FEDERAL COURT OF AUSTRALIA

SZGXV v Minister for Immigration and Citizenship [2007] FCA 800

MIGRATION – Tribunal did not give appellant particulars of any information in accordance with s 424A of the Migration Act - Tribunal's written reasons for decision summarise information provided by appellant in his protection visa application – inconsistencies between that information and information given at two Tribunal hearings – Tribunal formed adverse view of appellant's credibility due to inconsistencies – Tribunal did not consider one of appellant's claims as not satisfied of truth of that claim – whether information in protection visa application was part of the reason for forming an adverse view and not considering one of the claims, and therefore part of the reason for affirming the decision under review – **Held:** s 424A obliged the Tribunal to give the appellant particulars of the relevant information in his protection visa application

Migration Act 1958 (Cth) s 424A

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 cited
Applicant S v Minister for Immigration and Multicultural Affairs (2003) 217 CLR 387 cited
Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd [2006] FCAFC 48 cited
Curragh Queensland Mining Ltd v Daniel (1992) 34 FCR 212 referred to
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 215 ALR 162 cited
SZEEU v Minister for Immigration & Multicultural & Indigenous Affairs (2006) 230 ALR 1 applied
VAF v Minister for Immigration and Multicultural Affairs (2004) 206 ALR 471 cited

SZGXV v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL
NSD 161 OF 2007

BRANSON J
29 MAY 2007
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 161 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGE:	**BRANSON J**
DATE OF ORDER:	**29 MAY 2007**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The name of the first respondent be changed to Minister for Immigration and Citizenship.

2. The appeal be allowed.

3. A writ in the nature of certiorari issue quashing the decision of the Tribunal.

4. An order in the nature of mandamus issue to the Tribunal requiring it to determine the appellant's application for review of the decision of the delegate according to law.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
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AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**BRANSON J**
DATE:	**29 MAY 2007**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

INTRODUCTION

1 The appellant, a citizen of India, claims to be entitled to a protection visa under s 36 of the *Migration Act 1958* (Cth). A criterion for the grant of a protection visa is that the relevant decision-maker is satisfied that Australia has protection obligations in respect of the applicant under the *Convention Relating to the Status of Refugees 1951* as amended by the *Protocol Relating to the Status of Refugees 1967* (together 'the Convention'). Subject to exceptions not here relevant, Australia has protection obligations to the appellant if he:

> *'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'*. (Article 1A(2) of the Convention)

2 The appellant claims that his life is at risk in India because of his involvement with the Sikh separatist Khalistan Liberation Movement ('KLF') and his association with the group Babbar Khalsa ('BK').

3 A delegate of the then Minister for Immigration and Multicultural Affairs refused to

grant the appellant a protection visa. By a decision dated 13 April 1999 the Refugee Review Tribunal affirmed the delegate's decision. However, that decision of the Tribunal was set aside by a consent order of the Federal Magistrates Court which remitted the matter to the Tribunal to be determined according to law. A differently constituted Tribunal handed down its decision on 12 July 2005, again affirming the decision of the delegate.

4 On 17 January 2007 the appellant's application for judicial review of the decision of the Tribunal of 12 July 2005 was dismissed with costs by the Federal Magistrates Court.

5 The appellant, who was unrepresented at the hearing of his appeal from the judgment of the Federal Magistrates Court, apparently received assistance from a legal practitioner in drawing his notice of appeal and preparing written submissions. His notice of appeal identifies two grounds of appeal. The first of these grounds may be understood to raise for the Court's consideration whether the learned Federal Magistrate should have concluded that the Tribunal failed to comply with its obligations under s 424A of the Act. It is unclear what is intended to be raised by the second ground of appeal (see [19] below).

SECTION 424A OF THE ACT

6 Section 424A of the Act relevantly provides:

> *'(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.*
>
> …
>
> *(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.'*

REASONS FOR DECISION OF THE TRIBUNAL

7 The Tribunal did not give the appellant particulars of any information that the Tribunal considered would be the reason, or part of the reason, for affirming the decision of the delegate using a method authorised by s 424A of the Act.

8 Under the heading 'CLAIMS AND EVIDENCE' the Tribunal's written reasons for decision summarise:

(a) the information provided by the appellant in his protection visa application;

(b) the evidence given by the appellant at the first Tribunal hearing; and

(c) the evidence given by the appellant to the Tribunal following the order of remittal.

9 Thereafter, under the heading 'FINDINGS AND REASONS' the Tribunal's reasons record:

> *'The Tribunal has serious concerns about the* [appellant's] *credibility because as is clear from the detail set out above, the* [appellant's] *oral evidence to this Tribunal was highly inconsistent and confused, as well as at odds with his written evidence and with his oral evidence to the first Tribunal.'*

10 In context it is clear that the Tribunal's reference to the appellant's *'written evidence'* is a reference to information provided by him in his protection visa application. I interpolate that if the Tribunal considered that information in the appellant's protection visa application would be the reason, or a part of the reason, for affirming the decision that it was reviewing, it was obliged to give him particulars of that information and assure, as far as reasonably practicable, that he understood why it was relevant to the review (*SZEEU v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 230 ALR 1).

11 After giving particulars of inconsistencies in the appellant's oral evidence the reasons for decision of the Tribunal state:

> *'Although much of the* [appellant's] *evidence is very unreliable, for the present purpose, the Tribunal prefers the* [appellant's] *oral evidence as it was given directly to the Tribunal under oath and the Tribunal had the opportunity to at least try and explore and clarify his claims and evidence.'*

The Tribunal's statement of preference for the appellant's oral evidence must be understood

to mean that the Tribunal found the appellant's claims as outlined in his oral evidence to be the claims on which the appellant relied and which it was required to consider. The statement does not in context imply complete acceptance of the appellant's oral evidence.

12 The view formed by the Tribunal of the claims made by the appellant in his oral evidence is recorded in the following passage from the Tribunal's reasons for decision:

> *'Considering the* [appellant's] *claims and evidence to this Tribunal,* ***the Tribunal is not satisfied that the*** **[appellant]** ***was a member of BK as claimed as his other oral evidence to this Tribunal about his BK activities does not support the claim that he was a member rather than a (possibly reluctant) supporter.*** *However, although the* [appellant] *could only say that an unknown amount of ammunition was hidden in a corner of his home by BK and despite police searches it wasn't found, the Tribunal is prepared to accept that BK hid some ammunition at the* [appellant's] *home during the violent separatist campaign in the Punjab in the 1980s and early 1990s, that the* [appellant] *gave food to BK persons on occasions during those years, as Sikh civilian commonly did, but that the* [appellant] *did nothing else in relation to BK or any other militant group. The Tribunal also accepts that BK removed the ammunition in 1994 and he had no further contact with them.*
>
> *In considering the* [appellant's] *claims of detention and torture or beatings,* ***the Tribunal accepts as plausible his claim about the November 1984 detention as independent country information is that at the time of Mrs Gandhi's assassination, many Sikhs were detained, interrogated and tortured. Also the*** **[appellant's]** ***claim about this has been consistently presented. The Tribunal has much more difficulty with his claim to have been detained and tortured in October 1996 in relation to the Beant Singh assassination, because his evidence about this is inconsistent; in written evidence he said he was detained for four days and interrogated but he does not claim to have been mistreated or tortured, in oral evidence to the first Tribunal he said the last time he was detained was in 1995, but in oral evidence to this Tribunal he said that on 10 October 1996 he was detained and beaten.*** *Also, the Tribunal finds the claim difficult to accept given that the Beant Singh assassination had occurred well over a year earlier. However, for the present purpose, the Tribunal also accepts that the* [appellant] *was detained in October 1996 for a few days and tortured or at least seriously mistreated. The Tribunal accepts that in being tortured or beaten, the* [appellant] *suffered a broken wrist, broken leg and lower back injury, and that such harm was so serious as to amount to persecution within the meaning of the Convention, and that it occurred for reason of his actual or imputed political opinion in support of militants. The Tribunal also accepts that on a couple of other occasions, in 1992 and 1994, the* [appellant] *was detained for a few days, interrogated and verbally abused but not physically mistreated, and that this too was for reasons of his actual or imputed political opinion. Despite the unsatisfactory nature of the* [appellant's] *evidence the Tribunal has accepted these claims because they are generally consistent with*

> *independent country information about the treatment of ordinary Sikhs (as well as Hindus in the Punjab at the time), by the Punjab police during the violence of the 1980s and early 1990s.'* (emphasis added)

13 Notwithstanding the Tribunal's acceptance of significant parts of the appellant's claims it was not satisfied that his fear of persecution by the Indian authorities was well-founded if he were to return to India. It found that Sikh militancy is no longer active in the Punjab and that '[e]*ven militants who have served their sentences, live a normal life there now'*. It did not accept that the appellant was of adverse interest to the authorities before he left India or is presently of interest to them.

14 The Tribunal recorded its conclusion as follows:

> *'**Having considered the evidence as a whole**, the Tribunal is not satisfied that the* [appellant] *is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the* [appellant] *does not satisfy the criterion set out in s.36(2) of the Act for a protection visa.'* (emphasis added)

REASONS FOR JUDGMENT OF THE FEDERAL MAGISTRATES COURT

15 The learned Federal Magistrate rejected the contention that the Tribunal had failed to comply with s 424A(1) of the Act. His Honour took the view at [10] of his reasons for judgment that the Tribunal's credibility findings *'formed no part of the Tribunal's decision'*. He concluded at [10]-[11] that:

> *'I am of the view that the Tribunal made its decision on the basis of the evidence which it heard and disregarded entirely the concerns it had and which were expressed in the second paragraph about the* [appellant's] *credibility. Where the Tribunal came to a view that the* [appellant's] *credibility was an issue and it did not accept certain evidence it came to that conclusion on the basis of the evidence given to it and the Tribunal's views of that evidence.*
>
> *I am also of the view that the Tribunal had truly independent and otherwise unimpeached grounds for coming to its decision that the* [appellant] *had no well-founded fear should he return to India now or in the foreseeable future.'*

16 His Honour also rejected the contention that the Tribunal failed to appreciate that the appellant advanced two independent bases for his fear of persecution. At [12] his Honour recorded:

> *'As discussed with Mr Johnson* in arguendo, *I take the view that the Tribunal considered there were two independent bases of the* [appellant's] *alleged fear, the first being a general fear of the type of arrest and mistreatment which the Tribunal itself accepted at [CB 81] might occur to any Sikh nationalist and the second, the more specific fear relating to the ammunition. The Tribunal dealt with each of these although its phraseology might indicate that it was dealing with only one claim.'*

17 The appellant's application to the Federal Magistrates Court for judicial review of the decision of the Tribunal was dismissed with costs.

NOTICE OF APPEAL

18 The appellant's notice of appeal is poorly and confusingly drawn. However it is clear enough that the first ground is intended to invoke s 424A of the Act, albeit that it does not identify the section.

19 The second ground is expressed as follows:

> *'The Appellant further submits that the learned Federal Magistrate failed to accept that the Tribunal failed to assess properly the* [appellant's] *claim of fear from the Police because of stockpiling of a cache of arms & ammunitions in his farm on behalf of the Sikh terrorists and thereby stating the following:-*
>
> > "As discussed with Mr. Johnson arguendo *[sic]*, I take the view that the Tribunal considered there were two independent bases of the *[appellant's]* alleged fear, the first being a general fear of the type of arrest and mistreatment which the Tribunal itself accepted at (CB 81) might occur to any Sikh nationalist and the second, the more specific fear relating to the ammunition. The Tribunal dealt with each of these although its phraseology might indicate that it was dealing with only one claim" (Judgement – Para 12)
>
> *The Appellant submit that the Tribunal erred in making a positive finding under sec. 91R about whether there would be a 'real chance' that the* [appellant] *could face "serious harm" in the event he was asked to return to India. As the Tribunal failed to carry out this jurisdictional commitment which was mandatory, then, there was a 'jurisdictional error' that was made by the Tribunal and the learned Federal Magistrate misdirected by making the above conclusion which was contrary to the law.'*

CONSIDERATION

First Ground of Appeal

The Proper Approach

20 As Weinberg J pointed out in *SZEEU* 230 ALR at [110], the High Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162 by majority held that s 424A requires the Tribunal, at the hearing stage, to give the applicant written notice of any information that would be the reason, or a part of the reason, for affirming the decision under review and that any breach of the requirements of the section will constitute jurisdictional error.

21 As mentioned above, the Tribunal did not give the appellant particulars of any information pursuant to s 424A of the Act. Yet its reasons for decision reveal that it compared the information provided in the appellant's visa application with the oral evidence given by him to the Tribunal. It attributed significance to both consistencies and inconsistencies in the presentation of the appellant's claims. It is therefore necessary to determine whether any inconsistency between the information contained in the appellant's visa application and later oral evidence given by him at either or both of his Tribunal hearings was the reason or a part of the reason for the decision of the Tribunal to affirm the decision of the delegate.

22 Whether particular information was a reason or a part of the reason for a decision of a Tribunal to affirm a decision of a delegate is generally to be determined by reference to the reasons for decision of the Tribunal which may need to be 'unbundled' to reveal that reason, or the parts of that reason (*SZEEU* 230 ALR per Allsop J, with whom Weinberg J agreed, at [208]-[213]).

23 In *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471, a case decided earlier than *SZEEU* 230 ALR 1, Finn and Stone JJ at [33] had observed:

> *'It commonly is the case that the detail and complexity of the case advanced by a visa applicant, and the information that is given and garnered for the purposes of considering it, results in the Tribunal being confronted with issues that may be of varying importance, relevance and centrality both to the*

> *decision to be taken and to the reasoning that in the event sustains that decision. While the reasoning process may advert to, and express views on, such issues, all will not necessarily constitute part of the reason for the Tribunal's decision. Tribunals, no less than courts, engage in their own species of dicta often enough for reasons related to haste and pressure in composition. When a Tribunal's reasons are to be evaluated for s 424A(1) purposes, the Court as a matter of judgment is required to isolate what were the integral parts of the reasons for the Tribunal's decision. That task, necessarily, is an interpretative one. In some instances the differentiation of the integral and the inessential may be by no means easy — and made the more so by less than explicit indications in the reasons themselves as to what the Tribunal itself considered to be integral.'*

24 Allsop J pointed out in *SZEEU* 230 ALR at [214] that the decision of the High Court in *SAAP* 215 ALR 162 requires some aspects of the analysis in *VAF* 206 ALR 471 to be rejected. However, I do not understand the authority of the above passage from *VAF* to have been generally undermined. Nonetheless, their Honours' reference to the *'integral'* and the *'inessential'* must be understood more strictly than may originally have been intended. The critical question is whether the information in question was a part (that is, any part) of the reason for affirming the decision (*SZEEU* 230 ALR per Allsop J at [215]).

25 The task of ascertaining what was the Tribunal's reason, or the constituent parts of the Tribunal's reason, for affirming the decision under review may not be an easy one. It will require the reasons for decision of the Tribunal to be analysed with care. Ordinarily any statement made by the Tribunal in its written reasons for decision concerning its reason for affirming the decision will carry considerable weight. However, a statement of this kind will not necessarily be determinative. On an application for judicial review of the decision of the Tribunal it is for the court itself to determine what was the Tribunal's reason, or as appropriate the constituent parts of the reason, for affirming the decision under review. In doing so the court must remember that in *SAAP* 215 ALR 162 the majority made clear that it was not appropriate to engage in an evaluative analysis of the triviality, or alternatively the seriousness, of the failure to observe the requirements of s 424A (see per McHugh J at [83], Kirby J at [173] and Hayne J at [208]).

26 Information will, it seems to me, have been a part of the reason for affirming the decision under review if it provided the basis, or part of the basis, for any finding that formed an essential link in the chain of reasoning that led the Tribunal to affirm the decision under

review (cf *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR 212 at 220-221 per Black CJ).

The Tribunal's Reason for Affirming the Decision under Review

27 The present case is one in which it is not easy to ascertain precisely the Tribunal's reason, or the constituent parts of the Tribunal's reason, for affirming the decision under review. In particular it is not easy to ascertain whether the information provided in the appellant's visa application provided the basis for any finding that formed an essential link in the chain of reasoning that led the Tribunal to affirm the decision of the delegate.

28 The final link in the Tribunal's chain of reasoning was that it was not satisfied that the appellant's fear of persecution by the Indian authorities was well-founded. The Tribunal gave two immediate reasons for its lack of satisfaction in this regard. First, that there have been significant changes in the Punjab with the consequence that Sikh militancy is no longer active and even militants who have served their sentences live a normal life. Secondly, that the Tribunal did not accept that the police or the authorities generally were looking for the appellant when he left India or subsequently. There is no reason to think that the information provided in the appellant's visa application provided the basis for the Tribunal's findings concerning changes in the Punjab or the authorities' apparent lack of interest in the appellant.

29 However, it is necessary to 'unbundle' the Tribunal's reasons for decision to determine which of the grounds upon which the appellant claimed to fear persecution the Tribunal had in contemplation when it concluded that it was not satisfied that his fear was well-founded. It seems clear enough that the Tribunal had in contemplation the appellant's claim that BK hid ammunition on his property and his claim that he had fed BK members because it stated that it was prepared to accept those claims (see [12] above). However, it is far from clear that the Tribunal had in contemplation his claim to have been a member of BK.

30 The preferable view, in my opinion, is that the Tribunal did not have in contemplation the appellant's claim to have been a member of BK when it concluded that it was not satisfied that his fear of persecution was well-founded. I have formed this view on two bases. First, the Tribunal had earlier explicitly rejected his claim to have been a member of BK. By contrast, it was prepared to accept *'for the present purpose'* other aspects of the appellant's

claims notwithstanding that it found them difficult to accept. Secondly, the Tribunal referred to militants *'who have served their sentences'* living a normal life in the Punjab now. The inference arises that the Tribunal did not turn its mind to whether it was satisfied that BK members or former members, or militants generally, who had not been charged or sentenced were living a normal life in the Punjab now.

31 I therefore conclude that the chain of reasoning that led the Tribunal to affirm the decision of the delegate had the following essential links:

(a) the Tribunal accepted the appellant's claims that BK ammunition had been hidden at his home and that he had fed BK members, but rejected his claim to BK membership;

(b) the Tribunal accepted the appellant's claim to have been persecuted in the past because independent country information suggested that ordinary Sikhs were persecuted by the Punjab police during the violence of the 1980s and early 1990s;

(c) the Tribunal was not satisfied that the appellant's fear of persecution on the ground that BK ammunition had been hidden at his home and that he had fed BK members was well-founded because:

  (i) Sikh militancy is no longer active in the Punjab which is now a peaceful area; and

  (ii) the authorities were not looking for the appellant at the time that he left India and have not looked for him subsequently; and

(d) the Tribunal was not required to give consideration to whether the appellant had a well-founded fear of persecution on the ground that he was, or had been, a BK member as it was not satisfied of the truth of this claim.

32 For the above reasons I conclude that **if** the information provided in the appellant's visa application was the reason, or part of the reason, that the Tribunal concluded that it was not required to give consideration to whether the appellant had a well-founded fear of persecution on the ground that he was, or had been, a BK member, the Tribunal failed to comply with its obligations under s 424A. This is because link (d) above was critical to the decision actually made by the Tribunal to affirm the decision of the delegate. As I understand the authorities, it is not to the point that the Tribunal may well have made the same decision had it accepted, even provisionally, the appellant's claim that he was, or had

been, a member of BK.

33 The reasons for decision of the Tribunal identify the appellant's other oral evidence to the Tribunal as the reason for its failure to be satisfied that the appellant was a member of BK. However, the reasons do not make explicit whether the Tribunal additionally placed weight on its adverse view of the appellant's credibility generally and his failure to present his claim consistently. Even if they had indicated to the contrary, for the reasons identified in [22] and [25] above, this would not compel a finding that the appellant's other oral evidence provided the only reason for the Tribunal's failure to be satisfied about the truth of this claim. However, the failure to indicate to the contrary assumes significance in the context of the factors identified below.

34 The information contained in the appellant's visa application was plainly part of the reason that the Tribunal formed an adverse view of the appellant's credibility. The Tribunal took into account in this regard its view that information in the appellant's visa application concerning his involvement with BK was inconsistent with his oral evidence at his first Tribunal hearing. So much is made clear by the Tribunal in the passage set out in [9] above.

35 Additionally, as mentioned above, it can be seen that, generally speaking, the Tribunal regarded consistency in evidence as an indicator of veracity. The Tribunal considered that the consistent presentation of the appellant's claim to have been detained and tortured in 1984 was a reason for accepting his evidence on this topic (see [12] above). Conversely, the Tribunal had *'much more difficulty'* with his claim to have been detained and tortured in 1996 as a result of the inconsistencies between the information provided in the appellant's visa application and his oral evidence to the Tribunal at his two hearings – albeit that the Tribunal was prepared to proceed on the basis that he was detained and tortured in 1996.

36 In all of the circumstances it seems to me to be more likely than not that at least a part of the reason why the Tribunal rejected the appellant's claim to be a member of BK was its adverse view of his credibility generally and his failure to present this claim consistently. This conclusion seems to me to find support in the following features of the Tribunal's reasons for decision.

37 First, the reasons for decision of the Tribunal do not elaborate on what it was about

the appellant's oral evidence to the Tribunal concerning his BK activities that failed to support his claim of membership. The appellant's oral evidence to the Tribunal about his BK activities was that he had stored ammunition for BK at his home and gave BK members food when they came to his home but that he did nothing else for the group. This evidence by itself does not seem to provide any compelling reason to reject the claim of BK membership.

38 Secondly, the material upon which the Tribunal relied in forming an adverse view of the appellant's credibility related directly to his claim to be a member of BK. In particular the Tribunal noted specifically that at the first Tribunal hearing:

> *'He said he was never a member of any Sikh separatist organisation, but separatists came to his farm for food and shelter and then police would come and check up on him. He denied his written claims about such memberships but did not explain why those false statements had been made.'*

It seems logically unlikely that the Tribunal would attach no weight to the same material when considering the very issue of his membership of BK.

39 Thirdly, the Tribunal noted that its lack of satisfaction that the appellant is a person to whom Australia has protection obligations was based on a consideration of *'the evidence as a whole'* (see [14] above). A feature of the whole of the evidence before the Tribunal that the Tribunal emphasised in its reasons for decision was the apparent inconsistency between the information in the appellant's visa application and his subsequent oral evidence.

40 The conclusion that at least a part of the reason why the Tribunal rejected the appellant's claim to be a member of BK was its adverse view of his credibility generally and his failure to present his claim consistently, leads necessarily to the conclusion that the Tribunal placed weight in this regard on the information in the appellant's protection visa application.

41 For the above reasons I find that the information contained in the appellant's visa application was information that the Tribunal considered would be part of the reason for affirming the decision that it was reviewing. I conclude that the learned Federal Magistrate erred in concluding otherwise.

Second Ground of Appeal

42 The second ground of appeal is reproduced in [19] above. The written submissions filed by the appellant, on which he was unable to expand orally at the hearing of his appeal, contain the following paragraphs which presumably relate to this ground of appeal:

> *'What was crucial was the* [appellant's] *fear that he may be arrested once again if he returns to India because the Indian Police were looking for him with regard to a charge that he was hiding the militants ammunition in his land. Prior to he being arrested for this count, the* [appellant] *fled India. However, on this issue what the Tribunal decided was* – "the Tribunal does not accept that Police or the authorities generally were looking for the *[appellant]* at the time he left India.....".
>
> *The* [appellant's] *final contention is that the Tribunal failed to assess whether there is a* "real chance" *that the* [appellant] *could suffer arrest or serious harm because of this reason, if he returns to India. This was failure on the part of the Tribunal to act under sec, 91R of the Act. Whether the* [appellant's] *'civil liberties' could be jeopardized?*
>
> …
>
> *The Appellant submit … the Tribunal did not take into much consideration of the* [appellant's] *continued fear because the Police were aware that he* [appellant] *was hiding a stockpile of the ammunitions belonging to the Sikh militants were fighting for an independent State for the Sikhs, which was a serious offence under Terrorism and Disturbance Act (TADA) of India.* [Appellant's] *main fear was whether charges would be laid against him if returns back to India.'*

43 The difficulty that attends seeking to identify what the legal practitioner who apparently drew the appellant's notice of appeal and written submissions intended by the second ground is exacerbated by the final two substantive paragraphs of the written submissions which are in the following terms:

> *'The Appellant submit that the main issue is that the Tribunal failed to consider the claims put forward by the Applicant in the manner that was required in terms Provisions in Sec. 414, 415 and 420 of the Migration Act 1958. At the same time the Tribunal breached sec. 424A when refusing the* [appellant's] *claims for refugee, in addition causing a further failure to uphold the 'jurisdictional commitment' under sec. 91R of the Act. The* [appellant] *submit that considering the issues raised by the* [appellant] *in the three* [sic] *Grounds, there is cogent information to suggest that the Tribunal had made a clear cut jurisdictional* [sic]
>
> *Wherefore the Appellant pray that the Full Federal Court must appreciate the*

> *Appellant's arguments and uphold that the Tribunal had erred in its findings. Hence The Appellant seek that he should be granted justice by the Full Court by over-ruling both the decisions made by the Tribunal and the learned Federal Magistrate and issuing the appropriate Writs in favor of the* [appellant].*'*

44 The appellant has not earlier advanced a claim to fear being arrested and charged with an offence under the Terrorism and Disturbance Act if he returns to India. If he had, the Tribunal would presumably have pointed out to him that being arrested on a charge of contravening a law of general application would not, of itself, constitute persecution (see *Applicant A & Anor v Minister for Immigration and Ethnic Affairs & Anor* (1997) 190 CLR 225 and *Applicant S v Minister for Immigration and Multicultural Affairs* (2003) 217 CLR 387).

45 The appellant did not seek judicial review in the Federal Magistrates Court on the ground that the Tribunal breached any or all of ss 414, 415 and 420 of the Act. Nor has he particularised the way or ways in which he now alleges that the Tribunal breached those sections. As I can see no apparent merit in the submission that the Tribunal breached those sections I do not consider it expedient in the interests of justice to grant the appellant leave to rely in this Court on a ground not raised before the Federal Magistrates Court (*Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2006] FCAFC 48 at [53]).

46 To the extent that the appellant continues to submit that the Tribunal overlooked his claim to fear persecution in India on the specific ground that he had stored ammunition for the BK, I see no error in the way in which the Federal Magistrate dealt with this submission.

47 I am unable to identify any substance in the second ground of appeal.

CONCLUSION

48 I conclude that the Federal Magistrate erred in concluding that no occasion arose for the Tribunal to comply with s 424A of the Act. In my view s 424A obliged the Tribunal to give the appellant particulars of the information contained in his visa application concerning his involvement with KLF and his association with BK. It also obliged the Tribunal to ensure, as far as is reasonably practicable, that the appellant understood that that information was relevant to the review because it was relevant to his credibility in that he:

(a) gave inconsistent information at the Tribunal hearing held on 23 March 1999; but

(b) on 6 June 2005 told the reconstituted Tribunal that he was a member of BK.

49 The appeal will be allowed and a writ in the nature of certiorari issued quashing the decision of the Tribunal. An order in the nature of mandamus will issue to the Tribunal requiring it to determine the appellant's application for review of the decision of the delegate according to law.

I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Branson.

Associate:

Dated: 29 May 2007

Counsel for the Appellant:	The appellant appeared in person
Counsel for the First Respondent:	Mr J Mitchell
Solicitor for the First Respondent:	Blake Dawson Waldron
Date of Hearing:	1 May 2007
Date of Judgment:	29 May 2007