FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZIMM v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 34

MIGRATION – Application to review decision of Refugee Review Tribunal – whether Tribunal failed to comply with s.425(1) of the Migration Act by failing to disclose issues that arose on the review – whether Tribunal failed to comply with s.424A(1).

Migration Act 1958, ss.424A, 425

Bushell v Secretary of State for the Environment [1981] AC 75
Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576
Kanda v Government of Malaya [1962] AC 322
Kioa and Others v West and Others (1985) 159 CLR 550
Minister for Immigration and Multicultural Affairs v Al Shamry (2001) 110 FCR 27
Minister for Immigration and Citizenship v Applicant A125 of 2003 [2007] FCAFC 162
Paul v Minister for Immigration and Multicultural Affairs (2001) 113 FCR 396
Ridge v Baldwin [1964] AC 40
SAAP and Another v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 215 ALR 162
Singh v Minister for Immigration and Multicultural Affairs [2001] FCA 1679
SZATV v Minister for Immigration and Citizenship [2007] HCA 40
SZBEL v Minister for Immigration and Multicultural Affairs and Indigenous Affairs and Another (2006) 231 ALR 592
SZBYR and Another v Minister for Immigration and Citizenship and Another (2007) 235 ALR 609
SZEEU and Others v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 150 FCR 214
SZFDV v Minister for Immigration and Citizenship [2007] HCA 41
SZJUB v Minister for Immigration & Citizenship [2007] FCA 1486
Tin v Minister for Immigration and Multicultural Affairs [2000] FCA 1109
VAAC v Minister for Immigration & Multicultural Indigenous Affairs [2003] FCAFC 74
VAF v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 206 ALR 471
Verteuil v Knaggs [1918] AC 557
WAGP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 124 FCR 276
Win v Minister for Immigration and Multicultural Affairs (2001) 105 FCR 212

Applicant:	SZIMM
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 738 of 2006
Judgment of:	Barnes FM
Hearing date:	7 November 2007
Delivered at:	Sydney
Delivered on:	1 February 2008

REPRESENTATION

Counsel for the Applicant:	Mr L. Karp
Solicitors for the Applicant:	Christopher Levingston & Associates
Counsel for the Respondents:	Mr J. Potts
Solicitors for the Respondents:	Australian Government Solicitor

ORDERS

(1) That a writ of certiorari issue directed to the second respondent, quashing the decision of the Refugee Review Tribunal made on 16 February 2006 in matter N05/52898.

(2) That a writ 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 dated 1 December 2005.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 738 of 2006

SZIMM
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Background

1. The applicant seeks review of a decision of the Refugee Review Tribunal handed down on 16 February 2006 affirming a decision of a delegate of the first respondent not to grant him a protection visa.

2. The applicant, a citizen of Sri Lanka, is an ethnic Tamil born and raised near the eastern Sri Lankan city of Batticaloa. He arrived in Australia in July 2005 and lodged an application for a protection visa. In a statement accompanying his protection visa application he claimed that as a young boy he had witnessed acts of violence and atrocities committed by rebel Tamil groups including the LTTE (Liberation Tigers of Tamil Eelam). Although his father had not been prepared to provide assistance sought by the LTTE he had been suspected by the authorities, assaulted and detained by government

security forces and in 1986 had disappeared while in the custody of the security forces.

3. The applicant claimed that while he was at school he had been taken by force for training by the LTTE along with other students, but that he had managed to escape and had resisted subsequent attempts by the LTTE to recruit him.

4. The applicant claimed that after he left school he started studying computer skills and English at a local computer college (referred to as the Institute). He also assisted the Institute manager and because of his "*good behaviour and helpful attitude*" the management entrusted him with the task of going to Colombo to assist with Institute purchasing requirements. He also claimed that he had been selected to go to Singapore with officers of the Institute to purchase computer accessories and software. He claimed that he was given a list of computer hardware, software and other items to be purchased and asked to get a passport in Colombo and to wait there for another officer to join him to go to Singapore.

5. He claimed that in December 2001, after he obtained his passport from the passport office in Colombo, he was on a bus on which passengers were being checked. When his new passport and other documents relating to computer matters were seen he was taken to a local police station, questioned and kept in custody. The applicant claimed that he was detained for two months, questioned about any association with the LTTE and tortured by the police. His mother lobbied for his release. He was released in 2002 after parliamentary elections and one week after the peace agreement was signed. He claimed he suffered long-lasting pain in his shoulder and back from police mistreatment.

6. The applicant claimed that after he returned to his home town he went back to work at the Institute. He was given additional responsibilities, including admission and attending to the welfare of new students. He claimed that one day a named local LTTE leader came to the Institute as he wanted it to admit students the LTTE had selected to undergo computer training. The applicant claimed that he felt he could not refuse the request of the LTTE leader, despite

the fact that he was scared about repercussions from government authorities. On his mother's advice he stopped going to work.

7. Subsequently, the STF (Special Task Force), which was searching for wanted LTTE personnel, arrested and questioned LTTE members including the LTTE students admitted to the Institute on the request of the LTTE leader. The STF was able to capture some arms. The applicant claimed that when the LTTE leader heard that he was absent from work, the leader concluded that he had been responsible for providing information about the LTTE youths at the Institute. The LTTE then started searching for him. They invaded his house and assaulted his mother. The applicant went into hiding for two months, but in early 2004 he was captured by the LTTE when he visited his mother.

8. He claimed that while in LTTE custody he was interrogated and tortured for several days to find out whether he had given any information to the police about LTTE activities. He was then required to work for the LTTE at an LTTE camp. He described faction fighting and tension in the LTTE after the breakaway of the Karuna faction. He claimed that captives were tortured. One day there was a gathering outside the camp. Hundreds of people sought the release of their children who had been held in the camp for training. He claimed that in the resulting chaos and disarray he managed to escape.

9. The applicant claimed that after he found refuge in a village he was informed that the police had gone to his home and had taken his mother and sister in for questioning. During their interrogation his mother and sister had been questioned about his arrest in Colombo in 2001. He claimed that the police had reason to believe he might be a "*hard core*" LTTE terrorist. His sister had been very badly treated by members of the STF. He claimed that they had been released on condition they brought him to the police.

10. In these circumstances the applicant decided to surrender to the police. He claimed that he went to a local police station, where he was interrogated about the LTTE and physically abused. He was released following representations from his former employer on condition he report to the police station once a week. In the

Tribunal hearing he clarified that this detention occurred in May 2004 and that he was detained and tortured for 2 weeks.

11. The applicant also claimed that after the December 2004 tsunami he had worked for an NGO for three months. He subsequently discovered from his mother that an LTTE messenger had informed her that he should report to the LTTE camp and that the LTTE suspected him of giving secret information to the police because of his frequent visits to the police to meet his weekly reporting requirement. The LTTE, which believed that the Sri Lankan forces were helping the Karuna group, also suspected him of having secret contact with the Karuna faction at the police station.

12. The applicant claimed that he left Sri Lanka via Colombo with the assistance of his mother. He arrived in Australia on 29 July 2005. He claimed to fear that his life was in danger from both the LTTE and the Sri Lankan security forces.

13. In support of his application the applicant provided a number of documents, including a 1986 detention order in relation to his father and two medical certificates he had obtained in Australia in 2005. Dr R Karalasingham expressed the view that the applicant had suffered torture in Sri Lanka and that he was suffering from post-traumatic stress disorder due to physical and mental trauma, that he had right shoulder pain due to an assault and scars on his forehead and foot indicative of heavy assault. Dr A Sharah stated that he had no reason to doubt what the applicant had claimed about past events and expressed the opinion that he was suffering from nervous illness of an anxiety type due to the previous trauma that he had endured and would find it very difficult to recover if he returned home to Sri Lanka and its state of uncertainty.

14. The application was rejected by a delegate of the first respondent who found that the applicant did not have a well-founded fear of persecution. In particular, the delegate found that the claimed assaults had not been corroborated by the applicant through provision of hospital or other medical records originating from Sri Lanka and that the Australian medical reports were qualified diagnoses made without firsthand knowledge of the events claimed. The delegate also found that it would have been a relatively easy

matter for government security forces to maintain surveillance of the applicant and his activities, given that he had resided at the one location and had been with the one employer for more than two years and that had he been targeted by local LTTE cadres as claimed it was highly unlikely he would have been able to escape their notice and leave his home town for Colombo.

15. The delegate was satisfied that, given the ease with which the applicant had obtained his passport and subsequently departed Sri Lanka, the authorities did not consider the applicant to have a profile of concern. The delegate also considered it reasonable for the applicant to relocate within Sri Lanka.

16. The applicant sought review by application lodged with the Tribunal on 19 December 2005. The Tribunal invited him to a hearing. Prior to the hearing his solicitor/migration agent made written submissions in which he addressed the availability of internal relocation and the lack of stability in the political situation in Sri Lanka. It was submitted that if the applicant relocated to Colombo there was a risk of persecution for reason of his Tamil ethnicity and imputed political opinion of being an LTTE sympathiser or supporter based on the fact that he was a Tamil from the eastern part of Sri Lanka. Country information in relation to ongoing tension and violence in Sri Lanka was provided.

17. The transcript of the Tribunal hearing held on 1 February 2006 is before the Court. In the hearing the Tribunal explored a number of issues with the applicant and put to him certain concerns it had in relation to his claims, as discussed further below.

18. The applicant's adviser made a post-hearing submission to the Tribunal enclosing further country information, addressing the issue of relocation and the applicant's risk at the hands of security forces as well as the LTTE. The submission asked the Tribunal to consider the information in the medical reports provided to the Department of Immigration.

The Tribunal decision

19. In its reasons for decision the Tribunal accepted that the applicant was a Sri Lankan Tamil and accepted his claims about the arrest and disappearance of his father and the traumatic events he had witnessed and experienced as a child. However it found that the applicant was not discriminated against in either his education or employment for a Convention-related reason, having regard to the education he obtained and his evidence about his subsequent employment at the Institute.

20. The Tribunal set out the applicant's claims made in connection with his protection visa application, including the claims that because of his "good behaviour and attitude" the management of the Institute had asked him to go to Colombo to assist with purchasing requirements and had selected him to go to Singapore with officers to help with purchasing. It contrasted these claims with his oral evidence at the Tribunal hearing about his role at the Institute. He had told the Tribunal that the institute had 15 staff, that his role was to teach small children and that when new students came he followed the manager's directions. The Tribunal recorded that when asked about other work, the applicant did not claim to be involved in purchasing and that he had agreed that he was not very senior in the administration. The Tribunal stated:

> *The Tribunal accepts these claims made at the hearing over those in his protection visa application and does not accept that after such a short period and amongst a staff of 15 and as a very recently recruited only 19 year-old instructor for small children aged between 5 and 8 or 9, who was at that time was also himself a part time student, he would have been sent to Colombo to assist with purchasing and given the very small size of the institute that they also wanted him to go to Singapore with other "officers" in order "to help purchasing", which was the reason why he claims he obtained his passport.*

21. It noted the absence of any documentary evidence to support this claim or any evidence that the applicant was involved in purchasing. It found that it was not able to satisfy itself that the applicant was sent by the Institute to Colombo in order to help with purchasing or

that the Institute wanted him to go to Singapore with other officers. It did not accept those claims. It stated:

> *It follows that the Tribunal is also satisfied that the Applicant has embellished his claims for a protection visa and finds that he is not a credible witness.*

22. The Tribunal then addressed the applicant's claims that on the day he obtained his passport in Colombo in December 2001 he was detained at a police station for 2 months, during which time he was interrogated about his association with the LTTE and assaulted with a police baton, that he was released after the peace agreement was signed and had long-lasting back and shoulder pains.

23. The Tribunal accepted the medical evidence of Dr Karalasingham dated 15 September 2005 that the applicant was suffering from post-traumatic stress disorder and shoulder pain due to assault, that he had scars on his forehead and feet due to assault and that he needed ongoing counselling and treatment. It also accepted that in his report of 30 September 2005 Dr Sharah had accepted what the applicant had told him through an interpreter and was of the view that the applicant appeared to be suffering from nervous anxiety of an anxiety type due to his previous trauma. However the Tribunal stated:

> …… *in accepting that the Applicant has been assaulted and injured, and as his adviser submits in his submission dated 2 February that the Applicant medical reports previously provided indicate that the Applicant has* "suffered a number of traumatic events in his young age"*, the reports from both Dr Ruben Karalasingham and Dr Alex Sharah do not say how they know the causes of the Applicant's injuries and trauma. For example, they do not state that they have treated the Applicant immediately after the injuries occurred. Nor do they state that they are in a position to know when the injuries occurred or who inflicted them on him and in what circumstances, other than relying on what the Applicant himself has told them. Nor does the Applicant provide a copy of a detention order for his being held for a significant period of two months as he was able to do in regard to his father's detention, even though it occurred some 20 years ago.*

24. The Tribunal also found that there were a number of inconsistencies in the applicant's account at the hearing *"including that when asked*

what happened to him while in detention, the Applicant replied that he was tortured a lot and was beaten up severely by drunken personnel who scolded him and told him that he had come from the East, but at the same time he claimed he did not understand their language. When asked how he knew what they were saying if he did not speak Singhalese, and the Applicant obfuscated (sic) and replied that they beat him and he screamed and he could not tolerate a lot of torture."

25. The Tribunal also observed that the applicant had not provided a contemporaneous doctor's certificate or hospital admission certificate. Nor did he claim that he went into hiding after the detention and assault. The Tribunal was satisfied that if the applicant had been severely beaten and tortured in detention as claimed he would have gone into hiding when released. Moreover it was satisfied that as he had a passport, if he had been detained and severely assaulted and tortured as claimed, he would have sought international protection overseas. While the Tribunal accepted that as a young man the applicant had suffered a number of traumatic events (which it said was supported by the medical evidence) it did not accept that he was detained for two months in December 2001 during which time he was assaulted and tortured. The Tribunal found that this also went to the matter of the applicant's credibility.

26. The Tribunal then addressed the applicant's claims that a named LTTE area leader came to the Institute seeking that students be admitted, that the applicant stopped attending work and claimed that the LTTE leader concluded that he was absent from work because he had provided information about those students to the STF personnel who arrested them. The Tribunal summarised the applicant's claims that the LTTE started searching for him, that he was seized and tortured by the LTTE and held in their camp from which he later escaped and that after he discovered that his mother and sister had been taken in for questioning by the police who suspected he was "*hard core LTTE*" he went to the police station, was mistreated, interrogated and detained for seven days and that after the Institute manager intervened he was released on the basis that he would report weekly.

27. The Tribunal discussed the oral evidence of the applicant in relation to these claims. It found that many of his claims in this respect were *"unsupported and at best speculative, and he does not say how he knew that the LTTE suspected him or investigated him"*. It also had regard to the lack of documentary evidence in support of such claims.

28. In particular, the Tribunal found that it was not able to satisfy itself that the LTTE area leader and the LTTE had concluded *"that purely because* [the applicant] *was absent from work he had provided information about the LTTE students in the institute"*. It accepted the applicant's claims that he was a junior person in the Institute and not involved in enrolment procedures and therefore did not accept that he was either approached by the area leader to facilitate admission of LTTE students or that somehow he was held responsible for providing information to the authorities about the LTTE students in the Institute that resulted in their arrests.

29. The Tribunal continued:

> *It follows that the Tribunal has not been able to satisfy itself that he was subsequently detained by the LTTE for 3 months from January until April 2004 which [sic] he was tortured, and the Tribunal does not accept these claims. It also follows that the Tribunal does not accept the claims that flow from this including that when he escaped from the LTTE camp he found that his mother and sister had been "very badly treated and humiliated by two members of the STF" and were taken to the police station where they were interrogated because they thought the Applicant "might be hard core LTTE terrorist"; they questioned his mother and sister about his previous arrest in Colombo in 2001; and they were only released because they undertook to take the Applicant to the police and so for this reason he then went to the police station in May 2004 and was hit and kicked and detained for 2 weeks during which on this occasion [sic] he was beaten up and tortured a lot and was kept in a room and was beaten with a stick, including on his heal [sic]".*

30. The Tribunal noted that the applicant claimed he left the country legally without any difficulties, despite having said that in May 2004 the police had "*written down*" that he was charged with being supportive of the LTTE movement. It was satisfied that if the

applicant's claims about events involving the security forces and his detentions were true, the security forces would not have allowed him to leave Sri Lanka in July 2005 but would have detained or arrested him. The Tribunal was satisfied that the applicant was of no interest to the Sri Lankan authorities for any reason whatsoever and did not accept these claims.

31. It also found that "*in view of its earlier findings that he had not been detained by the Sri Lankan authorities as he claimed; that as part of his conditions of release he was required to report to them once a week; and the Applicant is of no interest to the Sri Lankan authorities for any reason whatsoever; The Tribunal does not accept these claims and more specifically that he had any weekly reporting conditions to breach and because he breached these reporting conditions, the Sri Lankan authorities will infer he is an LTTE supporter and will torture him, kill him, and ruin the lives of his mother and sister*".

32. Nor was the Tribunal able to satisfy itself that the LTTE had ever attempted to recruit the applicant or that it would have suspected he was providing the authorities with secret information or making secret contact with the Karuna faction at the police station. It noted that the limited nature of the applicant's activities at the Institute was known to the LTTE and that he was not in fact involved with the LTTE, the Karuna faction or with any agency that could provide him with '*secret information'* of interest to the authorities. It did not accept that there was a real chance that the LTTE would have suspected he had any '*secret information'* to give to the police or that they would regard him as some sort of spy working with or for the police and/or the Karuna faction. It found that this went to his credibility. It stated: "*Indeed, the Tribunal has already satisfied itself that the applicant did not report to the police station every Sunday and therefore does not accept that the LTTE would be suspicious of him for this reason*".

33. The Tribunal addressed the applicant's claims in relation to his future fears as a young Tamil male with a profile of interest to the authorities. Despite country information about current instability and violence in Sri Lanka it was not able to satisfy itself that the

applicant had a well-founded fear of serious harm amounting to persecution for a Convention reason on that basis. It did not accept that he had a profile of interest to the authorities who would suspect him of being connected to the LTTE. Nor did the Tribunal accept that because of the applicant's age, ethnicity and/or imputed pro-LTTE political opinion there was a real chance that he would be mistreated now or in the reasonably foreseeable future on the basis that the peace process was uncertain.

34. The Tribunal found, that given all its findings, if for "*any subjective reason the Applicant did not want to return to live with his mother and sister … then he would be able to live elsewhere in Sri Lanka in safety and without having a well-founded fear of serious harm amounting to persecution…*". It referred to his education and skills and employment. While accepting that the applicant had not lived in another part of Sri Lanka and did not have family or relatives in Colombo or in the south and did not speak Sinhalese, the Tribunal was satisfied that he would be "*able to relocate safely to another part of Sri Lanka of his choosing in safety from [the LTTE], particularly in the government controlled area*". It did not accept that if he did so there was a real chance he would be subjected to serious harm amounting to persecution for a Convention reason. Nor did it accept that because he was a Sri Lankan Tamil the applicant would not be able to satisfactorily explain his presence in Colombo or elsewhere and would be suspected of having links with the LTTE, or his claim because the Sri Lankan security forces had been responsible for persecution there was no part of Sri Lanka to which he could reasonably be expected to relocate.

35. The Tribunal also addressed the reason the applicant had given to obtain a tourist visa to visit Australia. In the hearing it had accused the applicant of dishonestly misrepresenting his reason for wanting to come to Australia. It found that he was evasive in his answers and did not accept that he did not know he was entering Australia on a short term visitor visa. It found that giving false information in his tourist visa application went to the applicant's credibility. The Tribunal also found that it was satisfied that if the applicant had come to Australia "*to protect his life and as he feared persecution*" he would have applied for a protection visa immediately or shortly

after arriving here and not have waited "*over five weeks*" before making his application.

36. The Tribunal concluded that, having considered all the applicant's claims individually and cumulatively, it was not able to satisfy itself there was a real chance he would be subjected to serious harm amounting to persecution for a Convention reason if he returned to Sri Lanka either now or in the foreseeable future. It found that he was not a refugee.

37. The applicant sought review of the Tribunal decision by application filed in this Court on 13 March 2006. He filed an amended application on 24 October 2007. There are two grounds in the amended application.

Section 425 issues

38. The first ground in the amended application is as follows:

> *The Tribunal failed to comply with s.425(1) Migration Act.*
>
> *Particulars*
>
> *(a) Failure to disclose issues that arose on the review as follows:*
>
> > *(i) Whether the applicant had been asked by his employer to go to Colombo and to Singapore to assist in purchasing equipment.*
> >
> > *(ii) Whether the reasons given by Doctors Karalasingham and Shahan [sic] for their diagnoses of the applicant were factually correct.*
> >
> > *(iii) How the applicant knew that the LTTE suspected him of informing on the people whom they had sent to study at the institute where he worked.*
> >
> > *(iv) That there was a need for corroborative evidence of thousands of people congregating outside the LTTE camp demanding the release of their children.*
> >
> > *(v) That the time taken for the applicant's application for a protection visa to be lodged after his arrival in Australia impinged on his credit.*

39. Section 425(1) is as follows:

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

40. The essence of the applicant's contentions in relation to s.425 is that in light of the principles considered by the High Court in *SZBEL v Minister for Immigration and Multicultural Affairs and Indigenous Affairs and Another* (2006) 231 ALR 592 the Tribunal failed to comply with its obligations under s.425(1) of the *Migration Act 1958* (Cth) to invite the applicant to appear before it to give evidence and present arguments *"relating to the issues arising in relation to the decision under review"*.

The scope of section 425

41. It was acknowledged that *SZBEL* was determined on a procedural fairness ground but submitted that the case was of direct relevance to the question of what was required of a Tribunal by s.425 of the Act. In that respect, as their Honours stated at [33], the Migration Act *"defines the nature of the opportunity to be heard that is to be given to an applicant for review by the Tribunal."* Their Honours stressed that the reference in s.425(1) to *"the issues arising in relation to the decision under review"* was *"important"*.

42. It was said to be clear that the issues referred to in s.425 could not necessarily be identified simply by describing them as whether the applicant was entitled to a protection visa. (SZBEL at [34]). As their Honours stated: *"The statutory language 'arising in relation to the decision under review' is more particular. The issues arising in relation to a decision under review are to be identified having regard not only to the fact that the Tribunal may exercise (s.415) all the powers and discretions conferred by the Act on the original decision-maker (here, the Minister's delegate), but also to the fact that the Tribunal is to review that* particular *decision, for which the decision-maker will have given reasons"*.

43. As submitted for the applicant, the Tribunal's task was to review the delegate's decision. It had to identify the issues that arose in relation

to that decision. However if a Tribunal takes "*no step to identify some issue other than those that the delegate considered dispositive, and does not tell the applicant what that other issue is, the applicant is entitled to assume that the issues the delegate considered dispositive are 'the issues arising in relation to the decision under review'*" (*SZBEL* at [35]).

44. It is also clear from the manner in which the High Court approached the question of what were "issues" in *SZBEL*, that "issues" for the purposes of s.425 can relate to specific factual assertions made by an applicant. In *SZBEL* their Honours addressed certain aspects of the appellant's account which had not been identified by the Tribunal as important issues, such as his account of how his ship's captain came to know of his interest in Christianity and of captain's reaction to that knowledge. These factual matters were found to be issues arising in relation to the decision under review (see [42] – [43])).

45. It was not disputed that there may be cases where a Tribunal has sufficiently indicated that everything an applicant said in support of his application was in issue (*SZBEL* at [47]) and that this may be done through the delegate's decision or the Tribunal's statements or questions during a hearing. It was acknowledged for the applicant that this may occur despite the fact that a Tribunal has not expressly put to an applicant that he or she was lying, or may not be accepted as a witness of truth, or that he or she may be thought to be embellishing an account of matters.

46. It was submitted by the applicant that for the Tribunal to "sufficiently" indicate to an applicant that all he or she said was in issue there must, consistent with principles of natural justice (and see s.422B of the Act), be a fair opportunity for the applicant to deal with what was put against him or her (see *SZBEL* at [47]). In that respect reliance was placed on what was said by Brennan J in *Kioa and Others v West and Others* (1985) 159 CLR 550 at [628] – [629]:

> *A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise: Kanda v Government of Malaya* [1962] A.C. 322, at p. 337; *Ridge v Baldwin* [1964] A.C., at pp. 113-114 *per Lord Morris; De*

> *Verteuil v Knaggs* [1918] A.C., at pp. 560, 561. *The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance. Administrative decision-making is not to be clogged by inquiries into allegations to which the repository of the power would not give credence, or which are not relevant to his decision or which are of little significance to the decision which is to be made. Administrative decisions are not necessarily to be held invalid because the procedures of adversary litigation are not fully observed. As Lord Diplock observed in Bushell v Environment Secretary* [1981] A.C., at p. 97*:*
>
> > *"To 'over-judicialise' the enquiry by insisting on observance of the procedures of a court of justice which professional lawyers alone are competent to operate effectively in the interests of their clients would not be fair".*
>
> *Nevertheless, in the ordinary case where no problem of confidentiality arises, an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made.*

47. As discussed in *SZBEL* at [47], it was submitted that where there were specific aspects of the applicant's account that the Tribunal considered *may* be important to the decision and may be open to doubt: *"In such circumstances the Tribunal must at least ask the applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted"* (ibid).

48. It was acknowledged by the first respondent that a factual issue could be a s.425 issue, as is apparent from the decision in *SZBEL*, but contended that the question was one of degree. It was suggested that it was implicit in *SZBEL* that it was necessary to consider whether the particular factual issue was of such significance or importance that it could be considered to be one of the dispositive or determinative issues and hence properly characterised as a s.425 issue that had to be specifically adverted to and drawn to the attention of the applicant or whether it could simply be relegated to something subsidiary to or subsumed in a greater issue that was plainly "on the table".

49. It also recognised by the first respondent that where there were specific aspects of an applicant's account the Tribunal considered may be "important" to the decision and open to doubt the Tribunal must at least ask the applicant to expand on those aspects of the account and ask the applicant to explain why the account should be accepted.

50. As the first respondent pointed out, *SZBEL* was decided on procedural fairness grounds. It is not disputed that such grounds are unavailable in the present case because of s.422B of the Migration Act. It was submitted for the first respondent that it could not be said that some, if not most, of the requirements of common law procedural fairness laid down in *Kioa v West* were to be imported back into the statutory procedures under the Migration Act (see s.422B of the Act). Rather, it was said that the starting point was the wording of s.425.

51. I note first, that s.422B does not exclude any claim under the statutory provisions arising in circumstances which might also be said to constitute a lack of procedural fairness at common law. Rather, s.422B provides that the provisions in the division in which s.425 appears *"are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with"* (and see *SZBEL* at [37]).

52. It is relevant to note that the appellant in *SZBEL* had attended a Tribunal hearing at which the Tribunal member asked him questions and obtained the same description of events as he had given in his statutory declaration. However, as the High Court pointed out at [3], at no stage did the Tribunal challenge what the appellant said, express any reaction to it or invite him to amplify any of three particular aspects of the account he had given in his statutory declaration and repeated in his evidence which the Tribunal later found to be implausible. The first the appellant in *SZBEL* knew of the suggestion that his account of events was implausible in these three respects was when the Tribunal published its decision. These three aspects of the appellant's account were critical issues in the sense that they were elements of his account that the Tribunal later found implausible in circumstances where, as their Honours pointed

out at [18], the Tribunal did not accept the appellant's underlying claim because it considered it not to be credible and found that these *"key aspects"* of his claims lacked credibility. Their Honours observed (at [20]) that these three points *"considered collectively"* had led the Tribunal to reject the appellant's claim that the captain of the ship on which he was a seaman intended to hand him over to the authorities of Iran because of his religious inclinations. In that context their Honours then asked whether the *"issues to which those reasoning processes were directed had been adequately notified to the appellant"* (at [21]).

53. *SZBEL* was addressing a claim that the Tribunal had denied the appellant procedural fairness by not putting to him "the critical factors upon which the decision was likely to turn". It was in that context that their Honours considered the requirements of common law procedural fairness and accepted (at [26]), that the statutory framework (including Division 4 of Part 7 in which s.425 appears) was of critical importance when considering what procedural fairness required. Their Honours suggested (at [33]) that the Migration Act *"defines the nature of the opportunity to be heard that is to be given to an applicant for review by the Tribunal"*.

54. In other words, in *SZBEL* the High Court was analysing the statutory framework to determine how it impacted upon what common law procedural fairness required, whereas in this instance what is in issue is what is required by s.425.

55. Hence, as submitted by the first respondent, the starting point for present purposes is the wording of s.425 having regard to the way in which the High Court construed and explained its operation in *SZBEL*. What is in question is the scope of the concept *"issues arising in relation to the decision under review"* in s.425 and the extent of the Tribunal's obligation under s.425 in relation to such "issues".

56. Clearly there must be some limit on the notion of issues arising in relation to the decision under review, as not every factual contest or factual matter will be a s.425 issue. The approach in *SZBEL* suggested that the concept may be confined to key or critical issues that the Tribunal considered dispositive or determinative, although it

is notable that its findings in this respect were couched in terms that referred to principles of natural justice

57. It is apparent that there must be an exercise of characterisation in the circumstances of any given case to determine whether or not a particular matter is an "*issue*" within s.425.

58. In that respect what their Honours said in *SZBEL* at [33] – [38] is clearly of relevance in determining the approach to be taken to s.425:

> *[33] The Act defines the nature of the opportunity to be heard that is to be given to an applicant for review by the Tribunal. The applicant is to be invited "to give evidence and present arguments relating to the* ***issues arising in relation to the decision under review****" (section 425(1)) [emphasis added]. The reference to "the issues arising in relation to the decision under review" is important.*
>
> *[34] Those issues will not be sufficiently identified in every case by describing them simply as whether the applicant is entitled to a protection visa. The statutory language "arising in relation to the decision under review" is more particular. The issues arising in relation to a decision under review are to be identified having regard not only to the fact that the Tribunal may exercise (section 415) all the powers and discretions conferred by the Act on the original decision-maker (here, the Minister's delegate), but also to the fact that the Tribunal is to review that particular decision, for which the decision-maker will have given reasons.*
>
> *[35] The Tribunal is not confined to whatever may have been the issues that the delegate considered. The issues that arise in relation to the decision are to be identified by the Tribunal. But if the Tribunal takes no step to identify some issue other than those that the delegate considered dispositive, and does not tell the applicant what that other issue is, the applicant is entitled to assume that the issues the delegate considered dispositive are "the issues arising in relation to the decision under review". That is why the point at which to begin the identification of issues arising in relation to the decision under review will usually be the reasons given for that decision. And unless some other additional issues are identified by the Tribunal (as they may be), it would ordinarily follow that, on review by the Tribunal, the issues arising in relation to the decision under review would be those*

which the original decision-maker identified as determinative against the applicant.

[36] It is also important to recognise that the invitation to an applicant to appear before the Tribunal to give evidence and make submissions is an invitation that need not be extended if the Tribunal considers that it should decide the review in the applicant's favour. Ordinarily then, as was the case here, the Tribunal will begin its interview of an applicant who has accepted the Tribunal's invitation to appear, knowing that it is not persuaded by the material already before it to decide the review in the applicant's favour. That lack of persuasion may be based on particular questions the Tribunal has about specific aspects of the material already before it; it may be based on nothing more particular than a general unease about the veracity of what is revealed in that material. But unless the Tribunal tells the applicant something different, the applicant would be entitled to assume that the reasons given by the delegate for refusing to grant the application will identify the issues that arise in relation to that decision.

[37] That this is the consequence of the statutory scheme can be illustrated by taking a simple example. Suppose (as was the case here) the delegate concludes that the applicant for a protection visa is a national of a particular country (here, Iran). Absent any warning to the contrary from the Tribunal, there would be no issue in the Tribunal about nationality that could be described as an issue arising in relation to the decision under review. If the Tribunal invited the applicant to appear, said nothing about any possible doubt about the applicant's nationality, and then decided the review on the basis that the applicant was not a national of the country claimed, there would not have been compliance with s.425(1); the applicant would not have been accorded procedural fairness.

[38] When it is said, in the present matter, that the appellant was not put on notice by the Tribunal that his account of certain events would be rejected as "implausible", and that this conclusion was "not obviously ... open on the known material", the focus of the contention must fall upon what was "obviously ... open" in the Tribunal's review. That can be identified only by having regard to "the issues arising in relation to the decision under review". It is those issues which will determine whether rejection of critical aspects of an applicant's account of events was "obviously ... open on the known material".

59. In the circumstances of *SZBEL* their Honours emphasised the obligation on the Tribunal to identify issues other than those that the delegate had considered "dispositive" or "determinative" against the applicant. This exemplifies the need to undertake a process of characterisation in the particular circumstances of the case in determining whether or not a matter is an "issue" within s.425, as well as pointing to the need to consider all of the circumstances of the review in question in assessing whether the Tribunal has met its s.425 obligation. The High Court had regard to the context in which the Tribunal hearing occurs, at a time at which the Tribunal is not persuaded by the material before it to decide the review in an applicant's favour, and the fact that such lack of satisfaction may be based on particular matters or on a general unease about the truth of what is revealed in the material before the Tribunal. The statement (at [36]) that unless the Tribunal told the applicant something different he or she would be entitled to assume that the reasons given by the delegate would identify the issues that arose in relation to that decision, dealt with the circumstances of that case. It is not inconsistent with the notion that some further characterisation may also be required in relation to issues that became apparent after the delegate's decision to determine whether such matters need to be put to an applicant under s.425 (unless of course the Tribunal sufficiently indicates that all that an applicant says is in issue).

60. Relevantly, in examining the facts of *SZBEL* the High Court pointed to the fact that the delegate in that case had not based his decision on the factual aspects of the matter in question, but rather on a lack of satisfaction about the appellant's commitment to Christianity, that the Tribunal had not identified such aspects of the applicant's account as "important issues" or "live issues" and that: *"Based on what the delegate had decided, the appellant would, and should, have understood the central and determinative question on the review to be the nature and extent of his Christian commitment."* (at [43]).

61. Nevertheless, the Court also stated at [40]:

> *If it had been intended that the Tribunal should consider afresh, in every case, all possible issues presented by an applicant's claim, it would not be apt for the Act to describe the Tribunal's*

task as conducting a "review", and it would not be apt to speak, as the Act does, of the issues that arise in relation to the decision under review.

62. Importantly, in *SZBEL* their Honours stated at [38] that the issues arising in relation to the decision under review were the issues that *"will determine whether rejection of critical aspects of an applicant's account of events was 'obviously … open on the known material'"*. For present purposes I accept that, as submitted by the first respondent, this illustrates the need for characterisation and discrimination between critical and subsidiary issues.

63. However, their Honours made clear in *SZBEL* (see [38] – [42]) that it is not simply a matter of the ultimate issue before the Tribunal in every case and that there may be a need to identify issues with more particularity.

64. I have had regard to the fact that what is in issue is the scope s.425, not common law procedural fairness. Hence some caution must be exercised in the application of statements made in that context to s.425. What the High Court stated at [38] reflected approval of the statement by the Full Court of the Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-591 that the requirement of procedural fairness in the exercise of a statutory power includes the fact that "*The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material"*. In that context the High Court expressed the view (at [38]) that what was *"obviously…open"* in the Tribunal's review *"can be identified only by having regard to 'the issues arising in relation to the decision under review' "*. It was those issues which it was said would determine whether rejection of critical aspects of an applicant's account of events (as was said to have occurred in *SZBEL*) was *"obviously … open on the known material"*. In contrast, in the context of s.425 the focus is on whether the Tribunal has met its obligation to invite the applicant to appear before it to give evidence and present arguments *"relating to the issues arising in relation to the decision under review"*

65. For present purposes I accept that an enquiry or exercise in characterisation must be undertaken to identify what are the determinative, dispositive, critical or important issues in the sense of issues on which the decision to reject the applicant's claim is based and that it is only such issues that meet the description of an issue "*arising in relation to the decision under review"* within the meaning of s.425.

66. The nature of the characterisation required and the extent of the s.425 obligation is illustrated by the approach taken by Bennett J in *SZJUB v Minister for Immigration & Citizenship* [2007] FCA 1486. In that case one of the grounds relied on by the appellant raised the question of whether there had been a breach of s.425 in that the Tribunal had failed to raise a specific issue at the Tribunal hearing. The appellant had claimed to be involved in a Bible smuggling operation and to be targeted by authorities. The Tribunal did not raise with her the specific questions of why she would take the risk of smuggling Bibles when she had a business and an 11 year old dependent child. It relied on these matters in its decision.

67. Bennett J set out an extract from the Tribunal hearing in which the Tribunal was said to have clearly put the appellant on notice that it was having real difficulty in accepting she would take the risk of being involved in a Bible smuggling operation and being the target of the authorities, although it did not refer to her business and child. The statements and questions by the Tribunal were said to have *"sufficiently indicated"* to the appellant that everything she said on this subject was in issue (see *SZBEL* at [47]). Her Honour stated at [25]:

> *The issue for the Tribunal was whether to believe the appellant. That raised the issue of whether she would have smuggled Bibles in view of the potential risk. The question is whether the fact that she had a business and a dependent child were issues in themselves or factual matters that related to the issue of risk. If they are factual matters that go to the issue arising in relation to the decision under review (ie, risk generally), the Tribunal was not obliged to put each of those factual matters to the appellant.* ***The Tribunal is obliged to inform her of the issue but not of each fact that relates to it****"*. (Emphasis added)

68. While Bennett J accepted that the issue of risk was an important factor in the rejection by the Tribunal of the appellant's claim, her Honour found (at [28]) "*that the business and the child were not the issues on which the decision to reject the appellant's claim were based. They were not determinative but additional factual matters that elaborated the matters to be balanced against the risk. The key point in the Tribunal's assessment was the fact that there was a risk to the appellant and, in those circumstances, it did not accept that there was sufficient reason for her to take such a risk. The appellant was directed to that issue at the hearing, asked about it and told that the Tribunal found it difficult to accept her evidence. The Tribunal did not fail to comply with s.425 of the Act in this regard*".

69. Thus it is necessary for the Tribunal to raise with an applicant determinative issues in the sense of issues on which the decision to reject the claim were based, but it is not required to descend into all the underlying facts when meeting its obligation under s.425.

70. A further limit on this process is suggested by *Minister for Immigration and Citizenship v Applicant A125 of 2003* [2007] FCAFC 162. In that case the appellant was given leave by the Full Court of the Federal Court to amend his application to raise an additional ground relying on s.425 of the Act. It was contended that the Tribunal had failed to comply with s.425 in relation to issues surrounding the timing and manner of the appellant's departure from Nepal. The Full Court described the argument as a claim that the Tribunal had "*failed to identify the significance of the questions that were asked of him regarding the timing of his leaving Nepal*" (at [80]). It rejected this contention.

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

72. While the Court did find at [89] that the Tribunal had, in any event, brought to the applicant's attention and put him on notice that the timing of his having left the school he worked at in Nepal was a

matter of concern and therefore adequately informed him of the way in which his answers might be used, their Honours pointed out that, as *SZBEL* makes clear (at [48]): *"The RRT is not obliged to provide 'a running commentary upon what it thinks about the evidence that is given'"* (at [89]).'

Did the Tribunal sufficiently indicate that everything was in issue?

73. In relation to the five matters relied on in the first ground in the amended application, it was contended generally for the applicant that the Tribunal did not *"sufficiently indicate"* to the applicant that everything he said in support of his application was in issue.

74. It was acknowledged for the applicant that in the hearing the Tribunal did put to the applicant that certain matters were in issue. For example, it put to the applicant that it had difficulty accepting that he was *"well qualified or trained to be a computer instructor"* as he was said to have claimed in his protection visa application (transcript page 13). It put to the applicant that it had difficulty accepting that the LTTE would have abducted and tortured him but not killed him, if they had suspected him of giving information to the authorities (transcript page 16). The Tribunal also raised difficulties it had with the claim that the applicant thought that the LTTE suspected that he was supplying information to the army and the rebel Karuna faction in view of the fact that he had no relevant information to reveal. (transcript page 17).

75. However I accept that as contended, having regard to all of the circumstances, this did not alert the applicant to the fact that everything he said was in issue.

76. The first respondent submitted that what the Tribunal stated at the outset of the Tribunal hearing indicated to the applicant that everything was in issue and that the Tribunal was proceeding in effect with a hearing *de novo* where all matters were in issue on the review (see *SZJUB* at [16]). This was said to arise from the fact that the Tribunal member had said to the applicant and his adviser that he was undertaking a new examination of the application and had later stated:

> *In short in applying the refugee definition to your situation the Tribunal must consider whether there is a real chance that on return to your country you will face persecution for one or more of the reasons in the refugee definition now or in the reasonably foreseeable future.* (Transcript at 4).

It is necessary however to consider the whole of the Tribunal hearing. At the start of the hearing the Tribunal member informed the applicant that the Tribunal was:

> *undertaking a new examination of [his] application and not just the earlier written decision [of the delegate]. As part of the process I will be considering all the evidence you have provided including the information you will be giving me today. I will then make a decision whether or not you are a refugee*. (At page 4 of the transcript).

However, critically, the Tribunal member also advised:

> *At this hearing I will only raise points on which I like further clarification or more detailed information and I will not necessarily cover everything you cover in detail.* (transcript p5)

This amounted to a clear statement or implication that not everything was in issue (cf *SZBEL* at [47]). In such circumstances I am not persuaded that the Tribunal sufficiently indicated to the applicant that everything he said in support of the application was in issue.

77. In these circumstances it was submitted for the applicant that the five matters relied on under ground 1 were "issues" within s.425 that were not disclosed to the applicant as issues which arose on the review. It was also submitted that either individually or cumulatively these matters were destructive of the validity of the Tribunal decision because each went to the applicant's credibility and went to the Tribunal's lack of belief in the applicant's claimed experiences, hence amounting to jurisdictional error. Moreover, it was submitted that the Tribunal's finding in relation to relocation was not an independent finding unaffected by such error, as it relied on the finding that the applicant had not been persecuted in Colombo (a government controlled area) which in turn relied on the Tribunal's findings as to the applicant's creditability to which the matters in issue were relevant.

Travel to Colombo

78. The first matter relied on under this ground was that there was a failure by the Tribunal to disclose as an issue that arose on the review "*whether the applicant had been asked by his employer to go to Colombo and to Singapore to assist in purchasing equipment*". In the hearing the Tribunal explored the applicant's role at the Institute and put to him that it understood that he was not very senior in the administration. The Tribunal asked the applicant questions about his employment at the Institute, his age and his role of instructing small children, the number of staff and the nature of courses offered at the institute. The Tribunal then put to the applicant (transcript page 13):

> *Given that you are only nineteen years old and you had only done some three month three month [sic] IT course which is a very short course and is not a two or three year university degree or other diploma course I am having difficulty accepting that you were well qualified or trained to be a computer instructor as you claim in your protection visa application. Would you like to comment?*

79. It was acknowledged that in this question the Tribunal was putting to the applicant that it had a problem with what it said was his claim that he was a well-qualified or trained computer instructor (although in fact he did not make any express claim to be a well qualified computer instructor in his protection visa application). However nothing in this exchange or anywhere else in the transcript was said to be such as to suggest that the Tribunal may not accept that the applicant was sent to Colombo or that he was asked to go to Singapore. This was said to be a specific aspect of the applicant's account that the Tribunal considered may be important to the decision because it went directly to his credibility and to his claim of being in Colombo and being tortured and detained by the police. The applicant contended that this 'issue' also went to the question of internal relocation, insofar as the Tribunal found on the basis of the applicant's credibility (which was partly based on this finding) that he could internally relocate to a government-run area of Colombo. Hence it was submitted that the failure to put this issue to the applicant constituted a jurisdictional error.

80. Counsel for the first respondent pointed out that the claim that the applicant had been asked by his employer to go to Colombo and to Singapore to assist in purchasing equipment was a claim made in the statement attached to the protection visa application. At the hearing the Tribunal had questioned the applicant about his education and qualifications and then about his work at the Institute. There was then an exchange as follows (transcript, pages 12 – 13):

> *M. What job did you do? What did you do in the job I am saying?*
>
> *I. I was an instructor teaching small children. And when new students came [the] manager would give specific directions and I did in accordance with the directions given by the manager.*
>
> *M. Given that you are only nineteen years old and you had only done some three month three month [sic] IT course which is a very short course and is not a two or three year university degree or other diploma course I am having difficulty accepting that you were well qualified or trained to be a computer instructor as you claim in your protection visa application. Would you like to comment?*
>
> *I. Since childhood I was very interested to learn computers. But in that school I had ample opportunity to study a lot. And additionally while I was studying in that Institute I was working and at the same time I was also studying a lot in that Institute.*
>
> *M. You didn't have any administrative or management experience or training. What other work did you do at the Institute?*
>
> *There were several other programs carried out in that college. And there were also notices and different projects done. And I would get the appropriate print outs and hand these print outs to the manager.*
>
> *M. So you are not very senior in the administration, is that correct?*
>
> *I. Yes I was not among them.*

81. It was contended for the first respondent that in this exchange the Tribunal member made it clear that he was having trouble accepting the claims about the applicant's employment with the Institute. It was said that when the member asked the applicant an open question

about the nature of the work he had done that was sufficient to raise as a "issue" the nature of the work done by him for the Institute and what he had done for that organisation. It was submitted that the Tribunal was not obliged to raise specifically the issues of travel to Colombo and Singapore to purchase equipment as these were underlying factual matters, not "issues" in the s.425 sense. (see *SZJUB*).

82. The issue of whether the applicant had been sent by his employer to Colombo and to Singapore to assist in purchasing equipment was a critical aspect of the applicant's claims in the sense considered in *SZBEL,* not simply an underlying factual matter. It was one of the issues on which the decision to reject the applicant's claim was based. It was of pervasive importance in the Tribunal decision. That is apparent from the fact that in its findings and reasons the Tribunal's disbelief of this claim was taken by it to establish that the applicant was not a credible witness. The finding of a lack of credibility contributed substantially to the Tribunal's rejection of other claims, in particular the claim about detention and mistreatment in Colombo in December 2001 – which the applicant claimed occurred during the time he was in Colombo at the request of the Institute immediately after he obtained the passport he claimed he obtained in order to go to Singapore for the Institute. Further, the Tribunal finding on relocation relied partly on the finding that the applicant had not been persecuted in Colombo and, in turn, this finding relied on the finding as to the applicant's credit. Hence this issue had to be disclosed to the applicant.

83. There is no suggestion that this issue was determinative in the delegate's decision. Indeed, while the delegate referred to the absence of corroborative evidence of the claimed 2001 (and 2004) assaults on the applicant and was satisfied, based on the ease with which the applicant obtained his passport (before his claimed detention) and departed Sri Lanka some years after, that the authorities did not consider him to have a profile of concern. However the delegate did not reject the claim about travel to Colombo (or subsequent detention) instead being satisfied that "*had the applicant been targeted by Sri Lankan security agencies* ***for further detention*** *he would have been detained prior to his*

departure, and he would not have been permitted to depart the country." (Emphasis added).

84. I am not persuaded that the questioning in the Tribunal hearing about what the applicant actually did in his job at the Institute was such as to disclose to him that an issue arising in relation to the decision under review was whether he had been asked to travel to Colombo (and Singapore) to purchase equipment. Such matters were conceptually distinct from the issue of the work done by the applicant at the Institute, his qualifications to be a computer instructor and whether he had administrative or management experiences, training or seniority. Those matters were directly relevant to the applicant's claim about his involvement in enrolment of LTTE students. They did not address or necessarily encompass the issue of whether the applicant was in fact sent to Colombo to assist with purchasing (or whether he was asked to go to Singapore).

85. Further, the question of travel to Colombo and Singapore was not simply an underlying factual matter in the sense considered in *SZJUB*. Had the specific issue of travel to Colombo for the Institute and the Tribunal's possible doubt in that respect been put to the applicant so that he had an opportunity to address Tribunal concerns, it is possible that he may have sought to provide documentary evidence to support these claims. The Tribunal relied on the absence of such material in rejecting this claim, which provided the basis for the adverse credibility finding.

86. In these circumstances, given the importance of this aspect of the applicant's account to his claimed fear of persecution from the Sri Lankan authorities and the importance of the Tribunal's rejection of this claim to its decision, I am satisfied that this matter constituted an issue arising in relation to the decision under review and that it had to be brought to the attention of the applicant. The Tribunal failed to do so. This constituted a failure to comply with s.425(1) of the Migration Act and a jurisdictional error.

87. Such a jurisdictional error provides a basis on which the Tribunal decision should be set aside and the matter remitted for reconsideration according to law.

88. Before considering the question of the discretion to refuse relief, for the sake of completeness I have however considered the other matters relied on under this ground as well as ground 2 in the amended application.

The medical diagnoses

89. The second matter relied on in ground 1 is an alleged failure to disclose *"Whether the reasons given by Doctors Karalasingham and Shahan [sic] for the diagnoses of the applicant were factually correct"*.

90. While the Tribunal accepted the evidence that the applicant suffered from post-traumatic stress disorder, shoulder pain due to assault, had scars on his forehead and feet due to assault, needed ongoing counselling and treatment and appeared to be suffering from nervous anxiety due to his previous trauma and would find it difficult to recover if he returned to Sri Lanka, the Tribunal also found it of significance that the medical reports did not state how the doctors knew the causes of the applicant's injuries and trauma or how they knew when the injuries occurred or who inflicted them and in what circumstances, other than based on what the applicant told them. This went to the Tribunal concluding that while it accepted that the applicant had suffered a number of traumatic events in his youth as supported by the medical evidence, it did not accept his claims that he was detained for two months in December 2001 during which time he was assaulted and tortured. Again it found that this went to the matter of his credibility.

91. It was submitted for the applicant that had the doctors' reports been accepted in their totality they would have been powerful corroborative evidence for the applicant, so that whether the reports were accepted was of critical importance. In this sense there were said to be issues in the proceedings consisting of specific evidence which was important to the decision. The Tribunal did not itself draw the applicant's attention to any doubts it may have had about the veracity of the doctors' reports, specifically in relation to the doctors' beliefs as to the cause of his problems.

92. The delegate of the first respondent found that the assaults claimed by the applicant *"have not been corroborated by the applicant through provision of hospital or other medical records originating from Sri Lanka"*, that while he had provided copies of two medical reports on his current state of health these had been written by health care professionals in Australia who had examined the applicant more than four years and more than one year respectively after the claimed events had occurred and that: *"Such diagnoses are qualified diagnoses, made without first hand knowledge of the events that have been claimed, but after being told of events by the applicant"*.

93. It was submitted for the applicant that the delegate's decision turned not on this issue but on the fact that the applicant had been able to leave Colombo through the airport and hence that the delegate had been satisfied that the Sri Lankan authorities did not consider the applicant to hold a profile of concern. In the alternative the delegate was said to have found that it was reasonable for the applicant to relocate to an another location in Sri Lanka (such as Colombo) based on country information and the applicant's possession of valid identity documents. It was said that the reference to the issue of medical certificates was simply an observation which was not an issue critical to the delegate's decision.

94. However, as submitted for the first respondent, not only did the delegate's decision refer to the doctors' reports, it clearly put the applicant on notice that the correctness of the reasons for the diagnoses were in issue. In essence the delegate indicated that, even taking the letters at their highest, the doctors did not have any way of knowing first-hand about the causes of the injuries. This was the same way in which the Tribunal used this material.

95. The delegate's decision turned in part on whether the applicant's fear that he would be killed if he returned to Sri Lanka was well founded. The delegate's finding as to the absence of diagnoses made with first-hand knowledge of past claimed assault (that is, in contemporaneous documentary corroboration from Sri Lankan sources) was one of the matters that led to the rejection of the applicant's claim that he feared that he would be killed by the authorities and the LTTE if he returned to Sri Lanka. Thus the

delegate's decision indicated that such issue was a determinative issue in the sense considered in *SZBEL* at [35]. The delegate's decision sufficiently indicated to the applicant that the correctness of the reasons for the diagnoses was in issue. Hence, on the assumption that this was an issue within s.425, it was an issue which the delegate addressed in such a way that it was sufficiently brought to the attention of the applicant (see *SZBEL* at [35] – [36]) so that the Tribunal was not required by s.425 to disclose it to or raise it with the applicant in the Tribunal hearing.

LTTE suspicion

96. The third alleged "issue" is "*how the applicant knew that the LTTE suspected him of informing on the people whom they had sent to study at the institute where he worked"*. It was acknowledged for the applicant that his claims that the LTTE suspected him of having informed on the students was discussed at the Tribunal hearing. However it was submitted that the issue raised by the Tribunal with the applicant was not "how" the applicant knew the LTTE suspected him but rather "why" the LTTE suspected him.

97. In its reasons for decision the Tribunal outlined the applicant's evidence in response to questions about why the LTTE suspected him. It recorded that it had put to the applicant that it was having difficulty accepting that he would have been held for three months simply because the LTTE suspected him of providing information to the authorities about the LTTE students in the Institute and that this went to the matter of his credibility. It also put to him that if the LTTE thought that he had betrayed them then it would have thought that the LTTE would have killed him. It recorded his explanation in response. The Tribunal then found that "*many of these claims are even by the applicant's own account, unsupported and at best speculative, and he does not say how he knew that the LTTE suspected him or investigated him (indeed, if they had indeed done this then by his own account they would have been able to put any claimed suspicions to rest)"*.

98. It was said to be clear from the way the Tribunal structured its decision that the issues of how the applicant knew that the LTTE

suspected him and why the LTTE suspected him were two separate issues and that the former issue was a matter which went to his credibility and was an issue in the proceedings not brought to the attention of the applicant.

99. The first respondent contended that, properly understood, s.425 and *SZBEL* did not require such fine distinctions to be drawn in the identification of "issues" as was proposed for the applicant. It was submitted that LTTE suspicion was not in issue, but if it was in issue it was raised by the Tribunal and that one did not have to descend to the level of specificity contended for by the applicant.

100. This aspect of ground 1 illustrates the difficulty of the characterisation process said to be required under s.425. However, I am not persuaded that the specific question of "how" the applicant knew that the LTTE suspected him was an issue arising in relation to the decision under review within s.425.

101. What was important to the Tribunal's decision was that the LTTE was said to suspect the applicant of informing about the LTTE students and the consequences of such suspicion. The Tribunal did not accept that the applicant was held responsible by the LTTE for providing information to the authorities about the LTTE students. While it referred to the absence of evidence as to how the applicant knew the LTTE suspected or investigated him in finding many of his claims to be unsupportive and at best speculative, the absence of evidence on a particular factual matter is not such as to constitute an issue arising in relation to the decision under review within s.425. The "issue" was whether the applicant was suspected by the LTTE of informing on the students and the consequences of such suspicion. Factual matters going to that issue did not have to be put to the applicant (*SZJUB* at [25] per Bennett J). The "key point" was whether the applicant was suspected by the LTTE of informing on the students – because this was what was said to have led to the applicant's subsequent detention and to be a factor in the risk of harm to him from the LTTE. It has not been contended that the Tribunal failed to comply with s.425 in relation to that issue. Indeed, the applicant was directed to that issue (see *SZJUB* at [28])

by the following exchange in the Tribunal hearing (Transcript at page 15):

> *M. Why did the LTTE then suspect you of providing information about these students when you weren't involved in their enrolment?*
>
> *I. The reason for the LTTE suspecting was that those students were arrested by army.*
>
> *M. So why would they suspect you of being involved?*
>
> *I. After that particular program I didn't go to the Institute at all. Later they consulted that Institute and they also made certain queries and ultimately came to the conclusion that it was me who might have provided or dobbed on them.*
>
> *M. What did you dobbed them in for?*
>
> *I. Prior to that when I had been arrested I had been severely warned by the Sri Lankan army in Colombo that I should not have any contacts whatsoever with the LTTE. That is why I didn't go thereafter. But they suspected.*

No failure to comply with s.425 has been established in relation to this matter.

Corroborative evidence

102. The next matter raised under this ground relates to the Tribunal finding that there was a need for corroborative evidence of *"thousands of people congregating outside the LTTE camp demanding the release of their children"*. It was said that the Tribunal had not asked the applicant for corroborative evidence in relation to this matter. While it was clear that the Tribunal was looking for evidence to support the applicant's claims, it was submitted that if there was an issue as to whether there was such specific evidence, then the Tribunal must put that to the applicant by at least asking him questions about the issue. It had failed to do so. It was pointed out that this finding also went to the applicant's credibility.

103. However, while this particular matter was not put to the applicant, as is made clear in *SZBEL*, the Tribunal is not obliged to put its reasoning process to the applicant for comment (and see *Applicant A125 of 2003* at [89]). The Tribunal's finding about the absence of corroborative evidence was merely part of the Tribunal's reasoning process on the claims about detention by the LTTE and escape from the camp. It was one aspect of the reasoning which led to its rejection of this claim. The Tribunal was not obliged to disclose this under s.425 of the Act.

Delay in protection visa application

104. The final matter relied on under ground 1 relates to the Tribunal finding that the time taken for the applicant's application for a protection visa to be lodged after his arrival in Australia "*impinged on his credit*". The Tribunal found that if the applicant had come to Australia to protect his life and feared persecution as claimed, he would have applied for a protection visa immediately or shortly after arriving here and not have waited *"over five weeks"* [sic] before making his application. The Tribunal went on to say "*However, it accepts that he did not do so and the Tribunal is satisfied that the Applicant does not have a well-founded fear of serious harm amounting to persecution for a Convention reason and is not a refugee"*.

105. It was submitted that this matter went to the applicant's credibility and to the well-foundedness of the applicant's fear and should have been put to him at the hearing. It was acknowledged for the first respondent that this matter was not put to the applicant.

106. The Tribunal's view as to whether a person fearing persecution would have applied for a protection visa sooner than the applicant did was an aspect of its reasoning in relation to the applicant's credibility. However, the length of the time between the applicant's arrival in Australia and his protection visa application was not in doubt – and the Tribunal reasoning in relation to the relevance of such time to the applicant's credibility does not raise a s.425(1) obligation. The Tribunal is not obliged to provide a "running

commentary" on what it thinks about the evidence it is given (*Applicant A125 of 2003* at [88] – [89] and *SZBEL* at [48]).

Section 424A of the Migration Act

107. The second ground relied on is:

> *The Tribunal failed to comply with section 424A of the Migration Act.*
>
> *Particulars*
>
> *(a) The Tribunal failed to disclose to the applicant as required by that section,*
>
> > *(i) Information to the effect that the applicant had claimed to be a well qualified computer instructor in his protection visa application…*
> >
> > *(ii) Information that the applicant replied to a question as to how he knew what police were saying when he did not speak their language by saying words to the effect that they "… beat him and he screamed".*

108. At the relevant time s.424A provided:

> *1. Subject to subsection (2)(a) and (3), the Tribunal must*
>
> > *(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and*
> >
> > *(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and*
> >
> > *(c) invite the applicant to comment on it.*
>
> *2. The information and invitation must be given to the applicant:*
>
> > *(a) except where paragraph (b) applies – by one of the methods specified in section 441A; or*
> >
> > *(b) if the applicant is in immigration detention – by a method prescribed for the purposes of giving documents to such a person*

3. This section does not apply to information:

> *(a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or*
>
> *(b) that the applicant gave for the purpose of the application; or ……..*

109. It was contended for the applicant that the Tribunal had failed to comply with s.424A(1) of the Migration Act as it stood at the relevant time by failing to put to him for comment what was said to be "information" to the effect that the applicant claimed to be a well-qualified computer instructor in the protection visa application and that he replied to a question in the Tribunal hearing as to how he knew what police were saying when he did not speak their language by saying words to the effect that *"they beat him and he screamed."*

110. It was submitted that both findings were incorrect as the applicant did not claim to be a well qualified computer instructor in his application and in the Tribunal hearing had said *"they screamed"* and not that *"he"* screamed.

111. It was contended first that such matters constituted information within s.424A(1).

112. Counsel for the applicant referred to a number of authorities in support of this proposition. In particular, in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 at [24]) Finn and Stone JJ had addressed the issue of what constitutes "information" as follows:

> *24 …There is now a considerable body of case law concerned with the compass of the term "information" in its s.424A(1) setting. The following propositions emerge from it:*
>
> > *(i) the purpose of s 424A is to provide in part a statutory procedural analogue to the common law of procedural fairness:* Paul v Minister for Immigration and Multicultural Affairs *(2001) 113 FCR 396 at 429 – 30 [104]; …. However the obligation imposed is not coextensive with that which might be imposed by the common law to avoid practical injustice:* VAAC v Minister for Immigration & Multicultural Indigenous Affairs *[2003] FCAFC 74;…*

(ii) the word "information" in s 424A(1) has the same meaning as in s 424: Win v Minister for Immigration and Multicultural Affairs *(2001) 105 FCR 212 at 218 [20]; and in this setting it refers to knowledge of relevant facts or circumstances communicated to or received by the tribunal:* Tin v Minister for Immigration and Multicultural Affairs *[2000] FCA 1109; … at [3]; irrespective of whether it is reliable or has a sound factual basis;* Win*, at 217-18 [19] – [22]; and*

(iii) the word does not encompass the tribunal's subjective appraisals, thought processes or determination: Tin *at [54];* Paul *at … [95];* … Singh v Minister for Immigration and Multicultural Affairs *[2001] FCA 1679 … at [25]; approved [2002] FCAFC 120; … nor does it extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the tribunal in weighing up the evidence by reference to those gaps, etc:* WAGP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs *(2002) 124 FCR 276 at… [26] – [29]*.

113. It was observed that this approach was referred to with approval by Moore J in *SZEEU and Others v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at [18].

114. It was also submitted that, when one had regard to the exemption from the operation of s.424A(1) in s.424A(3)(a) (of information not specifically about the applicant or another person and just about a class of persons of which the applicant or another person is a member), it was apparent that the "information" in s.424A(1) must be personal to the applicant or another person. It was submitted that both the information about what the Tribunal considered the applicant had claimed in his protection visa and what he was said to have told the Tribunal in the hearing constituted "information", as knowledge of relevant facts or circumstances irrespective of whether such knowledge had a sound factual basis.

115. It was also submitted that each item of information was *"part of the reason"* for affirming the decision under review. Reference was made to the decision of the High Court in *SZBYR and Another v Minister for Immigration and Citizenship and Another* (2007) 235 ALR 609 in which Gleeson CJ, Gummow, Callinan, Heydon and

Crennan JJ referred to the effect of *SAAP and Another v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162 and then discussed the circumstances in which s.424A was engaged in relation to material provided to the Department by a protection visa applicant.

116. In *SZBYR* the appellants had initially appeared to contend that the information the Tribunal should have provided in a s.424A notice consisted of inconsistencies between the statutory declaration provided by an appellant in connection with the protection visa application and oral evidence to the Tribunal. Subsequently the argument before the High Court had focused on whether s.424A required that relevant passages in the statutory declaration itself (from which inconsistencies were later said to arise) be put to the appellants for comment.

117. Their Honours acknowledged that, consistent with the decisions of the Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v Al Shamry* (2001) 110 FCR 27 and *SZEEU and Others v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214, it had been accepted by both parties that the exemption from the operation of s.424A(1) in paragraph (b) of s.424A(3) (*"information … that the applicant gave for the purposes of the application")* did not refer to the application for the protection visa itself and hence did not encompass the statutory declaration.

118. Their Honours then referred to the fact that the appellants had "assumed" but did not demonstrate that the statutory declaration of one of the appellants would be the reason, or a part of the reason, for affirming the decision under review. However, their Honours found not only that this had not been demonstrated, but also that the reason for affirming the decision under review :

> *[17]… is a matter that depends upon the criteria for the making of that decision in the first place. The tribunal does not operate in a statutory vacuum, and its role is dependent upon the making of administrative decisions upon criteria to be found elsewhere in the Act. The use of the future conditional tense (would be) rather than the indicative strongly suggests that the operation of s 424A(1)(a) is to be determined in advance – and independently –*

of the tribunal's particular reasoning on the facts of the case. Here, the appropriate criterion was to be found in s 36(1) of the Act, being the provision under which the appellants sought their protection visa. The "reason, or a part of the reason, for affirming the decision that is under review" was therefore that the appellants were not persons to whom Australia owed protection obligations under the Convention. When viewed in that light, it is difficult to see why the relevant passages in the appellant's statutory declaration would itself be "information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review". Those portions of the statutory declaration did not contain in their terms a rejection, denial or undermining of the appellant's claims to be persons to whom Australia owed protection obligations. Indeed, if their contents were believed, they would, one might have thought, have been a relevant step towards rejecting, not affirming, the decision under review.

119. It was acknowledged for the applicant that their Honours had stated (at [18]) that if the reason the Tribunal affirmed the decision was its disbelief of the appellant's evidence arising from inconsistencies therein *"it is difficult to see how such disbelief could be characterised as constituting 'information'"* within s.424A(1), citing *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 to the effect that information does not encompass subjective appraisals and thought processes. However it was said to be necessary to contrast the factual situation and what was in issue in *SZBYR and Another v Minister for Immigration and Citizenship and Another* (2007) 235 ALR 609 with what had been in issue in *SAAP and Another v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162 the earlier High Court decision on s.424A.

120. In *SAAP* the Tribunal member of his or her own volition had decided to call evidence from the applicant's daughter who had not been put forward as a witness by the applicant herself. Part of that evidence was inconsistent with the applicant's evidence. Although the Tribunal put the inconsistencies to the applicant at the hearing it was not done in writing. This was found to be a failure to comply with s.424A and a jurisdictional error.

121. Counsel for the applicant contended that in SAAP the information was extraneous to the applicant and went directly to contradict her claims. In contrast in *SZBYR* the alleged information stemmed from the statutory declaration lodged by the applicant but was not in fact information which by itself was contrary.

122. In light of these authorities it was contended that the Tribunal was obliged to put to the applicant in writing the "information" that the applicant had claimed to be a well qualified computer instructor in his protection visa application, when in fact he had not made such a claim. It was said that the Tribunal used information that it thought was given in the protection visa application in a way that went to the applicant's credit.

123. It was submitted that the exemption in s.424A(3)(b) did not apply, as on no view could it be said that the applicant gave this information to the Tribunal for the purpose of the review application.

124. It was acknowledged that it may seem to be an odd result that if the Tribunal were to use mistaken information as part of a credibility finding against an applicant it would fail to comply with s.424A unless it put such information in writing to the applicant. However it was submitted that s.424A applied in such circumstances.

125. Similarly it was contended that the Tribunal had mistaken the evidence given by the applicant at the Tribunal hearing in relation to what happened to him while in detention. It was said to be clear from the transcript of the Tribunal hearing that what the applicant had stated in response to a question as to what happened to him while in detention was as follows (Transcript page 14):

> *I* *They tortured me a lot. I never understood the language they were speaking. They came drunk and they beat me up severely and they tortured me. The scolded me. They made racial remarks.*
>
> *M* *Scalded or scolded?*
>
> *I* *Scolded verbally abused me. They checked my identity card and they beat me up saying that I was from the east, eastern province.*

M How did you know that if you didn't understand Sinhalese?

I In their language they would scream; they would shout; they would still beat. I couldn't tolerate their torture because they inflicted a lot of torture.

126. However, in its findings and reasons the Tribunal had mistakenly recorded that the applicant said *"They beat him and <u>he</u> screamed"* (emphasis added) when asked how he knew what they were saying if he did not speak Sinhalese.

127. It was submitted that the exemption in s.424A(3)(b) would not apply to such information, because the incorrect information was not in fact information that the applicant gave to the Tribunal for the purposes of the review.

128. Hence, having used information about the applicant which was not sourced from the applicant as part of the reason for affirming the decision (because it went to his credibility), the Tribunal was said to have fallen into jurisdictional error in failing to put such information to the applicant in writing. It was submitted that it was otherwise not to the point that the information was not correct, as it was knowledge, however mistaken, that was a part of the reason for affirming the decision under review and was personal to the applicant and not given by him.

129. It was contended for the first respondent that neither piece of information relied on was the reason or a part of the reason for the Tribunal's decision and submitted that the law in relation to s.424A had changed significantly following the High Court's recent decision in *SZBYR*.

130. It was contended first, that while the applicant had submitted that *SAAP* and *SZBYR* were difficult to reconcile, in *SZBYR* their Honours had in fact dealt with what the Court had decided in *SAAP*, indicating first that no party sought leave to reopen the question of construction given to s.424A in *SAAP* (at [2]) but that this did not *"obviate the need to pay careful attention to the application of s.424A to the present facts"*. At [13] it was clarified that a majority of the court in *SAAP* had determined first that the effect of s.424A was mandatory, in that a breach of the section constituted

jurisdictional error and secondly that *"its temporal effect was not limited to the pre-hearing stage"*. However their Honours went on to say that such propositions did not determine the outcome of the case before it.

131. It was submitted that *SZBYR* made it clear that the information in question must directly reject, deny or undermine the applicant's ability to satisfy the statutory criteria in order to be a *"part of the reason"*. It was submitted that to the extent that *SZEEU* had said something different it was no longer a good law, although their Honours did not expressly overrule *SZEEU* in *SZBYR.*

132. In this instance there was said to be nothing that the Tribunal drew from the protection visa application that formed information that was part of the reason for the Tribunal's decision. In relation to the first of the matters relied on, it was suggested first that even if the words "well qualified" did not appear in the protection visa application or the statement provided in support of it, this did not mean that the Tribunal could not conclude that that was the effect of such documents. Secondly, it was argued that viewed in light of *SZBYR* such information was not part of the reason, as it was not something that amounted to a rejection or denial or that undermined the satisfaction of the ultimate statutory criteria by the applicant.

133. As to the supposed misunderstanding of the evidence at the Tribunal hearing, it was submitted that the mistake about whether there was a statement to a particular effect was neither information nor part of the reason, but at best was a mistake in a finding of fact or conclusion. It was pointed out that if such information had been correct it would have come within the exception in s.424A(3)(b) because the applicant would have given such information for the purposes of the review. The fact that the Tribunal made a mistake about that in its finding or conclusion was said to be simply part of its reasoning process and not "information", consistent with what the High Court said in *SZBYR*.

134. It is not necessary for the purposes of this decision to determine the extent to which *SAAP* and *SZBYR* can be reconciled (although I note that the High Court in *SZBYR* was of the view that what was established in *SAAP* was not determinative in the different

circumstances of *SZBYR*). Nor is it necessary to determine the extent to which *SZEEU* is no longer good law.

135. First, it has not been established that information to the effect that the applicant claimed to be a well-qualified computer instructor in his protection visa application was part of the reason for affirming the decision under review.

136. There is no such express claim in the protection visa application or accompanying declaration. The applicant told the Tribunal at the hearing that he used skills obtained from studying at school to obtain a job at the Institute, where he also studied for three months after finishing school. In this context the Tribunal queried at the hearing whether he was a well-qualified computer instructor (as he was said to have claimed in his protection visa application) given that he was only 19 years old and had only done a 3 month IT course. The Tribunal was in error in stating that this claim appeared in the protection visa application. However this was a factual error in the questioning at the hearing of no significance to its decision. The Tribunal did not refer to such a claim in the findings and reasons part of the decision. Rather it accurately recorded the claims in the protection visa application, and contrasted these with the claims at the hearing which it accepted.

137. In these circumstances, whether or not the alleged claim to be a "well-qualified computer instructor" is "information", it was not the reason or part of the reason for affirming the decision under review. Section 424A(1) does not apply and hence it is not necessary to consider the operations of the s.424A(3) exception.

138. Further, the Tribunal's mistake in recording what the applicant claimed at the hearing – that he said they beat him and *he* screamed, when in fact he said they beat him and *they* screamed is also not a matter within s.424A. While this constituted an error of fact in the decision, it was not part of the reason for the decision such as to come within s.424A(1). Rather, in considering this aspect of the applicant's evidence, what was relevant to the Tribunal was inconsistency in the applicant's account as to whether he understood what the police had said to him, despite the fact that he also said that he did not speak Singhalese and also what the Tribunal considered

was his obfuscation when asked how he knew what they were saying. In such circumstances the factual error by the Tribunal as to who screamed cannot be said to be part of the reason for the decision.

139. I note in any event what the High Court stated in *SZBYR* at [17] to the effect that the use of the future conditional tense in s.424A(1) strongly suggests that the operation of s.424A(1)(a) is to be determined in advance – and independently – of the Tribunal's particular reasoning on the facts of the case. On that basis this factual error about a minor aspect of the applicant's oral evidence which would not go to the issue of the credibility of his claim about detention and mistreatment could not be said to be "part of the reason" in s.424A(1). No failure to comply with s.424A(1) is established on the basis contended for by the applicant.

Discretion

140. It was contended by counsel for the applicant that should the applicant succeed on either ground, the Tribunal's consideration of relocation did not provide an alternative independent basis for the Tribunal decision unaffected by jurisdictional error and hence that the Court should not exercise its discretion to refuse relief.

141. It is the case that, as counsel for the first respondent contended, the High Court has reaffirmed the operation of the relocation principle as an alternative independent basis for a decision and hence a reason to refuse to grant relief in the exercise of its discretion. However for this to be so the Tribunal must have made findings that the applicant could reasonably relocate that are unaffected by any error. (See *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 and *SZFDV v Minister for Immigration and Citizenship* [2007] HCA 41).

142. The first respondent contended that the relocation finding was separate and that relief should be refused in the exercise of the Court's discretion. It was pointed out that in *SZBYR* the High Court had accepted on the facts of that case that even if a breach of s.424A of the Migration Act had occurred, the appellants could not

overcome the Tribunal's finding that their claims lacked the relevant Convention nexus and hence that the matter was one that the decision-maker was bound by the governing statute to refuse. On this basis Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ found that relief should be refused in the exercise of the Court's discretion (at [29]). Kirby J also concluded (at [64]) that the critical aspect of the Tribunal's reasons was unimpeached by any contravention of s.424A.

143. Thus, it was submitted that the High Court had accepted that even if a breach of s.424A was established, if there were separate and unimpeached findings which themselves were sufficient to require the Tribunal to refuse the application then relief should be refused in the exercise of the Court's discretion. It was argued that in this case the findings on relocation provided such a separate unimpeached basis, because there would be an absence of the objectively well-founded fear where relocation was a possibility.

144. However, as acknowledged by counsel for the respondent, it is necessary to construe the Tribunal's findings to determine whether the relocation finding did stand alone.

145. Critically, the Tribunal finding on relocation followed the Tribunal's rejection of the applicant's factual claims as described above and, importantly, the adverse credibility findings (including the credibility finding based on its lack of satisfaction that the applicant was sent by the Institute to Colombo in order to help with purchasing or that they wanted him to go to Singapore with other officers). It also found that its rejection of subsequent claims, in particular that the applicant was detained in Colombo and tortured for two months from December 2001, "*again*" went to the matter of his credibility.

146. The finding on relocation was not a finding made on the basis that if the applicant's claims were accepted he could reasonably relocate. Rather that finding was as follows:

> ***Given all the above, including its earlier findings that the Applicant has not been detained and tortured by the Sri Lankan security forces in the past*** *and does not accept that there is real chance that he would be subjected to serious harm amounting to*

*persecution for a Convention reason from them, the Tribunal is also satisfied that **if for any subjective reason** the Applicant did not want to return to live with his mother and sister who are now living in a relatives' place in their village, then he would be able to live elsewhere in Sri Lanka in safety and without having a well-founded fear of serious harm amounting to persecution for a Convention reason. The Tribunal accepts that he is well-educated young man with IT skills and has not had any difficulty in finding a job in the past. And while accepting that the Applicant has not lived in another area of Sri Lanka, and does not have any family or relatives in Colombo or in the South and does not speak Singhalese, the Tribunal is satisfied that **if for any subjective reason** he fears that at some stage the LTTE may seek to force him to co-operate with them or persecute him if he doesn't so he does not want to return to his home village, then he would be able to relocate safely to another part of Sri Lanka of his choosing in safety from them, particularly in the government controlled area. Indeed, **given all the above**, the Tribunal does not accept that if the Applicant did relocate elsewhere in Sri Lanka there is a real chance that the Applicant would be subjected to serious harm amounting to persecution for a Convention reason. Nor does it accept that because he is a Sri Lankan Tamil, he would not be able to satisfactorily explain his presence in Colombo, (or elsewhere) and would be suspected of having links with the LTTE and, as he claims the Sri Lankan security forces have been responsible for the persecution he fears, there is no part of Sri Lanka he could reasonably be expected to relocate that is safe from the persecution he fears."* (emphasis added).

147. The Tribunal's finding in relation to relocation commenced *"Given all the above, including its earlier findings …"*. It is apparent that it relied on such prior findings, in particular that the applicant had not been persecuted in Colombo or in a government controlled area, which in turn relied on the Tribunal's findings as to the applicant's credit. The Tribunal's finding that the applicant was not a credible witness was based on its rejection of his claim that he was sent to Colombo to help with purchasing for the Institute and that the Institute wanted him to go to Singapore with other officers as *"embellished"* (although subsequent findings were also said to go to the matter of his credibility). Indeed, the relocation finding was in fact put on the basis that even though the applicant had no well-founded fear of persecution (because his claims of past harm were rejected), if he had a subjective fear for any reason he could relocate.

Further, the finding about the applicant's safety in government controlled areas (such as Colombo) was in part based on the Tribunal's rejection of his claims that he had been sent to Colombo and detained and assaulted there by the police. Hence it cannot be said to be an independent basis for the decision not affected by the failure to comply with s.425 discussed above.

148. In these circumstances I am not satisfied that the Tribunal's findings on relocation constitute an alternative independent basis for the decision unaffected by error such as to warrant refusal of relief on discretionary grounds. The application should be remitted to the Tribunal for reconsideration according to law.

I certify that the preceding one hundred and forty-eight (148) paragraphs are a true copy of the reasons for judgment of Barnes FM

Associate:

Date: 1 February 2008