(3)(b) and accordingly there was no failure to comply with s 424A.

58 The applicant filed a notice of contention. By that notice he submitted that the Federal Magistrate's decision should be affirmed on the ground that there was a failure to comply with s 424A in that the RRT considered the information in the visa application to be the reason or part of the reason for affirming the decision. In essence, that is simply the converse of the Minister's submission on the appeal to this Court.

59 However, during the course of the hearing of the appeal, counsel for the applicant foreshadowed a further ground of review that had not been raised in either the original, or the amended application for judicial review to the Federal Magistrates Court. Accordingly, the Court directed the applicant to file any proposed amended application for review by the Federal Magistrates Court, and any proposed amended notice of contention, together with written submissions, with this Court.

60 The applicant subsequently filed a proposed further amended application and an amended notice of contention. The further grounds that the applicant wishes to raise are as follows:

- the RRT failed to comply with s 425 of the Act in relation to the issues surrounding the timing and manner of the applicant's departure from Nepal; and
- the RRT engaged in jurisdictional error in the way in which it construed and applied the applicant's answers to questions 33 and 36 in the visa application.

61 The Minister opposes the proposed amendments. He submits that they lack sufficient merit to warrant the grant of leave to amend. He further submits that there is no adequate explanation as to why these grounds were not raised before the Federal Magistrate.

62 The Minister does not contend that he would suffer any prejudice if the Court were to consider the proposed new grounds. Ordinarily, a party to an appeal will be bound by the way in which that party conducted its case below. However, in the present case there are no factual issues to be resolved. The grant of a protection visa is of vital importance to the applicant and it cannot be said that the proposed new grounds are completely without substance. Accordingly, the Court should grant leave to make the amendments.

CONSIDERATION REGARDING S 424A

63 Since it came into force in 1999, s 424A has been the source of much difficulty. The section was obviously badly drafted, and has not infrequently led to odd results.

64 The s 424A issue in this appeal turns upon the use made by the RRT of the contents of the visa application. In that regard, it must be noted that question 33 does create some difficulty. It in no way requires the applicant to identify his last address in Nepal. Nor, does it require the applicant to identify any temporary place of residence that he may have occupied at any stage. It would have been non-responsive if the applicant had proffered the information, in answer to this question, that he had spent the final month of his time in Nepal at his friend's home in Kathmandu. Likewise, in answer to the second question, one does not cease to be "self-employed" merely because one has spent a month or so living with a friend. Yet, on one view, the RRT has treated the applicant's failure to provide non-responsive answers to these questions as, in some way, damaging to his case.

65 Clearly enough the RRT had regard to the visa application when it formulated the line of questioning set out in the above transcript extracts. The central question is whether the RRT's finding as to the applicant's lack of credibility resulted from any omissions from the visa application, or whether it was really the product of a series of inconsistent answers that he gave during the course of the hearing.

66 The transcript reveals that the applicant told the RRT at the hearing, apparently unequivocally, that just before he came to Australia he was living in his family home. That was consistent with what was stated in the visa application. However, when challenged as to why he had left his family home in September 2001, he told the RRT that he had in fact gone to Kathmandu a month earlier.

67 A careful reading of the transcript of the proceedings before the RRT, and of its findings, indicates that the reason it did not accept that he went to Kathmandu in August 2001, and rejected many of his other claims, was because of the inherent improbability of his account. The RRT found that the applicant had not always been honest in his evidence. It used that finding as the basis for its conclusion that the various documents that he produced to support his claims were unreliable, and should not be given credence.

68 It is true that the RRT referred to the fact that the applicant gave evidence that he had first mentioned his departure for Kathmandu at the first RRT hearing. It concluded that he had invented this claim to assist his application for protection. However, the RRT at no stage mentioned his failure to state, in answer to question 33, that he had gone to Kathmandu as the basis for its conclusion that his evidence had been untruthful. Rather, we consider that the RRT focused upon the inconsistencies in his evidence regarding this matter, and formed an adverse view of his credibility.

69 However, if the RRT did have regard to the visa application in concluding that the applicant's evidence at the hearing was untruthful, s 424A(3)(b) would still operate to exclude the requirements of s 424A(1). The Federal Magistrate's reasoning, previously discussed, regarding his adoption of what was said in the visa application would cover this point.

70 In the recent decision of *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 a majority of the High Court (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) stated (at [18]):

> *"… if the reason why the tribunal affirmed the decision under review was the tribunal's disbelief of the appellants' evidence arising from inconsistencies therein, it is difficult to see how such disbelief could be characterised as constituting "information" within the meaning of para (a) of s 424A(1). …*

> *Finn and Stone JJ correctly observed in* VAF v Minister for Immigration and Multicultural and Indigenous Affairs *that the word "information":*
>
> > *… does not encompass the tribunal's subjective appraisals, thought processes or determinations … nor does it extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the tribunal in weighing up the evidence by reference to those gaps, etc …*
>
> *If the contrary were true, s 424A would in effect oblige the tribunal to give advance written notice not merely of its reasons but of each step in its prospective reasoning process. However broadly "information" be defined, its meaning in this context is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence."* (Footnote omitted.)

See also the discussion of *SZBYR* in *SZKFQ v Minister for Immigration and Citizenship* [2007] FCA 1432 at [21]–[26].

71 The Minister submits that this passage in *SZBYR* effectively overruled a number of the decisions upon which the Federal Magistrate relied, in particular *SZEEU* and *NBKS v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 156 FCR 205. On the other hand, the applicant submits that there is nothing in the High Court's reasoning to support that conclusion.

72 In *SZBYR* the parties were content to assume the correctness of the Full Federal Court decisions in *Minister for Immigration and Multicultural Affairs v Al Shamry* (2001) 110 FCR 27 and *SZEEU*. It was for that reason that the majority stated (at [16]) that no occasion had arisen for determining whether that assumption was correct. However, the High Court was, at that paragraph, referring to a different point to that which is under consideration in this appeal.

73 It is plain that in *SZBYR* the High Court did not expressly overrule *SZEEU*. However, there is a real question as to whether the reasoning set out in the last few lines of [18] of the majority judgment, has the effect of impliedly overruling at least those aspects of the decision that were not the subject of the parties' assumption in *SZBYR*. There are arguments both ways on that point.

74 It must be noted that *Applicant S301/2003 v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 155 did not refer to *SZEEU*. At the same time, *NBKS* did not refer to *Applicant S301/2003*. Therefore, neither Full Court had the opportunity of considering the reasoning underpinning the decision of the other. That may go some way towards explaining any inconsistency in these judgments.

75 In any event, it is unnecessary, in this appeal, to resolve any conflict between *Applicant S301/2003* and *NBKS*, and we should not therefore attempt to do so. The reason is simple, the RRT did not reject the applicant's evidence because of any failure to mention, in the visa application, his time in Kathmandu. It did not base its finding that he had not been honest, in his evidence, upon any "omission" in his answer to question 33. Rather, it arrived at that conclusion because of the inherent improbability of his account, and the various inconsistencies in his answers to questions put to him during the course of the hearing.

76 It follows that the RRT did not fail to comply with s 424A on the basis of any "omission" from the visa application. Only if the RRT had done so would the Federal Magistrate have been required to consider the significance of any such omission, and whether, in context, it could constitute "information" within the meaning of that section. His Honour simply erred in his appreciation of the RRT's reasoning.

77 However, the Federal Magistrate was correct to reject the applicant's contention that the positive statement in the visa application that he had resided at the family home until September 2001 required notice to be given under s 424A(1). His Honour's analysis of s 424A(3)(b), and why it operated to exclude those notice requirements in the particular circumstances of this case was, in our respectful opinion, correct.

THE AMENDED APPLICATION FOR REVIEW

78 As indicated above, by way of answer to the Minister's appeal, the applicant now relies upon a ground that was not taken in his application for judicial review before the Federal Magistrate.

79 The applicant now contends that the RRT failed to comply with the requirements of s 425. That section provides, in effect, that where the RRT is unable to make a favourable

decision on the papers, it must invite the applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review. The applicant now submits that the manner in which the RRT conducted the hearing did not adequately or fairly enable him to give evidence and present arguments regarding the date on which he left his home. He complains that the RRT did not direct his mind to a critical issue on which its decision was ultimately based, namely the improbability that he would have continued to reside at his family home if indeed he had been attacked in August, as he claimed.

80 Put simply, the applicant argues that the RRT failed to identify the significance of the questions that were asked of him regarding the timing of his leaving Nepal. He claims that he could not reasonably have anticipated that matter to be a critical issue in the proceeding.

81 In that regard, the applicant pointed to the fact that the delegate had based his decision to reject the claim for a protection visa upon the lack of detail provided by the applicant, a finding that the Nepalese government was capable of providing adequate protection, and a further finding that the applicant could relocate within Nepal, or even perhaps to India. The delegate had not made any comment about the applicant's statement, in his visa application, that he had continued to reside at his family home until September 2001.

82 In support of that proposition he relies primarily upon the decision of the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152.

83 Judgment in *SZBEL* was delivered on 15 December 2006, after the first hearing before the Federal Magistrate on 9 November 2006. However, as the Minister submits, it was always open to the applicant to seek to have the matter re-listed so that he could apply for leave to amend his grounds of review in order to raise a point based upon *SZBEL*. Alternatively, the point could have been raised at the resumed hearing before his Honour on 8 February 2007.

84 In considering this new ground of review, it is necessary to note precisely what occurred during the hearing before the RRT. As previously indicated, the RRT first questioned the applicant about where he had lived prior to coming to Australia. He replied

that he had been living at the place stated in his application "just before" he came to Australia. Later, he was asked how he had managed to survive safely, living at his home and running the school until September when he left, if he was having all the difficulties that he claimed. He replied that he had to run the school because the education of the children was very important. However, he said that he ran the school in a state of fear.

85 It was this last response that led to a series of questions by the RRT about the consistency between the applicant's assertion that he ran away from the school and moved to Kathmandu, with his earlier evidence about where he lived prior to coming to Australia. During that exchange, the RRT questioned him as to when he first mentioned having gone to Kathmandu on 19 August 2001, and whether he had told his own advisor that he had done so. It was at that stage that the applicant replied that he had provided that information to the first RRT. Thereafter the RRT questioned the applicant about various documents provided in support of his application and queried whether they were "reliable and genuine".

86 Ultimately, as we have indicated, the RRT rejected the applicant's claim that he had gone to Kathmandu in August 2001, and appeared to do so on the basis that it considered that this claim had been invented at some point.

87 The applicant submits that the following passage from *SZBEL* (at [47]) encapsulates his complaint regarding the RRT's failure to comply with s 425:

> *"But where, as here, there are specific aspects of an applicant's account, that the Tribunal considers* may *be important to the decision and may be open to doubt, the Tribunal must at least ask the applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted."*

88 The short answer to the applicant's submission based upon *SZBEL* is that s 425 does not require the RRT to identify the significance of the questions that it puts to a claimant or the ultimate matter or issue to which those questions go. That is not what is required by *SZBEL*, and is an attempt to import the requirements of s 424A(1) into s 425.

89 In any event, we consider that the RRT did bring to the applicant's attention its concern about his claim to have remained at his school, in the face of Maoist threats, right up until the time he left Nepal. It did so by repeatedly asking him to explain where he had lived

just prior to coming to Australia. That led to his giving apparently contradictory evidence. However, it also clearly put him on notice that the timing of his having left the school was a matter of concern and therefore adequately informed him of the way in which his answers might be used. In this case the relevant issue identified by the RRT was the apparent disparity between the applicant's claims of having been subjected to persecution by the Maoists, and remaining living at home, and running his school, until he left for Australia. As *SZBEL* makes clear (at [48]) the RRT is not obliged to provide "a running commentary upon what it thinks about the evidence that is given". Accordingly, the first additional ground is not made out.

90 The second additional ground complains of the RRT's use of the applicant's answers in the visa application to questions 33 and 36 to the effect that that he had resided at his family home, and continued to work at the school, until September 2001. The applicant submits that the RRT used these answers in a way which misconceived what he had said. He relies upon *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 in support of the contention that this gave rise to jurisdictional error.

91 In his Reply to the Minister's Supplementary Submissions the applicant goes further and submits that nothing that he said during the course of the hearing was in fact inconsistent with his claim that he fled his home in August 2001. The applicant submits that a careful examination of the transcript shows that many of his answers to questions put by the RRT were ambiguous, or equivocal. He argues that the RRT failed to formulate its questions with precision, using vague terms such as "just before" which could, temporally, mean anything. The RRT's failure to listen carefully to what he had to say, and to appreciate the ambiguity of the language used in his answers to its questions vitiated its decision.

92 There may be some force in the applicant's contention that the RRT failed to formulate a number of its questions with sufficient precision. However, there is nothing to suggest that it failed to understand the answer that he gave to question 33. It is true that the form asked where outside Australia he had lived for 12 months or more in the ten years prior to the application. However, his answer indicated that he had lived at the address given until September 2001, that is later than when he subsequently asserted that he left.

93 The applicant's response to question 33 may have been based upon a misunderstanding of what precisely that question entailed. The misunderstanding may have been his, or it may have been that of his migration agent. For present purposes it matters not. The answer that he provided to that question was unequivocal.

94 The difficulty from the applicant's perspective is that the question, as formulated, did not allow for a statement to be made regarding any temporary absences from his place of residence, such as the time he later claimed that he had spent in Kathmandu. However, whatever difficulties there may have been with the form of the question, or the answer that he provided in the visa application, the fact is that his evidence at the hearing was clear and unequivocal. He stated that he had lived at the designated address until he left to come to Australia.

95 Of course, the applicant later qualified that answer. The RRT understood, and took that evidence into account, in arriving at its decision. The applicant's submissions regarding the equivocal nature of the exchanges that are set out earlier in these reasons for judgment go to the merits of his case, and not to any jurisdictional error. Plainly, the weight to be accorded to the applicant's evidence was a matter for the RRT. It is not a matter for this Court. It follows that the second proposed ground is not made out.

CONCLUSION

96 The appeal must be allowed. The orders of the Federal Magistrates Court are set aside. In lieu thereof it is ordered that the application to the Federal Magistrates Court be dismissed with costs. The Minister is also entitled to the costs of this appeal.

I certify that the preceding ninety-six (96) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Emmett, Weinberg and Lander.

Associate:

Dated: 22 October 2007

Counsel for the Appellant:	Mr R Beech-Jones SC and Mr T Reilly
Solicitor for the Appellant:	Sparke Helmore
Counsel for the Respondent:	Mr S Prince and Mr A Joseph
Solicitor for the Respondent:	Parish Patience Immigration Lawyers
Date of Hearing:	10 August 2007
Date of Judgment:	22 October 2007