

# FEDERAL COURT OF AUSTRALIA

## Minister for Immigration and Citizenship v SZHXF [2008] FCAFC 36

**MIGRATION LAW** – whether reliance on an external source “information” for s 424A(1) of the *Migration Act 1958* (Cth) – whether information “about the applicant or another person” for s 424A(3)(a).

*Federal Proceedings (Costs) Act 1981* (Cth)  
*Migration Act 1958* (Cth) ss 36, 424A(1), 424A(3)(a)

*SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 applied  
*NANM and NANN of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 99 cited  
*VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 cited  
*VHAJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 80 cited  
*VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 80 ALD 559 referred to

**MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZHXF AND REFUGEE  
REVIEW TRIBUNAL  
NSD 1798 OF 2007**

**TAMBERLIN, GYLES AND STONE JJ  
13 MARCH 2008  
SYDNEY**

GENERAL DISTRIBUTION

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

**NSD 1798 OF 2007**

**ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA**

**BETWEEN: MINISTER FOR IMMIGRATION AND CITIZENSHIP  
Appellant**

**AND: SZHXF  
First Respondent**

**REFUGEE REVIEW TRIBUNAL  
Second Respondent**

**JUDGES: TAMBERLIN, GYLES AND STONE JJ**

**DATE OF ORDER: 13 MARCH 2008**

**WHERE MADE: SYDNEY**

**THE COURT ORDERS THAT:**

1. The appeal be allowed.
2. The decision of Scarlett FM of 14 August 2007 be set aside.
3. The first respondent pay the appellant's costs of the proceedings before the Federal Magistrate and this appeal.

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

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**DATE: 13 MARCH 2008**

**PLACE: SYDNEY**

### **REASONS FOR JUDGMENT**

#### **THE COURT:**

1 This is an appeal by the Minister for Immigration and Citizenship (“the Minister”) from a judgment of a Federal Magistrate which set aside a decision of the Refugee Review Tribunal (“the Tribunal”) and remitted the matter to the Tribunal for reconsideration. The basis on which his Honour set aside the Tribunal’s decision was that there had been a failure to comply with the requirements of s 424A of the *Migration Act 1958* (Cth) (“the Act”) because “information” which was required to be disclosed to the first respondent was not disclosed, and this failure amounted to jurisdictional error on the part of the Tribunal.

#### **BACKGROUND**

2 The first respondent is a citizen of Bangladesh who arrived in Australia on 4 August 2004 and lodged an application for protection visa on 16 August 2004. On 5 November 2004, a delegate of the Minister refused to grant a protection visa, and on 9 December 2004 the first respondent applied to the Tribunal for review of that decision. The first respondent claims refugee status on the basis that if he was returned to Bangladesh he would be

persecuted because of his religious beliefs as an Ahmadi. He claims that, because of restrictions imposed by authorities, it is not possible for an Ahmadi to worship in Bangladesh. In particular, he fears persecution by Sunni Muslims. He says that his family was Ahmadiyya Muslim by faith, and his that parents tried to keep a low profile after several incidents of harassment and discrimination. He also says that, in May 2000, he was attacked in Chittagong by a local fanatic and severely tortured. He also refers to other Sunni Muslim fanatics trying to attack his house in Dhaka and warning his family that they would kill him because in their eyes he was a “non-believer”.

3 The Tribunal’s reasons which are relevant for this appeal are as follows:

*“I accept that Ahmadis are mistreated in Bangladesh. Whether an individual Ahmadi would have a real chance of suffering harm amounting to persecution for reason of his religion is a matter for case by case determination, but many would. **The critical prior question in this case, therefore, is whether the applicant is or is not a genuine Ahmadi** or whether, on the other hand, he has generated a proximity to the Ahmadis simply and solely as a basis of a claim for protection.*

*As to evidence on this matter, I have, on the one hand, statements made by the Ameer of the Ahmadiyya Muslim Jamat Bangladesh, orally and in writing. On the other, I have various statements made by the applicant, including the applicant’s answers to my questions at hearing, and statements by his friends and family.*

*Normally, the Tribunal gives great weight to advice from the Ahmadiyya Muslim Jamat Bangladesh (AMJB) ... as to whether a person is or is not an Ahmadi. The AMJB has been found to be careful and reliable in such matters. The letter submitted by the applicant on 24 October 2005 from the head of Ahmadiyya Community in Islam ... was intended by the applicant to serve as evidence of his membership of the Ahmadi community. However, I do not accept that the letter achieves that.*

...

*The Ahmadiyya Muslim Jamat Bangladesh, through its most senior official denied in writing claims by the applicant to have been involved in various incidents of persecution of Ahmadis. The Ameer, in clear and unequivocal terms and in writing, stated that the applicant was lying. They have also not heard of the applicant’s claimed conversions.*

*Finally, ... the applicant’s answers to my questions at hearing about the difference between Ahmadi beliefs and mainstream Muslim beliefs were inadequate, especially for a person claiming a life time of practise of a religion and years of active proselytising. **There are many things which***

*distinguish Ahmadi beliefs from those of mainstream Muslims. These are summarised [earlier in the Tribunal's reasons]. While I would not have expected a full account from the applicant, a person who had been involved in the community since birth and who had undertaken the proselytizing activities claimed by the applicant, in particular in this case, where the applicant is an educated man, would have been able to give a much fuller account than the applicant was able to do.*

...

*However, it is this Tribunal's experience that the Ahmadiyya Muslim Jamat Bangladesh is a careful and reliable source of advice on claims to be Ahmadi.*

*Taking into account all the matters canvassed above, I prefer and accept the advice of the Ameer of the AMJB and find that the applicant has formed an association with the Ahmadi community initially in Bangladesh, continued subsequently in Australia, solely for the purpose of generating a basis for a claim to protection in Australia. I find that he was not and is not a genuine Ahmadi and would not continue to associate with the AMJB is [sic] he were to return to Bangladesh. I base this conclusion both on the advice of the Ameer of the Ahmadiyya Muslim Jamat Bangladesh, and also, independently, on my lack of satisfaction with his answers to my questions about Ahmadi beliefs at hearing.'*

(Emphasis added.)

4           It can be seen from this extract that the decision of the Tribunal turned on the question as to whether the respondent was "a genuine Ahmadi".

## **DECISION BELOW**

5           The Federal Magistrate allowed the application for judicial review and made consequential orders in the nature of certiorari and mandamus quashing the decision of the Tribunal and directing the Tribunal to reconsider and re-determine the matter in accordance with law. His Honour decided that the view of the Tribunal regarding the reliability of information from the Ahmadiyya Muslim Jamat Bangladesh ("AMJB") and the Ameer was "information" required to be disclosed under s 424A of the Act and that it was "information" **about** the first respondent or another person, namely the Ameer: see s 424A(3) of the Act. His Honour also found that because the information used by the Tribunal to question the first respondent about his beliefs had not been disclosed there was a further breach of s 424A of the Act.

6 In essence, the pieces of “information” which his Honour found had not been disclosed by the Tribunal to the first respondent were as follows:

1. that the Tribunal regarded information from the AMJB as reliable, and worthy of “great weight”, in relation to the question whether a person is a genuine Ahmadi; and
2. that the first respondent’s inadequate and inaccurate awareness of figures of religious significance to the Ahmadi – such as Mirza Ghulam Admad, Jesus Christ and the prophet Muhammad – which distinguished Ahmadi beliefs from Muslim beliefs indicated that he was not a genuine Ahmadi.

7 His Honour also found that the Tribunal erred by failing to put to the first respondent the piece of “information” that, in the opinion of the National Ameer of the AMJB, the first respondent was “positively lying”. However, the first respondent conceded on this appeal, and it is readily apparent on the material before the Court, that this information was in fact disclosed by the Tribunal to the first respondent. Accordingly, despite the Minister pleading a ground of appeal addressing this point in its Notice of Appeal, the first respondent’s concession means that it is no longer a relevant issue for us to decide.

## LEGISLATION AND ISSUES ON APPEAL

8 Section 424A of the Act relevantly provides:

### ***‘424A Information and invitation given in writing by Tribunal***

- (1) *Subject to subsections (2A) and (3), the Tribunal must:*
  - (a) *give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and*
  - (b) *ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and*
  - (c) *invite the applicant to comment on or respond to it.*

...

(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 ...'*

9 The two issues raised on this appeal are as follows:

1. whether the material which the Tribunal referred to in its reasons was “information” within s 424A(1) of the Act; and
2. if so, whether it was information specifically about the first respondent or another person (see s 424A(3)(a) of the Act).

### **ISSUE 1 – “INFORMATION”**

10 The first matter to be considered is the statement that the Tribunal placed “great weight” on advice provided to it by the AMJB because the AMJB had been found in the past to be a careful and reliable source of information in relation to whether a person is a genuine Ahmadi. It should be noted that there is no explanation in the Tribunal’s reasons as to why the AMJB should be regarded as careful and reliable, nor any details of the past occasions on which the Tribunal has found the AMJB helpful.

11 The Minister submits that this statement is not “information” for the purposes of s 424A of the Act. The Minister relies on the recent decision of *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 where the High Court points to the need to identify the “information” and consider its relationship to the reasons for affirming the decision under review. The decision which was affirmed by the Tribunal in this case was the decision of the Minister that Australia does not owe the first respondent protection obligations under the Refugees Convention: see s 36 of the Act.

12 The views of the Tribunal as to the reliability of certain information or sources of information are not generally material which in itself goes to affirming the decision under review. Those views are part of the evaluation or appraisal of the evidence itself and are properly characterised as part of the Tribunal’s reasoning or thought processes. As such, they are not required to be disclosed to an applicant on the basis that they constitute

“information”: see *SZBYR* 235 ALR at 616; *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 at 477.

13           Where a source of information is perceived by the Tribunal to be generally reliable, the information derived from that source may then be used to weigh and assess evidence about the claims advanced by an applicant. The consequences of this assessment of the applicant’s evidence may support a conclusion that he or she is owed protection obligations, or it may not. Whatever the conclusion, this process of assessment cannot properly be described as materially undermining the applicant’s claim. Rather, it is a process which allows the Tribunal to investigate and evaluate the claims advanced by the applicant by weighing his or her evidence against another reliable source of information. Although information derived from such sources is used as part of the Tribunal’s process of consideration of the evidence advanced by an applicant, it is not of itself “information” within the meaning of s 424A of the Act, which is required be disclosed to the applicant.

14           In this case, the observation of the Tribunal that the AMJB is a “reliable” source of information does not undermine the first respondent’s case to obtain a protection visa under s 36 of the Act, nor does it disclose an error of law in the reasoning of the Tribunal. Indeed, the Tribunal often refers to evidence of general country information when assessing credibility of an applicant, and the weight it attributes to that evidence depends heavily on its acquisition from a reliable source. Comments which expound upon that reliability will often, as in this case, constitute nothing more than an indication of the reasoning or thought processes which underpin the Tribunal’s decision. Accordingly, such observations of reliability cannot be regarded as “information” for the purposes of s 424A of the Act.

15           The second matter to be considered relates to the Tribunal’s mode of assessing of the genuineness of the first respondent’s case, namely, by testing his familiarity with the Ahmadi faith and how it differs from the Muslim faith. The material gathered from this questioning process, such as information about figures of religious significance to the Ahmadi, is not, of itself, the reason or part of the reason for affirming the Minister’s decision that a protection visa should not be granted. Rather, it is a body of material used by the Tribunal as part of its evaluation exercise to weigh and consider the first respondent’s claim that he is an Ahmadi and is therefore subject to persecution in Bangladesh.

16 In this case, the material relating to the Ahmadi faith was used by the Tribunal in a process of reasoning which allowed it to reach a conclusion that the first respondent's beliefs were not genuine. This conclusion was formed pursuant to reasoning which assumed that knowledge of important aspects of the Ahmadi faith is indicative of the authenticity of a person's assertions that he or she is a genuine Ahmadi. By way of example, where a question arises as to whether a person is a Christian, it may be relevant for the Tribunal to ask him or her questions about biblical incidents and teachings, and it would not be necessary for the Tribunal to produce to that person, as "information" under s 424A of the Act, a copy of the Bible itself. Material which sets out basic religious beliefs is not information which is directed to a determination of an application. Rather, it is a tool which may be used to test and evaluate the credibility of evidence furnished to the Tribunal by an applicant or any other source.

17 Accordingly, for the above reasons, the Court is not persuaded that there has been a failure by the Tribunal to provide "information" within the meaning of s 424A of the Act. That is the question for decision. The ability of the Tribunal to utilise its experience in arriving at a decision is not in issue.

## **ISSUE 2 – "ABOUT THE APPLICANT OR ANOTHER PERSON"**

18 Although our conclusion on the first issue above is sufficient to dispose of this appeal, we will briefly consider the second issue.

19 In considering whether certain information is specifically **about** an applicant or another person for the purposes of s 424A(3)(a) of the Act, it is not necessary for the Tribunal, as a separate requirement, to make a finding that the relevant "information" is "just about a class of persons of which the applicant or other person is a member". The Full Court observed in *VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 80 ALD 559 at 563 that the reference to the "class of persons" in s 424A(3)(a) "is not another criterion to be met". Rather, the reference "is designed to underline the specificity required by precluding any argument that reference to a class would be taken as a reference to all individuals falling within it": see also *VHAJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 80 at 95 (per Kenny J) and 99 (per

Downes J); *NANM and NANN of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 99 at [17].

20           The first respondent submits that the “information” concerning the reliability of the AMJB’s advice as to whether a person is a genuine Ahmadi is specific information “about” the first respondent himself because it impacts on his credibility. In our view, this submission is incorrect. The Tribunal’s attitude towards the reliability of a particular source of information only relates to the soundness and dependability of information from **that** source; it is not an attitude, nor a piece of “information” for the purposes of s 424A of the Act, “about” the particular applicant. In this case, the degree of connection between the “information” acquired from the AMJB and the first respondent is not sufficiently close to be properly characterised as being information “about” him.

21           The first respondent also submits that the information is “about” another person, namely the National Ameer of the AMJB. The information, it is said, is that the Ameer is a very senior official of the Ahmadi faith, and that he communicated the advice or information to the Tribunal. In our view, there is no force in this submission because the reliance by the Tribunal is on the information sourced from the AMJB **as an institution**; the information relied on is not sourced from the head of that organisation as an individual, and therefore cannot be said to information “about” that individual.

22           Finally, in our view, references by the Tribunal to religious figures prominent in the Ahmadi faith, such as Mirza Ghulam Admad, Jesus Christ and the prophet Muhammad, is not “information” within the meaning of s 424A(3)(a) of the Act. The references to these figures and any material about how they are perceived by the Ahmadi faith is not, in substance, information about those figures themselves. Rather, it is information about how others perceive such people, and the role that such a perception plays in the lives of those who hold it. Such oblique and tangential references to religious leaders is not, in our view, to be described as information about another person within the meaning of s 424A(3)(a).

## CONCLUSION

23           Accordingly, because the material referred to above is not “information” for the purposes of s 424A of the Act, but rather is material which facilitates the Tribunal’s

assessment of the first respondent's credibility, and because that material is not specifically about the first respondent or another person, this appeal is allowed and the orders of his Honour are set aside.

24           The first respondent should pay the costs of the appellant below and on the appeal. Any application pursuant to the *Federal Proceedings (Costs) Act 1981* (Cth) can be made to the chambers of Tamberlin J.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Tamberlin, Gyles and Stone.

Associate:

Dated:     13 March 2008

Counsel for the Appellant:           Mr G. Kennett

Solicitor for the Appellant:         Clayton Utz

Counsel for the First Respondent:   Mr L. Karp

Date of Hearing:                        21 February 2008

Date of Judgment:                     13 March 2008