FEDERAL COURT OF AUSTRALIA

SZTGV v Minister for Immigration and Border Protection [2015] FCAFC 3

Citation:	SZTGV v Minister for Immigration and Border Protection [2015] FCAFC 3
Appeal from:	SZTGV v Minister for Immigration & Anor [2014] FCCA 1541 Application for an extension of time and leave to appeal: SZUBU v Minister for Immigration and Border Protection & Anor [2014] FCCA 1498 Application for an extension of time and leave to appeal: SZTWD v Minister for Immigration and Border Protection & Anor [2014] FCCA 1189
Parties:	**SZTGV v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and REFUGEE REVIEW TRIBUNAL** **SZUBU v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and REFUGEE REVIEW TRIBUNAL** **SZTWD v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and REFUGEE REVIEW TRIBUNAL**
File numbers:	NSD 716 of 2014 NSD 735 of 2014 NSD 837 of 2014
Judges:	**PERRAM, JAGOT AND GRIFFITHS JJ**
Date of judgment:	23 January 2015
Catchwords:	**MIGRATION** – application for a protection visa – *Migration Act 1958* (Cth) ss 424A and 424AA – what constitutes "information" – where "information" is the absence of evidence **MIGRATION** – application for a protection visa – whether the Tribunal's reasoning was illogical or irrational **MIGRATION** – application for a protection visa – *Migration Act 1958* (Cth) ss 424 and 425 – whether the Tribunal unreasonably failed to obtain a mental health

report about the appellant

Legislation:

Federal Circuit Court Rules 2001 (Cth) r 44.12
Federal Court of Australia Act 1976 (Cth) ss 24and 25
Federal Court Rules 2011 (Cth) 35.13
Migration Act 1958 (Cth) ss 336E, 422B, 424, 424A, 424AA and 425

Cases cited:

M55 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 131
Minister for Immigration and Border Protection v Singh (2014) 308 ALR 280; [2014] FCAFC 1
Minister for Immigration and Citizenship v Applicant A125 of 2003 (2007) 163 FCR 285; [2007] FCAFC 162
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18
Minister for Immigration and Citizenship v SZLFX (2009) 238 CLR 507; [2009] HCA 31
Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611; [2010] HCA 16
Minister for Immigration and Multicultural Affairs v Al Shamry [(2001) 110 FCR 27; [2001] FCA 919]
NAZY v Minister for Immigration and Multicultural Indigenous Affairs (2005) 87 ALD 357; [2005] FCA 744
NBKS v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 156 FCR 205; [2006] FCAFC 174
NBKT v Minister for Immigration and Multicultural Affairs (2006) 154 FCR 489; [2006] FCA 1107
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294; [2005] HCA 24
SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609; [2007] HCA 26
SZCJD v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 609
SZDPY v Minister for Immigration and Multicultural Affairs [2006] FCA 627
SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 150 FCR 214; [2006] FCAFC 2
SZKCQ v Minister for Immigration and Citizenship (2008) 170 FCR 236; [2008] FCAFC 119
SZMCD v Minister for Immigration and Citizenship (2009) 174 FCR 415; [2009] FCAFC 46
SZNKO v Minister for Immigration and Citizenship (2010) 184 FCR 505; [2010] FCA 297
SZNYL v Minister for Immigration and Citizenship (2010) 119 ALD 512; [2010] FCA 1282
SZRHL v Minister for Immigration and Citizenship (now Minister for Immigration and Border Protection) [2013] FCA 1093

	SZSSC v Minister for Immigration and Border Protection [2014] FCA 863 *VWBF v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 154 FCR 302; [2006] FCA 851
Date of hearing:	7 October 2014
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	136
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IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION

NSD 716 of 2014

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**SZTGV** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGES:	**PERRAM, JAGOT AND GRIFFITHS JJ**
DATE OF ORDER:	**23 JANUARY 2015**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent's costs.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION

NSD 735 of 2014

BETWEEN:	**SZUBU** **Applicant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**PERRAM, JAGOT AND GRIFFITHS JJ**
DATE OF ORDER:	**23 JANUARY 2015**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The applicant's applications for an extension of time and leave to appeal be dismissed.
2. The applicant pay the first respondent's costs.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION

NSD 837 of 2014

BETWEEN:	**SZTWD** **Applicant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**PERRAM, JAGOT AND GRIFFITHS JJ**
DATE OF ORDER:	**23 JANUARY 2015**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The applicant's applications for an extension of time and leave to appeal be dismissed.
2. The applicant pay the first respondent's costs.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION

NSD 716 of 2014

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**SZTGV** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

NSD 735 of 2014

BETWEEN:	**SZUBU** **Applicant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

NSD 837 of 2014

BETWEEN:	**SZTWD** **Applicant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGES: **PERRAM, JAGOT AND GRIFFITHS JJ**

DATE: **23 JANUARY 2015**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

1. THE THREE PROCEEDINGS

1 These three matters were listed for hearing on the same day before the same three judges on the basis that in each case information concerning the identity of the appellant and two applicants was unintentionally made available to the public by the Department of Immigration and Border Protection when a report was placed on the Department's website which enabled members of the public to access the personal details of persons who were in immigration detention on 31 January 2014. The disclosure of identifying information about a person in immigration detention other than in limited circumstances is an offence under s 336E of the *Migration Act 1958* (Cth) (the **Act**).

2 In the event, the so-called "data breaches" did not directly arise for consideration in these matters. Despite this, it is convenient to deal with the three matters together because they raise similar issues about the operation of ss 424A and 424AA, in particular, of the Act. These provisions are part of the statutory scheme for the provision of natural justice established by Div 4 of Pt 7 of the Act. Amongst other things, the appellant and the two applicants contend that the Refugee Review Tribunal (the **Tribunal**) contravened these provisions in a manner constituting jurisdictional error with the consequence that the decision of the Tribunal must be set aside and the matter remitted to the Tribunal for determination in accordance with law. In only one of the matters (SZTGV) was a similar argument made to the court below. In the two other matters (SZUBU and SZTWD), no such argument was put but, in any event, both matters require an extension of time and leave to appeal, neither of which the Minister opposes other than on the ground that the substantive arguments lack merit.

2. THE STATUTORY PROVISIONS

3 The relevant provisions of Div 4 of Pt 7 of the Act include s 422B as follows:

> (1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
>
> (2) Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the

natural justice hearing rule in relation to the matters they deal with.

(3) In applying this Division, the Tribunal must act in a way that is fair and just.

4 By s 424(1):

> In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.

5 Section 425(1) provides that:

> The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.

6 Section 424A provides that:

(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.

(2) The information and invitation must be given to the applicant:

> (a) except where paragraph (b) applies--by one of the methods specified in section 441A; or
>
> (b) if the applicant is in immigration detention--by a method prescribed for the purposes of giving documents to such a person.

(2A) The Tribunal is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 424AA.

(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 for review; or
>
> (ba) that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the

applicant to the Department; or

(c) that is non-disclosable information.

7 By operation of s 424A(2A), as set out above, s 424AA functions as an exception to the requirements in s 424A(2) for the giving of information to an applicant which otherwise would apply (namely, compliance with s 441A which sets out the permitted methods for information to be given to an applicant or, for a person in immigration detention, compliance with the method prescribed for the purposes of giving documents to such a person). Section 424AA, the exception, provides that:

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

8 Breach of s 424A(1), as all parties acknowledged, constitutes jurisdictional error and invalidates the Tribunal's decision (*SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294; [2005] HCA 24 at [77], [173] and [208]).

9 To determine whether there has been any breach of s 424A(1) of the Act it is necessary to answer the following questions:

(a) Is there information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review within the meaning of s 424A(1)(a)?

If the answer to question (1) is "No", s 424A(1) does not apply.

If the answer to question (1) is "Yes", s 424A(1) may or may not apply depending on the answer to question (2).

(b) If the answer to question (1) is "Yes", then is that information excluded from s 424A(1) by s 424A(3), in particular for the purpose of the three present matters, by s 424A(3)(b), being information that the applicant gave for the purpose of the application for review?

If the answer to question (2) is "Yes", s 424A(1) does not apply.

If the answer to question (2) is "No", s 424A(1) may apply depending on the answers to questions (3) and (4).

(c) Did the Tribunal comply with s 424AA(a) in respect of the information, by giving to the applicant orally 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?

If the answer to question (3) is "No", s 424A(1) applies.

If the answer to question (3) is "Yes", s 424A(1) may or may not apply depending on the answer to question (4).

(d) If the Tribunal complied with s 424AA(a) in respect of the information, by giving to the applicant orally 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, did the Tribunal comply with each of s 424AA(b)(i) – (iv)?

If the answer to question (4) is "No, s 424A(1) applies.

If the answer to question (4) is "Yes", s 424A(1) does not apply.

(e) If s 424A(1) applies and s 424AA does not apply, did the Tribunal give the applicant the information in accordance with s 424A(2)?

If the answer to question (5) is "No", the Tribunal has breached s 424A.

If the answer to question (5) is "Yes", the Tribunal has not breached s 424A.

10 In respect of question (1), what is information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review within the meaning of s 424A(1)(a)?

11 In *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609; [2007] HCA 26 (***SZBYR***) the High Court explained that:

[16] …First, while questions might remain about the scope of para (b) of s 424A(3), it was accepted by both sides that information "that the applicant gave for the purpose of the application" did not refer back to the application for the protection visa itself, and thus did not encompass the appellants' statutory declaration. In this regard, 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; [2001] FCA 919] and *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [(2006) 150 FCR 214; [2006] FCAFC 2] Accordingly, no occasion now arises for this Court to determine whether that assumption was correct.

[17] Secondly, the appellants assumed, but did not demonstrate, that the statutory declaration "would be the reason, or a part of the reason, for affirming the decision that is under review". The statutory criterion does not, for example, turn on "the reasoning process of the Tribunal", or "the Tribunal's published reasons". The reason for affirming the decision that is under review is a matter that depends upon the criteria for the making of that decision in the first place. The Tribunal does not operate in a statutory vacuum, and its role is dependent upon the making of administrative decisions upon criteria to be found elsewhere in the Act. The use of the future conditional tense ("would be") rather than the indicative strongly suggests that the operation of s 424A(1)(a) is to be determined in advance — and independently — of the Tribunal's particular reasoning on the facts of the case. Here, the appropriate criterion was to be found in s 36(1) of the Act, being the provision under which the appellants sought their protection visa. The "reason, or a part of the reason, for affirming the decision that is under review" was therefore that the appellants were not persons to whom Australia owed protection obligations under the Convention. When viewed in that light, it is difficult to see why the relevant passages in the appellants' statutory declaration would itself be "information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review". Those portions of the statutory declaration did not contain in their terms a rejection, denial or undermining of the appellants' claims to be persons to whom Australia owed protection obligations. Indeed, if their contents were believed, they would, one might have thought, have been a relevant step towards rejecting, not affirming, the decision under review.

[18] Thirdly and conversely, 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). Again, if the Tribunal affirmed the decision because even the best view of the appellants' evidence failed to disclose a Convention nexus, it is hard to see how such a failure can constitute "information". Finn and Stone JJ correctly observed in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* [(2004) 206 ALR 471; [2004] FCAFC 123] 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. The appellants were thus correct

to concede that the relevant "information" was not to be found in inconsistencies or disbelief, as opposed to the text of the statutory declaration itself.

12 In *Minister for Immigration and Citizenship v SZLFX* (2009) 238 CLR 507; [2009] HCA 31 (***SZLFX***) the High Court reiterated this approach as follows:

> [21] In *SZBYR*, it was stated that:
>
> > Section 424A does not require notice to be given of every matter the Tribunal might think relevant to the decision under review. Rather, the Tribunal's obligation is limited to the written provision of "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".
>
> [22] Furthermore, it was emphasised that for s 424A(1)(a) to be engaged, the material in question should in its terms contain a "rejection, denial or undermining" of the review applicant's claim to be a refugee. The Federal Magistrate approached the issue framed by reference to s 424A by considering whether the file note could or might undermine the credibility of the first respondent. He considered it could and also considered that no inference that the file note was not material to the decision should be drawn from the RRT's failure to mention the file note.
>
> [23] This approach was, with respect, flawed given the following observations in *SZBYR*:
>
> > [I]f 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) … 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.
>
> [24] As a Full Court of the Federal Court of Australia (Dowsett, Bennett and Edmonds JJ) pointed out correctly, shortly after *SZBYR*, in *SZKLG v Minister for Immigration and Citizenship* [(2007) 164 FCR 578; [2007] FCAFC 198], s 424A depends on the RRT's "consideration", that is, its opinion, that certain information would be the reason or part of the reason for affirming the decision under review. Here, there was no evidence or necessary inference that the RRT had "considered" or had any opinion about the file note.
>
> [25] As observed equally correctly by Heerey J in *MZXBQ v Minister for Immigration and Citizenship* [(2008) 166 FCR 483; [2008] FCA 319], s 424A speaks of information which "would", not which "could" or "might", be the reason or part of the reason for affirming the decision under review.

13 The appellant and two applicants in the present proceedings submitted that the High Court in *SZBYR* and *SZLFX* had not implicitly rejected the reasoning of Allsop J (as his Honour then was) in *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214; [2006] FCAFC 2 (***SZEEU***), where his Honour said:

> [221] I do not regard the operation of s 424A(1) as limited to circumstances where

the information imports some positive factual finding. To the extent that cases such as *MZWPK v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1256 at [14] and *SZEKY v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1138 at [19]–[23] say as much, in my respectful view, they limit too narrowly the operation of the section. That, of course, is one way that the information is a part of the reason. Another would be the inconsistency between the information and what was now being said. If the Tribunal considers that inconsistency relevant to the assessment of the claims, it may be that the information would be part of the reason. If a Tribunal says that it does not believe an applicant for reasons that can be seen to include the fact that one thing was said in the prior statement and another at the hearing, or the fact that if what is now being asserted at the hearing is true it would have been in the prior statement in that form, the information would be part of the reason. The information is the knowledge imparted to the Tribunal of a prior statement in a particular form. The significance given to it by considering it in the light of evidence is the product of mental processes. This significance and those mental processes are not information, but rather, are why the information is relevant for s 424A(1)(b).

[222] In my view, it is necessary to exercise care in applying what was said in *VAF* by Finn and Stone JJ 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.

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

[224] I adhere to and adopt what I said in the above respects in *SZECF v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1200 to which I would only add that, as I read her Honour's reasons, Branson J concluded as her Honour did in *NAIH of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 124 FCR 223 (discussed in *WAGP* and *SZECF*) because of her Honour's view that it was the unsatisfactory nature of the oral evidence before the Tribunal, alone, that was the reason for affirming the decision.

[225] If the Tribunal finds as relevant to its reasoning some inconsistency or incompatibility between earlier information and evidence to it as relevant to its reasoning that may well engage s 424A if such inconsistency or incompatibility can be seen to have been a part of the reason for affirming the decision.

14 Justice Weinberg at [158] in *SZEEU* agreed with Allsop J.

15 Justice Allsop applied the same approach in *NBKS v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 156 FCR 205; [2006] FCAFC 174 (***NBKS***) at [74] in these terms:

> As I said in *SZEEU v Minister for Immigration and Multicultural Affairs and Indigenous Affairs* (2006) 150 FCR 214 at [221]–[225], care needs to be exercised in applying [24(iii)] of *VAF*. Here, the absence of something in Dr Nair's report was not merely taken as a gap, but was implicitly probative of Dr Nair's view that there was no such danger. If the form of Dr Nair's report (including what it did not say) did not have this significance for the Tribunal there would have been no point in mentioning it.

16 The Full Court of this Court (Emmett, Weinberg and Lander JJ) considered whether the reasoning in *SZEEU* was inconsistent with that in *SZBYR* in *Minister for Immigration and Citizenship v Applicant A125 of 2003* (2007) 163 FCR 285; [2007] FCAFC 162 and at [73] said only that:

> 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.

17 Another Full Court of this Court (Stone, Tracey and Buchanan JJ) also dealt with the issue in *SZKCQ v Minister for Immigration and Citizenship* (2008) 170 FCR 236; [2008] FCAFC 119. Justice Buchanan concluded at [93] that no part of the analysis of the High Court in *SZBYR* "involved any rejection of the reasoning in *NBKS* either expressly or impliedly". Justices Stone and Tracey at [1] did not consider it necessary to resolve this issue.

18 The reasoning of the High Court in *SZBYR* and *SZLFX* is not readily reconcilable with that in *SZEEU* and *NBKS*. What is clear from *SZBYR* and *SZLFX* is the High Court's endorsement of the proposition that "information" within the meaning of s 424A(1) of the Act does not extend to the "prospective reasoning process" of the Tribunal. Further, the information must be information that "would", not "could" or "might", be the reason or part of the reason for affirming the decision under review. Such information necessarily involves a rejection, denial or undermining of the applicant's claims.

19 For the present appeals, these propositions are determinative as explained below.

20 In respect of question (2), what does information the applicant gave for the purposes of the application for review as provided for in s 424A(3)(b) of the Act mean?

21 As the High Court said in *SZBYR* at [16], it is clear that the application for review is the application to the Tribunal, not the application to the Minister for a protection visa. As such, information the applicant gave for the purposes of the application for review does not include the statutory declaration that an applicant submits as part of the application to the Minister for a protection visa.

22 Otherwise, different approaches to the scope of s 424A(3)(b) have been taken, as summarised by Young J in *NBKT v Minister for Immigration and Multicultural Affairs* (2006) 156 FCR 419; [2006] FCAFC 195 (***NBKT***) at [48] – [64]. As his Honour's summary discloses:

(1) In *NAZY v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 87 ALD 357; [2005] FCA 744 (***NAZY***), Jacobson J held that the exemption in s 424A(3)(b) applies to information from a protection visa application which an applicant for review expressly adopts and puts forward as part of his or her application for review by the Tribunal, but does not apply to information provided by an applicant during questioning by the Tribunal member in the course of a hearing. Young J noted at [50] that the "rationale for this narrow approach to the exemption is that by giving the information to the Tribunal other than by way of response to questioning, the applicant is assumed to be aware of the significance of the information: *NAZY* at 363 [37]".

(2) In *M55 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 131, Gray J held that the provision of the appellant's passport as part of the original protection visa application did not necessarily exclude the operation of s 424A(1). Because the appellant had provided a written submission to the Tribunal which expressly relied upon the terms of his protection visa application, he had given his passport information to the Tribunal within the meaning of s 424A(3)(b).

(3) In *VWBF v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 154 FCR 302; [2006] FCA 851 (***VWBF***), Heerey J at [48] said that:

> If this matter were free from authority, there would be much to be said for the view that an applicant "gave" information for the purpose of the Tribunal review application if the information was delivered to the Tribunal by the applicant, whether

in answer to a question asked by the Tribunal or whether volunteered. Either way, the information is conveyed from applicant to Tribunal.

(4) In *SZEEU* at [179], Weinberg J said that adoption of an earlier statement in the course of evidence can bring it within the scope of s 424A(3)(b). As his Honour put it:

> … if an applicant makes a statement [pre-hearing] …that is inconsistent with later evidence given at a hearing, s 424A(1) requires that written notice be given of the possible use of that statement to draw inferences against the applicant. If, however, the applicant repeats the earlier statement at some stage during the course of the hearing, and adopts it as true, and then subsequently resiles from that statement, the Tribunal is not obliged to afford the applicant an opportunity to comment upon the discrepancy…This is because the adoption of the earlier statement brings it within the scope of the s 424A(3)(b) exception. If, however, the Tribunal proposes to use the earlier statement as the "reason", or "a part of the reason" for affirming the decision under review, rather than the later adoption, it must comply with s 424A(1).

Moore J acted on the same basis at [91], and Allsop J agreed at [264].

(5) In *SZCJD v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 609 (***SZCJD***) Heerey J said at [42] that the exception in s 424A(3)(b) would apply to information which is affirmed by an applicant for the purposes of the review, even if the information might also have been obtained by the Tribunal from another source and at [43] repeated his view that:

> To conclude that an applicant "gave" information for the purpose of the Tribunal application it is not necessary that the information was initially volunteered by the applicant. Information is equally given if it comes in response to questioning by the Tribunal.

(6) In *SZDPY v Minister for Immigration and Multicultural Affairs* [2006] FCA 627, Kenny J held that *SZEEU* at [91], [173] and [264] supports the proposition that where an applicant affirms a specific fact before the Tribunal, that information will be covered by s 424A(3)(b).

23 At [59] in *NBKT,* Young J concluded that:

> These authorities highlight the importance of giving careful consideration to the nature of the information that is said to fall within s 424A(3)(b) and the circumstances in which it is communicated to, or elicited by, the Tribunal. There may be good reasons for requiring that the applicant affirm or actively give specific 'information' for the purposes of the review, in order for the exemption in s 424A(3)(b) to apply. Both *SZEEU* and *NAZY* suggest that the exception may not apply where the appellant does no more than affirm the accuracy of a statement which contains many diverse pieces of information. At the same time, the weight of authority indicates that artificial distinctions should not be drawn between

> information that is provided by an applicant in the course of his evidence in chief rather than in answer to questions posed by the Tribunal.

24 It is apparent from the various approaches taken to s 424A(3)(b) that the question is ultimately one of fact. Consistent with the reasoning of Heerey J in *VWBF* and *SZCJD*, there is nothing in the text of s 424A(3)(b) which supports any distinction between information proffered by an applicant to the Tribunal of the applicant's own volition or elicited from an applicant by the answering of the Tribunal's questions. In either case, the applicant may have given information to the Tribunal. Despite this, not every answer by an applicant to a question from the Tribunal will involve the applicant giving information to the Tribunal. The nature of the information, of the question asked by the Tribunal and the applicant's answer will all be relevant to determining whether s 424A(3)(b) is engaged.

25 Contrary to the submissions of the appellant and the two applicants in the present matters, there is no principle that complex information or information about controversial facts cannot be given by an applicant to the Tribunal by a mere affirmation in response to a question by the Tribunal. The nature of the information will be relevant, as we have said. But labelling the information as complex or simple or as about a controversial or undisputed fact does not determine the answer to the question whether s 424A(3)(b) is engaged. The complexity or simplicity of the information and whether the information relates to a controversial or undisputed fact are circumstances that inform the answer to the question whether s 424A(3)(b) is engaged, but to focus on these circumstances alone involves an incorrect focus, away from the statutory description.

26 In respect of question (3), what does the requirement in s 424AA(a) that the Tribunal give to the applicant orally 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 mean?

27 In *SZNKO v Minister for Immigration and Citizenship* (2010) 184 FCR 505; [2010] FCA 297 (***SZNKO***) at [23] Flick J said:

> There may be circumstances in which the requirement to "give" information to which s 424A applies may not extend to a requirement to disclose the entirety of any document in which such "information" is contained. In those cases it may not matter for the purposes of making a decision affirming a refusal of a protection visa that the "information" in question is but part of a document or report touching other matters or containing diverse other matters. In those cases the disclosure of that specific part of a much lengthier document may be sufficient. But "information" for the purposes of s 424A cannot in all cases be clinically divorced from the context it which it

> appears. How much of that surrounding context must also be disclosed must necessarily depend upon the facts and circumstances of each individual case. In some cases it may be necessary to identify the "source" from which information has been obtained. Thus, in *SZLIQ v Minister for Immigration and Citizenship* [2008] FCA 1405 Buchanan J concluded that extracts from a published book and the source of that material should have been disclosed. Indeed, the extent of disclosure may not necessarily be confined to the disclosure of material which ensures that a particular part is not rendered misleading; the touchstone is that ss 424A and 424AA require the disclosure of so much as to ensure that the opportunity to "comment … or respond …" is meaningful. In some cases the disclosure of the "substance" of information may be sufficient (*NAVM v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 99 at [33]); in other cases "clear particulars" may require more.

28 At [25] in *SZNKO*, on the facts of that particular case, Flick J said:

> …in the present proceeding and where the "information" is contained within a comparatively short letter which has come to the attention of a Tribunal Member, and which was presumably readily available, it is respectfully considered that details as to who wrote that other letter, the capacity of the person who wrote that letter and its date must be disclosed if "clear particulars" of that letter are to be given.

29 In respect of question (4), what do the requirements of s 424AA(b) involve?

30 At [29] in *SZNKO*, Flick J said:

> Compliance with s 424AA(b)(iii) and/or (iv), does not require a Tribunal Member to repeat the very words employed in s 424AA(b)(iii) in some ritualistic or "parrot-like recantation". Indeed, cases may be envisaged where to do so may not meaningfully convey to an applicant the opportunity sought to be secured by those provisions. Compliance with those provisions must necessarily depend upon the facts and circumstances of the claims being advanced before the Tribunal, the ability of any particular applicant to properly avail himself of the opportunity to be heard before the Tribunal, and the limited procedural protections prescribed by the Commonwealth legislature.

31 His Honour continued at [31] as follows:

> If s 424AA(a) is invoked, s 424AA(b)(iii) imposes a requirement that an applicant be positively advised that he may seek additional time in which to respond. How that advice may be effectively communicated may be left to be resolved by reference to the facts and circumstances of individual cases. But compliance is not achieved by a statement which merely implicitly conveys to an applicant that he may seek and be given "additional time". Nor can non-compliance with s 424AA(b)(iii) necessarily be excused or cured by reason of "additional time" in fact being extended. Non-compliance with s 424AA(b)(iii) may not in all cases be equated with a consideration of whether there may be discretionary reasons for refusing relief.

32 Although the Minister submitted that *SZNKO* was wrongly decided, the general propositions which Flick J identifies at [29] and [31] do nothing more than reflect the terms of the relevant provisions and orthodox principles. No doubt, the result turned on the

particular facts, and reasonable minds might differ about those facts, but his Honour's statements of general application are persuasive.

33 *SZNYL v Minister for Immigration and Citizenship* (2010) 119 ALD 512; [2010] FCA 1282, a decision of North J, also discloses that the question of compliance with s 424AA(b) depends on the particular facts of the case. At [28] his Honour said:

> The requirements of s 424AA could only have been met if the Tribunal had, first, separated the various strands of information and, second, explained what, in relation to each of them, would be the consequence of the Tribunal relying on each. Had that been done then the appellant would have been alerted to the consequence that the Tribunal might accept Father Cosmos' evidence to find that at the time when the letter was written the appellant did not face any threats in Kenya. In the end that was the finding made in [36] of the Tribunal's reasons.

34 Justice North cannot be understood as suggesting that the separation of strands of information and an explanation of the consequence of the Tribunal relying on each is a necessary requirement of s 424AA(b). Read in the context of the preceding paragraph of his Honour's reasons, [27], it is apparent that North J meant only that given the nature of the information in question, the questions the Tribunal asked, and the applicant's answers, the requirements of s 424AA(b)(i) (to ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review) had not been satisfied.

35 Against this background, the individual matters may now be considered.

3. SZTGV

3.1 The appeal

36 This is an appeal against orders of the Federal Circuit Court of Australia dismissing the appellant's application for judicial review of the decision of the Tribunal which affirmed the refusal of the Minister's delegate to grant the appellant a protection visa. The appellant was not represented before the Federal Circuit Court, but was represented by pro bono counsel in the appeal. Although he contended that the Tribunal had contravened s 424A(1) of the Act, those arguments have been expanded in this appeal. The appellant has also raised two additional grounds, being the unreasonableness of the decision and alleged breach of s 425(1) of the Act. Accordingly, the reasoning of the primary judge (*SZTGV v Minister for Immigration & Anor* [2014] FCCA 1541) that there was no breach of s 424A(1) because the

information on which the appellant relied was not information within the meaning of that section does not address most of the appellant's contentions in this appeal.

3.2 Alleged breaches of ss 424A and 424AA

3.2.1 Facts

37 The appellant, a citizen of Namibia, arrived in Australia on a transit visa. In his application for a tourist visa lodged on 23 July 2012 the appellant answered question 19 ("Do you have a spouse, de facto partner, any children, or fiancée who will NOT be travelling with you?") by giving the name of a woman and identifying her as his de facto partner. He also supplied three letters purporting to be from Amazon in Canada. The effect of the letters was to represent that the appellant was employed by Amazon and had been granted 30 days leave of absence. His application for a tourist visa was refused. After he arrived in Australia on a transit visa (which was cancelled) the appellant applied for a protection visa. He claimed that he was homosexual and was subject to persecution in Namibia by reason of his sexuality. He also said he had been sexually abused as a child by his uncle which had caused him to develop a stutter and his imprisonment in Namibia for being gay brought back to him the feelings he had as a child when he was abused.

38 In an interview with a delegate of the Minister the appellant initially said that the letters from Amazon were genuine but later acknowledged that they were false. In the same interview the appellant said that he was not in a relationship with the woman named as his de facto partner on his tourist visa application, but that she was a work colleague. He had named her as his de facto partner because he "wanted to make myself seem more of an individual".

39 On 12 March 2013 the appellant was notified that his application for a protection visa had been refused. In the decision record attached to the letter notifying the appellant that his application for a protection visa had been refused the delegate of the Minister referred to the appellant having ultimately admitted in the interview that the letters from Amazon were not genuine. The decision record also referred to the appellant having said in his tourist visa application that he was in a de facto relationship with a woman in order to give his application a better chance of being accepted.

40 The appellant applied to the Tribunal for review of the decision. In response to an invitation from the Tribunal to submit any new information he wished the Tribunal to

consider the appellant's advisers forwarded a letter to the Tribunal dated 14 June 2013. This letter referred to an attachment, being a letter from the appellant "addressing issues of credibility raised in the Department of Immigration and Citizenship's decision record dated 12 March 2013". The attached letter from the appellant to the Tribunal, dated 7 June 2013, stated:

> Following are:
> 1 **Statements directly in response to the Protection Visa Decision Rcord dated 12 March 2013**…
> …
> The Case Officer stated that:
> There were also a number of differences in the information the applicant provided in his tourist and Transit visa applications for Australia and his Protection visa application. In his tourist visa application which was refused on 20 August 2012, the applicant stated that he was in a De facto relationship with a woman called Monaliza Mondata and also provided fraudulent documents in relation to his employment in Canada and work training course in South Africa. He also submitted a Canadian work permit but did not state that he had been deported from Canada. He also failed to declare that he had been deported on his application for a Transit visa.
> My Response:
> I am ashamed to say that the above statements are true. My time in South Africa was the lowest point in my life. I had just been deported from Canada and I knew that I could not go back to Namibia because of fear of discrimination and imprisonment. I was also very suicidal and depressed. On top of that I was unable to apply for asylum in South Africa so I was really at a bad place. I decided to try to come to Australia to apply for protection but I did not qualify and so being at this low point in my life and feeling like I was trapped in a corner, I decided to forge some documents in order to qualify for a tourist visa. I used a friend from Canada, Monaliza Mondata as a De facto partner in my application so that it would seem more genuine. I have to add that I am not proud of doing any of the mentioned things.

41 In the hearing before the Tribunal, the Tribunal member told the appellant's representative that there was information that he had to put to the appellant that, depending on how he assessed the case, would be the reason or part of the reason for affirming the decision of the delegate not to grant the appellant a protection visa under s 424A of the Act. The Tribunal member continued as follows:

> …The information is your transit visa application that you made to Australia, your tourist visa application you made to Australia. Do you understand what that information is?
>
> APPLICANT: No.
>
> [TRIBUNAL MEMBER:] The information, in particular, is the detail that you provided in those applications that may contradict your claims. So, in particular, the information that I want to put to you is that in one of those applications you actually said that you had a female de facto partner and that specifically contradicts your claim of being homosexual. Do you understand what that is?

APPLICANT: Can I say something? Yes.

[TRIBUNAL MEMBER:] You can in a minute. I just want to – the other information that's contained in that documentation are the letters that you provided that you said originally were genuine letters from Amazon and that you later admitted were false.

APPLICANT: Yes.

[TRIBUNAL MEMBER:] That either you – or you had obtained - - -

APPLICANT: …..yes.

[TRIBUNAL MEMBER:] I think you said that you had obtained them in an internet café. I'm not sure whether you wrote them yourself or you claimed that someone wrote them for you. Now, why it's relevant, as I said, is the documentation from Amazon is relevant because they're fabricated and it shows that you're prepared to actually fabricate documentation and, perhaps, lie about your claims. The claim of having a female de facto partner is relevant because it contradicts our claim about being homosexual and if it's not true, it also indicates that you're prepared to fabricate your claims and actually lie in visa applications to Australia and, again, that's something that the delegate put to you, but I need to put it you under this particular method of putting information.
The consequences of my relying on the information in relation to credibility is that I rely on this information, I may not accept that there's a real chance that you will be persecuted for one or more of the five Contention grounds if you returned to Namibia. Likewise, I might not accept that there are substantial grounds for believing that as a necessary and foreseeable consequence of your being removed to Australia to Namibia there's a real risk you would suffer significant harm. If I rely on that information, it may form the reason or part of the reason for my concluding that you are not a person to whom Australia has protection obligations and that you are, therefore, not entitled to be granted a protection visa. Do you understand what the possible consequences of my relying on this information are?

APPLICANT: A bit…..I don't understand it completely.

[TRIBUNAL MEMBER:] Okay, what it means is, in a nutshell, if I rely on that and I find that you're not credible, you won't get a protection visa.

APPLICANT: Okay.

[TRIBUNAL MEMBER:] If you wish, you may comment on or respond to this information. Do you want to comment or respond further than what you already have in relation to the matter?

APPLICANT: Yes. Yes.

[TRIBUNAL MEMBER:] What would you like to say?

APPLICANT: I say – can explain that when I was in South Africa I experienced very bad time for me, very low. I was depressed, I was….money and I couldn't go back home to Namibia. I – so I couldn't …..to stay…..so that was the…..it was very hard. So…..of those circumstances I did…..my application to come here to Australia and…..but I wouldn't say that – I was really in a low state and I regret it, yes because I just, I wanted to get out of that situation that I was in, a very, very bad situation in my life and unfortunately I, yes, I did do those things and – but, yes, but I'm here

now at this point and I – I still believe in myself. I think that, yes, given what I – I want to – again, I should be considered in my case for protection visa, please.

[TRIBUNAL MEMBER:] Okay. Anything more you wanted to say in relation to that?

APPLICANT: No. just that Mona Lisa, as I said, she is not my partner. I just used her to seem more aligned and to help my application, and the documents for the same cause, to help get.....

[TRIBUNAL MEMBER:] Okay. Thank you for that.

APPLICANT: .....yes, it was my – I just wanted you to take out of that bad situation and just take out of there and, yes, and - - -
…
…

[TRIBUNAL MEMBER:] Now, is there anything more you would like to – that you want to tell me that hasn't been covered by the questions that we've asked or what we've discussed today?

APPLICANT: Yes. In regards to country conditions and…
…
…

[TRIBUNAL MEMBER:] Okay. Thank you for that. Anything more you wanted to tell me, sir, before the hearing finishes?

APPLICANT: Yes. My…..identity. There again, I…..important points, that I feel that should be…..

[TRIBUNAL MEMBER:] Is this in a document that you've already submitted or is this a new document?

APPLICANT: Yes. It's - - -

MS DUBAUSAKS: No. This was submitted in the pre-submission, in the letter that was sent last week.

[TRIBUNAL MEMBER:] Yes. Thank you for that. I forgot to mention that I had that.
…
…

[TRIBUNAL MEMBER:] Thank you. Now ma'am, did you want to make a submission today or you want to rely on your submissions that's dated 14 June or did you want time to put something in writing?

MS DUBAUSAKS: I would like to make a brief submission at the moment and make two requests, maybe some further time. First of all, just to submit that the client applied for the visas in Australia because he was fearful. He did anything possible that he could. That is the reason why he did obtain false documentation and he made the claims that he did in those applications. It was out of an act of desperation and that was because he was scared to go back to Namibia…

42 The Tribunal affirmed the decision to refuse the appellant a protection visa. In its reasons for decision the Tribunal recorded that:

> The Tribunal put to the applicant under section 424AA the documents on the Department file relating to the Visitor's visa and Transit visa applications in particular his having detailed that he was in a heterosexual defacto relationship, and further his having supplied false documents – the letetrs [sic] from Amazon. It was put to him that this indicated he was not homosexual and further that he was prepared to provide false documents in support of his claims. He said he understood the relevance and wanted to make further comment. He claimed he was depressed in South Africa, was running out of money and couldn't return to Namibia. He couldn't stay in South Africa and so as a result made these applications. He was in a low state at the time and regrets having provided this false information and documents. He said this is now past, he still believes in himself and "given what I have been through I should be considered for a Protection visa… as I said Monaliza wasn't my partner I just used her to seem more aligned and to help my application…the documents were for the same cause I wanted to get out of a difficult situation".

43 The Tribunal concluded that the appellant's claims were not true and had been fabricated.

3.2.2 Appellant's submissions

44 The appellant submitted that the primary judge was wrong to conclude that the appellant had given the information to the Tribunal as an attachment to the letter to the Tribunal dated 14 June 2013 (with the consequence that s 424A(1) did not apply by reason of the exclusion in s 424A(3)(b) of the Act).

45 According to the appellant, citing in support *SZBYR* at [18], the information was the primary documents being question and answer 19 in the the tourist visa application and the letters from Amazon "coupled, perhaps in the case of the Amazon letters, with the admissions made by the appellant in his interview with the delegate". This conclusion, submitted the appellant, is consistent with the fact that in its reasons for decision the Tribunal made clear that it was the documents on the Department's file that constituted the relevant information.

46 As was said in *SZEEU* at [204], it is "the information that that the Tribunal considers relevant that must be assessed in order to see whether, prior to the decision being made, it would be the reason or a part of the reason for affirming the decision".

47 Further, submitted the appellant, in the hearing before the Tribunal the appellant did not adopt the statements made in his tourist visa application or in his letter dated 7 June 2013 concerning the Amazon letters. In any event, mere adoption of an earlier statement does not

mean that the appellant has given the information adopted to the Tribunal (*SZEEU* at [20] and [157], *NBKT* at [59]).

48 The Tribunal did not comply with s 424AA and, in particular, did not advise the appellant he may seek additional time to comment on or respond to the information put to him, as s 424AA(b)(iii) required. The Tribunal was thus bound to comply with s 424A but did not do so.

49 Further, or in the alternative, the appellant submitted that non-compliance with s 424AA itself constituted jurisdictional error. The appellant acknowledged that this was inconsistent with *SZMCD v Minister for Immigration and Citizenship* (2009) 174 FCR 415; [2009] FCAFC 46 (***SZMCD***), but formally submitted that *SZMCD* was wrongly decided.

3.2.3 Discussion

50 As the Minister submitted, the only information that the Tribunal considered would be the reason or part of the reason for affirming the decision under review was that the claim in the tourist visa application that the appellant had a female de facto partner contradicted his claim that he was homosexual, and that the appellant had admitted that the Amazon letters were false. Nothing in the tourist visa application or the Amazon letters contained a rejection, denial or undermining of the appellant's claims. The relevant information, accordingly, was not question and answer 19 in the tourist visa application and the Amazon letters, but the appellant's admission that the answer to question 19 was false and the Amazon letters were forgeries. The appellant gave that information to the Tribunal in his letter dated 7 June 2013. In stating in that letter that "I am ashamed to say the above information is true" the appellant admitted that the answer to question 19 was false and the Amazon letters were forgeries.

51 This conclusion does not involve construing an appellant's answer to a question from the Tribunal in order to ascertain whether the appellant's answers constitute giving information to the Tribunal. The appellant elected to provide submissions to the Tribunal dealing with issues set out in the decision record of the delegate. In so doing, the appellant gave to the Tribunal the information relevant for the purposes of s 424A(1), being his admissions of the falsity of the information he supplied as part of his tourist visa application.

52 As the Minister also submitted, if s 424A(3) should be applied with regard to its purpose of exempting from s 424A(1) information which the appellant knows is significant

(*NAZY* at [37]), then there can be no doubt that the appellant was so aware in the present case. The appellant was taking it upon himself to directly inform the Tribunal of his explanation for giving false information in his tourist visa application.

53 The essential premise of the appellant's case for breach of s 424A(1) of the Act cannot be accepted for these reasons. The appellant gave the information to the Tribunal in accordance with s 424A(3)(b), with the result that s 424A(1) did not apply to the information. It follows that s 424AA is immaterial. The Tribunal did not have to comply with s 424AA in order to be exempt from the requirements of s 424A(1). The fact that the Tribunal apparently believed s 424A(1) to apply to the information is immaterial if, in fact, the information was exempted from the operation of that provision.

54 If s 424A(1) applied then s 424AA would be relevant. In the present case, there cannot be any real question about s 424AA(a) and (b)(i) and (ii). The extracts from the transcript set out above disclose that the Tribunal gave to the appellant clear particulars of the information that the Tribunal considered would be the reason, or a part of the reason, for affirming the decision that is under review, ensured, as far as is reasonably practicable, that the appellant understood why the information was relevant to the review, and the consequences of the information being relied on in affirming the decision that under review, and orally invited the appellant to comment on or respond to the information. The only potential issue is s 424AA(b)(iii) which required the Tribunal to advise the appellant that he may seek additional time to comment on or respond to the information.

55 The extracts from the transcript set out above disclose that the Tribunal asked the appellant's representative whether she wished to "make a submission today" or "rely on your submission that's dated 14 June" or "did you want time to put something in writing". These questions were not put to the appellant's representative in the immediate context of the information under s 424A. Nor were they understood by the appellant's representative to relate to that information. Later in the hearing, the appellant's representative sought and was granted more time in respect of a mental health issue which she wished to explore.

56 If s 424A(1) had applied to the information in the present case, then we would not be satisfied that the Tribunal complied with s 424AA(b)(iii). In the context in which it arose (which was not the information which the Tribunal put under s 424A) asking the appellant's representative whether she wished to "make a submission today" or "rely on your submission that's dated 14 June" or "did you want time to put something in writing" did not satisfy the

requirement that the Tribunal advise the appellant that he may seek additional time to comment on or respond to the information. The questions asked did not involve the Tribunal in advising the appellant of anything. The fact that the appellant's representative did not seek an adjournment of the hearing under s 424AA(b)(iv), contrary to the Minister's submissions, does not mean that s 424AA(b)(iii) would have been satisfied on the facts of this case. The failure to advise the appellant as required by s 424AA(b)(iii), had s 424A(1) applied, would have meant that the Minister could not succeed in the argument that the Tribunal did not need to comply with s 424A(2) because it had complied with s 424AA.

57 The appellant's further or alternative argument that breach of s 424AA itself gives rise to jurisdictional error if s 424A(1) applies to the information need not be considered. Section 424A(1) does not apply to the information in the present case. In any event, s 424AA is nothing more than a provision which, if satisfied, exempts the Tribunal from compliance with s 424A. As such, we can see no basis upon which it could be said that *SZMCD* was wrongly decided in this regard.

3.3 Alleged unreasonableness and ss 424 and 425

3.3.1 Appellant's case

58 Sections 424(1) and 425(1) are set out above. Section 424(1) enables the Tribunal to get any information it considers relevant in conducting the review. Section 425(1) requires the Tribunal to invite an applicant to appear before the Tribunal.

59 The appellant alleges that the Tribunal acted unreasonably in the exercise of its discretion under ss 424(1) and 425(1) in not obtaining a report about the mental health of the appellant and in the conduct of the hearing. As the appellant put it in written submissions (noting the arguments were developed orally in a somewhat different way):

> The Appellant further submits that the Tribunal's decision:
>
> a. was unreasonable, in the sense that gives rise to jurisdictional error: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18; *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1 at [42]-[48]; and
>
> b. failed to comply with the requirement of s 425(1) of the Act, that the Appellant be permitted to "present arguments relating to the issues arising in relation to the decision under review": *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 81 ALJR 515; [2006] HCA 63.

60 The argument that the Tribunal acted unreasonably in not obtaining a mental health report about the appellant involves a number of propositions.

61 First, the Tribunal accepted that the appellant was sexually abused as a child and this caused him anxiety and his stutter was worse when he was anxious.

62 Second, according to the appellant, this made him a "vulnerable person" within the meaning of the Tribunal's "Guidance on Vulnerable Persons" (the **Guidelines**). The Guidelines define a vulnerable person as a "person whose ability to understand and effectively present their case or fully participate in the review process may be impaired or not developed".

63 Third, the provisions of the Guidelines specify various means by which the Tribunal may assist a vulnerable person to present their case including an entitlement to have another person with them at the hearing (para 26), creating an informal setting for the hearing (para 43), allowing any procedural accommodation that may be reasonable (para 43), questioning in a sensitive and respectful manner and in a way the person understands (para 43), and encouraging a person to seek appropriate counselling or other support services after a hearing (para 43). Paragraphs 33 and 44 of the Guidelines also provide as follows:

> 33 In some circumstances, it may be appropriate for the tribunal to obtain a medical report by arranging for the person to attend a specialist…
>
> 44 If, at a tribunal hearing, the member considers it appropriate that a vulnerable person be given the opportunity to obtain assistance or be medically assessed, the member should adjourn the hearing to enable the assistance or a medical or other expert report to be obtained…

64 Fourth, there is no suggestion in the reasons of the Tribunal that it considered the Guidelines.

65 Fifth, the transcript discloses that the appellant's stutter affected the presentation of his evidence.

66 Sixth, the Tribunal partly based its adverse credit findings on the "confusing and conflicting" account the appellant gave about whether he had applied for asylum in Canada, which is readily explained by the appellant's stutter.

67 Seventh, the Tribunal placed significant weight on a psycho-social assessment conducted when the appellant was in detention, which was provided to the Tribunal after the hearing. The appellant's representative relied on the report as evidence to show that issues relating to the credibility of the appellant were affected by his mental health. The way in which the Tribunal used the psycho-social assessment was illogical. It used hearsay from the

appellant in the report to support its finding of lack of credit and concluded that the report did not evidence a mental illness because it was "premised on…significant false and misleading information" (at para 55). Moreover, the appellant was not asked to comment on the statements in the psycho-social assessment used by the Tribunal. While the appellant gave the psycho-social assessment to the Tribunal (so that s 424A did not apply), the question is whether the appellant had a meaningful opportunity to participate in the hearing as required by s 425(1).

68 In the context of this argument, it is also apparent, according to the appellant, that the conduct of the hearing was unreasonable. The questions the Tribunal asked the appellant were based on stereotypes about gay male behaviour and, at times, bordered on the offensive (such as the question whether the appellant had done anything else "of a gay nature" in Canada). The Tribunal's reasoning about the appellant's evidence of his conduct in Canada was not based on the Guidelines and in light of the appellant's obvious difficulties in giving evidence. For example, the Tribunal relied, unreasonably, on the appellant wrongly locating a gay bar in Toronto half a block away from its true location.

69 For these reasons, taken together or independently, the appellant contended that the Tribunal had not given him a meaningful opportunity to be heard on crucial matters in breach of s 425(1) of the Act, had failed to obtain a medical report which, in all the circumstances, was in breach of s 424(1) of the Act, and had acted unreasonably in assessing the appellant's credibility, thereby committing jurisdictional error. The appellant cited in support of the latter proposition the observation of Logan J in *SZRHL v Minister for Immigration and Citizenship (now Minister for Immigration and Border Protection)* [2013] FCA 1093 (***SZRHL***) at [37] where his Honour, having found that the reasoning of the Tribunal about an applicant's credit was illogical because its questions of the applicant had been based on a false factual premise, said:

> Recalling the Full Court's observation in *VAAD v Minister for Immigration and Multicultural and Indigenous Affairs* [[2005] FCAFC 117] at [39], that "[a]n assessment of credibility is not necessarily linear", it is not, in my view, open to conclude that the appellants have not, as a result of the error made by the Tribunal, been deprived of the possibility of a successful outcome on the merits of their protection visa applications. It is the existence of such a possibility which is both necessary and sufficient to warrant the granting of relief on judicial review: *Stead v State Government Insurance Commission* (1986) 161 CLR 141; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

3.3.2 Discussion

70 Consistent with the submissions for the Minister, these additional grounds of appeal cannot be sustained.

71 In *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 the High Court held that the Tribunal's refusal to exercise a discretionary power to adjourn a hearing was unreasonable in the circumstances. In *Minister for Immigration and Border Protection v Singh* (2014) 308 ALR 280; [2014] FCAFC 1 (***Singh***), the Full Court of this Court considered the same discretionary power of adjournment. At [42] in *Singh* the Full Court said:

> Unlike some grounds of review, legal unreasonableness is invariably fact dependent, so that in any given case determining whether an exercise of power crosses the line into legal unreasonableness will require careful evaluation of the evidence before the court, including any inferences which may be drawn from that evidence.

72 The Full Court in *Singh* continued as follows:

> [43] The conditioning of a power such as the one in s 363(1)(b) of the Act with a requirement of reasonableness occurs because of an implication concerning parliamentary intention in the conferral of such a power. There is, as the High Court said in *Li* 297 ALR 225 ; [2013] HCA 18, particularly at [29] per French CJ, at [63] per Hayne, Kiefel and Bell JJ, and at [88] per Gageler J, a presumption of law that Parliament intends an exercise of power to be reasonable…
> …
>
> [48] The standard of legal reasonableness will apply across a range of statutory powers, but the indicia of legal unreasonableness will need to be found in the scope, subject and purpose of the particular statutory provisions in issue in any given case. As we have said, unlike some other grounds for review of the exercise of power, the reasoning process in review for legal unreasonableness will inevitably be fact dependent.

73 Section 424(1) vests a discretionary power in the Tribunal (to get any information that it considers relevant). Section 425(1), however, imposes an obligation on the Tribunal (to invite the applicant to appear before the Tribunal).

74 The appellant's argument to the effect that the Tribunal unreasonably failed to exercise its power in s 424(1) to obtain a mental health report about the appellant cannot be sustained once the facts are taken into account, as *Singh* discloses is critical.

75 Properly analysed, the appellant's claim is that it was unreasonable for the Tribunal not to consider that a mental health report about the appellant would be relevant and thus unreasonable not to exercise its power in s 424(1) to obtain such a report.

76 However, the factual circumstances do not support the conclusion that it was unreasonable for the Tribunal not to consider that a mental health report about the appellant would be relevant.

77 In particular, the appellant's contention that he was a "vulnerable person" within the meaning of the Guidelines is not obviously correct. The appellant has not given any evidence suggesting that his ability to understand and participate in his review was impaired by reason of his anxiety and stutter. The appellant has not identified any matter or circumstance in respect of the hearing which might have been different had he not been so impaired. The transcript on which reliance was placed as disclosing the impact of the appellant's stutter and his anxiety and distress is not persuasive evidence of the existence of any impairment. Neither the appellant nor his representative suggested to the Tribunal that the Guidelines might be engaged.

78 Further, if engaged, the Guidelines are not mandatory. The only obligation is to consider the Guidelines (para 3). The Guidelines, if engaged, are not intended to be applied inflexibly (para 10). Paragraphs 33 and 44 do not oblige the Tribunal to obtain a medical report in respect of vulnerable people. They provide that the Tribunal may do so if appropriate.

79 The appellant and his representative did not request that the Tribunal exercise power under s 424(1) of the Act to obtain a medical report. To the contrary, the appellant's representative told the Tribunal that she would like further time to see if she could obtain a medical report, requested one week in which to do so, and the Tribunal granted that time as sought. The appellant's representative, within that week, submitted the psycho-social assessment.

80 As the Minister submitted, it is difficult to conclude that the Tribunal acted unreasonably in not obtaining a medical report in these circumstances. In *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594; [2011] HCA 1 (***SZGUR***) the High Court considered whether the Tribunal was bound to arrange an independent assessment of an applicant's mental health on a request to that effect being made having regard to the Tribunal's power in s 427(1)(d) of the Act to require the Secretary of the Department to arrange a medical examination. The Tribunal had affirmed the decision to refuse the applicant a protection visa, partly because of the inconsistencies in the applicant's claims and evidence. When invited to comment on these inconsistencies the applicant's agent referred to

the applicant's mental health problems as an explanation and requested that the Tribunal arrange for the applicant's mental health to be examined. The Tribunal did not do so. French CJ and Kiefel J at [20] noted that s 427(1)(d) is ancillary to s 424. They continued, in the same paragraph:

> Those two provisions [ss 427(1)(d) and 424] and s 415, which confers upon the Tribunal all the powers and discretions of the person who made the decision under review, give the Tribunal wide discretionary powers to investigate an applicant's claims. But they do not impose upon the Tribunal a general duty to make such inquiries. Relevantly to the present case, as Gummow and Hayne JJ observed in *Minister for Immigration, Multicultural and Indigenous Affairs v SGLB* [(2004) 78 ALJR 992 at 999; 207 ALR 12 at 21; [2004] HCA 32 at [43]]:
>
> > whilst s 427 of the Act confers power on the Tribunal to obtain a medical report, the Act does not impose any duty or obligation to do so.
>
> That observation was made in a context in which the Tribunal had considered it highly likely that the applicant for review was suffering from Post Traumatic Stress Disorder. The court, by majority, held the Tribunal was under no duty to inquire as to the effect of that condition.

81 At [22], their Honours said:

> The question whether s 427(1)(d) imposes a legal duty on the Tribunal to consider whether to exercise its inquisitorial power under that provision was answered in the negative by the Full Court of the Federal Court in *WAGJ v Minister for Immigration and Multicultural and Indigenous Affairs* [[2002] FCAFC 277]. The court held that absent any legal obligation imposed on the Tribunal to make an inquiry under s 427(1)(d) "[b]y a parity of reasoning … there is no legal obligation to consider whether one should exercise that power. That view is correct. That is not to say that circumstances may not arise in which the Tribunal has a duty to make particular inquiries. That duty does not, when it arises, necessarily require the application of s 427(1)(d).

82 The appellant's contention that it was unreasonable for the Tribunal not to obtain a medical report is inconsistent with the reasoning in *SZGUR*. The Tribunal was not obliged to consider exercising the power in s 424(1) to obtain a medical report, particularly in circumstances where the appellant had not requested the Tribunal to do so and, indeed, had requested time to obtain his own medical report, time which the Tribunal allowed. Not having been bound to consider the exercise of the power in s 424(1), it cannot have been unreasonable for the Tribunal not to have exercised that power.

83 Insofar as the use the Tribunal made of the psycho-social assessment is concerned, the complaint about lack of logic should not be sustained. The Tribunal had found the appellant to lack credibility on grounds separate from the psycho-social assessment. The Tribunal's comment that the psycho-social assessment was based on significant false and misleading

information was a result of the conclusions the Tribunal had reached irrespective of the psycho-social assessment. The Tribunal did not use the psycho-social assessment to bolster its conclusions about the appellant's lack of credibility. The appellant's submission that the Tribunal did not ask the appellant about the comments in the report goes nowhere. There is no basis for concluding that the Tribunal had any obligation to do so. The Tribunal was not persuaded the psycho-social assessment disclosed any mental illness. The Tribunal's preparedness to accept that the appellant had been sexually abused, had a stutter, and that his stutter was worse when he was anxious, did not mean that the Tribunal was bound to obtain another report about his mental condition for the reasons already given.

84 The question posed by the appellant, whether he had a meaningful opportunity to participate in the hearing as required by s 425(1) of the Act, must be answered in the affirmative. As the Minister put it:

> He attended the hearing. He made claims and put forward evidence. He was represented. His representatives made submissions before, during and after the hearing.

85 Insofar as complaints are made about the conduct of the hearing being unreasonable due to the Tribunal making unwarranted assumptions based on stereotypes about gay male behaviour and asking offensive questions, the Minister's response as follows is a sufficient answer.

> …it was the appellant who claimed to have frequented gay bars in Toronto…The delegate asked him to name the bars that he claimed he had attended, and he named them…The Tribunal found that the names of the bars he gave were not the names of gay bars in Toronto and challenged him about this. These questions arose as part of a perfectly legitimate questioning of the appellant's actual claims.

86 The facts of the present case do not bear any resemblance to those considered in *SZRHL*. The Tribunal did not act on any false factual premise in the present case. Accordingly, the proposition that reasoning about credibility is not linear, which readily may be acknowledged, cannot assist the appellant.

3.4 Conclusions

87 None of the appeal grounds can be sustained. It follows that the appeal must be dismissed, with costs.

4. SZUBU

4.1 Extension of time and leave to appeal applications

88 The Federal Circuit Court dismissed the applicant's claims for constitutional relief directed to the Tribunal on a summary basis on 3 July 2014: *SZUBU v Minister for Immigration and Border Protection & Anor* [2014] FCCA 1498. That summary dismissal was done pursuant to r 44.12 of the *Federal Circuit Court Rules 2001* (Cth). A decision summarily to dismiss a claim is taken to be interlocutory by r 44.12(2). An appeal from the Federal Circuit Court to the Federal Court from an interlocutory order does not lie as of right but requires an antecedent grant of leave: *Federal Court of Australia Act 1976* (Cth) s 24(1A). By r 35.13 of the *Federal Court Rules 2011* (Cth) such an application must be filed with this Court within 14 days.

89 Because the orders of the Federal Circuit Court were made on 3 July 2014, the applicant was obliged, therefore, to file his application for leave to appeal with the Court before the Registry closed on 17 July 2014.

90 On that day the applicant sought to file with the Registry a notice of appeal. He was informed by the Registry that he needed to file an application for leave to appeal instead and that if he did not do this by 4:30 pm he would also need to file an application for an extension of time in which to seek leave. This message was conveyed by an email which the applicant did not see for a couple days presumably because he was in immigration detention. On 21 July 2014 nevertheless he filed an application for an extension of time and leave to appeal.

91 On the present hearing the Minister confined his opposition to both applications to the single argument that the underlying proposed appeal was without merit.

4.2 Background matters

92 The applicant is a citizen of India born in Punjab. He is nearly thirty years old. He is a member of the Ramdasia caste which is regarded as historically disadvantaged in India. He obtained an Indian passport in 2006 and applied in the same year for the issue of an Australian student visa. That visa was issued in September 2007 and he shortly afterwards travelled to Australia arriving here on 1 October 2007. He then studied a course in community welfare. The terms of his visa expired, however, in due course (it is not precisely clear when) and once this had occurred he became an unlawful non-citizen and liable to be

removed from Australia and until then held in immigration detention. On 22 August 2013 he was apprehended and has, since that time, been held in detention by the Commonwealth.

93 A little over a month after he was detained the applicant applied for a protection visa on 27 September 2013. A delegate of the Minister refused that application. This decision was affirmed by the Tribunal on review and it was the Tribunal's decision which the applicant then sought judicial review of in the Federal Circuit Court.

94 Before the Tribunal it was necessary for the applicant to establish that he had a well-founded fear of persecution for a Convention reason. This he sought to establish by three different means:

(a) he claimed to fear harm in India from the family of a Jat Sikh woman with whom he had had a relationship in 2006 prior to his departure. As a member of the Ramdasia caste he was from a lower caste than this woman and the woman's family made threats against him. It was for that reason, so it was said, that he left India and came to Australia in 2007;

(b) he claimed to be bisexual and feared persecution for that reason if returned to India; and

(c) he claimed that he feared persecution in India if returned there because some of his personal details had been made public on the Department's website.

95 Issue (c) which involved a sur place claim is not the subject of the applicant's case in this Court and may be put to one side. The Tribunal was disinclined to accept either of (a) or (b) because it did not accept that the applicant was telling the truth. It thought he was lying because of his failure to mention the relationship with the Jat Sikh woman in 2006 or his bisexuality at a 'compliance interview' conducted with him on the day of his apprehension. Because it did not believe his claims the Tribunal affirmed the decision of the delegate to refuse the grant of the visa.

96 The proceedings before the Federal Circuit Court were conducted by the applicant in person with the aid of an interpreter. On the arguments presented to it that Court was unable to identify any jurisdictional error and hence dismissed the application on the summary basis indicated.

4.3 The proceedings in the Federal Court

97 The applicant's applications for an extension of time in which to apply for leave to appeal, and if that extension be granted, leave to appeal must be heard by a single judge unless a judge directs the application be heard and determined by a Full Court: *Federal Court of Australia Act* s 25(1AA) and (2). However, the listing of the SZTWD and SZTGV matters before a Full Court made it convenient for the applicant's claims to be heard by the same Bench.

98 If the applicant were permitted to appeal he proposes that two grounds would be pursued. These would be:

1. The Second Respondent's decision made on 24 April 2014 was affected by jurisdictional error in that the Second Respondent failed to comply with ss 424A and 424AA of the *Migration Act 1958*.
2. The Federal Circuit Court erred in failing to find that the Second Respondent's decision made on 24 April 2014 was affected by jurisdictional error.

99 In a nutshell, the applicant contends that the Tribunal infringed s 424A because it did not notify him that it was intending to use the contents of (or, in fact, the absences from) his compliance interview as part of its process of reasoning in affirming the delegate's decision.

4.4 Discussion

100 It is useful to begin with the compliance interview. This was conducted by an officer of the Department on 22 August 2013 at 2:19 pm. The officer completed a form entitled 'Compliance Client Interview' which was several pages long. The officer incorporated into this form various answers given by the applicant during the course of the interview. Those answers were given in response to questions appearing on the form. The relevant parts for the purposes of the present application were as follows:

> Question 22: "Are there any reasons why you cannot return to your home country? What are those reasons?" The officer ticked "Yes" and wrote "*Two days late when I applied for visa – that's why I didn't get it. Been to MRT*"
>
> Question 23: "Are you willing to depart Australia? (If yes, when? If no, why not?)". The officer ticked "No" and wrote:
>
> *"No" "I don't want to go there."*
> *Q. Why?*
> *A. "Just don't want to go there"*
>
> A section in the box entitled "Any additional information or statements from client"

in which the officer wrote:

> *Q. What was your intention to come to A/a?*
> *A. "Make money – make my family happy. Many things happen when I come here – Gov. changed rules."*
> *Q. If you weren't located today – What were your plans?*
> *A. "Just to stay"*

101 It will be observed that the applicant is not recorded as having mentioned during the interview either the Jat Sikh woman (or her furious family) or his bisexuality as reasons for not desiring to return home (Q 22), for not wanting to leave Australia (Q 23) or as explaining why he came to Australia in the first place (i.e. 'Any additional information'). The Tribunal reasoned that the failure of the applicant to mention these matters during this interview was a good reason for disbelieving him. It expressed itself this way (at [51]-[55]):

> 51. The Tribunal noted that the applicant was interviewed by compliance shortly after being detained for being an unlawful non-citizen in Australia. He was asked pursuant to s 424AA of the Act, to explain the responses he provided when interviewed by compliance if he feared returning to India for any reason and it was noted that no mention was made by the applicant of his relationship with the Jat Sikh girl, his caste, or his sexuality. He was advised that the information contained in the compliance interview, subject to his response could form the reason or part of the reason for the Tribunal affirming the Department's decision as the information could impact adversely on his credibility. He was asked why he did state that his intentions were to make money and to make his family happy and agreed that he did say that he came here to make money. He further complained about changes of the rules relating to student visas after he arrived in Australia. He further indicated that had he not been located by compliance in Australia that he would have remained here. He maintained that he was in danger in India.
>
> 52. The Tribunal considered the applicant's responses, but rejects his explanations. Had he feared returning to India for reasons of his inter-caste relationship and fear of his girlfriend's family, or his sexual orientation, that he would have so mentioned in his compliance interview. The Tribunal finds that the applicant's claims in relation to his caste, his claimed inter-caste relationship and his sexual orientation and fear of harm resulting from these claims not to be credible. As these are the central elements of the applicant's claim, the Tribunal finds that there is insufficient credible evidence upon which to make a finding that the applicant is a Convention refugee or that he is an individual in respect of whom Australia owes protection obligations. The Tribunal does not believe that the applicant was in an inter-caste relationship or that he suffered any harm as a result of a relationship that never happened. It further does not believe that the applicant went to the police to report attacks that never took place.
>
> 53. The applicant had no documentary evidence to corroborate his claimed relationship with the girl, in relation to his caste, or his claimed sexual orientation. In the Tribunal's view, this further seriously undermines his credibility.

> 54. It is the applicant's own evidence that he last had contact with his girlfriend before he left India. The relationship is over and has been for many years. He never met her family. He last saw her in 2007. The Tribunal finds that it is implausible that the girl's family would have any continued interest in the applicant under the circumstances and that it is not credible that her family continues to harass the applicant's family in India in order to locate the applicant.
>
> 55. In relation to the applicant's claims to be bisexual the Tribunal finds his claims not be credible. No mention was made of any claims relating to the applicant's sexual orientation in his original protection visa application. He raised the issue for the first time in his departmental interview. The applicant's evidence relating to his claimed sexual relations with his male cousin were not credible. The Tribunal notes that the applicant claimed only one same sex relationship in Australia in 2012. This claimed former partner did not testify on the applicant's behalf and no corroborating evidence by anyone was provided relating to the applicant's claimed sexual orientation. The applicant's limited knowledge of the LGBTI community in Sydney was at best superficial and he was not aware of when Mardi Gras takes place even though he claimed to have attended. He was unaware of gay publications or internet sites in Australia. The Tribunal considered all the evidence before it and finds that the applicant is not credible in relation to his claimed sexual orientation.

102 It is apparent therefore that the Tribunal's process of reasoning involved (a) a consideration of what had *not* been said at the compliance interview; (b) the assertion of a forensic principle that if the applicant's version were true then he would have mentioned it at that time; and (c) a deduction that because it was not mentioned at that time the account was false. The absence of any reference to the Jat Sikh woman or his bisexuality was to be seen as a matter from which one could reason to the falsity of his account.

103 The applicant's argument was that this matter was 'information' which was required to be disclosed to the applicant within the meaning of s 424A. However, for the reasons we have already given, an absence of evidence is not information within s 424A: *SZBYR* at [18]. It follows that proposed appeal ground one cannot succeed.

104 The applicant faces an additional difficulty which is that a partial transcript of the Tribunal hearing suggested that the Tribunal had raised the compliance interview with the applicant and had done so specifically in the context of s 424AA. It is not necessary to set the transcript out in full. It suffices to say that his failure to mention the Jat Sikh woman or the applicant's bisexuality in his responses to Question 22 or 23 or under the 'Additional Information' heading was raised directly with him and he was informed that the failure might form part of the Tribunal's reasons.

105 The applicant's response to the transcript was to submit that it did not meet the requirement of s 424AA(b)(i) that the Tribunal "as far as is reasonably practicable" ensure that the applicant understood why the information was relevant to the review and the consequence of the Tribunal relying upon it.

106 We do not accept that this contention is made good. Two extracts from the transcript show that the applicant understood precisely what was taking place. First, the Tribunal introduced the topic of the compliance interview this way:

> TRIBUNAL: And just one final question for you sir, um, and this arises from the compliance interview that was conducted shortly after you were detained. And, um, legally I'm required to put this to you under the provisions of section 424AA of the Act. And that provision requires the Tribunal to invite you to comment on or respond to certain information which subject to your comments or response would be the reason or part of the reason for affirming the decision under review.
>
> Now the Tribunal hasn't made up its mind about the information but, uh, because of the legislation it has to be put to you in this way. And the particulars of the information are, uh, the record of the compliance interview, and just to refresh your memory that took place on the 22nd of August 2013 at 2:19 pm. And, um, the record of interview in relation to questions 22 and 23 indicates as follows….
>
> [Questions 22 and 23 were then paraphrased with the applicant's responses]
>
> TRIBUNAL: Now you were asked what, whether there were any reasons why you could not go to your home country, but there's no mention of your relationship with your ex-girlfriend, the fact that they caused harm to you, that they're still after you, that you fear that they would kill you, that you're a bisexual, um, or that you fear return because of your caste.
>
> INTERPRETER: At that time then they when they detained me, I was very depressed at that time. I didn't know what to say.
>
> TRIBUNAL: Any other reason why you didn't mention it at that time?
>
> INTERPRETER: And in one line I also said that I can't go back because I don't feel safe over there. And also I don't know like, how, what to say to government to do with me, and I was depressed and it was like suddenly I was, I got caught.

107 The applicant's explanation for his failure to mention his present claims at the compliance interview was, therefore, that he was depressed at the time he was apprehended. He gave a similar answer in response to question 23.

108 In relation to the balance of the matters set out above from the compliance interview the applicant sought to justify what he had said without engaging with the Tribunal's basic inquiry of why he had not mentioned his present claims at that time. Read in isolation they

might suggest that he had not understood the significance of what he was being asked. But in the context of his earlier response (set out above) this is not a tenable view.

109 Finally, at the end the Tribunal invited the applicant to put in any additional material that came to his mind within a week. This was sufficient compliance with s 424AA(b)(iii).

4.5 Conclusion

110 We conclude that had s 424A been engaged (which it was not) the Tribunal would have successfully utilized s 424AA. Consequently, there would be no breach of s 424A either. In those circumstances, proposed appeal ground 1 has no reasonable prospects. No separate argument was advanced in relation to proposed appeal ground 2. The applications should be dismissed with costs.

5. SZTWD

5.1 Extension of time and leave to appeal applications

111 The applicant seeks an extension of time and leave to appeal from a judgment dated 6 June 2014 of the Federal Circuit Court. The Federal Circuit Court dismissed an application for judicial review of the Tribunal decision dated 20 January 2014. The Tribunal affirmed a decision of the Minister's delegate, who had rejected his application for a Protection (Class XA) visa.

112 The applicant relied on an amended application for an extension of time and leave to appeal and a draft amended notice of appeal. He was represented by Ms Zelie Heger on a pro bono basis.

113 As noted above, the Minister opposed the extension of time and the grant of leave to appeal on the sole basis that the proposed grounds of appeal were wholly without merit.

5.2 Background matters

114 The applicant is a Thai citizen who first arrived in Australia on 5 May 1990 on a visitor's visa. He remained in Australia unlawfully for several years thereafter before making his first application for a protection visa on 26 February 1996. His application was refused and his appeal to the Tribunal was rejected. He was removed from Australia on 15 August 1997.

115 On 14 May 1998, the applicant re-entered Australia using a false passport which contained a visitor visa. That visa expired on 14 August 1998. Thereafter the applicant

remained unlawfully in Australia until he was apprehended on 14 June 2013. Shortly thereafter, he lodged a second application for a protection visa. That application was refused by the Minister's delegate on 9 September 2013, whereupon the applicant applied again to the Tribunal.

116 In broad terms, the applicant's claims to be entitled to a protection visa were as follows. He claimed that he was a homosexual and that his sexuality was not accepted in his community. He claimed that, prior to coming to Australia, he was in a relationship with a man (**NK**), who was a local drug dealer. The applicant claimed that he had looked after NK's cash and that he was robbed of some of the money (in excess of one million baht). The applicant claimed that NK accused him of taking the money and threatened to kill him unless he paid the money back. The applicant claimed that if he returned to Thailand, he would be killed by NK. He also claimed that if he were returned to Thailand he would be imprisoned because he left Thailand using another person's identity.

117 In the course of the Tribunal hearing, the applicant stated that he no longer feared persecutory harm by reason of his sexual orientation, but he confirmed his concerns that he would be killed by NK. He also said that he would be gaoled for his illegal departure and that he would be placed at risk of harm in gaol because of his sexual orientation.

118 The Tribunal did not find the applicant to be a credible witness. It found that he was prepared to supply false information to obtain a favourable immigration outcome. It also found that some of his claims were vague and inconsistent. Furthermore, the Tribunal found that the applicant's delay of 14 years in applying for protection cast doubt over his credibility. It rejected his explanation that he was not aware that he could apply for protection and pointed to the fact that he had previously made an unsuccessful application for protection in Australia. The Tribunal did not accept that the applicant was accused of stealing money from NK or that he was ever threatened by him. It concluded that it was not satisfied that there was a real chance that the applicant would suffer serious or significant harm if he were to return to Thailand by reason of his claimed dispute with NK. Although the Tribunal found that the applicant could be punished in Thailand for having used a fraudulently altered passport, it said that the relevant Thai laws were of general application and were not discriminatory in their terms. Accordingly, it found that he would not suffer harm under the *Convention Relating to the Status of Refugees 1951, as amended by the Protocol Relating to the Status of Refugees 1967* (**Refugee Convention**).

119 Finally, after referring to country information, the Tribunal concluded that the penalty the applicant might face for breaching Thai laws did not amount to serious harm for the purposes of s 36(2)(aa) of the Act. In reaching that conclusion, the Tribunal relied on country information which, it found, suggested that if the applicant was subject to a legal process for leaving Thailand unlawfully, the outcome of that process might be a fine and a suspended sentence. The Tribunal added that it was not satisfied that there was a real risk that the applicant, as a first time offender, would be imprisoned. The Tribunal stated that, even if that finding were wrong and the applicant was imprisoned, it was not satisfied that the country information provided substantial grounds to conclude that there was a real risk that he would be subjected to significant harm in prison because of his sexual orientation.

120 The applicant sought judicial review in the Federal Circuit Court. He represented himself. The grounds of his application were as follows (errors in the original):

1. Appeals RRTs decision for refusing to grant the requested visa.
1. Never intended to break the law of any country.
2. Decided to break several laws in both Thailand and Australia out of necessity for fear of my life.
3. Life at Villawood Detention Centre is safer than any Thai prison. I believe I will definitely be harmed at the Thai prison.

121 The Minister sought an order from the Federal Circuit Court pursuant to r 44.12 of the *Federal Circuit Court Rules* that the applicant's judicial review application be dismissed on the basis that it did not raise an arguable case for relief. That application was successful. The Federal Circuit Court summarised the Tribunal's reasons for rejecting the applicant's judicial review application, including its adverse credibility findings. Her Honour observed at [29] of her reasons for judgment that such findings were "a matter par excellence for the RRT". Her Honour found that the applicant had not identified any error in the Tribunal's reasons for decision which suggested that they were capable of review by the Court or asserted any jurisdictional error. Her Honour added that, while she made no final decision as to whether or not the Tribunal's decision was affected by jurisdictional error, none was apparent on the face of the decision record, nor was there anything on the face of that record which suggested that the Tribunal's findings were not open to it.

5.3 The proceedings in the Federal Court

122 As noted above at [112], in the Full Court, the applicant relied on an amended application for extension of time and leave to appeal. The grounds of the amended application were as follows:

> **Grounds of application**
>
> 1. The decision of the primary judge is attended by sufficient doubt to warrant consideration by an appellate court.
> 2. The primary judge erred in failing to find that the Second Respondent's decision was affected by jurisdictional error.
> 3. If an extension of time and leave to appeal were to be refused, substantial injustice would result in that:
>
> a. the decision of the Federal Circuit Court had the effect of finally determining the Applicant's application for a protection visa;
> b. the Applicant is now precluded, subject to the favourable exercise of the First Respondent's discretion under s. 48B of the *Migration Act 1958* (Cth), from making a fresh application for a protection visa while he remains in the migration zone;
> c. in or about February 2014, the First Respondent or the Department of Immigration and Border Protection, by his/its agents or servants, released the Applicant's personal information by publishing it on the world wide web (the **Data Breach**);
> d. the Applicant's personal information so released included his name, date of birth, nationality, gender, details about his detention (when detained, the reason for his detention and where) and also the identity of any family members in detention;
> e. on 24 September 2014, by letter to the Applicant, the Department of Immigration and Border Protection invited the Applicant to make submissions relating to the impact of the Data Breach on his ability to return to his home country or country of usual residence;
> f. it is not clear what process or power is involved in the Minister considering those submission; and
> g. should leave to appeal be granted, the appeal be allowed and the matter be remitted to the Tribunal, the Tribunal would be in a position to consider more fully the impact of the Data Breach on the Applicant's claims.

123 The amended notice of appeal raised the following proposed grounds of appeal:

> 1. The primary judge erred in failing to conclude that the Tribunal's rejection of the Applicant's claim that he would suffer harm at the hands of a gang leader was irrational or illogical.
> 2. The primary judge erred in failing to conclude that the Tribunal failed to comply with ss. 424AA and 424A of the *Migration Act 1958* (Cth).
> 3. The primary judge erred in failing to conclude that the Tribunal's rejection of the Applicant's claim that he would suffer harm at the hands of a gang leader was legally unreasonable.

124 It might be noted that:

(a) the applicant did not raise any proposed ground of appeal concerning the Data Breach; and

(b) in oral argument, Ms Heger said that proposed ground 3 relating to unreasonableness was not pressed.

125 The Minister's solicitor filed an affidavit which annexed a copy of the transcript of the Tribunal's hearing. The transcript was not in evidence before the primary judge.

126 For the following reasons, the application for an extension of time and leave to appeal should be dismissed.

5.4 Discussion

5.4.1 Proposed appeal ground 1 (irrationality and illogicality)

127 It is desirable to set out the following passages from the Tribunal's reasons for decision which underpin its adverse findings on credibility. These passages ([50]-[52]) are the focus of the applicant's claim that the Tribunal's reasoning was irrational or illogical.

> I had difficulty reconciling the applicant's evidence that Mr NK would be motivated to kill him if he returned to Thailand, with the fact that the applicant's own evidence does not indicate that Mr NK attempted to take any action against the applicant (or in his absence his family) after the applicant failed to repay the one million baht he was accused of stealing from Mr NK. Despite claiming that he fled Thailand after he failed to repay Mr NK 1 million baht, the applicant's mother and brother remained living in the same village as Mr NK: the applicant's younger brother continued to buy drugs from Mr NK and his mother lived in the village until she passed away last year. The applicant testified he did not have any contact with Mr NK after he left Thailand. The applicant's evidence does not indicate that Mr NK took any action to demand the applicant repay the money by making threats to his mother or brother. In response to the tribunal's questions, he said it was a personal matter between him and Mr NK.
>
> … I do not consider the applicant has adequately explained why, despite claiming Mr NK would still be motivated to him kill him, neither the applicant or his family were threatened or harmed by Mr NK after the applicant failed to repay the one million baht within the timeframe stipulated by Mr NK.
>
> … However, I consider the fact that the applicant's family was able to remain living in his village after he fled Thailand and that there is no credible evidence that Mr NK attempted to take any action against the applicant when he failed to repay the one million baht debt, casts doubt on the credibility and plausibility of the applicant's claims.

128 Ms Heger argued that this reasoning was illogical or irrational because:

(a) the unstated premise that if NK was prepared to harm the applicant then he would necessarily be prepared to threaten or harm the applicant's brother or mother was not borne out by "ordinary human experience";

(b) there was no proper basis in the evidence for inferring that NK could or would threaten the applicant's family; and

(c) it was also illogical or irrational to rely on the absence of any threats being made by NK to the applicant after he fled to Australia.

129 The Minister submitted that, to succeed on this proposed ground of appeal, the applicant must show that the Tribunal's state of satisfaction was one to which no rational or logical decision-maker could arrive on the same evidence (citing *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; [2010] HCA 16 at [130] per Crennan and Bell JJ) (***SZMDS***).

130 As noted in *SZSSC v Minister for Immigration and Border Protection* [2014] FCA 863 at [71] there may currently be a difference of opinion in the Court as to whether the grounds of irrationality or illogicality relate to the ultimate outcome or result, as opposed to the decision-maker's reasoning. The Minister's submission suggests the former, whereas the applicant's argument focuses on the latter. It is sufficient for the purposes of this application to deal with the matter on the basis upon which it has been argued by the applicant.

131 We do not accept that the Tribunal's reasoning in the relevant passages relied upon by the applicant was irrational or illogical in the manner described in *SZMDS*. In effect, the applicant invites the Court to take a different view as to the merits of the material before the Tribunal, which is impermissible and does not accord with the test in *SZMDS*. We accept that the Tribunal's adverse credibility findings are susceptible, in principle, to judicial review, but we have not been persuaded that the Tribunal's reasoning was irrational or illogical in the relevant sense. We agree with the primary judge that the Tribunal's findings in respect of the applicant's lack of credibility were plainly open to be made on the evidence before the Tribunal and did not disclose irrational or illogical reasoning.

132 In particular, in assessing the applicant's credibility, we consider that:

(a) it was not irrational or illogical for the Tribunal to take into account the fact that NK, whom the applicant alleged to be a violent gangster and who lived "very close in the same village", did not threaten or harm the applicant's mother or brother (who lived

with the applicant in the family home) after the applicant fled the village following NK's assault of him and demand that he repay the money;

(b) in circumstances where the applicant claimed that: NK lived very close to his family home and in the same village, they had had an intimate personal relationship for some months, NK was a violent gangster who had assaulted the applicant and accused him of stealing a substantial sum of money from him and the applicant's younger brother was buying drugs from NK and "was in [NK's] group", there plainly was a proper basis for inferring that NK could or would threaten the applicant's family after he fled Thailand; and

(c) it is not irrational or illogical for the Tribunal to rely on the absence of any threats having been made by NK to the applicant after he fled the country in circumstances where, having regard to all the circumstances described above, NK could have threatened the applicant via his family who remained in the village after the applicant had fled.

5.4.2 Proposed appeal ground 2 (ss 424A and 424AA of the Act)

133 It is to be noted that this ground was not argued below.

134 For the reasons given above in the introductory part of these reasons for judgment, we consider that proposed ground 2 cannot succeed. That is because, as the Minister submitted, the foundations for the application of s 424A simply do not arise. As the High Court found in *SZBYR* at [18], "information" for the purposes of these provisions is related to the existence of evidentiary material or documentation and "not the existence of doubts, inconsistencies **or the absence of evidence**" (emphasis added). The information which the applicant argues fell within the requirements of s 424A was described in his outline of written submissions as "information relating to the absence of any threat to the Applicant or his family". In light of *SZBYR*, such information is not "information" within the meaning of s 424A. Accordingly, the proposed ground of appeal cannot succeed.

5.4.3 Proposed ground 3 (legal unreasonableness)

135 As noted above, this ground was not pressed.

5.5 Conclusions

136 The applications for leave to extend time and leave to appeal should be dismissed and the applicant ordered to pay the Minister's costs.

I certify that the preceding one hundred and thirty-six (136) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Perram, Jagot and Griffiths.

Associate:

Dated: 22 January 2015