# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*SZCLY v MINISTER FOR IMMIGRATION & ANOR* *[2009] FMCA 569*

MIGRATION – Application to review decision of Refugee Review Tribunal – whether jurisdictional error in relation to consideration of relocation – whether failure to comply with ss.424(3), 424A or 425 of the Migration Act – whether error of law.

*Migration Act 1958* (Cth), ss.424, 424A, 424B, 424C, 425, 426, 427, 441A

*Abebe v The Commonwealth of Australia* (1999) 197 CLR 510
*Appellant P119/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 230
*Curragh Queensland Mining Limited v Daniel and Others* (1992) 34 FCR 212
*Januzi v Secretary of State for the Home Department* [2006] 2 AC 426
*Luu and Another v Renevier* (1989) 91 ALR 39
*Minister for Immigration and Citizenship v SZLFX* [2008] FCAFC 125
*Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597
*Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518
*Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992
*NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1
*NAIZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 37
*NAOA v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 241
*Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437
*Raru v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 35 ALD 373
*Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405
*Re Minister for Immigration and Multicultural Affairs; Ex parte S154/2002* (2003) 77 ALJR 1909
*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014
*SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 77 ALD 402
*SZAIX v Minister for Immigration and Multicultural and Indigenous Affairs*

*and Another* (2006) 150 FCR 448
*SZAJB v Minister for Immigration and Citizenship and Another* (2008) 168 FCR 410
*SZATV v Minister for Immigration and Citizenship and Another* (2007) 233 CLR 18
*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152
*SZBJI v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 216
*SZBQS v Minister for Immigration & Anor* [2008] FMCA 812
*SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190
*SZEPZ v Minister for Immigration and Multicultural Affairs and Another* (2006) 159 FCR 291
*SZFDV v Minister for Immigration and Citizenship and Another* (2007) 233 CLR 51
*SZGIY v Minister for Immigration and Citizenship* [2008] FCAFC 68
*SZHKA and Another v Minister for Immigration and Citizenship and Another* (2008) 172 FCR 1
*SZIAR v Minister for Immigration and Citizenship and Another* (2008) 220 FLR 232
*SZIZO and Others v Minister for Immigration and Citizenship and Another* (2008) 172 FCR 152
*SZJYA v Minister for Immigration and Citizenship (No 2) and Another* (2008) 102 ALD 598
*SZKCQ v Minister for Immigration and Citizenship and Another* (2008) 170 FCR 236
*SZKGF v Minister for Immigration and Citizenship* [2008] FCAFC 84
*SZKTI v Minister for Immigration and Citizenship and Another* (2008) 168 FCR 256
*SZLPO v Minister for Immigration and Citizenship* [2009] FCAFC 51
*SZLWQ v Minister for Immigration and Citizenship and Another* (2008) 172 FCR 452
*SZLYR v Minister for Immigration & Anor* [2008] FMCA 1322
*Television Capricornia Pty Ltd v Australian Broadcasting Tribunal* (1986) 13 FCR 511
*VAAD v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 117
*WALT v Minister for Immigration and Multicultural and Indigenous Affairs* [2007] FCAFC 2
*Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518

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| Applicant: | SZCLY |
| First Respondent: | MINISTER FOR IMMIGRATION & CITIZENSHIP |
| Second Respondent: | REFUGEE REVIEW TRIBUNAL |
| File Number: | SYG 1337 of 2008 |
| Judgment of: | Barnes FM |
| Hearing date: | 2 December 2008 |
| Date for Last Submission: | 12 December 2008 |
| Delivered at: | Sydney |
| Delivered on: | 26 June 2009 |

## REPRESENTATION

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| Counsel for the Applicant: | Dr M Allars |
| Counsel for the Respondent: | Mr T Reilly |
| Solicitors for the Respondent: | Sparke Helmore |

## ORDERS

(1) That a writ in the nature of certiorari issue directed to the second respondent, quashing the decision of the Refugee Review Tribunal made on 8 April 2008 in Tribunal case file number 071526655.

(2) That a writ in the nature of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent made on 19 November 2001.

**FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY**

**SYG 1337 of 2008**

**SZCLY**
Applicant

And

**MINISTER FOR IMMIGRATION & CITIZENSHIP**
First Respondent

**REFUGEE REVIEW TRIBUNAL**
Second Respondent

# REASONS FOR JUDGMENT

1. This is an application for review of a decision of the Refugee Review Tribunal made on 8 April 2008 and handed down on 6 May 2008 affirming a decision of a delegate of the first respondent not to grant the applicant a protection visa.

2. The applicant, a citizen of Tanzania from the island of Zanzibar, arrived in Australia in January 2001 and applied for a protection visa. The application was refused and the applicant sought review by the Tribunal. Two previous decisions of the Tribunal affirming the delegate's decision ($T_1$ and $T_2$) were set aside by consent orders made by this Court on 19 April 2006 and 15 June 2007, respectively. The Tribunal as most recently constituted ($T_3$ or the Tribunal) held two hearings that the applicant attended, on 22 August 2007 and 26 February 2008.

3. The applicant claimed in essence to fear persecution in Tanzania for reason of his political opinion as a member and activist in the Civic United Front (CUF), a political party that opposed the inclusion of Zanzibar in Tanzania. He claimed that he did not accept the 1964

union of Zanzibar and Tanganyika in Tanzania. The applicant claimed that he had come to the attention of the police and the authorities, that he had been arrested on a number of occasions, in particular in April 1995 and January 2000 when he had been arrested, detained and tortured. He claimed that he was arrested again in August 2000, charged with an offence, released on bail and then warned by CUF leaders that he should leave Zanzibar. He claimed that he hid on the mainland in Dar es Salaam before coming to Australia with the assistance of the CUF on a false passport in January 2001.

4. The applicant provided a copy of what he said was his true passport to the Department. The Department advised him that the Document Examination Section had indicated that that passport displayed alterations consistent with photo substitution. The applicant elaborated on his claims and addressed the question of his identity in a Departmental interview and written submissions. His application was refused by a delegate of the first respondent.

5. After he sought review the applicant made written submissions and gave oral evidence at hearings conducted by each Tribunal. As discussed further below, the applicant also responded to information put to him by $T_1$ under s.424A of the *Migration Act 1958* (Cth) that had been obtained by $T_1$ from a CUF official and a lawyer. He provided further supporting documents and information to $T_2$ and to $T_3$. In particular the applicant provided $T_3$ with information from a psychiatrist and a psychologist to whom he had been referred due to concerns about his depressed mood and extreme psychological stress. In a lengthy s.424A letter $T_3$ invited the applicant to comment on matters such as his identity, changes in the detail of his claims, information from the CUF party and a CUF lawyer and independent country information as well issues in relation to the applicant's connection with Dar es Salaam. The applicant responded to this letter.

## Tribunal decision

6. In its reasons for decision the Tribunal set out at length the applicant's claims and information provided in connection with his protection visa application and in the course of the reviews by $T_1$, $T_2$ and $T_3$, including

his evidence at the $T_1$ and $T_2$ hearings and at the two hearings conducted by $T_3$ and other information before it from various sources.

7. The Tribunal found that (as the applicant had claimed to the Department) he had entered Australia using a false passport. It expressed doubt about whether the applicant's identity was as claimed, given the expert opinion that there was evidence of tampering or alteration indicative of photo substitution in the passport he claimed was his true passport. However it considered the other information he had provided about his identity, accepted that he followed the Moslem religion and, notwithstanding its concern about the applicant's actual identity and certain "*oddities*" in the information he provided, proceeded on the basis that the applicant was who he claimed to be (a person of a specified name, that the Tribunal accepted may be spelt in a number of ways, who was born in Tanzania on a particular date in 1960). It also accepted that a CUF membership card provided by the applicant (which bore a different middle name) was his membership card.

8. The Tribunal outlined the applicant's claims to fear persecution in Tanzania, essentially because he was a member and an activist in the Civic United Front (CUF) Political Party. It summarised his claims that he first attended CUF political meetings in 1991 (as he told $T_1$ at the hearing) or 1990 (as he stated in the hearing conducted by $T_3$). He also claimed that he came to the attention of the police and authorities in 1991 and that he had been refused a passport because police watched the CUF meetings. He claimed he had been to court many times. At the $T_1$ hearing he claimed that Zanzibar was a small place so that he was known. Subsequently he claimed that he had not been taken to court in 1991. At the $T_2$ hearing he claimed that he had been arrested numerous times prior to 1992, but only arrested three times after 1992. At the $T_3$ hearing he claimed that he had attended many CUF meetings from 1990 to 1993 and that he was detained and tortured by the police many times.

9. The Tribunal recorded that at the $T_1$ hearing the applicant claimed that the CUF was formally established in May 1992. At the $T_3$ hearing he claimed that the CUF started in 1992 and was registered in 1993. He claimed he worked for the party, but that he only became a member in

1994. In April 1994 he was elected to the position of Secretary for Mobilisation for a particular branch in Zanzibar and was re-elected every two years thereafter. He claimed that he then undertook recruitment for the CUF in Zanzibar and at times he was sent to Dar es Salaam.

10. The applicant claimed that in April 1995 he was arrested and detained for two weeks and tortured. He claimed that his home was searched on occasion and money stolen. In January 1996 his CUF membership card was taken. He later obtained a fresh membership card issued in Dar es Salaam. In January 2000 he was arrested and detained for ten days and tortured before being released without charge.

11. The applicant also claimed that during the August 2000 elections he was arrested and detained after a voter registration fracas at a particular voting station. He claimed he was bailed by the CUF and warned by party members and police that he should flee Zanzibar so he went to hide in Dar es Salaam. He claimed that the CUF organised a false passport for him and that he left Tanzania illegally in January 2001.

12. The Tribunal recorded the applicant's claim that he feared returning to Tanzania because he had skipped bail and was still wanted by the authorities and that he feared returning to Tanzania and Zanzibar because the current government was anti-CUF. The applicant also claimed that Mr Haji, a CUF lawyer who had represented him in August 2000, but who had denied this to $T_1$, had sought a bribe which he refused to pay and had threatened him with retribution. He claimed that his family had been harassed and threatened and warned he faced harm if he returned.

13. The Tribunal had regard to evidence about the applicant's medical condition, in particular in relation to the "*profound stress*" from which he was said to be suffering, his current mental condition and ongoing treatment. However it was satisfied that the applicant's capacity to give evidence and present arguments at the hearings before it was not compromised by his medical condition.

14. The Tribunal also stated that it had had regard to an issue raised by the applicant in relation to the interpreters at the hearings conducted by $T_1$ and $T_2$. It observed that the applicant's answers were sometimes

complicated and dense and appeared to provide difficulties for the interpreters in translating his evidence to English. It stated that it had given regard to the issue of translation difficulties and had carefully considered any apparent inconsistencies in the applicant's oral evidence in light of such difficulties.

15. The Tribunal accepted on the basis of the evidence before it, including a letter from the Secretary General of the CUF and the applicant's CUF membership card issued in 1996, that the applicant was an official CUF member and had attended CUF political meetings from 1990 and that he had been actively involved in the CUF before becoming a member in 1994. In particular it accepted that he came to the attention of the authorities in the period from 1990, that he was not able to get a passport in Zanzibar and that after political meetings he had been detained by the police and then released and that thereafter he worked for the party. It accepted that in April 1994 he was elected to a position as Secretary for Mobilisation for a Zanzibar branch, that he was re-elected every two years thereafter and that he undertook recruitment for the CUF in Zanzibar and at times was sent to Dar es Salaam.

16. The Tribunal also accepted that in April 1995 the applicant was arrested, detained for two weeks and tortured, that his home was searched on many occasions and money stolen and that in January 1996 his home was searched and his CUF membership card taken and that he obtained a fresh card issued in Dar es Salaam.

17. However the Tribunal did not accept that the applicant was tortured many times from 1990 to 1993, based on differences in the evidence he had given at the various Tribunal hearings and the late nature of the claim about such frequent torture (first raised at the hearing conducted by $T_3$). The Tribunal found that the late nature of this claim led it to conclude that the applicant had embellished his claims concerning the period up to 1994, although it accepted that he was harassed and detained by the authorities in this period before being released without charge. It observed that he did not raise any particular claims of harm in the period from April 1995 until 2000.

18. The Tribunal accepted that the applicant was a CUF member and held a position at a local branch in Zanzibar at the time of the 2000 election campaign. It found his claim about events in January and August 2000

was central to his claim that he fled Zanzibar and hid in Dar es Salaam, that the CUF arranged a false passport and visa for him and that he fled Zanzibar illegally. It accepted, consistent with the applicant's claims, supporting information from other persons and independent information about the volatile political situation in Zanzibar during the 2000 election year, that in January 2000 he was arrested and detained in Zanzibar for ten days and tortured before being released without charge.

19. However, the Tribunal did not accept that the applicant was arrested in August 2000 after a voting registration fracas at a voting station or that he was detained, bailed by the CUF with the assistance of a CUF lawyer, warned he should flee Zanzibar by party leaders and the police, or that he hid in Dar es Salaam. The Tribunal had regard to the absence of any reference to such incidents in a 2003 supporting letter from the Secretary-General of the CUF in relation to the applicant's membership of the CUF and to the fact that the Deputy Secretary-General of the CUF lacked knowledge of the applicant. The Secretary-General had provided a letter to $T_1$ at the applicant's request confirming his membership of the CUF. The Deputy Secretary-General had replied to a $T_1$ letter to the CUF information officer, and had advised that he had been trying to find out whether the applicant was a member of the CUF, that from his name he could be a fellow Zanzibari and member of the party but that: "*It has been difficult to prove about* [the applicant's and another visa applicants] *membership and could not therefore trace their respective party branches in Zanzibar*." The Tribunal stated that "*the Secretary-General's brief description of the applicant merely as an activist performing different tasks as assigned to him by his leaders at branch level*", and the Deputy Secretary-General's non-recognition of the applicant led it to conclude that the applicant was "*a low profile party member at the time of the 2000 election, and do not support his claim to have been bailed with CUF's legal assistance and financial support*".

20. The Tribunal considered the applicant's claims about and the evidence before it in relation to Mr Haji, a CUF lawyer. After questioning at the $T_1$ hearing the applicant had stated that in August 2000 he was represented by Mr Haji, a CUF lawyer, who had applied for bail on his

behalf which was granted on condition that three people put up a bond. The applicant consented to $T_1$ contacting Mr Haji to confirm this claim.

21. On 3 June 2003 $T_1$ emailed Mr Haji. It had been given his contact details in relation to another application. It asked Mr Haji whether he had represented the applicant in relation to charges laid against him in August 2000. It also asked about another visa applicant, the subject of a separate Tribunal review who claimed to be represented by a Mr Nassor Khamis. The Tribunal sought contact details for Mr Khamis. It also asked whether to Mr Haji's knowledge the CUF ever provided assistance to wanted activists to leave the country, including by providing false passports and travel papers.

22. In an email response of 9 June 2003, Mr Haji stated about both applicants: "*I do not know them, I have never represented either of them in any case in any Court.*" Mr Haji suggested that in some circumstances the CUF may make arrangements for a person to escape persecution in Zanzibar, but that to his knowledge it had never assisted any person to do so using false documents. He also said he had discussed "*this issue*" with Mr Khamis who sometimes worked for the CUF, who said he had not heard of the applicant and had not represented him in any court case. The lawyer also advised that he had been unable to get CUF officials to comment on the issue of the two named applicants and that the officials and Mr Khamis had refused to provide contact details because they did not know these people, had never dealt with them and had no record of their activities.

23. $T_1$ then emailed Mr Haji requesting him to provide details of his qualifications. He did so. $T_1$ subsequently telephoned the lawyer on a mobile number on the letterhead that the Tribunal member had obtained in connection with another matter before the Tribunal. It recorded that he confirmed that he was the CUF lawyer and had sent the emails referring to the applicant.

24. $T_1$ put this information to the applicant for comment. His adviser responded that the applicant insisted that Mr Haji did in fact represent him. He could not provide any explanation for Mr Haji's letter.

25. When the matter was before $T_2$ the applicant provided a statutory declaration dated 27 June 2006 in which he stated that when he had

contacted Mr Haji in 2003 to inform him that $T_1$ would contact him to establish that he was the applicant's representative at the Court hearing in Zanzibar, Mr Haji had demanded $7,000 as a bribe to provide genuine information to the Tribunal.

26. The applicant claimed that because he was an active CUF member he had tried to find other means of support and thus had provided the supporting letter from the CUF Secretary-General. The letter from the Secretary-General dated 8 September 2003 stated that the Secretary-General had been acquainted with the applicant since he became a member of the CUF party some six or seven years earlier, that the applicant had been a party activist since the party was formed, that he had been involved in a campaign team before the 2000 elections and that he was an activist performing different tasks as assigned to him by his leaders at branch level.

27. The Tribunal recorded that when the claim about Mr Haji was raised at the $T_2$ hearing, $T_2$ had asked the applicant why he had not told $T_1$ his claims about Mr Haji's bribery attempt when the issue was raised with him. He stated that he had not thought it was important and that he did not wish to embarrass the CUF. He also told $T_3$ that he had been too ashamed to tell the Tribunal, but that he had informed the CUF chairman. He referred to information in support of his claims, including supporting emails he provided to the Tribunal.

28. The Tribunal did not accept that Mr Haji had acted as the applicant's "court lawyer" in August 2000, that he had asked the applicant for a bribe in 2003 or that he had subsequently threatened the applicant through various people, including his sister. The Tribunal concluded that the applicant had fabricated these and associated claims.

29. The Tribunal had regard to the late time at which the bribery claim was raised and the fact that the applicant was represented before the Tribunal in 2003. It found that he was well aware of the significance of the issue, yet could not provide any explanation and that the claim that Mr Haji held an important position in the CUF such that exposing him would humiliate the CUF party, did not explain how confidentially informing the Tribunal of a claimed bribery attempt would have humiliated the CUF. Nor did the Tribunal accept the applicant's explanation that he did not think it important at the time and hoped that

Mr Haji would change his mind, given that $T_1$ had written to the applicant in August 2003 indicating that Mr Haji's advice, that he had not represented the applicant, was significant to the outcome of his case.

30. The Tribunal did not accept that the information from the Secretary-General addressed the potentially adverse information from Mr Haji. It found that the applicant's evidence that he had informed the party chairman of the issue did not explain why the Secretary-General of the CUF had then failed to make any mention of the claimed incident in his letter of support. The Tribunal considered recent supporting emails the applicant had provided referring to threats from Mr Haji. However it found it implausible that some four years after Mr Haji's advice to $T_1$ he would continue to make threats against the applicant (a CUF member) or would inform people openly of such a bribery attempt. The Tribunal found that the timing and content of an email on this issue from the applicant's sister showed that it was solicited and that the information in it was contrived.

31. The Tribunal found that Mr Haji, who was well known, did not act as a court lawyer for the applicant and that the applicant's claims in this respect were fabricated and that he had not been threatened or his family harassed by Mr Haji. The Tribunal found that changes in the applicant's evidence in relation to his knowledge of claimed bail arrangements made in August 2000 reinforced its concern about his claims about his court appearance, the bail arrangements and party assistance at that time and showed that his evidence was not based on personal experience.

32. The Tribunal accepted that in 2000 the applicant was an activist at branch level in Zanzibar. It could not discount that he may have come to the attention of the authorities during the 2000 election campaign and that he had been harassed. It accepted that in January 2000 the applicant was arrested and detained for ten days and tortured, before being released without charge. However the Tribunal did not accept that during the August 2000 election the applicant was arrested after a voter registration fracas, detained, bailed by the CUF with the assistance of a CUF lawyer, warned to flee Zanzibar by party leaders and police, or that he secretly did so and hid in Dar es Salaam.

33. The Tribunal found that the advice of Mr Haji that he did not know the applicant and that neither he nor Mr Khamis had ever represented the applicant in any case in any court was "*compelling evidence which contradicts the applicant's claims concerning his involvement in an incident which led to a Court appearance, assistance by a CUF lawyer and subsequent bail arrangements*."

34. The Tribunal also found that the advice from the Deputy Secretary-General of the CUF and the letter of support from the Secretary-General obtained by the applicant after he advised the Secretary-General of the lawyer's bribery attempt, did not support the applicant's claim to have been arrested and bailed in August 2000 with CUF's legal assistance and financial support.

35. As the Tribunal did not accept that the applicant had any involvement in an August 2000 incident, including a court appearance or bail arrangements, it rejected the claims which flowed from that, including that he had jumped bail, was advised to flee Zanzibar, fled to Dar es Salaam and hid there with party support. It found that the supporting statements provided by the applicant which attested to his involvement in this incident and the bribery claim did not overcome the "*major problems*" the Tribunal had with his claims concerning the August 2000 incident and in relation to Mr Haji and the bail arrangement.

36. The Tribunal rejected the claim that the CUF organised a false passport, visa application and travel to Australia for the applicant having regard to the evidence before it, including the advice from the Deputy Secretary-General of the CUF, the Secretary-General of the CUF and Mr Haji. It concluded that the applicant decided to leave Zanzibar after the incident in January 2000 and travelled to Dar es Salaam where he organised his own travel arrangements to Australia involving a false passport and a "*false and elaborate*" visa application.

37. In light of the applicant's "*low profile*", the Tribunal also considered it implausible that the CUF organised a costly a legal escape to Australia via a false passport and elaborately detailed visa application (on the basis of a Christian conference in Australia), particularly as an obvious destination for a quick and a cheap escape would, according to country information, have been one of a number of close African countries.

However it did not consider this implausibility "*determinative*" in light of its other findings.

38. The Tribunal placed no weight on medical and character evidence before it in regard to the specific incidents claimed, although it accepted that this evidence may show that the applicant had a subjective fear of returning to Zanzibar.

39. Having rejected the applicant's claims about and arising out of the alleged August 2000 incident, the Tribunal considered the issue of a return to Zanzibar. The Tribunal did not accept that the applicant had been threatened with harm if he returned or that he feared to return because he had skipped bail, was wanted by the authorities, or because Mr Haji had sought a bribe he refused to pay and had threatened him with retribution. It did, however, accept that he may fear to return to Zanzibar (and Tanzania) because of the current government and because of his support of the CUF.

40. In light of the applicant's evidence about his family circumstances (a wife and children living in their home in Zanzibar not far from his parents) and his home ownership, it found it reasonable to consider that if the applicant returned to Tanzania he would return to live in Zanzibar Town.

41. It found that while evidence showed that the situation was currently peaceful, there may be a risk of psychological harm if the applicant were to return to Zanzibar in light of the past events it accepted occurred between 1990 and 1993 and its findings that the applicant was arrested, detained and tortured in April 1995 and January 2000. The Tribunal had regard to information concerning the uncertain political situation in Zanzibar, the fact that it remained highly politicised, that the CUF remained in opposition and to information about the applicant's mental condition and treatment in Australia.

42. The Tribunal acknowledged that such psychological harm may be serious harm for the applicant even if not objectively based, but considered that the applicant would be able to relocate to a part of Tanzania other than Zanzibar (in which all the harm he suffered had occurred). The Tribunal found, in light of independent country information, that it was reasonable for the applicant to relocate to Dar

es Salaam or elsewhere on the mainland without fear of harm for reason of his political activities, which it found he would be free to continue. In making this finding the Tribunal rejected the applicant's claim that he was currently wanted for bail jumping or for any reason associated with his political opinion, or that he was of particular interest to the authorities because of his political opinion and past political activities.

43. It referred to his "*poor mental condition*", his evidence about the whereabouts of his family and friends and party connections in Zanzibar and his past friendships, visits, business and CUF activities on the mainland, in particular in Dar es Salaam. It concluded that he had lived in Dar es Salaam "*for a time*" immediately before departing Tanzania and that he was familiar with it. It had regard to information in relation to discrimination experienced by CUF supporters in Zanzibar.

44. The Tribunal acknowledged that the applicant may face difficulties, even in Dar es Salaam, of gaining employment within State institutions. However, having regard to the applicant's past work as a taxi driver, the fact that his political opinion had not prevented him from working and managing a taxi, and that he had shown a current willingness and desire to work notwithstanding his mental condition, the Tribunal concluded that "*he has driving skills and a current willingness to work which will enable him to seek meaningful employment on the mainland and in particular in Dar es Salaam*" where he could "*forge a new life*". The Tribunal considered that the risk of psychological or other harm was remote if the applicant returned to Dar es Salaam or elsewhere on the mainland. It did not consider his poor mental health "*whether in isolation or considered cumulatively with his ethnicity, political history and in the light of his use of false passport, will make him vulnerable to persecution on the mainland.*"

45. Finally, the Tribunal was satisfied that if the applicant faced a penalty on return for having used a false passport and breaching the laws of Tanzania, such a penalty would be the result of the non-discriminatory enforcement of a law of general application and would not constitute persecution for a Convention reason.

46. The Tribunal concluded that it was not satisfied that the applicant had a well-founded fear of persecution for one or more of the Convention reasons now or in the reasonably foreseeable future if he returned to Tanzania.

47. The applicant sought review by application filed in this Court on 26 May 2008. He relies on an amended application filed on 4 September 2008 which contains five grounds.

## Relocation issues

48. Ground one of the amended application makes six separate but related claims of jurisdictional error in relation to the Tribunal determination that the applicant did not face a real chance of persecution if he returned to Tanzania because he could relocate within Tanzania.

49. The first aspect of ground one is that the Tribunal erred in law in that it misconstrued and misapplied the proper test relating to relocation by failing to consider what might reasonably be expected of the applicant with respect to his relocation to the mainland of Tanzania. The particulars to this aspect of ground one are as follows:

> *i) The Tribunal found that in light of the applicant's family circumstances it was reasonable to consider that if the applicant returned to Tanzania he would return to live in Zanzibar Town, but in the context of the issue of relocation the Tribunal found it was reasonable for the applicant to relocate to the mainland of Tanzania, without considering the applicant's family circumstances.*
>
> *ii) In relation to relocation the Tribunal failed to consider the personal circumstances of the applicant relevant to his ability to obtain employment on the mainland of Tanzania.*
>
> *iii) In relation to relocation the Tribunal failed to consider the present prospects of the applicant having any accommodation on the mainland of Tanzania.*
>
> *iv) In relation to relocation the Tribunal failed to consider the psychological impact upon the applicant of exposure to detection by police from Zanzibar who travel to the mainland of Tanzania.*

50. Secondly, it was contended that the Tribunal failed to take into account a relevant consideration it was bound to take into account, namely the applicant's family circumstances. The particulars are as follows:

> *i) In determining whether the applicant could reasonably relocate the Tribunal was bound to take into account the applicant's family circumstances in Tanzania.*
>
> *ii) The Tribunal accepted the applicant's evidence concerning his family circumstances in Zanzibar.*
>
> *iii) The Tribunal accepted the applicant had no relatives in the mainland of Tanzania.*
>
> *iv) The Tribunal accepted that the applicant's wife and three school age children lived in Zanzibar Town in a home jointly owned by the applicant and his wife, which the applicant had built.*
>
> *v) The Tribunal accepted that the applicant's elderly parents lived nearby in Zanzibar Town.*
>
> *vi) In relation to the applicant's substantive claim, the Tribunal found that in light of the applicant's family circumstances it was reasonable to consider that if the applicant returned to Tanzania he would return to live in Zanzibar Town.*
>
> *vii) In relation to relocation the Tribunal failed to consider whether the applicant's family members would be able to relocate to the mainland of Tanzania with him.*

51. In addition it was contended that the Tribunal failed to take into account a relevant consideration it was bound to take into account, namely the applicant's psychological condition. The particulars to this aspect of ground one are:

> *i) The Tribunal accepted that the applicant suffered from depression due to the lengthy separation from his family and inability to support them.*
>
> *ii) The Tribunal apparently found that the applicant would be able to live on the mainland of Tanzania on his own, perhaps with a friend.*
>
> *iii) The Tribunal did not take into account the effect upon the applicant of continued separation from his family by reason of his relocation to the mainland of Tanzania.*

52. The Tribunal was also said to have failed to take into account a relevant consideration it was bound to take into account, namely whether the applicant was entitled to drive a taxi or engage in similar work on the mainland of Tanzania or had any prospect of obtaining such an entitlement, and to have taken into account an irrelevant consideration it was bound not to take into account in determining the issue of whether relocation to the mainland of Tanzania was reasonable, namely the applicant's ability to obtain a renewal of his licence to drive a taxi in Zanzibar.

53. Finally it was contended that the Tribunal erred in law in making a finding when there was no evidence to support that finding, namely that if the applicant was able to renew the taxi driver licence he previously held in Zanzibar (which the Tribunal found had its own President, Parliament, court system and considerable autonomy), this would entitle him to operate as a taxi driver on the mainland of Tanzania.

54. Counsel for the applicant explained that the alleged failure by the Tribunal could be analysed in different ways and that this was what had been done in ground one. While ground one was presented as a number of different grounds, counsel for the applicant explained that the core contention was a contention that the Tribunal failed properly to apply the test as to the practical realities of relocation.

55. It was pointed out that when the Tribunal determined that the applicant did not face a real chance of persecution if he returned to Tanzania because he could relocate within Tanzania, by this the Tribunal meant that the applicant could relocate from the islands of Zanzibar to the mainland of Tanzania.

56. The applicant submitted that the Tribunal was required to address the practical realities that would face an applicant if he or she relocated (see *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437, *SZATV v Minister for Immigration and Citizenship and Another* (2007) 233 CLR 18, *SZFDV v Minister for Immigration and Citizenship and Another* (2007) 233 CLR 51, *NAIZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 37 at [22] per Branson J and [73] per North J, *WALT v Minister for Immigration and Multicultural and Indigenous*

*Affairs* [2007] FCAFC 2 at [45], *SZAIX v Minister for Immigration and Multicultural and Indigenous Affairs and Another* (2006) 150 FCR 448 and *SZBJI v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 216). It was submitted that this entailed the Tribunal giving consideration to an applicant's personal history, including his language skills, age, education, health, familial connections, employment and demonstrated ability to live independently elsewhere than in the locality of origin (see *WALT* at [45]).

57. In *SZATV v Minister for Immigration and Citizenship and Another* (2007) 233 CLR 18 Gummow, Hayne and Crennan JJ stated (at [24]) that in considering relocation:

> *What is "reasonable", in the sense of "practicable", must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality*

58. It was submitted that this test was not directed to living conditions generally but rather to the circumstances of the individual and matters such as differential treatment in matters of race, religion or political opinion (*SZATV* at [26]).

59. The applicant contended that *SZATV* and *SZFDV v Minister for Immigration and Citizenship and Another* (2007) 233 CLR 51 did not depart from the pre-existing principles set out by the Full Court of the Federal Court in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 as to the relocation test (in *SZAJB v Minister for Immigration and Citizenship and Another* (2008) 168 FCR 410 Allsop J suggested at [109] that *SZATV* and *NAIZ* were "*only an elaboration of pre-existing principles*", for example, in *Randhawa*).

60. It was suggested that the application of this test was illustrated by the fact that in *NAIZ* the Full Court of the Federal Court held that the Tribunal fell into jurisdictional error by failing to give consideration to the practical realities of accommodation for the applicant if she returned to her home country, while in *SZAIX v Minister for Immigration and Multicultural and Indigenous Affairs and Another* (2006) 150 FCR 448 at [55] – [64] the Tribunal was found to have

failed to acknowledge the major difficulties of a psychological and physical nature which would confront the applicant if she returned to her home country, and hence misapplied the relocation test. Reference was also made to *SZBJI v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 216 in which Allsop J was said to have held that the Tribunal failed to address the practical reasonableness of relocation.

61. In this respect reliance was placed on what was said by Black CJ in *Randhawa* (at 443) as follows:

> *I agree that it would ordinarily be quite wrong for a decision-maker faced with a relocation possibility to take the general approach that there must be a safe haven somewhere without giving the issue more specific attention, but the extent of the decision-maker's task will be largely determined by the case sought to be made out by an applicant. In the present case the applicant raised several issues, all of which were dealt with by the decision-maker. If the appellant had raised other impediments to relocation the decision-maker would have needed to consider these but having regard to the issues raised by the appellant and to the material that was before the decision-maker on the issue of relocation she was entitled to come to the conclusion that the appellant could reasonably be expected to relocate elsewhere in India.*

62. It was contended that in the present case, while the Tribunal found that it was reasonable for the applicant to relocate to the mainland of Tanzania, it had failed to address the practical realities of relocation for the applicant and to elicit from him the information required in order for it to address the issue of relocation properly in accordance with the test in *Randhawa*. In particular, the Tribunal was said to have failed to consider the applicant's personal and family circumstances, including the prospect of the family finding accommodation on the mainland of Tanzania, the psychological impact upon the applicant of separation from his family on the mainland, the possibility of exposure to detection by police from Zanzibar who travelled to the mainland, and his ability to obtain employment as a licensed taxi driver on the mainland of Tanzania.

63. It was explained in oral submissions that it was not submitted that the Tribunal had to deal with every potential practical reality. Rather it

was claimed that there were facts before the Tribunal about the background of the applicant, such as the psychological impact on him of separation from his family who lived in Zanzibar, the fact he had built a family home he owned with his wife in Zanzibar and the fact that he had children in Zanzibar. It was submitted that the Tribunal "*sidestepped*" these matters or reached inconsistent factual conclusions in the context of considering relocation.

64. It was submitted that while the Tribunal discussion under the heading of relocation included quite a lot of material, when one looked at the decision most of it was not about the practical realities, and that as in *NAIZ* there was in fact very little consideration by the Tribunal of the practical realities facing the applicant were he to relocate.

65. In particular reference was made to the Tribunal's alleged failure to consider the applicant's family circumstances in this context, notwithstanding its acceptance of the facts in relation to such matters and its finding that it would be reasonable to consider that if the applicant returned to Tanzania he would return to live in Zanzibar given his family circumstances. It was also submitted that the applicant's past visits to Dar es Salaam and what he knew about it did not really assist in the question of practical realities and that there was no real consideration of the psychological harm the applicant was suffering or would suffer because of separation from his family in the context of relocation. Hence it was said that the part of the Tribunal decision that dealt with the practical realities contained inconsistencies and failed to take into account the evidence before the Tribunal in relation to these matters.

66. It was also clarified that, contrary to the first respondent's submissions, it was not submitted that the Tribunal had a duty of inquiry as considered in *Luu and Another v Renevier* (1989) 91 ALR 39 at 45. Rather it was submitted that the Tribunal had failed to address the practical realities of relocation on the information that was before it.

67. The applicant suggested that the approach in *NAIZ* was of particular relevance. In that case the Tribunal had failed to explore the significance of the appellant's reference to having no one in Fiji to look after her. Branson J found that the Tribunal was obliged to consider the significance of the factual material it had elicited. Reliance was also

placed on *SZBJI* in which the Tribunal was found to have failed to raise with the appellant or to consider in its reasons the practicality and reasonableness in all the circumstances of the appellant relocating outside his home town for the foreseeable future.

68. It was submitted that the Tribunal in this case had accepted the applicant's evidence concerning his family circumstances in Zanzibar, including that he had no relatives on the mainland and that his wife and three children lived in Zanzibar Town in a home jointly owned by the applicant and his wife which the applicant had built and that the applicant's elderly parents lived nearby. However it was contended that the Tribunal had failed to take into account the applicant's family circumstances in determining whether he could reasonably relocate and that it was bound to do so.

69. Moreover the Tribunal had found in light of the applicant's family circumstances that it was reasonable to consider that if he returned to Tanzania he would return to live in Zanzibar Town. Despite this, the Tribunal held it was reasonable for the applicant to relocate to the mainland. It was submitted that the Tribunal made this finding without giving any consideration to the impact of such relocation on the applicant's family or to the fact that he jointly owned the home he had built in Zanzibar which was near his parents' home. It was contended that the Tribunal had failed to consider whether the applicant's family members would be able to relocate to the mainland of Tanzania with him, having regard to employment, schooling and accommodation issues. Further, while the Tribunal was said to have appeared to assume that the applicant would be able to live with a friend in Dar es Salaam because he had stayed with a friend temporarily in the past, it gave no consideration to accommodation for the rest of the family in the event that they were able to move. In essence it was submitted that a relevant consideration was the applicant's family circumstances and that the Tribunal had failed to take this into account.

70. In addition counsel for the applicant contended that the Tribunal was bound to take into account the applicant's psychological condition in considering the reasonableness of relocation and that it had failed to do so. It was noted that the Tribunal had referred to evidence, including oral evidence from a witness at the Tribunal hearing, about the

psychological impact on the applicant of the lengthy separation from his family and his inability to support them. It was submitted that while the Tribunal accepted that the applicant would suffer psychological harm if he returned to Zanzibar, it did not properly consider whether he would suffer such harm if he returned to the mainland. It was also said that the Tribunal failed to consider the psychological impact upon the applicant of exposure to detection by police from Zanzibar who travelled to the mainland of Tanzania. It was submitted that the Tribunal's finding that the risk of psychological harm on return to the mainland was remote could not stand with its finding that the applicant was suffering psychological damage by reason of the continued separation from his family and his fear of harm if he returned, given that such separation would continue if he relocated to the mainland of Tanzania, as would his fear of harm if he returned to visit Zanzibar or if police from Zanzibar detected him on the mainland.

71. In addition, it was submitted that the Tribunal failed to take into account whether the applicant was entitled to drive a taxi or engage in similar work on the mainland of Tanzania or whether he had any prospect of obtaining such entitlement and that this was a relevant consideration the Tribunal was bound to take into account. Counsel for the applicant pointed out that the Tribunal took into account that the applicant was previously a taxi driver in Zanzibar and that he had been able to renew his licence there until his departure. However it was submitted that the Tribunal did not turn its mind to consider whether the applicant could work as a taxi driver on the mainland. The fact that the applicant had obtained licence renewal in Zanzibar was said not to assist in answering the question as to whether he could obtain a licence on the mainland, which was said to have a different legal system from Zanzibar. It was contended that the Tribunal had failed to put this question to the applicant and that as a result it had failed to take into account the practical realities relating to his prospects of gaining employment on the mainland.

72. It was also contended that the Tribunal took into account an irrelevant consideration it was bound not to take into account, being that the applicant had been able to obtain renewals of his licence to drive a taxi

in Zanzibar. This was said to be irrelevant to the question of whether he would be able to obtain a licence to drive a taxi on the mainland.

73. The final aspect of ground one is the contention that the Tribunal erred in law making a finding when there was no evidence to support that finding. The finding in issue was said to be a finding that if the applicant was able to renew the taxi driver licence he previously held in Zanzibar this would entitle him to operate as a taxi driver on the mainland of Tanzania. On the basis of independent country information the Tribunal had found that Zanzibar had its own President, Parliament and court system and exercised considerable autonomy. Insofar as it relied on the fact that the applicant stated he was able to renew his taxi driver licence in Zanzibar prior to his departure, it was submitted that this evidence did not support a finding that he would obtain a licence entitling him to operate as a taxi driver on the mainland of Tanzania.

74. The first respondent submitted generally in relation to ground one that while it could be accepted that the Tribunal was required to consider the applicant's objections to relocation, it had done so in accordance with the principles in *Randhawa* and was not obliged to make the applicant's case for him or to attempt to stimulate elaborations that he did not wish to give. It was contended that ground one essentially sought merits review having regard to the fact that the applicant's only objection when relocation was raised with him was said to be that he would not be safe in Dar es Salaam. The Tribunal was said to have considered but rejected this objection. It was submitted that the matters relied on under this ground were not put to the Tribunal by the applicant when relocation was raised and hence that they could not be said to be relevant considerations in the sense of considerations that the *Migration Act 1958* (Cth) required to be taken into account. It was also submitted that the Tribunal did have regard to the applicant's family circumstances, his prospects of employment and the risk of psychological harm were he to relocate and that the applicant's disagreement with the Tribunal's conclusions on these issues did not establish any jurisdictional error.

75. In oral submissions counsel for the first respondent suggested that relocation had been an issue in this case from the very start. This was

said to be apparent from the delegate's decision, the fact that the Tribunal raised relocation at the hearing and also in a s.424A letter sent prior to the second hearing. This letter put to the applicant his evidence that he regularly visited Dar es Salaam, that he had a friend or brother who lived there and that his CUF membership card was issued in Dar es Salaam and showed a residential address for the applicant in Dar es Salaam. Similarly, the passport which the applicant claimed was his was issued in Dar es Salaam and showed the same residential address as his brother's address and telephone number there. The Tribunal also put to the applicant country information to the effect that there was no evidence of human rights abuses of CUF officials/supporters on mainland Tanzania, most probably because the CUF was regarded as a Zanzibari party focussing on Zanzibari issues on the mainland and had only a very small presence there, being just one of many political parties. The Tribunal put to the applicant that this suggested either that he in fact resided in Dar es Salaam or at least that he had great familiarity with Dar es Salaam and the mainland, and that this may suggest that he was reasonably able to relocate to the Tanzanian mainland, for example Dar es Salaam, and that that he would not face a real chance of persecution by reason of his political opinion and activities.

76. The applicant's response to this aspect of the section 424A letter on this issue was as follows:

> *I cannot live in Dar es Salaam. It is the same government and the same police and I would still be in fear for my life. Nothing would change. I cannot relocate to any part of Tanzania as I would be in constant hiding and fear of my life.*

77. It was also pointed out that at the second hearing conducted by the Tribunal (as most recently constituted) it recorded that it put to the applicant that the independent information it had put to him suggested he could live safely in Dar es Salaam and that: "*He stated he could not live in Dar es Salaam safely. He is at risk as it is the same government. Also, police go from Zanzibar to Dar es Salaam, as do security people. He cannot stay in Dar es Salaam safely - and he cannot stay there in hiding as he has a family.*"

78. The Tribunal also referred to information that suggested the CUF members would be able to safely relocate and live in Dar es Salaam and that, "*The applicant discussed how CUF members could not stay in Dar es Salaam safely: the information was not true. The government spread untrue information about how the opposition never had problems. He repeated the government, opposition, security are still the same. He cannot stay in Dar es Salaam safely as he has a family - he cannot hide there as the police are always watching the opposition*."

79. It was contended for the first respondent that where relocation had been raised not only by the delegate but also by the Tribunal in its s.424A letter and at the hearing, the Tribunal was entitled to regard the applicant's response in writing and at the hearing as being his reasons why he could not relocate. It was submitted that the Tribunal dealt at length with such matters. While it was not suggested that there was a general rule that the Tribunal need only limit its consideration to matters raised by an applicant, in this case it was said that the applicant had been given quite an extensive opportunity to address the issue of obstacles to relocation and that consistent with what Black CJ stated in *Randhawa* the extent of the decision-maker's task will "*be largely determined by the case sought to be made out by the applicant*."

80. It was submitted that this was not a case in which there was an unarticulated claim that arose squarely on the material before the Tribunal as considered in *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1.

81. Counsel for first respondent also submitted that insofar as the Tribunal took into account the applicant's previous renewal of his taxi licence in Zanzibar, this was not having regard to an irrelevant consideration in the sense that constituted jurisdictional error. It was submitted that whether or not it was factually relevant was a matter for the Tribunal. It was also contended that insofar as it was asserted that there was no evidence to support the Tribunal "*finding*" that the applicant "*would be able to obtain a taxi licence on the mainland*" this was not in fact a finding that the Tribunal made. Rather the Tribunal was said to have found that the applicant's driving skills and current willingness to work would enable him to seek meaningful employment on the mainland.

Such a conclusion was said to be open to the Tribunal for the reasons that it gave.

**Applicable principles**

82. As Black CJ stated in *Randhawa* at 441:

> *The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country.*

83. In this case the Tribunal was satisfied that if the applicant relocated from Zanzibar island to the mainland of Tanzania he would not be at risk of harm. Hence a critical issue for the Tribunal was whether it was reasonable to expect the applicant on return to live in an area other than the islands of Zanzibar (see *NAIZ* at [15] per Branson J).

84. In *Randhawa* at 442 – 443 Black CJ (with whom Whitlam J agreed) described the manner in which such an inquiry is to be approached as follows:

> *In the present case the delegate correctly asked whether the appellant's fear was well-founded in relation to his country of nationality, not simply the region in which he lived.* ***Given the humanitarian aims of the Convention this question was not to be approached in a narrow way*** *and in her further analysis the delegate correctly went on to ask not merely whether the appellant could relocate to another area of India but whether he could reasonably be expected to do so.*
>
> *… In the context of refugee law* ***the practical realities*** *facing a person who claims to be a refugee* ***must be carefully considered****.*
>
> *…*
>
> *If it is not reasonable in the circumstances to expect a person who has a well-founded fear of persecution in relation to the part of a country from which he or she has fled to relocate to another part of the country of nationality it may be said that, in the relevant sense, the person's fear of persecution in relation to that country as a whole is well-founded. …*
>
> *In the present case, the delegate recognised the width of the inquiry required by considering whether the appellant's Sikh*

*culture prevented him from relocating in India. Once the question of relocation had been raised for the delegate's consideration she was of course obliged to give that aspect of the matter proper consideration. However, I do not consider that she was obliged to do this with the specificity urged by counsel for the appellant. I agree that it would ordinarily be quite wrong for a decision-maker faced with a relocation possibility to take the general approach that there must be a safe haven somewhere without giving the issue more specific attention, but the extent of the decision-maker's task will be largely determined by the case sought to be made out by an applicant. In the present case the applicant raised several issues, all of which were dealt with by the decision-maker. If the appellant had raised other impediments to relocation the decision-maker would have needed to consider these but* ***having regard to the issues raised by the appellant and to the material that was before the decision-maker on the issue of relocation*** *she was entitled to come to the conclusion that the appellant could reasonably be expected to relocate elsewhere in India.* (Emphasis added.)

85. Counsel for the applicant relied generally on the subsequent remarks by Black CJ at 443 in which his Honour expressed agreement with the proposition that "*it would ordinarily be quite wrong for a decision-maker faced with a relocation possibility to take the general approach that there must be a safe haven somewhere without giving the issue more specific attention*".

86. As counsel for the first respondent pointed out, Black CJ had continued "*but the extent of the decision-maker's task will be largely determined by the case sought to be made out by an applicant"*. In *Randhawa* Black CJ found that the decision-maker had dealt with the issues or "*impediments to relocation*" raised by the appellant, before concluding that "*having regard to the issues raised by the appellant and to the material that was before the decision-maker on the issue of relocation"* the decision-maker was entitled to come to the conclusion that the appellant could reasonably be expected to relocate elsewhere in his country of origin (at 443). In reaching this conclusion in *Randhawa* Black CJ rejected the contention of counsel for the appellant that a series of specific matters needed to be addressed in considering whether it was reasonable in the circumstances for an applicant to relocate including the area, city or region to which it was contemplated that an applicant could relocate and "*the general lifestyle adjustments*"

that would need to be made by a person were he or she to relocate within the country of nationality.

87. In *SZATV* the High Court addressed the correctness of what Gummow, Hayne and Crennan JJ described (at [9]) as the "*internal relocation principle*" expounded by the Full Court of the Federal Court in *Randhawa*. Their Honours adopted the approach that the matter of "*relocation*" was relevant to the question of whether it could properly be said that an applicant was or was not outside his or her country of nationality owing to a well-founded fear of persecution for a Convention reason, consistent with the reasoning of Lord Bingham of Cornhill in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426 at 440 (at [19]). Their Honours referred with apparent approval to the statement by his Lordship in *Januzi* at 440 that … "*a person will be excluded from refugee status if* ***under all the circumstances*** *it would be reasonable to expect him to seek refuge in another part of the same country*" (emphasis added).

88. The issue before the High Court in *SZATV* arose in a situation where the Tribunal's approach had been that the protection visa applicant was expected to move elsewhere in his country of nationality and live "*discreetly*" so as not to attract the adverse attention of the authorities in his new location lest he be further persecuted by reason of his political opinion (at [32]). In that context their Honours addressed (at [23]) the submission of the Minister that the issue was whether "*it be reasonable, in the sense of practical, for the appellant to relocate to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution*". Gummow, Hayne and Crennan JJ observed at [24] however that "*what is 'reasonable', in the sense of 'practicable',* ***must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation*** *of the place of residence within the country of nationality*" (emphasis added).

89. Their Honours accepted (at [25]) that the Convention was concerned with persecution in the defined sense and "*not with living conditions in a broader sense*", such as differential living standard in various areas in a country "*whether attributable to climatic, economic or political conditions*". Their Honours acknowledged at [26] that "*in particular*

*cases territorial distinctions may have an apparent connection with the particular reason for the asserted well-founded fear of persecution*" (at [26]).

90. In *SZATV* their Honours found that by reasoning that the appellant, a journalist, could move elsewhere in his home country and live discreetly and obtain employment of some other kind not involving the public expression of his political opinions and so not attract adverse attention or be persecuted for political opinion, the Tribunal had "*side-stepped consideration of what might reasonably be expected of the appellant with respect to his 'relocation'*" in his country of nationality (at [32]). This constituted an error of law going to an essential task of the Tribunal, being the determination of whether the appellant's fear of persecution was "*well-founded*" in the Convention sense (at [32]). (Also see *SZFDV v Minister for Immigration and Citizenship and Another* (2007) 233 CLR 51).

91. What is important for present purposes is the emphasis in *SZATV* on the need for consideration of *"all the circumstances"* in the sense of the particular circumstances of the applicant and the impact upon that person of relocation of the place of residence in determining what is "*reasonable*" in the sense of "*practicable*".

92. The applicant contended that these principles and the need to address the practical realities that would face an applicant if he or she relocated, entailed the Tribunal giving consideration to the applicant's personal history, including his language skills, age, education, health, familial connections, employment and demonstrated ability to live independently elsewhere than in the locality of origin. In support of this proposition reliance was placed on the decision of McHugh J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 at [44] – [47]. In *Durairajasingham* McHugh J was satisfied that the Tribunal had either expressly or implicitly taken into account various matters that were raised in the ground under consideration. What his Honour stated in relation to factual matters that had been raised in the particular case under consideration is not such as to establish that in all cases the particular matters suggested by counsel for the applicant must be addressed expressly or implicitly by the Tribunal. However

*Durairajasingham* does illustrate the need for the Tribunal to take into account matters raised by the applicant and the material before the Tribunal in the particular case in question.

93. Counsel for the applicant also relied on the decision of the Full Court of the Federal Court in *WALT*. In that case Mansfield, Jacobson and Siopis JJ confirmed (at [45]) that the Tribunal was required to address the practical realities facing an applicant if he were to relocate, consistent with the approach taken by Black CJ in *Randhawa*. In the particular circumstances of that case the Court was satisfied that the Tribunal did properly address those practical realities. In that context the Tribunal had regard to the fact that the appellant's country of nationality was predominantly Christian and that state protection against family-incited violence and other non-state actors was available. It also had regard to the appellant's personal history, including his language skills, age and employment whilst in another country, the skills he thereby acquired and his demonstrated ability to live independently in another country. It was in those circumstances that their Honours found that the Tribunal's view that the appellant's employment and language skills were transportable to and likely to be of use in his home country was reasonably available to it. Again this case illustrates the relevance of an applicant's personal circumstances to the reasonableness of relocation.

94. Of particular relevance in this instance is the decision of the Full Court of the Federal Court in *NAIZ*. In that case the Tribunal had recognised that the appellant claimed that she could not relocate within Fiji as she would have no-one to look after her. The Tribunal was not satisfied that it would be unreasonable for the appellant to relocate. The Tribunal noted her claimed difficulties, but continued "*I also note that her daughter has assisted her in the past and does so here in Australia. I am satisfied that with the assistance of her daughter the* [appellant] *would be able to relocate within Fiji*".

95. Branson J (with whom North J agreed) was of the view (at [18]) that the statements of the appellant about her situation in Fiji were "*intended to convey a concern*" about where she would live and how she could be looked after as a 55-year old unemployed widow in Fiji and that the assistance from the appellant's daughter referred to must,

given the evidence, be understood to be financial assistance. This was so notwithstanding that the appellant's adviser apparently did not stress that the appellant would experience difficulty in finding a home in which to live in a new neighbourhood. Branson J found that the Tribunal's consideration of relocation failed to give the necessary consideration to "*the practical realities facing the appellant with respect to accommodation and care should* [the appellant] *seek to relocate within Fiji"* (at [18] – [22]), having regard to the fact that there was no explicit consideration given in the Tribunal decision "*to how, even with some financial assistance from her daughter, the appellant would find a new home in which to live in Fiji and access such support as she might reasonably require to live in that home*" (at [21]). Branson J found that the "*summary way*" in which the Tribunal dealt with the issue of relocation including "*its failure to explore the significance of the appellant's references to having no-one in Fiji 'to look after her'",* caused her to conclude that the Tribunal did not apply the right test when it concluded that it was satisfied that with the assistance of her daughter, the appellant would be able to relocate within Fiji.

96. Hence in *NAIZ* the majority concluded that because the Tribunal had misconceived the content of the requirement that it not be unreasonable for the appellant to relocate within Fiji, it did not ask itself the right questions before determining that it was not satisfied that the appellant was a person in respect of whom Australia owed protection obligations under the Convention.

97. The approach in *NAIZ* is consistent with the views of Black CJ in *Randhawa* that "[g]*iven the humanitarian aims*" of the Refugees Convention a consideration of relocation in the context of addressing the issue of whether an applicant's fear is well founded is "*not to be approached in a narrow way*" and that the "*practical realities facing a person who claims to be a refugee must be* ***carefully considered***" (*Randhawa* at 442). (Emphasis added).

98. In *SZAJB v Minister for Immigration and Citizenship* at [109] Allsop J suggested that the decisions in *SZATV* and *NAIZ* were "*only an elaboration of pre-existing principles*" such as were expressed in *Randhawa*. However *SZATV* and *NAIZ* demonstrate that in giving

consideration to how in a practical sense an applicant could reasonably be expected to relocate, the Tribunal must address the particular circumstances of the applicant in question and how he or she "*could deal with those practical realities*" (Branson J in *NAIZ* at [22]).

99. In *SZAIX* counsel for the appellant had argued that the Tribunal was obliged to consider a number of specific issues relevant to the appellant's personal circumstances that arose on the evidence before the Tribunal. It was contended that the Tribunal failed to take into account the psychological difficulties for the appellant to continue to live anywhere within a country and culture in which she had experienced rape on two occasions. The Tribunal member had engaged in no discussion of questions of this kind in its findings. Relevantly, this was said to suggest that the psychological aspects of the practical realities facing the appellant "*were not present to his mind*". Madgwick J considered it appropriate to draw the inference in that case that such matters were not considered by the Tribunal and found that this suggested that the psychological aspects of the practical realties facing the appellant had been overlooked. Hence there had been, as in *NAIZ,* a failure by the Tribunal to ask itself "*the right questions*" (*SZAIX* at [61] – [63]).

100. In considering whether the Tribunal failed to ask itself the right questions it is important to bear in mind the nature of the enquiry in issue. In *SZBJI* the Tribunal had accepted that an appellant from Nepal had Maoist political involvement and a low profile which would have placed him at some risk in his home town of Kathmandu. The Tribunal addressed the possibility of a short-term move outside Kathmandu. However Allsop J found that the Tribunal did not raise with the appellant or broach in its reasons the practicality and reasonableness in all the circumstances of the appellant relocating outside Kathmandu "*for the foreseeable future*" (at [21]). His Honour found that the Tribunal failed to address an essential element of the question of avoidance of possible future persecution by relocation (at [21]). While Allsop J accepted (at [22]) that the Tribunal was "*not required in addressing relocation to elaborate on every aspect of its practical application*", his Honour found that if, from the reasons and the material before the Court it did not appear that "*the practical application of relocation*" had been addressed, it would be wrong to

assume that it had been. His Honour found that, as part of the analysis of relocation, the issue of the appellant's Maoist adherence had to be addressed by the Tribunal. It had not been (at [23]). Hence the Tribunal had failed to complete its jurisdictional task. This case illustrates the scope and nature of the obligation on the Tribunal to address the practicality and reasonableness in all the circumstances of relocation for the foreseeable future.

**Resolution**

101. In order to determine whether the Tribunal fell into error in its consideration of relocation it is necessary to consider the material before the Tribunal in relation to relocation and its decision in that respect.

102. Counsel for the first respondent suggested that from the time of the delegate's decision it should have been clear to the applicant that relocation was an issue. It is notable, however, that the delegate's discussion of relocation proceeded on the basis that the information before the Department, in particular in relation to the issue of what the applicant claimed was his real passport and his travel to the mainland, supported the conclusion that at the time of the issue of his passport the applicant was a "*resident*" of mainland Tanzania and not of Zanzibar. On this basis, having regard to evidence about the presence of the CUF on the mainland and the fact that CUF members had been able to assist the applicant there, the delegate concluded that, if the applicant was the person he claimed to be, he had previously lived for some time on mainland Tanzania and had spent some months there prior to his departure for Australia. Based on these findings the delegate was of the view that if the applicant returned to Tanzania he would be able to return to live in the mainland where he would not face persecution for his membership of the CUF.

103. Thereafter the applicant took issue with the suggestion that he had ever lived on the mainland (as well as with other issues referred to by the delegate). $T_1$ made no findings about relocation, finding that the applicant did not have a well-founded fear of persecution if he returned to Zanzibar. Nor did $T_2$, which did not accept that the applicant was actively involved in the past with the CUF or that he would involve

himself in political events on behalf of the CUF on his return to Tanzania.

104. As set out above, $T_3$ accepted some of the applicant's claims about his political opinion, past political activities and involvement in the CUF and that he was harassed, arrested, detained from 1990 on (and tortured while detained in April 1995 and January 2000).

105. The Tribunal accepted the applicant's evidence concerning his family circumstances in Zanzibar (that he and his wife had a home there that he had built, that his wife and children and his parents lived there) and found it reasonable to consider that if he returned to Tanzania he would return to live in Zanzibar Town. However it concluded that there may be a risk of psychological harm (which may be serious harm) if the applicant returned to the islands of Zanzibar, having regard to the past events it accepted, the applicant's support for the CUF, the political situation in Zanzibar and the information about the applicant's mental condition and treatment.

106. It is apparent from the $T_3$'s account of the hearings that in addition to the evidence the applicant gave $T_1$ and $T_2$ about his circumstances, $T_3$ took evidence from him about matters relevant to his family circumstances, including the issue of where members of his family lived and whether he had lived in Dar es Salaam. At the second $T_3$ hearing the Tribunal discussed with the applicant other matters of potential relevance to the issue of relocation, (although there is no indication that this discussion occurred in that specific context), including his past employment and residential arrangements, how often he travelled to Dar es Salaam, his activities there and the issue of his passport and CUF membership card. The Tribunal's account of the discussion of relocation at the hearing (the only evidence in that respect before the Court) is as follows:

> *The Tribunal indicated the independent information put to him suggested he could live safely in Dar es Salaam. He stated he could not live in Dar es Salaam safely. He is at risk as it is the same government. Also, police go from Zanzibar to Dar es Salaam, as do security people. He cannot stay in Dar es Salaam safely – and he cannot stay there in hiding as he has a family.*

> *The Tribunal referred to the information previously given to him – from DFAT in 2006 after the 2005 election – this suggested that CUF members would be able safely relocate and live in Dar es Salaam. And subject to his other claims, the information suggested a CUF member could live safely in Dar es Salaam. Subject to his claims about events in Zanzibar, the information suggested that if he was a CUF member, he could relocate to Dar es Salaam safely. The applicant discussed how CUF members could not stay in Dar es Salaam safely: the information was not true. The government spread untrue information about how the opposition never had problems. He repeated the government, opposition, security are still the same. He cannot stay in Dar es Salaam safely as he has a family – he cannot hide there as the police are always watching the opposition.*

107. Hence it appears that the discussion at the $T_3$ hearings specifically in relation to relocation was limited to a discussion of independent information suggesting that as a CUF member the applicant could live safely in Dar es Salaam. It was in response to that issue that he stated that he could not live in Dar es Salaam safely, that he was at risk as it was the same government, that the police went from Zanzibar to Dar es Salaam, as did security people and that he could not stay there in hiding as he had a family. This response clearly raised the applicant's concern in relation to relocation as a family man (although he addressed the specific issue of hiding in Dar es Salaam with a family). I note also that this discussion was clearly limited to the practical realities facing a CUF member **as such** and not based on other attributes of the applicant or other practical realities facing the applicant.

108. While, as the Tribunal recorded, it put questions to the applicant in the hearing about whether or not he would be safe if he went back to the mainland, there is no evidence that it put other matters to him in that context, notwithstanding that safety is not the only aspect of relocation and matters such as language, employment, family and personal circumstances may be key factors. This is relevant to the first respondent's submission that the Tribunal was entitled to regard the applicant's responses at the hearing (and to the s.424A letter) as his reasons why he could not relocate.

109. The s.424A letter $T_3$ sent to the applicant on 19 December 2007 put to him evidence relating to the absence of human rights abuses of CUF

officials and supporters on mainland Tanzania. Again, it did not address the applicant's personal attributes as such, except insofar as the Tribunal sought comment on evidence that the applicant had regularly visited Dar es Salaam and had a friend and brother who lived there, that his CUF membership card was issued there and that it and his passport showed a residential address there. This information was said to be relevant because it suggested that he had either resided in Dar es Salaam or at least had great familiarity with Dar es Salaam and the mainland, which may suggest that he was reasonably able to relocate to the Tanzanian mainland (for example, Dar es Salaam) and not face a real chance of persecution by reason of his political opinion and activities.

110. The applicant's response to the s.424A letter addressed the issues raised in that letter. It was "*I cannot live in Dar es Salaam. It is the same government and the same police and I would still be in fear for my life. Nothing would change. I cannot relocate to any part of Tanzania as I would be in constant hiding and fear of my life*". The Tribunal accepted his evidence that he now had no relatives on the mainland, although he "*previously*" had friends there and had often stayed with a friend there when visiting.

111. The fact that the applicant addressed the specific issues raised by the Tribunal and no others, should not be taken to indicate that he was suggesting that there were no other obstacles to relocation. It is not apparent from the Tribunal's account of the conduct of the hearings that the Tribunal asked the applicant generally why he could not relocate. Rather, it appears that it put to him particular items of independent country information and aspects of his evidence and other material before it on the basis that such information suggested that as a CUF supporter he could safely live in Dar es Salaam or elsewhere on mainland Tanzania. I am not persuaded that it can be said that the applicant should be taken to have raised all possible obstacles to relocation that had to be considered by the Tribunal. Moreover it is apparent from the Tribunal decision and its account of the hearings that it obtained or received from the applicant other evidence as to his particular circumstances that was relevant to the practical realities and obstacles to relocation facing him.

112. Further, the Tribunal was not relieved of its duty to apply the practical realities test properly simply because the applicant had previously been the subject of a decision by a delegate which considered or purported to consider relocation or because he had been the subject of earlier Tribunal decisions.

113. The cases referred to above require a consideration of "*all the circumstances"* (*SZATV*) and oblige the Tribunal to address evidence "*intended to convey a concern"* about matters relevant to relocation (*NAIZ*) as well as matters that arise on the material before the Tribunal *(SZAIX* and *SZBJI*). Given the manner and circumstances in which relocation was raised with the applicant, I am not persuaded by the first respondent's contention that because relocation had been raised by the delegate and also by the Tribunal in its s.424A letter and at the hearing, the Tribunal was entitled to regard the applicant's response in writing and at the hearing as being his reasons why he could not relocate and thus that it had no obligation to consider evidence of other practical realities apparent on the material before it.

114. While, as Black CJ stated in *Randhawa*, the extent of the decision-maker's task will, "*be largely determined by the case sought to be made out by the applicant*" (at 443), in such circumstances the Tribunal's enquiry should not be confined to the specific responses of the applicant to particular issues. Consistent with the humanitarian aims of the Refugees Convention, the decision-maker should not approach the question in a narrow way and must carefully consider the practical realities facing a person who claims to be a refugee (at 442).

115. Counsel for the first respondent relied on the approach taken in *NABE*. That case addressed the issue of whether a particular aspect of a claim about a Convention ground had been raised by the applicant on the material before the Tribunal. As Madgwick J suggested in *SZAIX* at [51] the Full Court in *NABE: "was absolving the Tribunal from any duty to engage in subtle teasing out of hypotheses that only abstrusely arise from an applicant's account of the circumstances that have led to the claim of refugee status.*"

116. Cases such as *NABE* in relation to whether a particular claim or aspect of a claim about a particular Convention ground had been raised by the applicant are not determinative in relation to the relocation issue. The

Tribunal had a duty that was not affected by whether or not the applicant put forward information about matters on the basis that such information was relevant to relocation. The authorities, including *Randhawa*, do not go so far as to state that it is only if a particular objection or issue was raised by the applicant in relation to relocation that the Tribunal is required to deal with it. While in *Randhawa* Black CJ stated that a decision-maker's task would largely be determined by the case sought to be made by the applicant, this means that if the applicant had raised particular impediments to relocation the decision-maker would need to consider them. His Honour did not go so far as to state that in all cases the Tribunal did not need to consider other impediments apparent on the material before the Tribunal unless the applicant raised them as impediments. In this instance there was material before the decision-maker relevant to the practical realities of relocation, such as employment, family, accommodation and psychological problems of the applicant that had to be considered.

117. On the approach taken by the Federal Court, particularly in *NAIZ* and *SZAIX,* it is apparent that the Tribunal is required in its reasons for decision to give consideration to the practical realities facing an applicant and in that respect that it must explore the significance of the applicant's claims in relation to matters relevant to a consideration of such practical realities.

118. While expressed in number of ways, the essence of ground one is that the Tribunal did not apply the right test when it concluded that it was satisfied that the applicant would be able to relocate to the mainland of Tanzania and hence that it fell into jurisdictional error (because in misconceiving the content of the requirement that it not be unreasonable for the applicant to relocate within Tanzania it did not ask itself the right questions in the manner considered by Branson J in *NAIZ*).

119. The issues which the Tribunal was said to have failed to give proper consideration to (in the context of considering the practical realities facing the applicant should he seek to relocate within Tanzania) related to his family and personal circumstances, his prospects of accommodation and his psychological condition.

120. While there is no "*general rule*" that a Tribunal must consider whether family members can join an applicant if the applicant is expected to relocate, in this case the applicant raised the issue of his family. The Tribunal had evidence before it about the fact that the applicant's wife and children lived in Zanzibar in the family home near his parents.

121. As counsel for the applicant pointed out, the Tribunal had found in light of the applicant's family circumstances (in particular the fact he had a house in Zanzibar and his family still lived there) that it was reasonable to conclude that if he returned to Tanzania he would return to live on the islands of Zanzibar, that is to live with his family. However in considering relocation the Tribunal found it was reasonable for him to relocate to the mainland. It set out his family circumstances and the fact that he had relatives on the mainland. However the Tribunal failed to address the significance of these circumstances except in relation to the risk of persecution. It did not consider the practical impediments faced by the applicant in relocating as a family man.

122. The applicant raised the issue of his family in the context of submitting that he could not hide with a family and may be exposed to detection by police from Zanzibar travelling to the mainland. Even if this matter may be said to be addressed (at least in part) by the Tribunal rejection of the claims by the applicant that he was wanted by the police because he had skipped bail, there is a more general relevance of the applicant's family (as well as his psychological condition) to the practicability and reasonableness of relocation. The Tribunal accepted the medical evidence (from a psychiatrist and a psychologist) that the applicant suffered from depression due to the lengthy separation from his family and his inability to support them. Insofar as it appears that the Tribunal was of the view that the applicant would be able to live on the mainland of Tanzania on his own or perhaps with a friend and "*forge a new life*", it failed to consider the effect upon him of continued separation from his family by reason of such relocation in addressing the reasonableness of relocation.

123. As in *NAIZ*, the summary way in which the Tribunal apparently dismissed the relevance of these factors and its failure to explore with the applicant the significance of his references to his family in relation

to living on the mainland, cause me to conclude that the Tribunal did not apply the right test when it concluded that it was satisfied that the applicant could reasonably relocate to the mainland, in particular to Dar es Salaam and could "*forge a new life there*".

124. In addition, there was other evidence before the Tribunal about the applicant's mental condition and treatment, which it accepted. In addition to evidence from a psychiatrist about the applicant's concern about his family (his wife, children and elderly parents) as well as the impact on his relationships with them of his inability to support them financially, he was said to have presented as extremely distrustful and fearful, with symptoms of extreme psychological stress. Concern was expressed to the Tribunal that he was suicidal, as well as about his mental health generally.

125. The Tribunal accepted there was a risk of psychological harm if the applicant returned to Zanzibar (which it found it would be reasonable to consider would occur given his evidence concerning his family circumstances) in light of his past mistreatment and independent information, as well as the information about his mental condition and treatment. However in the context of relocation, its consideration of the applicant's mental condition was confined to whether, in isolation or considered cumulatively with his ethnicity, political history and use of a false passport, it would "*make him vulnerable to persecution on the mainland*." The Tribunal's statement that it considered the risk of psychological or other harm remote if the applicant returned to the mainland was made in this context. It did not consider whether his condition was itself a practical impediment to relocation as distinct from a factor that put him at risk of persecution.

126. In other words, insofar as issues of the applicant's family and psychological condition were considered, they were considered as relevant to the risk of persecution, but not as they were or may have been relevant more generally to the "*reasonableness*" of relocation and the practical realities facing the applicant should he seek to relocate, as considered in *NAIZ*, *SZAIX* and *SZBJI*. It was, however, necessary for the Tribunal to consider "*what might reasonably be expected of the* [applicant] *with respect to his 'relocation'*" in Tanzania (see *SZATV* at [32]).

127. The Tribunal's finding that the applicant had showed a current willingness and desire to work in Australia "*despite his mental condition*" did not acknowledge the possibility of difficulty based on the psychological aspects of the practical realities facing the applicant, with his mental condition, in adjusting to a new place of residence in a part of Tanzania where he must "*forge a new life*" in the absence of support from his family who lived in the part of Tanzania (Zanzibar) in which there was a risk of what may be serious harm to the applicant (see *SZAIX* at [62]).

128. Hence the Tribunal fell into error in that it did not give proper consideration to the practical realities facing the applicant with respect to his family circumstances and psychological condition should he seek to relocate within Tanzania. It erred in the manner considered in *NAIZ* and failed to complete its jurisdictional task (*SZBJI* at [23]). As stated in *SZATV* at [32], this amounted to an error of law going to an essential task of the Tribunal, being the determination of whether the applicant's fear of persecution was "*well-founded*" in the Convention sense.

129. The same cannot be said in relation to the issue of employment (whether as a taxi driver or otherwise). As the first respondent submitted, the Tribunal addressed the issue of whether the applicant could earn a living in Dar es Salaam. The Tribunal acknowledged that the applicant may face difficulties getting public sector employment in Dar es Salaam. It found, having regard to his past work experience including taxi driving and notwithstanding his political opinion, and given his willingness and desire to work in Australia despite his mental condition, that "*he has driving skills and a current willingness to work which will enable him to seek meaningful employment on the mainland and in particular in Dar es Salaam.*" These were factual issues for the Tribunal, which turned its mind to the issue of whether the applicant would be able to support himself if he relocated, relevant to the reasonableness of relocation.

130. However, as the Tribunal fell into jurisdictional error in the manner discussed above the matter should be remitted for determination according to law.

## Section 424

131. Ground two in the amended application is that the Tribunal fell into jurisdictional error in that it failed to comply with the procedure under s.424(3) of the Migration Act in two ways. First it was contended that on two occasions the Tribunal invited Mr Haji (the CUF lawyer contacted by $T_1$) to give additional information as to his identity pursuant to s.424(2) of the Act, without giving the invitation by one of the methods in s.441A of the Act as required by s.424(3).

132. Secondly it was submitted that the Tribunal failed to comply with s.424(3) in that it invited Mr Haji to give additional information obtained from Mr Nassor Khamis without giving the invitation to Mr Nassor Khamis by one of the methods in s.441A of the Act.

133. Section 424 of the Migration Act as it stood at the relevant time was as follows:

> *(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.*
>
> *(2) Without limiting subsection (1), the Tribunal may invite a person to give additional information.*
>
> *(3) The invitation must be given to the person:*
>
> > *(a) except where paragraph (b) applies—by one of the methods specified in section 441A; or*
> >
> > *(b) if the person is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.*

## The invitations to Mr Haji

134. It appears from the material before the Court (in particular the decision of $T_1$) that in the course of the hearing conducted by $T_1$ the applicant claimed that in August 2000 he was arrested with other CUF workers, taken to the local police station and after two days taken before the Court. $T_1$ recorded that the applicant said he was represented by a CUF lawyer whom he named as Mr Haji, who had applied for bail which

was granted on condition that three people put up the title deeds to their property as surety. The applicant provided the names of the three CUF leaders who he claimed provided security for his bail. $T_1$ recorded that the applicant consented to the Tribunal contacting the lawyer Mr Haji, to confirm this claim.

135. The Tribunal member who constituted the Tribunal in 2003 sent an email to Mr Haji dated 3 June 2003. In its decision $T_1$ recorded that it had been given Mr Haji's contact details in relation to another application to the Tribunal. In that email, $T_1$ asked Mr Haji about two applicants. The applicant in this case was said to have claimed that Mr Haji had represented him, "*before Vuga Court in relation to charges laid in August 2000*". The other applicant was said to have claimed to have been represented by Nassor Khamis.

136. $T_1$ advised Mr Haji that the applicant had agreed that the Tribunal contact him for information and that if he could help $T_1$ could provide further information and some specific questions. $T_1$ asked Mr Haji whether there was a lawyer by the name of Nassor Khamis who did work for the CUF and if so if he had an email address for him.

137. $T_1$ also asked Mr Haji if the CUF ever provided assistance to wanted activists to leave Zanzibar, including providing false passports and travel papers and whether he was able to provide the name and contact details of any CUF official who might be able to tell whether this happened.

138. It is apparent from the copy emails contained in the Court Book that $T_1$ received an email response under the name of Mr Haji dated 9 June 2003 attaching a copy of a letter dated 4 June 2003 which referred to both applicants and stated in reference to those persons:

> *I do not know them, I have never represented either of them in any case in any court.*

Mr Haji confirmed that there was a lawyer by the name of Nassor Khamis who sometimes worked for the CUF and continued:

> *I had an opportunity of discussing this issue with him yesterday after our evening prayer and he also deny representing any of the above person, he don't know any of them. I asked for his permission to provide you with his e/mail address but he saw no*

*need of communicating with you for the issue of a person who he don't know him* (sic).

*Leaving Zanzibar for the wanted activists is the responsibility of a person(s) concerned including preparations of passport and all other necessary documents. Depending upon the circumstances and on case by case basis CUF do make all necessary arrangements for such a person to escape persecution in Zanzibar. According to my knowledge CUF has never assisted any person to leave Zanzibar using false documents. The use of false documents such as passports, travel papers and any other identity is a criminal offence which CUF do not entertain.*

*Unfortunately the efforts of getting CUF officials to comment on the issue of these two gentlemen was not successful. They refused to provide you with their contact details because they don't know these people, they have never dealt with them and they have no record of their activities.*

139. In an email to Mr Haji of 11 June 2003 $T_1$ expressed puzzlement as to why no-one from the CUF would provide a response and indicated that it would be helpful to have further written confirmation that the CUF did not know these people and did not operate in the manner claimed. $T_1$ also asked "*I wonder if you could provide me with details of your qualifications (where, when you graduated, how long you've been in practice and what kind of work you do) for the sake of completeness*." By email of 15 June 2003 Mr Haji forwarded the Tribunal a copy of his curriculum vitae.

140. In its reasons for decision $T_1$ recorded that on 17 June 2003 the Tribunal member telephoned Mr Haji on the mobile number on the letterhead that had been obtained in relation to another review application. There is no record of the content of the telephone conversation before the Court other than the $T_1$ reasons for decision. $T_1$ recorded that Mr Haji confirmed that he was a CUF lawyer and that he had sent the emails referring to the applicant.

141. The applicant submitted that both the initial request for information in the email of 3 June 2003 and the telephone conversation of 17 June 2003 constituted a request for "*additional information*" from Mr Haji within s.424(2). It was submitted that an invitation by telephone did not comply with s.441A of the Act (which provides for documents to be given to a person by handing them to the person, despatch by pre-

paid post or transmission by fax, email or other electronic means to the last such address provided to the Tribunal by the recipient in connection with the review) and that this was a breach of s.424(3) by reason of which the Tribunal ($T_3$) failed to comply with the procedure required by law to be observed in connection with the making of the decision and fell into jurisdictional error.

142. The applicant also contended that the initial email to Mr Haji of 3 June 2003 was a request for additional information in s.424(2) which breached s.424(3) because it did not comply with s.441A(5) because that section requires transmission of a document by email to the last email address "*provided to the Tribunal by the recipient in connection with the review*".

143. In oral submissions counsel for the applicant clarified that it was contended that s.424(2) applied to the 3 June 2003 email to Mr Haji as an invitation to give additional information on the basis that "*additional information*" meant information Mr Haji had not already provided to the Tribunal or that the Tribunal had not obtained in another way. The applicant contended that while the Tribunal had obtained an email address for Mr Haji in the course of considering another application by a different protection visa applicant, s.424(2) was applicable to the first contact by the Tribunal in the course of the review in relation to the applicant with the person from whom it sought information. It was contended that the word "*additional*" in s.424(2) did not mean additional to information that that particular person had already provided, but rather that whenever the Tribunal obtained information from someone additional to what it had before it from any source, it had to comply with s.424(3). This interpretation was said to be consistent with the approach of the Full Court of the Federal Court in *SZKTI v Minister for Immigration and Citizenship and Another* (2008) 168 FCR 256 at [43].

144. In *SZKTI* the appellant had provided the Tribunal with a letter of support from church elders. Subsequently the Tribunal telephoned one of the elders about the appellant. It put the information obtained from the elder to the appellant under s.424A. However the Full Court of the Federal Court found that the Tribunal had obtained additional information within s.424(2) by that telephone conversation and had

breached s.424(3) because the invitation was not made in accordance with the procedure in s.441A. The applicant also relied on *SZKCQ v Minister for Immigration and Citizenship and Another* (2008) 170 FCR 236 in which a differently constituted Full Court declined to depart from the principles in *SZKTI* as to the application of s.424.

145. An appeal in *SZKTI* (and also in *Minister for Immigration and Citizenship v SZLFX* [2008] FCAFC 125) is presently before the High Court which may clarify the requirements of s.424 and the circumstances (if any) in which jurisdictional error may result if the procedures contemplated in ss.424(2) and (3), 424B and 441A are not followed. However it was submitted that the present case was on all fours with the decision of the Federal Court in *SZKTI*, which I am bound to follow.

146. More generally the applicant contended that s.424(2) of the Act was applicable because Mr Haji did not give evidence on oath or affirmation to the Tribunal pursuant to s.427(1)(a), the Tribunal did not obtain the information from him by summons pursuant to s.427(3)(a)(b) or s.427(1)(d) of the Act and the applicant had not given the Tribunal notice pursuant to s.426(2) that he wanted it to obtain oral evidence from Mr Haji.

147. While the alleged non-compliances occurred while the matter was before $T_1$, counsel for the applicant submitted that $T_3$ reproduced and affirmed the findings of $T_1$, including those based on the information it had obtained in response to the invitation to Mr Haji and that it relied heavily on the information from Mr Haji in concluding that the applicant was not represented by Mr Haji and that he had concocted this claim. It was said that the non-compliance with s.424(3) was a non-compliance by $T_3$, notwithstanding that the information was obtained by $T_1$ (a differently constituted Tribunal).

148. In that respect the applicant referred to *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 in which the High Court held that the Full Court of the Federal Court had erred when it ordered that a matter be remitted to the Tribunal as previously constituted. The applicant submitted that the High Court indicated that on remitter the Tribunal was required to carry out its task afresh and make whatever findings of fact were appropriate at the time of its

decision, although it would be open to the newly constituted Tribunal to preserve findings from the first review or to make new findings on those matters. As Gummow and Hayne JJ stated in *Wang* at [68]:

> *Whether any findings from the first review would be preserved would entirely depend upon the view formed by the Tribunal in conducting the second review.*

149. Reliance was also placed on *SZHKA and Another v Minister for Immigration and Citizenship and Another* (2008) 172 FCR 1 in which the Full Court of the Federal Court considered the principles in *Wang* in relation to the issue of whether a reconstituted Tribunal was under an obligation to invite an applicant to a further hearing under s.425 of the Act. The majority (Gray and Gyles JJ) held that a fresh invitation to a hearing was required in every case and that a failure to invite the applicant to a new hearing would result in jurisdictional error.

150. Gray J stated at [18] that a Tribunal hearing a matter on remitter must determine the review by dealing with the issues as they presented themselves at the time of its determination "*according to the facts as the Tribunal finds them to be at that time.*" His Honour pointed out that the facts may appear differently to the second Tribunal and held that the second Tribunal was required to conduct a s.425 hearing.

151. Gyles J stated in *SZHKA* at [37]:

> *... it is difficult to see an escape from the proposition that once an administrative decision is set aside for jurisdictional error, the whole of the relevant decision-making process must take place again (*Minister for Immigration and Multicultural Affairs v Bhardwaj *(2002) 209 CLR 597). ... Mandatory statutory obligations must be carried out again. The suggested dichotomy between an administrative decision and what precedes it is unconvincing in this context. Such a conclusion would not mean that what has taken place in the previous review cannot be taken into account in the second review if considered relevant. The proceedings are administrative, not judicial, and the Tribunal can have regard to all relevant material, including a transcript of what took place at the previous hearing, subject to compliance with the statutory regime.*

152. These principles were said to support the proposition that the decision of $T_3$ was affected by jurisdictional error because of the breach of s.424(3) albeit the invitation under s.424(2) was extended by $T_1$.

153. Counsel for the applicant also submitted that there is only one "*review*" for the purposes of Div 4 in Part 7 of the Act, even when an application for review is set aside by an order of the Court and the matter remitted and re-determined by a differently constituted Tribunal (as here). This was said to have been clarified in *SZEPZ v Minister for Immigration and Multicultural Affairs and Another* (2006) 159 FCR 291 in which the Full Court of the Federal Court stated at [39]:

> *In any event, when ss 421, 422 and 422A refer to "a particular review", they identify the review initiated under s 414(1) and culminating in a decision in accordance with s 430, being the review that a particular person, namely the applicant for review, has initiated in respect of an RRT-Reviewable Decision. The expression does not depend upon the identity of the particular member constituting the Tribunal. Rather, it refers to the function of the Tribunal to review a decision. Until the Tribunal has made a valid decision on the review that has been initiated by a valid application under s 414, it has a duty to perform that particular review. An invalid decision by the Tribunal is no decision at all but it does not follow that all steps and procedures taken in arriving at that invalid decision are themselves invalid. The Tribunal still has before it the materials that were obtained when the decision that had been set aside was made.*

154. In that case it was held that if the Tribunal as originally constituted had given a notice to an applicant in compliance with s.424A of the Act it was not necessary for the Tribunal as reconstituted (which also considered the information in question to be part of the reason for affirming the decision under review) to do so again.

155. Counsel for the applicant submitted that if the Tribunal as originally constituted failed to comply with a statutory requirement, the Tribunal as reconstituted had to carry out that procedure afresh. The applicant contended that the fact that the decisions of $T_1$ and $T_2$ had been set aside in judicial review proceedings did not relieve $T_3$ from its duty to comply with s.424(3) or protect it from legal error if it failed to do so (see *Wang* and *SZEPZ*) having regard to the fact that there was only one review which was said to remain "*pending*" before $T_3$. Counsel for

the applicant submitted that neither $T_1$, $T_2$ nor $T_3$ had invited Mr Haji to give information by means of one of the methods of invitation set out in s.441A and hence it could be said that there was a breach of s.424(3) by the Tribunal as most recently constituted and that as the Tribunal as reconstituted had not given a fresh invitation to Mr Haji in a manner that complied with s.424(3) it could not rely on the information obtained by $T_1$ in breach of s.424(3).

156. The applicant also submitted (ground one paragraph (b)) that the Tribunal failed to comply with s.424(3) by writing to Mr Haji to obtain information from Mr Nassor Khamis without giving the invitation by one of the methods in s.441A of the Act. While the particulars to this ground refer to an invitation to Mr Haji, the applicant's written submissions refer to an invitation to Mr Khamis (through Mr Haji) to give his email address. It was submitted that this was an invitation to Mr Khamis to give additional information and was not given by any of the methods in s.441A. The applicant submitted that contacting an intermediary by email did not comply with s.441A. While such alleged non-compliance "*occurred in relation to the first Tribunal hearing*" it was said to have infected the review and the decision made by $T_3$ because $T_2$ and $T_3$ also failed to comply with s.441A.

157. The first respondent submitted first that *SZKTI* did not compel the conclusions contended for by the applicant, as the inquiries in this case were undertaken by the Tribunal as originally constituted. It was submitted that the case was not on "*all fours*" with *SZKTI.*

158. Reference was made to *SZLWQ v Minister for Immigration and Citizenship and Another* (2008) 172 FCR 452, in which Buchanan J considered the consequences of a failure to comply with requirements of s.424B(2) in relation to an invitation to give additional information. Relevantly, s.424B(2) directs that where there is an invitation under s.424(2) the information is to be given "*within a period specified in the invitation*." His Honour stated at [52] that:

> *The consequence of any failure to specify a period is that the facility in s 424C of proceeding to a decision in the absence of the information might not be available but I do not see s 424B(2) as establishing the kind of obligation on the RRT which could lead to either statutory breach or jurisdictional error.*

159. Buchanan J found (at [52]) that a failure to specify a period and consequent inability to rely on s.424C did not constitute a breach of s.424B(2) and that "*in any event, any failure to comply with its strict terms did not, in the circumstances of this case at least, amount to jurisdictional error on the part of the RRT*."

160. It was also submitted that even if the applicant established that $T_1$ had not complied with s.424(3) of the Act, as that decision has been set aside any breach by $T_1$ of s.424(3) could have no bearing on whether the most recently constituted Tribunal ($T_3$) committed a jurisdictional error, as otherwise the Tribunal could never make a valid decision. It was contended that the information elicited by $T_1$ and $T_2$, whether or not in breach of s.424, was before the Tribunal as most recently constituted and that the applicant had not explained why that information could not be examined by the Tribunal as part of the record before it. The first respondent contended that nothing in the Act prevented the Tribunal from having regard to material referred to in previous Tribunal decisions.

161. Any suggested analogy with s.424A was said to be inapposite because that section created obligations with respect to information before the Tribunal. In contrast, s.424 was said not to be a source of obligation on the present Tribunal, except to the extent that when it made inquiries or extended an invitation to give additional information pursuant to that section, the procedure in s.424 must be followed by it. However, it was submitted that the Tribunal was not obliged to re-perform inquiries that had been made or to extend fresh invitations already given under s.424 by a previously constituted Tribunal in relation to the applicant, despite already having that information.

## Resolution

162. I have considered first whether any of the conduct complained of amounted to a failure to comply with s.424(3). The short answer to ground two paragraph (b) is that even if it is correct to analyse what occurred as an invitation to Mr Khamis to give additional information, such invitation was not given in connection with the review of the decision of the delegate in relation to the applicant *SZCLY*. The Tribunal's email to Mr Haji of 3 June 2003 related to two separate

applications. The applicant in this case claimed Mr Haji had represented him. The other applicant (who was said to claim to be the nephew of the CUF Secretary General) claimed he was represented by a "*CUF lawyer named Nassor Khamis*". It is clear that the request for contact details for Mr Khamis was made in connection with the review application relating to that other applicant, not in relation to the applicant in these proceedings. The reasons for decision of both $T_2$ and $T_3$ confirmed and clarified that the applicant's claim was that Mr Haji (not Mr Khamis) represented him.

163. In any event, the request in the email to Mr Haji was not an invitation to Mr Khamis. It was a request to Mr Haji to provide information as to whether there was a lawyer named Mr Khamis who did work for the CUF and the email address for Mr Khamis. No jurisdictional error is established on the basis contended for in ground two paragraph (b) as expressed in the application or as explained in written submissions.

164. As to ground two paragraph (a), first there are a number of reasons why, as contended by the first respondent, the initial $T_1$ email to Mr Haji in relation to the applicant is not a breach of s.424(3). First, on the approach taken by Cameron FM in *SZIAR v Minister for Immigration and Citizenship and Another* (2008) 220 FLR 232 at [35] – [39] such initial inquiry to an address known to the Tribunal through its own records would not be a failure to comply with s.441A and hence not a breach of s.424(3). Cameron FM stated at [38]:

> *In cases where it is the Tribunal which is initiating contact with a third party for the purposes of eliciting information under s 424, the reference in s 424(3)(a) to "one of the methods specified in section 441A" must be understood to be a reference to personal service (s 441A(2)); hand delivery to a person at the recipient's residential or business address (s 441A(3)); despatch by pre-paid post or other pre-paid means (s 441A(4)); or transmission by fax, email or other electronic means (s 441A(5)) to or at an address known to the Tribunal rather than to or at an address supplied to the Tribunal by the third party for the purposes of the review. At the outset of communications, if the Tribunal is aware of a third party's address through its own records or researches, rather than because that information has been supplied by the third party in connection with the review, the Tribunal's initial inquiries should not be taken to fall outside the scope of s 441A. Certainly, subsequent communications would have to be sent to*

> *any address identified by the recipient as being the appropriate address to which communications ought be sent but, until that point, the Tribunal should be entitled to use whatever address it has as being the most likely one at which it can make contact with the intended recipient.*

165. Driver FM reached a similar result in relation to s.441A for different reasons in *SZBQS v Minister for Immigration & Anor* [2008] FMCA 812 at [28] on the basis that:

> *... Parliament intended that the Tribunal must use an address given by a recipient for the purposes of a review, I do not think Parliament intended to deprive the Tribunal of the ability to write to a recipient at an address already known to it, subject to the proviso that the recipient could not be deemed to have received the correspondence, and must be given a reasonable time to respond.*

166. On this basis, which I am not persuaded is clearly wrong, there would not be a failure to comply with s.441A. Hence I did not consider it necessary to give the parties the opportunity to comment on *SZLPO v Minister for Immigration and Citizenship* [2009] FCAFC 51 a decision of the Full Court of the Federal Court made after judgment was reserved in this case. In *SZLPO* it was held that "*additional information*" in s.424(2) was limited to "*information additional to information previously given to the Tribunal by the invitee"* (at [98] – [102]). This puts it beyond doubt that the initial email to Mr Haji was not a request for additional information from him and hence that s.424(3) and 441A did not apply.

167. This leaves as the only possible failure to comply with s.424(3) the fact that after $T_1$ sought and obtained written information from Mr Haji of his qualifications, it telephoned him for confirmation of his identity and that he had sent the emails referring to the applicant. On this basis it is said that the decision of $T_3$ is infected by jurisdictional error.

168. Consistent with the approach taken in *SZKTI*, the telephone call to Mr Haji by $T_1$ was a request for additional information from him (and also see *SZLPO*). While the first respondent submitted that the failure to give that invitation in one of the ways specified in s.441A was not necessarily jurisdictional error having regard to *SZLWQ*, in that case Buchanan J was considering an invitation which complied with s.441A

but did not specify a period for reply as specified in s.424B(2). His Honour's view in relation to the effect of a failure to comply with s.424B is not directly in point.

169. The issue of whether a failure to comply with s.424(3) is a jurisdictional error where the information is sought from a third party and no issue arises as to reliance on s.424C (which empowers the Tribunal to make a decision without taking further action to obtain information) is presently before the High Court in *SZKTI*. However, consistent with the decision of the Full Court of the Federal Court in *SZKTI*, there was a breach of s.424(3) constituting jurisdictional error by $T_1$ when it invited Mr Haji by telephone to confirm his identity and that he had sent the earlier emails to the Tribunal. I note that it was not suggested that the material Mr Haji was invited to provide in the telephone conversation was not "*information*".

170. Neither party was able to assist the Court with authority directly in point in relation to whether, where there was a failure to comply with s.424(3) by a Tribunal as originally constituted, there was also a jurisdictional error by a Tribunal as reconstituted, at least where it relied on the additional information obtained in response to the invitation. In that respect it is important to bear in mind that the non-compliance by $T_1$ in question was not the use of information. Rather it was the failure to give the invitation in the manner required by s.441A that amounted to a breach of s.424(3). Clearly if $T_3$ invited a person to give additional information it would be obliged to comply with s.424(3). It did not give such an invitation.

171. The applicant sought to rely on an analogy with the approach taken in *SZHKA* in relation to the mandatory statutory obligation to invite an applicant to a hearing under s.425 of the Migration Act. However in contrast to the position in *SZHKA*, this is not a case in which $T_3$ failed to perform a mandatory statutory obligation that had been performed by $T_1$ or $T_2$ which also applied to $T_3$ (such as the obligation of a Tribunal reconstituted after remittal to invite an applicant to a hearing). Moreover in *SZHKA* it was the nature of the "*right*" of an applicant to an invitation to a hearing, the purposes of such a hearing and the need to put dispositive issues to an applicant as they presented themselves at the time of determination that led Gray J to conclude that it was

"*difficult to see*" how a reconstituted Tribunal could dispense with the step of inviting the applicant to a hearing under s.425 "*simply because another Tribunal member has taken that step at an earlier time*" (at [19]).

172. In contrast to the s.425 obligation, ss.424(2) and (3) are not limited to invitations to the applicant and a Tribunal is not under an **obligation** to invite any person to give additional information. The obligation to comply with s.424(3) arises only when it gives such an invitation. While Gyles J suggested in *SZHKA* that it was "*difficult to see an escape from the proposition that once an administrative decision is set aside for jurisdictional error, the whole of the relevant decision-making process must take place again* (Minister for Immigration and Multicultural Affairs v Bhardwaj *(2002) 209 CLR 597)*" (at [37]) and that "[m]*andatory statutory obligations must be carried out again"*, ss.424(2) and (3) do not compel a Tribunal to seek additional information afresh in a manner akin to the statutory obligations to accord a fresh invitation to the applicant to attend a hearing.

173. The decision of the High Court in *Wang* in relation to the issue of whether a matter could be remitted to the Tribunal as previously constituted does not establish the proposition that the decision of $T_3$ was infected by a jurisdictional error of $T_1$ consisting of a failure to comply with s.424(3). While on remitter the Tribunal is required to carry out its task afresh and make findings of fact appropriate at the time of its decision, it was not suggested that on remitter a Tribunal was required to in effect start again as though the first review had not occurred, so that it could not have regard to material obtained by the first Tribunal. The parties did not suggest that that was the case.

174. While the Full Court of the Federal Court in *SZEPZ* considered that there was only one "*review*" for the purposes of Division 4 of Part 7 of the Act where a matter has been remitted and redetermined, as was pointed out at [39]: "*An invalid decision by the Tribunal is no decision at all but it does not follow that all steps and procedures taken in arriving at that invalid decision are themselves invalid. The Tribunal still has before it the materials that were obtained when the decision that had been set aside was made*."

175. In *SZEPZ* the Full Court considered that where the first Tribunal had complied with s.424A it was not necessary for the second Tribunal to do so again. That is not the situation in this case, but it does support the view that the information obtained by $T_1$ would be before and could be taken into account by $T_3$.

176. I also note that there is no suggestion that either of the decisions of $T_1$ or $T_2$ were set aside for a jurisdictional error consisting of a failure to comply with the s.424(3) obligations.

177. There is said to be no authority directly in point. The issues raised by the applicant are of some complexity and have wider implications which, understandably, were not addressed in these proceedings. For example, a somewhat analogous issue would arise if a Tribunal on remittal, in addition to conducting a further hearing, sought to rely on other evidence given by an applicant at a hearing conducted by a differently constituted Tribunal which was affected by jurisdictional error, for example because of interpreter inadequacy or mistranslation (see *Appellant P119/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 230).

178. In any event, if the decision of $T_3$ was affected by jurisdictional error merely because $T_1$ gave an oral rather than a written invitation to Mr Haji to provide information which merely confirmed his identity and this had been the only basis on which jurisdictional error was established in this case, I would have exercised my discretion to refuse relief. The fact that $T_1$ gave the invitation to Mr Haji to confirm his identity by a method other than that prescribed in s.441A of the Act (that is, in a documentary form) was not material to the decision of $T_3$. There is no suggestion that the content or form of that invitation had any impact on the response by Mr Haji confirming his identity. No practical unfairness to the applicant has been established in relation to the decision of $T_3$ from the fact that $T_1$ obtained confirmation of Mr Haji's identity by telephone rather than in writing. I note that the Tribunal put to the applicant under s.424A that Mr Haji's identity had been confirmed.

179. I am satisfied in all the circumstances that if there was a jurisdictional error by $T_3$ consisting solely of a failure to comply with s.424 in relation to the telephone call to Mr Haji these would be "*exceptional*

*circumstances*" as considered in *SZIZO and Others v Minister for Immigration and Citizenship and Another* (2008) 172 FCR 152 at [97] (and see *SZKGF v Minister for Immigration and Citizenship* [2008] FCAFC 84 and the discussion in *SZLYR v Minister for Immigration & Anor* [2008] FMCA 1322), such that the Court should refuse relief. However as jurisdictional error has been established in relation to the Tribunal consideration of relocation the matter should be remitted on the basis of that error.

180. In such circumstances it is unnecessary to attempt in these proceedings to resolve the broader issues raised by this ground as to the nature and scope of a Tribunal review on remittal.

## Section 425

181. The next ground in the amended application is that the Tribunal failed to comply with s.425(1) of the Migration Act under which the Tribunal is obliged to invite the applicant to a hearing to give evidence and present arguments in relation to the issues arising in relation to the decision under review.

182. There are two aspects to this ground. The first is that the Tribunal failed to inform the applicant that it considered the issue of his ability to obtain employment within State institutions on the mainland was an issue relevant to its determination. However in oral submissions counsel for the applicant conceded that in light of the Tribunal reasons for decision this was a "*non-issue*" and hence did not have to be put to the applicant under s.425.

183. The remaining alleged failure to comply with s.425 is that the Tribunal failed to inform the applicant that it considered the issue of his ability to work by driving a taxi on the mainland, in particular in Dar es Salaam, to be an issue relevant to its determination.

184. The applicant contended that the Tribunal considered that the issue of the applicant's ability to work by driving a taxi on the mainland, in particular in Dar es Salaam, was an issue relevant to its determination, but that it failed to give notice to the applicant of this fact during the hearing. It was also said that this issue was not raised with the applicant by the delegate or by the first or second Tribunal so that he

was not offered an opportunity to give evidence or present arguments to the Tribunal as to his ability or inability to obtain a licence to drive a taxi on the mainland of Tanzania or in Dar es Salaam. This was said to constitute a breach of s.425(1) of the Act.

185. Reliance was placed by the applicant on the principles considered by the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 in relation to what is required of a Tribunal under s.425 of the Act.

186. Counsel for the first respondent submitted that this ground failed at the outset as the applicant had not submitted a transcript of the hearing so that there was no factual foundation established for the claimed breach of s.425 (see *NAOA v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 241 at [21]). It was said that the applicant bore the onus of establishing a lack of procedural fairness (*VAAD v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 117 at [44] – [45]) and that the same must apply to s.425.

187. The first respondent also submitted that in any event the relevant issue for the purposes of s.425 was whether the applicant could relocate to the mainland and that, according to the Tribunal account of what occurred in the hearing, this issue was raised with him. It was contended that the Tribunal was not bound by s.425 to raise with the applicant possible objections to relocation that he did not raise and that procedural fairness did not require the Tribunal to set up for an applicant's consideration during the hearing every detail of the reasoning process it eventually employed (*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* (2003) 77 ALJR 1909 at [54]).

188. First, the Tribunal did not simply find that the applicant could drive a taxi on the mainland. Rather, it found, in light of a number of factors, (including his past experience as a taxi driver and taxi manager in Zanzibar; the past renewals of his licence; the fact that his political opinion did not prevent him "*from working, and eventually managing a taxi*"; and the fact that in Australia, he had shown a current willingness and desire to work despite his mental condition) that he had "*driving skills and a current unwillingness to work which will enable him to*

*seek meaningful employment on the mainland and in particular in Dar es Salaam*." Such a finding was not a finding that the applicant could work as a taxi driver on the mainland.

189. It is not in dispute that the Tribunal raised the issue of relocation with the applicant at the hearing. The issue of the applicant's ability to work by driving a taxi on the mainland was not a dispositive issue in the sense considered in *SZBEL* such that an obligation of disclosure arose in relation to "*an issue arising in relation to the decision under review*" under s.425 of the Migration Act. The applicant's claims about his work experience, including as a taxi driver and manager were accepted by the Tribunal (cf *SZBEL*). It was not required to put its provisional reasoning to the applicant.

190. Hence it is not necessary to determine whether this is a case in which an inference should be drawn that a particular matter was not raised at the hearing based on what appears in the reasons for decision (cf *SZJYA v Minister for Immigration and Citizenship (No 2) and Another* (2008) 102 ALD 598. This ground is not made out.

## Section 424A

191. Ground four is that the Tribunal failed to comply with ss.424A(1)(a) and (b) of the Act as it stood at the relevant time. The first aspect of this ground is that the Tribunal failed to give the applicant particulars of the questions it put to Mr Haji or to ensure as far as was reasonably practicable that the applicant understood why that information was relevant to the review.

192. The particulars to this part of ground four are as follows:

> *i) By letters dated 14 August 2003 and 19 December 2007 the Tribunal gave to the applicant particulars of items of information which it stated it considered would be the reason or a part of the reason for affirming the decision under review.*
>
> *ii) The Tribunal's letters dated 14 August 2003* [and] *19 December 2007 described a reply given by Mr Ussi Khamis Haji to enquiries made by the Tribunal.*

*iii) The Tribunal letters dated 14 August 2003 and 19 December 2007 did not inform the applicant of the nature of the enquiries and in particular did not disclose to the applicant what questions the Tribunal put to Mr Ussi Khamis Haji.*

*iv) Since he was not given the questions, the applicant was not in a position to understand the significance of Mr Ussi Khamis Haji's responses.*

*v) The Tribunal failed to comply with s 424A(1)(b) of the* Act.

*vi) The questions which the Tribunal put to Mr Ussi Khamis Haji were information within s 424A(1)(a), which should have been provided to the applicant.*

*vii) The Tribunal failed to comply with s 424A(1)(a) of the* Act.

*viii) By reason of the breaches of s 424A(1)(a) and (b) the Tribunal failed to comply with the procedure that was required by law to be observed in connection with the making of the decision and fell into jurisdictional error.*

193. The applicant submitted that while $T_1$ and $T_3$ wrote to the applicant by letters dated 14 August 2003 and 19 December 2007 giving him particulars of information that the respective Tribunal members considered would be the reason or a part of the reason for affirming the decision under review, these letters did not meet the obligations under s.424A.

194. In particular it was contended that the nature of the inquiries and the questions the Tribunal put to Mr Haji were information within s.424A(1)(a) which should have been provided to the applicant (in addition to particulars of the reply). It was submitted that since he was not given the questions the applicant was not in a position to understand the significance of Mr Haji's response. It was said that the Tribunal should have put to the applicant the way in which it described or sought to identify him to Mr Haji.

195. In submissions it was also contended that the Tribunal was obliged to give the applicant particulars of Mr Haji's curriculum vitae and information about the results of Google searches it conducted, as this was said to be part of the reason the Tribunal affirmed the decision under review because it confirmed the identity and standing

of Mr Haji and because of this information the Tribunal placed weight on the letter from Mr Haji which had no letterhead.

196. The applicant submitted that *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 did not pose the test as to what constituted information within s.424A(1) in terms of whether the material in question constituted a "*rejection, denial or undermining*" of an applicant's claim. It was submitted that such an approach placed a gloss on the section and that the passage in *SZBYR* in which this concept occurred (at [17]) was not a statement of principle but a comment on the nature of the particular information in the circumstances of that case.

197. However, as the first respondent submitted, subsequent Federal Court decisions have addressed the scope of "*information that the Tribunal considers would be the reason or part of the reason for affirming the decision under review*" by reference to whether such information constitutes a rejection, denial or undermining of the applicant's claims as considered in *SZBYR*. In particular, in *SZGIY v Minister for Immigration and Citizenship* [2008] FCAFC 68 the Full Court of the Federal Court accepted that particular information was "*neutral*" and would not engage s.424A(1) and stated at [23]:

> *It did not, in terms, reject, deny or undermine the appellant's claim to be a person to whom Australia owed protection obligations. See* SZBYR v Minister for Immigration and Citizenshi*p [2007] HCA 26; (2007) 81 ALJR 1190 at [17]. It was therefore not information which could be the reason, or part of the reason, for affirming the delegate's decision.*

198. The questions asked of Mr Haji did not in their terms reject, deny or undermine the applicant's claim to be a person to whom Australia owed protection obligations.

199. Further, insofar as the applicant relied on *SZKCQ v Minister for Immigration and Citizenship and Another* (2008) 170 FCR 236 in support of the proposition that the way in which the questions were posed to Mr Haji constituted information within s.424A(1)(a) and also had to be put to him for the Tribunal to meet its obligation in s.424A(1)(b) to "*ensure, as far as is reasonably practicable, that the*

*applicant understands' why* [the information in s.424A(1)(a)] *is relevant to the review*" this contention is not made out.

200. In *SZKCQ* Buchanan J made the point that in some circumstances the use by the Tribunal of the context in which a response is given by a third party may be such that the nature of the questions asked is a relevant fact or circumstance and therefore "*information*" which has to be disclosed under s.424A(1)(a).

201. However in the particular circumstances in *SZKCQ* the use made of the response to a request to third parties "*depended importantly on the context in which the response was given*". As his Honour stated at [84]:

> *What told against him was that Mr Khalid was to be asked a specific question (which the appellant did not know about) but he made no reference to things the appellant had spoken about. That "omission" by Mr Khalid only had significance in a context where it was known that the question was to be asked and on the assumption that it was.*

202. It was in those circumstances that Buchanan J found that "[t]*he fact that the question was to be posed was part of the "information" upon which the RRT relied."* This is not such a case. No failure to comply with s.424A(1)(a) in relation to the questions asked of Mr Haji is established on such a basis. It has not been established that the use made of Mr Haji's response would (or did) depend on the context in which the response was given.

203. In relation to s.424A(1)(b), the applicant referred to the fact that in *SZKCQ* Stone and Tracey JJ (as well as Buchanan J) found that the Tribunal had failed to comply with s.424A(1)(b) where it put to the appellant for comment information provided in response to the inquiry from the Australian High Commission, but not the questions asked in that inquiry. Stone and Tracey JJ sated at [4]:

> *For the appellant to understand why the information provided in response to the High Commission's enquiry might be relevant to the review he needed to understand the context in which that information was given; in other words he needed to be informed of the questions to which the two gentlemen were responding. There can be no doubt that it was "reasonably practicable" for*

> *the Tribunal to give him the questions. Without them the appellant's capacity to comment on the responses was severely compromised; he was not afforded the procedural fairness for which the Act provides. As McHugh J remarked in* SAAP v Minister for Immigration and Multicultural and Indigenous Affairs *(2005) 228 CLR 294 at [77], it would be an "anomalous result" if, despite the Tribunal's failure to take the steps that the* Migration Act *laid down so that an applicant would be accorded procedural fairness, its decision were found to be valid.*

204. Their Honours pointed out (at [3]) that the significance of the information in that case lay in what the responses "*did **not** say rather than in what they did say*" and that "[i]*n the light of the questions that were asked their responses were significantly deficient"* (at [3] and see Buchanan J at [78] – [95]).

205. Again, the same cannot be said in this case. It was not necessary for the applicant to be given details of the questions asked to understand why the information provided by Mr Haji might be relevant to the review. The s.424A letter sent by $T_3$ sufficiently put the information in s.424A(1) to the applicant and explained the relevance of the information to Mr Haji as follows:

> *After question at T1's hearing you stated a CUF lawyer, Ussi Khamis Haji, acted as your court lawyer in the August 2000 incident. A Google search showed many references to Mr Haji and that he was a well known CUF lawyer and a Zanzibar High Court advocate. The Tribunal (T1) made enquiries after the hearing, sent on 3 June 2003 and Mr Haji replied within a few days on 9 June. He advised that he had never represented you in any case in any court. He mentioned that he had also discussed the case with another lawyer who sometimes worked for CUF. The Tribunal subsequently confirmed that the advice was indeed given by Mr Haji.*
>
> ***This information is relevant because it shows that Mr Haji says he and another CUF lawyer have no knowledge of you. If accepted, this may suggest that you fabricated the claims: to have been involved in the incident in August 2000; to have been arrested and attended Court as a result; to have been represented by Mr Haji; to have been bailed with CUF support; and hence to have jumped bail and fled to Zanzibar.***
>
> ***Alternately, if it is accepted that you did appear in Court in August 2000, it may suggest that a CUF lawyer did not***

***represent you because the matter was either not serious, or was finalised promptly. This may also suggest you were not bailed with CUF support; and hence did not jump bail and flee to Zanzibar.***

***This information is relevant as it may suggest that Mr Haji has no interest in you and so has not threatened you either directly or indirectly through others.*** (Emphasis in original).

206. It was not necessary for the "*whole of the exchange*" (cf *SZKCQ* at [94] per Buchanan J) to be disclosed. This is not a case in which the applicant needed to be informed of the questions asked to understand why the information provided by Mr Haji might be relevant to the review. No failure to comply with s.424A(1)(b) is established.

207. In addition, Mr Haji's curriculum vitae and the Google search information did not have to be put to the applicant beyond the manner in which the s.424A letter referred to the results of a Google search confirming that Mr Haji was a well-known CUF lawyer and Zanzibar High Court advocate. The Tribunal obtained the curriculum vitae to confirm that the person who responded to its emails was Mr Haji. The confirmation of his identity was the relevant information (not the content of the curriculum vitae). The Tribunal put to the applicant in its s.424A letter that it had confirmed that the advice was given by Mr Haji. No breach of s.424A(1) is established in the manner contended for in paragraph (a) of ground four or in submissions.

208. Paragraph (b) of ground four involves a contention that the Tribunal failed to comply with ss.424A(1)(a) and (b) in failing to give the applicant particulars of the questions it put to Mr Khalid Mgnanah (who was designated on the CUF website as the CUF information officer) or to ensure as far as reasonably practical that the applicant understood why that information was relevant to the review. The particulars refer to the fact that $T_1$ sent an email to Mr Mgnanah on 17 June 2003 asking him a number of questions about the applicant and also about an applicant in another matter before the same Tribunal member.

209. The Tribunal email to Mr Mgnanah is not included in the material before the Court. However, included in the material and referred to in the decision of $T_1$ is an email to $T_1$ dated 10 August 2003 from another person (Juma Duni Haji) who described himself as the Deputy Secretary General of the CUF Zanzibar and stated that he was responding to an email received through Mr Mgnanah. $T_1$ and $T_3$ put to the applicant particulars of Mr Juma Duni Haji's response in s.424A letters. Issue is taken in ground four paragraph (b) with the fact that neither $T_1$ nor $T_3$ informed the applicant of the questions the Tribunal put to Mr Mgnanah or of the questions which he passed on to Mr Juma Duni Haji. Such questions were said to be information within s.424A(1)(a) which should have been put to the applicant. It was submitted that since they were not put to the applicant he was not in a position to understand the significance of Mr Juma Duni Haji's responses and hence that the Tribunal failed to comply with s.424A(1)(b).

210. I am not persuaded that in all cases the questions asked of a third party constitute information in s.424A(1)(a) or have to be put to an applicant so that he can understand the significance of responses. There is no evidence before the Court as to what questions were asked of Mr Mngana (or Mgnanah). It has not been established that the circumstances in this case are akin to those considered by Buchanan J in *SZKCQ*. The nature of the response of Mr Juma Duni Haji and the manner in which the particulars of that response were put to the applicant are not such as to establish the suggested breaches of s.424A. There is no suggestion that the Tribunal otherwise erred in the manner in which it put Mr Juma Duni Haji's response to the applicant. This ground is not made out.

## No evidence

211. The fifth and final ground in the amended application is that the Tribunal "*erred in law in that it based its decision on the existence of a particular fact and that fact did not exist, the fact being that the applicant's passport issued to him in his own name on 25 August 1992 was not genuine and that the name in the passport was not his true identity*."

212. The particulars are as follows:

i) *By letter dated 14 May 2001 the first respondent informed the applicant that the Department's document examination unit had advised that the passport issued in the applicant's own name displayed alterations consistent with photo substitution and did not represent his true identity.*

ii) *By letter dated 8 June 2001 the applicant stated that it was a genuine passport.*

iii) *By letter dated 17 September 2001 the first respondent sought comment on whether the passport was genuine.*

iv) *By letter dated 24 October 2001 the applicant stated that the passport was genuine and the name in it was his true identity.*

v) *The applicant provided the Tribunal with a receipt for the passport issued on 25 August 1992.*

vi) *The Tribunal found that it had doubts as to the identity of the applicant because on the expert opinion referred to in particular (i) above, the passport issued to him in his own name had been tampered with.*

vii) *The Tribunal's finding that it doubted the identity of the applicant was material to its decision, in particular with regard to the applicant's credibility and whether there was a real chance of harm by reason of breach of the law prohibiting departure from Tanzania on a false passport.*

viii) *By telephone conversation on 14 August 2008 Mr Igor Vyvey of the Department informed Grace Ellul, the applicant's adviser, that verification of identity had been made and the Department recognised that the identity of the applicant was as stated in the passport issued to him in his own name.*

213. The applicant contended that the Tribunal’s finding that it had doubts as to the identity of the applicant on the basis of the Department's expert opinion was material to its decision, in particular with regard to the applicant's credibility and whether there was a real chance of harm by reason of breach of the law prohibiting departure from Tanzania on a false passport.

214. The Tribunal was said to have based its decision on the existence of a particular fact which did not exist, as considered in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014. Reference was made in submissions for the applicant to the "*no evidence*" ground in ss.5(1)(h) and 5(3) of the *Administrative Decisions (Judicial Review) Act* (1977) (Cth) (as to which see *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal* (1986) 13 FCR 511, *Curragh Queensland Mining Limited v Daniel and Others* (1992) 34 FCR 212 and *Raru v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 35 ALD 373).

215. It was acknowledged that the no evidence ground required the applicant to establish that a fact that was central to the decision did not exist, rather than that there was an absence of evidence, but it was submitted that this had been established in the present case. It was contended that the Tribunal drew an inference, in reliance on the expert opinion by the Department's document examiner, that there was evidence of tampering and alterations being made to the passport indicative of photo substitution, that the applicant's passport issued in his own name on 25 August 1992 was not genuine and that the name in the passport was not his true identity.

216. In support of this proposition, the applicant referred to correspondence from the Department informing the applicant of the opinion of the Document Examination Unit, the applicant's response that it was a genuine passport and the fact that the applicant had provided the Department with further information and had provided the Tribunal with various documents indicating his identity (including a receipt for the passport issued on 25 August 1992). In addition the applicant sought to rely on evidence not in existence at the time of the Tribunal decision. In particular, the applicant sought to rely on an affidavit sworn by Grace Ellul, the applicant's adviser, on 20 May 2008 relating to Departmental verification of the applicant's identity that occurred after the Tribunal decision.

217. The applicant submitted that this evidence positively established that the fact on which the Tribunal based its critical finding of doubt about the applicant's identity (being the finding in the report of the Department's document examiner that the passport had been tampered

with or altered by photo substitution) was incorrect as a matter of fact. It was submitted that it was now clear that the passport was genuine and had not been tampered with and that the Tribunal could be said to have based its decision on a fact that was critical and that did not exist in a manner constituting jurisdictional error.

218. However even if a jurisdictional error can be established on the basis of a "*no evidence*" ground such as that contained in the *Administrative Decisions (Judicial Review) Act 1977* or otherwise (cf *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at [39]), there was evidence before the Tribunal at the time of its decision of tampering with the applicant's passport. Hence there was some evidence for the Tribunal's statement about the results of the Department's inquiries of May 2001. In addition a "*no evidence*" ground could only be made out if the factual conclusion for which there was no evidence was a critical conclusion for the Tribunal's decision (see *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 77 ALD 402 at [19], [27] and [30]). However the Tribunal proceeded on the basis that the applicant was who he claimed to be and hence did not rely on the fact of the applicant's passport having been tampered with as a factual matter critical to its decision.

219. The evidence that the applicant wished to lead on this matter is not relevant to establishing jurisdictional error. At most it would demonstrate that the Tribunal made a wrong finding of fact which is not jurisdictional error (see *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510). As such it is inadmissible. Whether the Tribunal made a finding for which there was "*no evidence*" is not to be determined on the basis of subsequently obtained information in the manner contended for by the applicant. This ground is not made out.

220. However as the applicant has succeeded on ground one the matter should be remitted for redetermination according to law.

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**I certify that the preceding two hundred and twenty (220) paragraphs are a true copy of the reasons for judgment of Barnes FM**

Associate:

Date: 26 June 2009