FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZOSE v MINISTER FOR IMMIGRATION & ANOR *[2011] FMCA 640*

MIGRATION – Application to review decision of the Refugee Review Tribunal – whether Tribunal sufficiently indicated to the applicant at the hearing that his claims of having adhered to and practised Catholicism in China were in issue – whether Tribunal failed to comply with s.424A of the *Migration Act 1958* (Cth) in relation to oral evidence of the applicant's daughter – requirements of s.424AA of the Act.

Migration Act 1958 (Cth), ss.91R, 424A, 424AA, 425

AZAAD and Another v Minister for Immigration and Citizenship and Another (2010) 189 FCR 494; [2010] FCAFC 156
Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576; [1994] FCA 1074
Minister for Immigration and Citizenship v SZLFX and Another (2009) 238 CLR 507; [2009] HCA 31
Minister for Immigration and Ethnic Affairs v Guo and Another (1997) 191 CLR 559; [1997] HCA 22
Minister for Immigration and Multicultural Affairs v SZGMF [2006] FCAFC 138
MZYFH v Minister for Immigration and Citizenship and Another (2010) 188 FCR 151; [2010] FCA 559
Paul v Minister for Immigration and Multicultural Affairs (2001) 113 FCR 396; [2001] FCA 1196
SAAP and Another v Minister for Immigration and Multicultural and Indigenous Affairs and Another (2005) 228 CLR 294; [2005] HCA 24
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs and Another (2006) 228 CLR 152; [2006] HCA 63
SZBYR v Minister for Immigration and Citizenship (2007) 81 ALJR 1190; [2007] HCA 26
SZEOP v Minister for Immigration and Citizenship [2007] FCA 807
SZFMK v Minister for Immigration and Citizenship and Another (2010) 119 ALD 123; [2010] FCA 1287
SZHBX v Minister for Immigration & Citizenship [2007] FCA 1169
SZJUB v Minister for Immigration & Citizenship [2007] FCA 1486
SZJYA v Minister for Immigration and Citizenship and Another (No.2) (2008) 102 ALD 598; [2008] FCA 911
SZKLG v Minister for Immigration and Citizenship and Another (2007) 164 FCR 578; [2007] FCAFC 198
SZMCD v Minister for Immigration and Citizenship and Another (2009) 174

FCR 415; [2009] FCAFC 46
SZMKR v Minister for Immigration & Citizenship [2010] FCA 340
SZMTJ v Minister for Immigration and Citizenship and Another (No.2) (2009) 109 ALD 242; [2009] FCA 486
SZNKO v Minister for Immigration and Citizenship and Another (2010) 184 FCR 505; [2010] FCA 297
SZNWA v Minister for Immigration and Citizenship [2010] FCA 470
SZNWW v Minister for Immigration and Citizenship [2010] FCA 158
SZOBC v Minister for Immigration and Citizenship and Another (2010) 116 ALD 147; [2010] FCA 712

Applicant:	SZOSE
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2304 of 2010
Judgment of:	Barnes FM
Hearing date:	24 March 2011
Date of Last Submission:	27 April 2011
Delivered at:	Sydney
Delivered on:	23 August 2011

REPRESENTATION

Counsel for the Applicant:	Mr L Karp
Solicitors for the Applicant:	Kinslor Prince Lawyers
Counsel for the Respondents:	Ms A Mitchelmore
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) A writ in the nature of certiorari issue directed to the second respondent, quashing the decision of the second respondent made on 27 September 2010 in Tribunal case number 1006482.

(2) A writ in the nature of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent made on 3 August 2010.

FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY

SYG 2304 of 2010

SZOSE
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application for a review of a decision of the Refugee Review Tribunal dated 27 September 2010 affirming a decision of a delegate of the first respondent not to grant the applicant a protection visa.

2. The applicant, a citizen of the People's Republic of China, arrived in Australia in December 2007 as the holder of a student guardian visa obtained on the basis that his daughter was studying in Sydney. He applied for a protection visa in March 2010.

3. In connection with his protection visa application the applicant claimed that he and a friend and two other fishermen had been caught in a storm while fishing in September 2004. He believed the prayers of his friend "*miraculously*" saved him and the others from drowning in circumstances where other fishermen were killed in that storm. He claimed the friend introduced him to the underground Catholic church. He claimed he attended a secret training class and that he was baptised

into the underground Catholic church in China in December 2004. He claimed he later encouraged other persons to become Catholic. The applicant claimed that with the assistance of a priest and his friend he established the first secret Catholic group in the underground church in his home village in August 2005 and that he also assisted another friend to establish a Catholic group in another village in October 2006.

4. The applicant claimed that he "*assisted*" the daughter of a distant relative "*to become a Catholic in the underground church*". She ultimately became a nun. He claimed that when that relative discovered this in January 2007 he "*was very upset*" and reported the applicant to the PSB. The applicant claimed that on 27 January 2007 he was arrested, detained for two months and subject to mistreatment and torture. He claimed a bribe was paid for his release by the underground church through a solicitor in March 2007 and that he was able to leave China with the help of the underground church in December 2007. He attended church in Australia.

5. The applicant attended an interview with the delegate. He elaborated on his claims and provided a number of documents in support, including a document headed "*Certificate of Being Released From Detention*" dated 31 March 2007 and documentation in relation to his attendance at church in Australia.

The delegate's decision

6. In a decision dated 14 July 2010 the delegate refused to grant the applicant a protection visa. The delegate accepted that at interview the applicant had "*displayed a reasonable knowledge of the Catholic faith, which would indicate he is a Catholic, or has had some exposure to Catholic doctrine*". It referred to supporting evidence about his activities in Australia and, based on his testimony and that evidence found that he "*is a Catholic*". However it found that the applicant had not been able to adequately explain why he could not express his faith in a registered church in China. It was not satisfied that he held "*such a rigid doctrinal view, that he could not practise his faith in a registered Catholic Church in China*". Further, even if he "*chose to express his faith in an unregistered Catholic Church in Fujian*" Province the delegate found that he would not come to the adverse

attention of the Chinese authorities for that reason. The delegate did not address s.91R(3) of the *Migration Act 1958* (Cth) (the Act).

7. In relation to the applicant's claims of having been persecuted in China as a result of his underground Catholic church activities, the delegate had regard to the fact that while the applicant had provided some information about his activities, his answers at the interview "*lacked detail and he tended to repeat his responses in a rehearsed manner, especially his reasons for becoming a Catholic. In light of the ample documentation (including two passports and a police certificate) the applicant ha*[d] *been able to obtain from the Chinese government, his departure from China without being stopped or questioned, his delay in applying for a Protection visa once in Australia, his failure to raise his claims of protection in his* [earlier] *interactions with the department*" (when renewing his student guardian visas), as well as "*country information regarding the underground Catholic church in Fujian province*", the delegate was "*not satisfied of the applicant's claims that he* [had been] *involved in the underground Catholic church so as to bring him to the attention of the authorities*". It found that these claims had been "*fabricated for the purposes of advancing his Protection visa claim*" and (having regard to the fact that the applicant only applied for protection following the expiration of his student guardian visa and twelve months of unlawful status) that he applied for protection not for any well-founded fear of persecution in China but "*to extend his stay in Australia to live and work*".

The Tribunal review

8. The applicant sought review by the Tribunal. The Tribunal wrote to him on 24 August 2010 pursuant to s.424A of the Act inviting him to comment on several items of information. The applicant responded in the form of a statutory declaration.

9. The applicant attended a Tribunal hearing on 20 September 2010. A transcript of the hearing is before the court annexed to an affidavit of Joanne Jennifer Kinslor, sworn on 25 February 2011. At the hearing the Tribunal heard evidence from Father Paul McGee and the applicant's daughter, as well as from the applicant. The Tribunal put information to the applicant during the hearing pursuant to s.424AA of

the Act. What occurred at the hearing is discussed further below. The applicant provided further supporting documentation in relation to his claim about attending church and church activities in Australia and articles on the underground Catholic church in China.

The Tribunal decision

10. In its findings and reasons the "*Tribunal found that the applicant and his daughter* [were not] *witnesses of credibility*" and "*that the applicant ha*[d] *not been truthful in his claims*". The Tribunal stated that it "*reached these conclusions having due regard to the applicant's claim of sleeplessness and making allowances for* [his] *nervousness and limited education*" which he had raised at the hearing.

11. The Tribunal had regard to a number of factors, including the significant delay in the applicant's application for a protection visa. The Tribunal considered, but did not accept, the applicant's explanations for this delay (that a migration agent advised him that his daughter would be affected if he made such an application, that he feared disclosing his information to migration agents and that he relied on God). The Tribunal was of the view that such delay was inconsistent with a genuine fear of persecution in China. It caused the Tribunal to find that the applicant had not been truthful about events in China. The Tribunal was supported in this view by the fact that the applicant had approached the Chinese Consulate in Sydney to renew his passport. It found that this suggested that he had no fear of persecution from the Chinese authorities.

12. The Tribunal also expressed concern about the fact that the applicant's wife had not attempted to leave China, notwithstanding that he claimed she was also a Catholic who attended religious activities with him and was harassed by the authorities. The Tribunal found that the applicant's failure to refer to any reasons why his wife had not or could not leave China (other than referring to God's will) suggested that his wife had never had any intention of leaving the country. It was of the view that if she had experienced any persecution as claimed, the family could have considered her departure from China.

13. The Tribunal also found that the applicant had not been able to explain to its satisfaction why he needed the assistance of a friend to apply for his student guardian visa. It appears that this is a reference to the applicant's claim that a friend who wanted to help him leave China after his release from detention prepared his student visa application in China. The Tribunal had regard to the fact that the applicant did not refer to his lack of language skills or employment or other factors that may have influenced such a decision, claiming only "*that God did not tell him to apply for the visa but* [that] *God reminded his friend that he had to leave the country*". The Tribunal found that this suggested that the applicant's decision to leave China was not motivated by his fear of persecution but by suggestion from another person.

14. The Tribunal found that at the hearing the applicant appeared to have difficulty providing information about whether or not he had been "*charged*". It noted that his advisor suggested that he may not understand the word "*charge*". However the Tribunal had regard to the express references to the applicant being "*charged*" in his written claims to the delegate and to the Tribunal. It expressed "*concern*" that the applicant's written statements, including his claims and his description of persecution, were prepared by another person and not by him. The Tribunal was supported in this view by the fact that at the hearing the applicant could not explain what was meant by the statement in his protection visa application that "*he would later provide evidence that he had been subjected to persecution owing to his Catholic belief*". The Tribunal formed the view:

> *…that this information, as much of the other information contained in the applicant's protection visa application and his various statements, was prepared by another person and that the applicant was simply unaware of his undertaking to provide evidence of his persecution at a later date.*

15. The Tribunal did not accept the applicant's reasons for the delay in presenting to the Department a copy of the Detention Release Certificate dated 31 March 2007, in particular that he was not asked for it and that he forgot to tell his agent about it. He lodged his application on 2 March 2010 and provided a copy of the certificate after his interview on 17 May 2010. The Tribunal described this as a delay of "*some months*". The Tribunal did not accept that the applicant or

"*more significantly*" his agent, (who was said by the Tribunal to be experienced in protection visa applications), expected to be asked to provide such document or that they were "*unaware that* [it] *could not be provided unless it was requested*" (sic). It noted that the applicant had provided the document to the Department in May 2010 despite not being asked for it. The Tribunal found that the applicant's claim that he "*forgot*" to mention this document to his agent suggested that he did not take his application seriously. It found it "*unthinkable*" that the applicant would "*forget*" to mention such evidence of a significant event like release from detention. It was of the view that the applicant had not been truthful when offering these explanations. The delay in presentation of this document and the applicant's inability to explain what evidence he had referred to in his application form caused the Tribunal to find that at the time of the application the document either was not available to the applicant or that it did not exist. It referred to country information about the availability of fraudulent documents in China, concluded that this was not a genuine document and that the fact the applicant had presented it supported the view he was not a person of credibility.

16. The Tribunal also had regard to what it regarded as "*significant inconsistencies*" between the applicant's oral evidence and that of his daughter. It stated:

> *Finally, there were significant inconsistencies between the applicant's and his daughter's oral evidence given to the Tribunal. For example:*
>
> *a. The applicant stated that the church gatherings were held every Sunday after supper from 7 pm to 9 pm while his daughter stated that there was no fixed time for such gatherings.*
>
> *b. The applicant stated this his daughter did not attend Mass during school term because she did not live at home while his daughter said that she attended Mass every Sunday except during the time of her father's detention and before she came to Australia. The applicant explained that his daughter lived away and he did not know and she did not tell him about it. The Tribunal does not accept these explanations. The Tribunal does not accept that, given the central significance of religious belief to the applicant, the persecution he claims to have suffered as a result and the effect it had on his decision to leave the country, the*

> *applicant would not be aware that his daughter had been attending Mass weekly when she lived away from home.*
>
> *c. The applicant said that his daughter did not attend the evening gatherings. The applicant's daughter stated that she sometimes attended gatherings in the evenings, later suggesting that she did not attend gatherings.*

17. The Tribunal also found that the applicant's answers about whether the Chinese authorities knew of his claimed involvement in the activities of the Catholic church was "*vague and confused*". The Tribunal formed the view that the applicant had not been truthful in his evidence.

18. The Tribunal concluded that the combination of these concerns caused it to find that the applicant and his daughter were not persons of credibility and that the applicant had "*fabricated his claims for the purpose of his protection visa application*". The Tribunal continued:

> *The Tribunal rejects the applicant's claims. The Tribunal does not accept that the applicant is a Catholic, that he had been baptised in China or that he ever had any association with the unregistered Catholic Church. The Tribunal does not accept that the applicant or his family attended religious gatherings, of either registered or unregistered church or that they otherwise had any involvement with the Church, in particular, the Catholic Church. The Tribunal does not accept that the applicant had developed commitment or faith to God and the church.*

19. The Tribunal also rejected the applicant's claims about his involvement in introducing Catholic teaching to others and bringing others to the Catholic Church and his participation in other activities of the church. It did not accept that he helped another person to "*become a nun*" and that as a result he was denounced to the authorities, detained and released only because a bribe was paid. Nor did it accept that he and his wife or other members of his family had been harassed, questioned or were otherwise of any adverse interest to the Chinese authorities. It did not accept that there was an outstanding investigation concerning the applicant or that he remained of interest to the Chinese authorities. Nor did it accept that the authorities had become aware of the applicant's role in the Catholic Church and in organising activities of

the Church or that the applicant left China to avoid persecution by the Chinese authorities.

20. The Tribunal did not accept "*the entirety of the applicant's claims concerning the events in China*". It found that there was no real chance the applicant would be persecuted for his religious beliefs, actual or imputed, due to anything that occurred prior to his departure from China.

21. The Tribunal accepted, on the basis of the applicant's evidence, supporting documentation and the oral evidence of Fr McGee, that the applicant had been attending church in Australia and that he had engaged in religious activities in Australia since shortly after his arrival. The Tribunal acknowledged that Fr McGee perceived the applicant to be a genuine and committed Catholic, but had regard to the fact that it had found the applicant not to be a witness of credibility and that he had "*no involvement with the Catholic Church in China*". It found that the applicant had not satisfied it that he engaged in religious activities in Australia otherwise than for the purpose of strengthening his claim to be a refugee. It was of the view that his early attendance at church in Australia may have been the result of the advice of the migration agent he consulted shortly after his arrival and not his commitment to the church. The Tribunal disregarded this conduct pursuant to s.91R(3) of the Act.

22. The Tribunal did not accept the applicant's explanation for how he could leave China despite his case not having been finalised and that while he was still under investigation members of the underground Catholic church obtained his release and departure though bribery. It considered it much more likely that the applicant was of no interest to the authorities at the time of his departure.

23. Having rejected the applicant's claim that he had "*any involvement with Christianity and Catholicism in China*" and finding that he had no commitment to the church or to Catholicism, the Tribunal found that he would not engage in any religious activities or associate with other practitioners if he were to return to China now or in the reasonably foreseeable future and that he would be of no interest to the Chinese authorities either as a result of his past or future conduct. It concluded that there was no real chance the applicant would be persecuted for

reasons of his religion or for any other Convention reason if he were to return to China now or in the reasonably foreseeable future. The Tribunal affirmed the decision under review.

24. The applicant sought review by application filed on 25 October 2010. He now relies on a further amended application filed in court on 24 March 2011. There are two grounds in the further amended application (referred to for convenience as the application).

Section 425 of the Migration Act

25. The first ground is that the Tribunal's decision was made in breach of s.425 of the Migration Act. Particulars to this ground are that:

> *The Tribunal failed to sufficiently indicate to the applicant that his claims of having practiced Catholicism in China were in issue.*

Reliance was placed on what was stated by the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs and Another* (2006) 228 CLR 152; [2006] HCA 63 at [47] as follows:

> *First, there may well be cases, perhaps many cases, where either the delegate's decision, or the Tribunal's statements or questions during a hearing, sufficiently indicate to an applicant that everything he or she says in support of the application is in issue. That indication may be given in many ways. It is not necessary (and often would be inappropriate) for the Tribunal to put to an applicant, in so many words, that he or she is lying, that he or she may not be accepted as a witness of truth, or that he or she may be thought to be embellishing the account that is given of certain events. The proceedings are not adversarial and the Tribunal is not, and is not to adopt the position of, a contradictor.* ***But where, as here, there are specific aspects of an applicant's account, that the Tribunal considers*** **may** ***be important to the decision and may be open to doubt, 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*** (emphasis added).

26. It was pointed out that in *SZBEL* the High Court had held that s.425 was a statutory embodiment of certain requirements of procedural fairness, including that natural justice would ordinarily require the

party affected to be given the opportunity of ascertaining the relevant issues (*SZBEL* at [32], *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590 – 592; [1994] FCA 1074).

27. It was submitted that the Tribunal's statements during the hearing did not sufficiently indicate to the applicant that all his claims were in issue and that the Tribunal did not sufficiently ask the applicant to expand upon his practice of Catholicism in China and why his account should be accepted.

28. Counsel for the applicant contended that what was required to satisfy the requirements of s.425 would vary with the circumstances of the applicant and his or her claim. In this case the delegate was said to have found that the applicant was a Catholic. It was submitted that at interview with the delegate the applicant had given an "*unimpeachable*", albeit brief, summary of his Catholic beliefs. In addition, there was evidence before the Tribunal from Fr McGee that in his opinion, as a priest of than 40 years, the applicant was a genuine Catholic. It was also said to be relevant that the applicant claimed to be a Fuqing-speaking fisherman who had only two years primary education. He told the Tribunal that he did not speak Mandarin fluently in the context of explaining why he did not approach the Immigration Department and apply for protection soon after his arrival in Australia.

29. It was acknowledged that the Tribunal gave the applicant general warnings at the hearing that the information he had provided in his protection visa application might not be correct and also put to the applicant pursuant to s.424AA of the Act that inconsistencies in his evidence and that of his daughter about church activities in China might lead the Tribunal to conclude that he and his daughter were "*untruthful*". However it was submitted that this was inadequate to convey the extent of the Tribunal's suspicions.

30. In particular, it was submitted that the occasions on which the Tribunal had raised matters with the applicant during the hearing (and informed him that it might decide that he did not have a fear of persecution in China or that the information he had provided in his protection visa application was not true), had to be considered in context and that the

context included the evidence from Fr McGee that the applicant was a Catholic and the fact that the delegate had accepted that the applicant is a Catholic. It was contended that while the particular matters raised by the Tribunal at the hearing related to the question of whether the applicant had a well-founded fear of persecution, these matters did not, either in terms or implicitly, deal with the applicant's fundamental beliefs. Counsel for the applicant also submitted that the same could be said about the information specifically put to the applicant under s.424AA of the Act, as this was said to relate to the "*practice*" of religion, rather than to the applicant's beliefs.

31. Counsel for the applicant also acknowledged that the Tribunal told the applicant that his claims may not be believed and that there was some questioning about his practice of Catholicism at the hearing. However it was submitted that there was no questioning by the Tribunal of the applicant's fundamental beliefs and that it was not put to him that his evidence as to his fundamental beliefs may not be accepted and that in the particular circumstances of this case the Tribunal had to tell the applicant that his claims of having been a practising Catholic in China might be disbelieved and ask him to explain why they should have been accepted.

32. The first respondent submitted that at the hearing the Tribunal sufficiently indicated to the applicant that everything he said was in issue and that there was no obligation on it to state specifically that his having been a Catholic in China was in issue (see *SZBEL* at [47]).

33. It was submitted that in the course of the hearing the Tribunal gave sufficient indication that everything the applicant said was in issue in a number of ways. In circumstances where the applicant's claimed fear was based on the fact that he was a member of an underground Catholic church his religion was said to be a central aspect of his claims. The first respondent contended that it was sufficient for the Tribunal to state generally, as it did on a number of occasions, that its concerns may lead it to conclude that the applicant did not have a genuine fear of persecution in his home country and that the information he provided in his protection visa application might not be true, without specifically putting to him that it might not accept that he had been a Catholic in China. In other words the first respondent's

submissions proceeded on the basis that the Tribunal adequately indicated to the applicant at the hearing that everything he said in support of his application was in issue and in those circumstances there was no need for the Tribunal to put the applicant specifically on notice that his claim to have been a practising Catholic in China might not be accepted.

34. Section 425 of the Migration Act is as follows:

> *(1) 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.*
>
> *(2) Subsection (1) does not apply if:*
>
> > *(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or*
> >
> > *(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or*
> >
> > *(c) subsection 424C(1) or (2) applies to the applicant.*
>
> *(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.*

35. As elaborated on in oral submissions, the applicant's submission is that the Tribunal had to disclose to him that his claim to have been a practising Catholic in China (as distinct from his claim to have engaged in and to have been persecuted for his activities with the underground Catholic Church) was in issue, but that it failed to meet that obligation.

36. Reliance was placed on *SZBEL*. In that case what was in issue was whether the visa applicant had been denied procedural fairness. He was an Iranian seaman employed on an Iranian shipping line who had jumped ship and applied for protection. He claimed he jumped ship because he feared for his safety because the captain of the ship knew of his interest in Christianity (*SZBEL* at [1] – [2]). The delegate was not satisfied that the applicant had a genuine commitment to Christianity.

37. The delegate dealt directly with only one of three relevant elements of his claim (the applicant being allowed off the ship to visit a doctor) but not with the applicant's account of how the ship's captain came to

know of his interest in Christianity or his account of the captain's reaction to that knowledge. The Tribunal found these three elements of his written account of his claims in a statutory declaration were implausible. On that basis the Tribunal rejected the applicant's claims and did not accept that he was considered by the Iranian authorities to be an apostate or actively involved in Christianity before his arrival in Australia.

38. The High Court found in *SZBEL* that the two elements of the applicant's claims not addressed by the delegate but which the Tribunal found implausible were determinative issues to which the Tribunal's reasoning processes had been directed but that they had not been adequately notified to the applicant by the Tribunal at the hearing (see [21] and [42] – [44]) and hence that the Tribunal had not accorded the applicant procedural fairness.

39. In reaching this conclusion the High Court stated at [43]:

> *The delegate had not based his decision on either of these aspects of the matter. Nothing in the delegate's reasons for decision indicated that these aspects of his account were in issue. And the Tribunal did not identify these aspects of his account as important issues. The Tribunal did not challenge what the appellant said. It did not say anything to him that would have revealed to him that these were live issues. 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. Nothing the Tribunal said or did added to the issues that arose on the review.*

40. The High Court reached this conclusion notwithstanding that at the hearing the Tribunal had asked the applicant questions about matters including his meeting in his home town with friends (in which he had described his interest in Christianity and which he said had come to the attention of the captain), what happened when he was called before the captain on board ship and his going ashore for medical treatment in Australia (at [16]). The High Court was of the view that the Tribunal had not given the applicant "*a sufficient opportunity to give evidence, or make submissions, about what turned out to be two of the three determinative issues arising in relation to the decision under review*" (at [44]). The High Court accepted (at [25]) that what is required by

procedural fairness "*is a fair hearing, not a fair outcome*" and that in that sense the relevant question was about the Tribunal's processes not its decision.

41. While the ground relied on in this case is expressed in terms of s.425 of the Act, it is clear from the applicant's submissions that reliance is placed on the principles considered in *SZBEL*. I note however that as the High Court pointed out that "*the statutory framework within which a decision-maker exercised statutory power is of critical importance when considering what procedural fairness requires*" and that "*the particular content given to be the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case*" (at [26]). It also referred to the fact that, as recognised in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* at 590 – 591; [28]:

> *It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard.* ***That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues*** *and to be informed of the nature and content of adverse material.*

(Emphasis added in *SZBEL* at [32]).

42. Importantly, the High Court expressed the view 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*" (at [33]) and that "*the issues arising in relation to the decision under review*" in s.425(1):

> *…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 (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* (at [34]).

43. As the High Court continued at [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.*

44. Their Honours recognised that the Tribunal conducted a hearing where it was not persuaded by the material already before it to decide the review in the applicant's favour, but stated that (*SZBEL* at [36]):

> *…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.*

45. It is important to bear in mind that in this case the delegate accepted that the applicant is "*a Catholic*", although there is nothing in the delegate's decision to suggest that such acceptance was necessarily limited to the applicant having acquired such beliefs in Australia.

46. The delegate recorded that the applicant attended an interview and that when asked about his "*Christian beliefs*":

- *…The applicant stated that the Roman Catholic church spread the gospel and provided him with the answers to important theories, that he believed that Jesus Christ dies for our sins and that he knew the love of our Holy Saviour; that the authority of the church was the Roman Pope, Benedict 16th; that the Roman Catholic church had been passed down for generations and was not created by man. The applicant also stated that he had become a Catholic on 25 December 2004 in order to honour Jesus Christ as a result of an incident that took place while he was fishing*

- *The applicant stated that through baptism, original sin would be forgiven.*

47. After describing his activities with the underground Catholic Church in China, the applicant claimed that if he returned to China he would attend the underground Catholic church. According to the delegate, when asked why he could not attend the registered Roman Catholic church in China, the applicant stated:

> *…that those churches were established by the government however the underground Catholic churches had been established by Jesus Christ. The case officer asked the applicant the difference between the registered and underground church. The applicant reiterated that the registered church had been established by the government however the underground Catholic churches had been established by Jesus Christ.*

48. The delegate found that at interview the applicant had "*displayed a reasonable knowledge of the Catholic faith, which would indicate he is a Catholic, or has had some exposure to Catholic doctrine*". He had regard to letters of support from priests associated with the Columban Mission Institute in Australia (Fr Paul McGee who also gave evidence to the Tribunal) and the Australian Catholic Chinese Community, attesting to the fact that the applicant, who arrived in Australia on 24 December 2007, had been regularly attending Sunday Mass since early January 2008 (or "*ever since he arrived*") and to the fact that he "*is a devote* (sic) *Catholic*". The delegate also had regard to photographs of the applicant and his daughter participating in church activities in Australia. It was in that context that the delegate found, based on the applicant's testimony and the evidence, that "*the applicant is a Catholic*". However the delegate did not accept that the applicant had been "*involved in the underground Catholic church so as to bring him to the attention of the* [Chinese] *authorities*". He found that the applicant's claims of past persecution as a result of his underground church activities to have been fabricated.

49. Moreover, the delegate was not satisfied that the applicant could not "*express his faith*" in a registered Catholic church in China and that there would be a real chance of persecution even if the applicant chose to express his faith in an unregistered Catholic church in Fujian (his home province).

50. In this case, as in *SZBEL,* the delegate did not base his decision on the issue under consideration. Nothing in the delegate's reasons for decision indicated that the applicant's Catholicism as such was in issue, albeit the delegate did not expressly address whether the applicant was a Catholic in China. If the delegate had rejected this aspect of the applicant's claims, this would have made it clear that everything the applicant claimed was in issue before the Tribunal (see for example *SZNWA v Minister for Immigration and Citizenship* [2010] FCA 470; *SZFMK v Minister for Immigration and Citizenship and Another* (2010) 119 ALD 123; [2010] FCA 1287 at [49] and *SZOBC v Minister for Immigration and Citizenship and Another* (2010) 116 ALD 147; [2010] FCA 712 at [27] – [29]). That was not what occurred in the present case. Based on what the delegate decided, the applicant may well "*have understood the central and determinative question on the review*" to be his claimed involvement in underground Catholic church activities and also whether Catholics could practice their faith in China in the sense considered in *SZBEL* at [43].

51. One of the bases on which the Tribunal affirmed the delegate's decision was that it rejected the applicant's claim that he was a practising Catholic in China. It disregarded the applicant's conduct in Australia and hence did not go on to consider whether the applicant had a well-founded fear of persecution as a Catholic in China. As Edmonds J stated in *SZHBX v Minister for Immigration & Citizenship* [2007] FCA 1169 at [14]:

> *Section 425, as construed in* SZBEL, *requires the Tribunal to disclose to an applicant additional issues which were not live issues in the delegate's decision or otherwise made known to the applicant as being in issue. If the Tribunal proposes to make an adverse finding on a matter where the delegate accepted or found no deficiency in the applicant's claims and the applicant has not otherwise been notified that the matter is in issue, the Tribunal should disclose to the applicant that it has a concern about the matter…*

52. In these circumstances, notwithstanding some lack of clarity in the delegate's decision, procedural fairness (and hence s.425 of the Act) obliged the Tribunal to indicate to the applicant that his claim that he was a Catholic in China (as distinct from his claims of past persecution

as a result of underground Catholic church activities in China) was in issue.

53. However, as the first respondent submitted, the Tribunal's statements and questions during the hearing sufficiently indicated to the applicant that whatever he said in support of his application was in issue in the sense considered in *SZBEL* at [47].

54. The Tribunal extensively questioned the applicant about the aspects of his application that might suggest that he was not telling the truth. It observed that his answers were at times not responsive and expressly put to him that it had concerns about his credibility and whether he had any involvement in preparing the statement of his claims. For the reasons given below, I am satisfied that there was no need for the Tribunal expressly to put the applicant on notice that his claims of having been a practising Catholic in China might not be accepted, as he was clearly put on notice at the hearing that the credibility of his claims in their entirety was in issue. The Tribunal also put the specific aspects of his account that the Tribunal relied on it rejecting the truth of all his claims to the applicant for comment (see *SZBEL* at [47]).

55. It is necessary to have regard to what occurred in the whole of the Tribunal hearing. The transcript of the hearing is in evidence before the court. This is not a case in which the Tribunal told the applicant at the start of the hearing that it was looking at everything from the start or that it was not bound by any findings of the delegate (cf *SZJUB v Minister for Immigration & Citizenship* [2007] FCA 1486 at [7] and *AZAAD and Another v Minister for Immigration and Citizenship and Another* (2010) 189 FCR 494; [2010] FCAFC 156 at [44]). However that is not the only way in which a Tribunal can sufficiently indicate to an applicant that everything he says in support of the application is in issue.

56. The Tribunal first took evidence from Fr Paul McGee in the presence of the applicant. Fr McGee is the assistant chaplain for the Chinese Catholic Community of Western Sydney. He had given one of the letters of support which the delegate had regard to in accepting that the applicant "*is*" a Catholic. Fr McGee told the Tribunal that he had known the applicant for at least 18 months, that he regularly attended Sunday Mass and weekly Bible study and that "*I see* [the applicant] *as*

a genuine Catholic person". Fr McGee did not know about the applicant's migration status during this time and had not been asked by the applicant for advice about seeking protection. As required he had written a letter of support and agreed to give evidence to the Tribunal. The hearing continued (transcript p.4):

> *TRIBUNAL: Okay. Father McGee, I know you have come to the tribunal on a number of occasions previously. In your opinion, how would you distinguish someone who is genuinely committed to Catholicism and someone who is attending your church for the purpose of their protection visa application?*
>
> *FR McGEE: Straight off, I would say, Member, body language is a good indication, meaning to say that from my experience of 45 years being a Catholic priest,* [the applicant] *presents as a genuine Catholic.*
>
> *TRIBUNAL: Is there anything else that you want to add?*
>
> *FR McGEE: I would just like to say something about the situation of the church in China as I see it, Member.*
>
> *TRIBUNAL: Look, I'm happy to – I do accept that Catholics are persecuted in China, so that's not really an issue before me.*
>
> *FR McGEE: Right, okay, that's fine, Member. No, I don't have anything more.*

57. While Fr McGee's opinion was that the applicant presented as a genuine Catholic, it is notable that he expressed this view in drawing a distinction between a person with a genuine commitment to Catholicism and a person who attended church in Australia for the purpose of his or her protection visa application. Section 91R(3) of the Migration Act, when applicable, requires the Tribunal to disregard any conduct engaged in Australia unless the person satisfies it that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee.

58. The Tribunal statement that it accepted that "*Catholics are persecuted in China*" is relevant to whether the Tribunal sufficiently indicated that everything the applicant said in support of his application was in issue through what occurred in the hearing.

59. Thus as first respondent pointed out, the Tribunal raised with the applicant his delay in making his application for a protection visa. He arrived in Australia on 24 December 2007 and applied for a protection visa on 2 March 2010. In that context the Tribunal told the applicant (transcript p.10) that:

> *…the fact that it took you more than two and a half years to apply for protection may cause me to conclude that* ***you did not have a genuine fear of persecution in China and that the information you have provided in your protection visa application was not true*** (emphasis added).

60. Importantly, the Tribunal's concern about the information in the applicant's protection visa application was clearly not limited to any particular aspect of the applicant's claims in his application. This statement went towards putting the applicant on notice that everything he said in support of his application was in issue.

61. The applicant's response was that:

> *Everything I told is true, is genuine. If I return to China I will definitely be persecuted.*

62. This response is consistent with the respondent's submission that the applicant was in fact on notice that the truth of all of his claims and "*everything he* [said] *in support of the application*" (*SZBEL* at [47]) was in issue.

63. The first respondent also referred to the fact that, after discussing other issues of concern about the applicant's claims, the Tribunal extensively questioned the applicant about his ability to leave China on his own passport and how the authorities knew he had been actively participating in underground Church activities. In that context the Tribunal put to him (transcript pp.12 – 13) that his claim was that:

> *So because of the corrupt government officials, you were able to get released from the detention and to leave the country holding your passport,* ***even though you're a member of the underground Catholic Church?*** (emphasis added).

64. Of itself this remark and the Tribunal questioning on this issue did not alert the applicant to a concern about the truth of his claimed religious beliefs in China as such (as distinct from his claims about his

membership in the underground Catholic church, as well as his detention and his claimed fear that as the PSB had not finalised his case he would be arrested again). The Tribunal's questioning in this respect focused on the applicant's claims about the ability of the underground Catholic church to exert influence over corrupt officials. It went on to ask whether the authorities had now found out about "*your senior role or your active role in the church*" (transcript p.13).

65. Similarly, when the Tribunal then asked the applicant about whether he had been formally charged with any offence (a matter addressed in his written statement) and expressed concern "*that your statements have been prepared by somebody else on your behalf and not by yourself*" (transcript p.17), this remark was made in the particular context of the applicant's apparent difficulty in answering the question about whether he had been "*charged*" with any offence (transcript pp.15 – 17). It did not indicate that the truth of all his claims (as distinct from the authorship of his written statements) was in issue, albeit it did raise a matter relevant to the applicant's credibility.

66. There then occurred the only questioning in the hearing that might be seen as relating directly to the applicant's knowledge of Catholicism. It is apparent from *SZBEL* at [16], that the fact of questioning about matters that are live issues does not necessarily suffice to indicate that these are determinative issues or issues of concern. The Tribunal's questions did not relate to the applicant's beliefs as such, but did address an aspect of his knowledge about Catholicism. In response to his mention of his claims about the concern of his relative whose daughter became a nun after being converted by him, the Tribunal asked the applicant (transcript p.17):

> *How does one become a nun of the Catholic church?*

67. It appears that the interpreter's translation of the applicant's response may involve some confusion about gender (as with earlier replies). The transcript of the hearing continued at p.17:

> *APPLICANT: Because* (indistinct) *is a genuine Christian, and he is – he becomes a Christian, a genuine Christian, through my introduction and he then after* (indistinct) *by the Bible, she will study it, find her God to become a nun.*

TRIBUNAL: So how does one become a nun in the Catholic church?

APPLICANT: To become a nun, this person should be needed by the Gods, and if she was not – if she is not needed by the Gods, then this person couldn't be a nun.

TRIBUNAL: Mr [Applicant]*, there are certain procedures or processes that are required to become a nun, so can you tell me what they are?*

APPLICANT: I only know as I introduced her to become a Christian. After that, prison, and then she – when she participates and she (indistinct) *or she has been participant in the church and studying the Bible. As for how the father arranging for her to become a nun, I really don't know.*

68. The Tribunal did not challenge what the applicant said in this respect or make adverse findings on the basis of this aspect of his evidence (*SZBEL* at [43]).

69. The Tribunal then expressed concern about the fact that the applicant had not provided the Certificate of Being Released from Detention to the Department at the time of his application, suggesting that it would have been obvious that if he had any evidence of detention this should have been provided with his protection visa application. This was a matter relevant to the applicant's overall credibility, albeit of itself it related to the applicant's claims about detention for his active involvement in the underground church.

70. The Tribunal then stated (at transcript pp.18 – 19):

TRIBUNAL: When you applied for the protection visa in March, you said on the application form that you would later be submitting evidence that you were subjected to persecution due to your Catholic belief. Which evidence were you referring to there? When you applied for the protection visa, you said on the application form that you would be submitting evidence of being persecuted for your Catholic belief. Which evidence were you referring to?

APPLICANT: I just need more materials here so – used to apply for the protection visa.

TRIBUNAL: I'm sorry, can you say that again?

APPLICANT: Just the materials that I needed to apply for my protection visa.

TRIBUNAL: Well, no, you specifically said – the question is, "Will you be providing any evidence later?" You specifically said, "Evidence that I have been subject to persecution owing to my Catholic belief." So what were you referring to?

APPLICANT: I orally told my migration agent everything but including this material.

TRIBUNAL: Do you mean including your release certificate?

APPLICANT: Well, how would I need it? I told my migration agent everything that happened to me in China, about where I was detained and this certificate I have – yes, in my (indistinct) *and I didn't show it to my migration agent.*

TRIBUNAL: Did you tell your migration agent about the release certificate?

APPLICANT: Later on he asked whether I have one – or I have one and I told him that yes, I did. I (indistinct).

TRIBUNAL: So when you filled in the application form in March, what evidence were you referring to then?

APPLICANT: I mention (indistinct) *when I was in China because of my Catholic religion belief I was persecuted in China.*

TRIBUNAL: [Mr Applicant], *you have specifically referred to evidence of your persecution. I've asked you several times; I'm going to ask you one more time, which evidence are you referring to in the application form?*

APPLICANT: I particularly – I was accused by [X] *that I used – that I used religion to poison the teenagers.*

71. The Tribunal did not receive a clear response to its question about what evidence the applicant was referring to when he stated in his protection visa application that he would provide "*Evidence that I have been subjected to persecution owing to my Catholic belief*". It was in that context that the Tribunal then stated (transcript p.20):

> [Mr Applicant], ***I have some serious concerns about your credibility and the truthfulness of the information you have provided in your protection visa application.*** *I also have*

> *concerns about whether this document* [which in context is clearly a reference to the detention release certificate] *is a genuine document. The country information before me suggests that it's very easy to obtain fraudulent documents in China* (emphasis added).

72. This statement was not confined to the possibility that the Tribunal might not accept that the document was genuine. The Tribunal drew a distinction between its general concern about the applicant's credibility and the truthfulness of the information in his application and the specific issue of the genuineness of the document. Seen in light of all that occurred in the hearing, this expression of concern, not only about the applicant's credibility but also about the truthfulness of the information he provided in his protection visa application (in which he claimed to have become a Catholic in China), went to putting him on notice that all of his claims and everything he said in support of his application was in issue. Through the course of the hearing the applicant was sufficiently alerted to the fact that the Tribunal might find that he was not a Catholic in China.

73. Further, while the applicant's response focused on the specific issue of the genuineness of the Certificate of Being Released from Detention, he also addressed the "*truth*" of all that he said (transcript p.20) as follows:

> *Everything I said to you is the truth. I didn't spend money for anything. I didn't spend money getting anything including these certificates.*

74. The Tribunal then asked the applicant why he had approached the Chinese Consulate in Australia for a new passport if he thought there was some "*ongoing investigation*" and if he escaped China to avoid persecution. Again, this questioning was followed by a broadly expressed concern on the part of the Tribunal (at transcript p.21):

> *The fact that you have approached the Chinese Consulate for the passport* ***may suggest to me that you did not have a genuine fear of persecution and that the information you have provided in the application is not correct*** (emphasis added).

75. As Counsel for the first respondent submitted, the repetition of such a general expression of concern, not only about the genuineness of the

applicant's fear of persecution but also about the truth of the information in the protection visa application, indicated to the applicant that all aspects of his claim, (including whether he had become a Catholic in China as claimed in his protection visa application) were in issue. The fact that the Tribunal concerns were based on particular aspects of the applicant's evidence was also sufficiently put to him through the hearing.

76. I have borne in mind the first respondent's submission that as the applicant's fear was based on the claim that he was a member of an underground Catholic church, his Catholicism was an essential aspect of his claim. However this overlooks the distinction (addressed by the delegate) between active members of the underground Catholic church and other Catholics in China. The delegate had concluded that the applicant "*is a Catholic*" and considered whether a Catholic in China would have a well-founded fear of persecution.

77. It is the case that the Tribunal said nothing specific about any possible doubt about the applicant's religion in China and did not invite the applicant to expand on his beliefs or ask him to explain why his claim that he was Catholic in China should be accepted (cf *SZBEL* at [47]). However, throughout the hearing the Tribunal put to the applicant the fact that its concern about particular aspects of his conduct or claims may suggest that none of his claims were true. In contrast to *SZBEL*, there is no suggestion that the Tribunal failed to alert the applicant to the issues to which it had regard in reaching the conclusion that none of his claims were true (which involved a rejection of *all* his claims, including his claimed Catholicism in China).

78. Indeed, the Tribunal's failure to invite the applicant to expand on his beliefs has to be seen in light of the fact that, as the Tribunal accepted, the applicant had been attending a Catholic church in Australia for over two and a half years at the time of the hearing. The Tribunal was not obliged to put to the applicant its thought processes (*SZBEL* at [48]). The Tribunal's rejection of the applicant's claim to be Catholic was based not on any deficiencies in his knowledge of Catholicism, but rather on the combination of specific aspects of the applicant's account that it considered were open to doubt and certain aspects of his conduct (such as his delay in applying for a protection visa). The Tribunal put

these issues to the applicant in a manner that sufficiently alerted him not only to the fact that these matters were live issues but also to the fact that everything he claimed in his protection visa application may not be accepted as true. That is so notwithstanding that the Tribunal's questions related to specific aspects of his account that were of concern and did not address his religious beliefs as such.

79. The Tribunal questioned the applicant about his claimed activities in the underground church (as discussed in relation to ground two). It also put to the applicant for comment the need to consider whether he engaged in religious activities in Australia for the purpose of strengthening his claim to be a refugee and the fact that if it made such a finding it must disregard such activities.

80. An important aspect of the hearing, which went to put the applicant on notice that all that he said in support of his application was in issue, was the fact that the Tribunal expressed the view to him that he had not answered a question it put several times about whether his wife (whom he claimed was also a Catholic) had made any attempt to leave China.

81. When the applicant was first asked if his wife had made any attempt to leave China (transcript p.23) he responded "*Well, because we are persecuted by – because we was persecuted at home so well, listen to God, so we just follow God*" (transcript p.23).

82. He was asked again. His answer is recorded as "*indistinct*" in the transcript (although it starts with a reference to "*Only I follow the Gods*").

83. The Tribunal then referred to the fact that the applicant had come to Australia and asked if his wife had made any attempt to come to Australia or to go to any other country (transcript p.24). The applicant replied that:

> *I just thought that if I –if the Gods (sic) arrange that my wife to come to Australia and then we will always – we will follow this advice and come to Australia and then we will be get – we will get together here in Australia and then go to church together.*

84. The Tribunal then stated (transcript p.24) "*…I'll ask you one more time. Has she made any attempt to leave China?*" The applicant responded (transcript p.24):

> *Because she was visiting me in China, she was questioned officially – she was questioned officially and the Chinese government so yes, we were listen – were following God and even the God can send her to Australia and she is – and if she's able to come she must come to Australia, a country we – religion freedom, then we will all* (indistinct) *together. I, of course, will never give up my religion* (sic) *belief.*

85. The hearing continued (transcript p.24):

> *TRIBUNAL: Mr* [Applicant]*, I have asked you about four times now. You haven't answered my question so I'm assuming your wife hasn't made any attempt to leave China. Is that the truth?*
>
> *APPLICANT: Well, just as I said, my wife was persecuted in China and I am a Catholic and I will always follow the God advice and if the God can send her to Australia then we will stay and I will of course stay in Australia as well her and I am already a Catholic. I am a Catholic so I will always follow – I will always follow the Gods and I will never give up.*

86. Importantly the Tribunal then asked (transcript p.24):

> *So can you explain to me why you, as a Catholic, took steps to leave China and the persecution, while your wife, who is also a Catholic, took no such steps?*

87. The applicant reiterated (transcript p.24):

> *Because I was persecuted in China and then the Gods* (sic) *arranged for me – and the God arranged my leave – my left – the God arranged for me to leave China. As for my wife – as for my wife, now the Gods hasn't approved my wife to leave so it's all up to the God's decision.*

88. In this exchange the Tribunal put to the applicant the "*live issue*" of the fact that his wife, who was also said to be Catholic, had not made any attempt to leave China and that he had not answered this question (cf *SZBEL* at [43]). In the context of all that occurred at the hearing this contributed to alerting the applicant to the fact that all that he said in

his application (including his claim to have been a Catholic in China) was in issue.

89. The Tribunal then spoke to the applicant's daughter. Her evidence about involvement in church activities in China is discussed below in relation to ground two in the application. She claimed her father was involved in setting up and guiding an underground church group. The Tribunal then put to the applicant under s.424AA of the Act the following (transcript p.29):

> *…I have some information which, subject to your comments, may be a reason, or a part of the reason for affirming the decision under review, and that information is the information that your daughter has given to the tribunal. She told me that she has been attending Mass all the time except for the time when you were in detention, or just before you came to Australia, while you told me that she had not been attending Mass while she was living away during the school term, it's the information that your daughter told me that the Mass started at 4.00 or 5am, while you told me it started at 3.00 or 4 am. It's the information that your daughter has given me that the Mass was sometimes held in the evenings whereas you told me that the Mass was always held in the mornings. Your daughter told me that your gatherings had no specific time, when you told me they were held from 7.00 to 9 pm every Sunday.*
>
> *This information is relevant because it might cause me to conclude that you and your daughter are not witnesses of truth and have not been truthful in your evidence. I may find that you have not been truthful about the events you have described in Chian and I may reject your claims. It is also relevant because it might cause me to conclude that you engaged in religious activities in Australia for the purpose of strengthening your claim to be a refugee. As I explained before, if I* (indistinct) *I must disregard those activities. Finally, the information is also relevant because it may cause me to conclude that the documents that you have provided with your application are not genuine documents.*

90. This clearly put the applicant on notice that particular inconsistencies between his evidence and that of his daughter may not only cause the Tribunal to conclude that they were "*not witnesses of truth*" in what they said to the Tribunal at the hearing but also that the Tribunal may find "*that you have not been truthful about the events you have*

described in China and I may reject your claims" (transcript p.29). This was a clear indication that the Tribunal may not accept any of the applicant's claims, including his claim to have been a Catholic in China as well as his claim about the manner in which he practised his Catholicism in China. This was reinforced by the fact that the Tribunal then stated that the information in his daughter's evidence might also cause it to conclude that the applicant had engaged in religious activities in Australia for the purpose of strengthening his claim to be a refugee. By implication, this would involve a rejection of the claim that he engaged in such religious activities because he had become a Catholic in China.

91. The applicant responded in relation to the inconsistencies. After asking the applicant if there was anything else he wanted to add, the Tribunal told the applicant that he could provide other information or other material before the decision was made.

92. I am satisfied that in the course of the hearing the applicant was given the opportunity to respond to and expand on his evidence on the issues which formed the basis for the Tribunal's adverse credibility finding and its rejection of all of his claims. On several occasions the Tribunal explained to the applicant that its concerns may lead it to find that the information he provided in his protection visa application was not true and that he did not have a genuine fear of persecution. From the start of the questioning of the applicant on issues of concern (in particular the delay in applying for a protection visa), the matters the Tribunal raised with the applicant and what it stated to him were such that it sufficiently alerted him to the fact that the entirety of his claims (including his claim to have been a Catholic in China as well as his practice of Catholicism in China) was in doubt.

93. As indicated, the delegate did not address the operation of s.91R(3) of the Act. The Tribunal did. It asked the applicant to comment on its need to consider whether he engaged in religious activities in Australia for the purpose of strengthening his claim to be a refugee and its obligation to disregard such activities (cf *SZJYA v Minister for Immigration and Citizenship and Another (No.2)* (2008) 102 ALD 598; [2008] FCA 911). He was also expressly informed that both his credibility generally (as well as that of his daughter) and the

truthfulness of his claims in his protection visa application were in issue (not simply the credibility or truthfulness of particular aspects of his account). The Tribunal asked the applicant about each of the issues that formed the basis of its adverse credibility findings (cf *SZBEL*).

94. In particular, as set above, the Tribunal put to the applicant that the fact that he approached the Chinese Consulate for a passport may suggest to the Tribunal that he "*did not have a genuine fear of persecution and that the information you have provided in the application is not correct*". It put to him information about inconsistencies between his evidence and that of his daughter in relation to church activities in China and stated that this may cause the Tribunal to conclude that he and his daughter were not witnesses of truth and had not been truthful in their evidence, that he had not been truthful about the events he had described in China and that the Tribunal may reject his claims.

95. Elsewhere in the hearing the Tribunal indicated to the applicant that the fact that it took him more than two and a half years to apply for protection may cause it to conclude he did not have a genuine fear of persecution in China and that the information he provided in his protection visa application was not true. The Tribunal repeated this remark to the applicant when he said he did not understand. The Tribunal extensively questioned the applicant about his ability to leave China on his own passport. In response to the applicant's claim that the PSB had not finalised his case and that he would be arrested on his return, the Tribunal expressed concern about his evidence in relation to whether he had been charged and differences between his written and oral evidence which it said led it to be concerned that his written statements had been prepared by someone else on his behalf and not by him. It also questioned the applicant about what evidence he intended to provide in support of his claim to have been subject to persecution "*owing to* [his] *Catholic belief*" as well as why he had not provided his Certificate of Being Released from Detention when he submitted his protection visa application, when his evidence was that he had the document at that time.

96. Critically, after discussion of particular matters of concern, the Tribunal told the applicant that it had serious concerns about his credibility and the truthfulness of the information he had provided in his protection

visa application, not simply concerns about whether the Certificate of Being Released from Detention was a genuine document.

97. Finally, the Tribunal drew to the applicant's attention that he had not answered a question it had asked of him "*about four times*" as to whether his wife (who was also said to be a Catholic) had made any attempt to leave China. The Tribunal put to the applicant the need to explain why he "*as a Catholic, took steps to leave China and the persecution*", while his wife, who was also said to be Catholic, "*took no such steps*" (transcript p.24).

98. Notwithstanding that the delegate accepted that the applicant was Catholic (and allowing for the possibility that this involved an acceptance that he had become a Catholic in China), the Tribunal sufficiently alerted the applicant to the fact that all that he said in support of his application (and all the claims that he made) were in issue (*SZBEL* at [47]). It was not necessary for it to state specifically that it might not accept that he was a Catholic in China. It sufficiently indicated to him that his claims of having practised Catholicism in China were in issue. It asked him to expand on those specific aspects of his account to which it had regard in reaching its conclusion. Insofar as the Tribunal's conclusion that the applicant was not Catholic could be said to be an adverse conclusion not obviously open on the known material (as considered in *Alphaone*) the Tribunal disclosed the possibility that it may not accept the truthfulness of any of the applicant's claims in his protection visa application in the course of the hearing (cf *AZAAD*). In these circumstances it was not necessary for the Tribunal to inform the applicant expressly that it may make a different finding about his Catholicism from that made by the delegate (*SZNWW v Minister for Immigration and Citizenship* [2010] FCA 158 at [34] – [35]).

99. Ground one is not made out.

Sections 424A and 424AA of the Migration Act

100. The second ground in the application is that the Tribunal breached s.424A "*read with*" s.424AA of the Migration Act. The particulars to this ground are as follows:

(a) The Tribunal failed to disclose for comment evidence given by the applicant's daughter to the effect that, "she sometimes attended [church] gatherings in the evenings…" but that she later suggested that, "… she did not attend gatherings."

(b) The Tribunal failed to ensure, as far as reasonably practicable, that the applicant understood that the information disclosed at page 32 of the affidavit of Joanne Kinslor (page 29 of the transcript) was relevant to the issue of whether the applicant was a Roman Catholic.

101. Sections 424AA and 424A of the Act are as follows:

424AA If an applicant is appearing before the Tribunal because of an invitation under section 425:

(a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) if the Tribunal does so--the Tribunal must:

(i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and

(ii) orally invite the applicant to comment on or respond to the information; and

(iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and

(iv) if the applicant seeks additional time to comment on or respond to the information--adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.

424A (1) Subject to subsections (2A) and (3), the Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and

(c) invite the applicant to comment on or respond to it.

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

(a) except where paragraph (b) applies--by one of the methods specified in section 441A; or

(b) if the applicant is in immigration detention--by a method prescribed for the purposes of giving documents to such a person.

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

(3) This section does not apply to information:

(a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or

(b) that the applicant gave for the purpose of the application for review; or

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

(c) that is non-disclosable information.

102. While the Tribunal sent the applicant a letter under s.424A of the Act (on 24 August 2010) that letter did not relate to any of the "*information*" said to be in issue under this ground.

103. The applicant submitted first that the Tribunal failed to put to him either at the hearing or in writing the oral evidence given by his daughter to the effect that "*she sometimes attended [church] gatherings in the evenings*" but that she later suggested that "*she did not attend*

gatherings". This evidence was referred to in the Tribunal's finding that there were significant inconsistencies between the applicant's and his daughter's oral evidence.

104. It was submitted that the applicant's daughter's oral evidence at the Tribunal hearing was information that was part of the reason for affirming the decision under review, as was the evidence of the applicant's daughter in *SAAP and Another v Minister for Immigration and Multicultural and Indigenous Affairs and Another* (2005) 228 CLR 294; [2005] HCA 24.

105. While some of the daughter's oral evidence was put to the applicant at the hearing, apparently in purported compliance with s.424AA of the Act, it was contended that the Tribunal did not disclose to the applicant for comment clear particulars of this aspect of the daughter's evidence. This was said to be an aspect of her evidence that went to what the Tribunal considered to be significant inconsistencies between the evidence of the applicant and his daughter which, in turn, were said to go to an undermining of the applicant's claims.

106. The Tribunal put the daughter's evidence to the applicant as follows:

> *I have some information which, subject to your comments, may be a reason, or a part of the reason for affirming the decision under review, and that information is the information that your daughter has given to the tribunal.* ***She told me that she has been attending Mass all the time except for the time when you were in detention, or just before you came to Australia, while you told me that she had not been attending Mass while she was living away during the school term, it's the information that your daughter told me that the Mass started at 4.00 or 5am, while you told me it started at 3.00 or 4 am. It's the information that your daughter has given me that the Mass was sometimes held in the evenings whereas you told me that the Mass was always held in the mornings. Your daughter told me that your gatherings had no specific time, when you told me they were held from 7.00 to 9 pm every Sunday*** (emphasis added).
>
> *This information is relevant because it might cause me to conclude that you and your daughter are not witnesses of truth and have not been truthful in your evidence. I may find that you have not been truthful about the events you have described in China and I may reject your claims. It is also relevant because it*

> *might cause me to conclude that you engaged in religious activities in Australia for the purpose of strengthening your claim to be a refugee. As I explained before, if I* (indistinct) *I must disregard those activities. Finally, the information is also relevant because it may cause me to conclude that the documents that you have provided with your application are not genuine documents.*
>
> *Now, you can provide your comments or response orally or in writing. You can do that now or you can request the tribunal to adjourn the review. What would you like to do?*

107. In order to consider whether the Tribunal met the requirements of s.424AA (so that s.424A(1) did not apply (see s.424A(2A)) it is necessary to consider the evidence given by the daughter.

108. The applicant's daughter's evidence at the hearing related primarily to her involvement in church activities in China and that of her father. It has to be seen in light of the applicant's earlier evidence.

109. The Tribunal had asked the applicant if he had participated in activities of the Catholic church in China and about such activities. The applicant referred to participating in "*Mass and underground church activity*". According to the Tribunal, the applicant explained that the group meetings involved spreading the Gospel, introducing grace and praying. The Tribunal questioning also distinguished between Mass and other group activities. After the applicant explained that church meetings were held from seven to nine pm every Sunday and that Mass was "*normally held in early morning so probably around 3.00 to 4 o'clock in the morning*" at someone's house as there was no church (transcript p.22) and that Mass was "*quite early because this activity was not allowed in public*" (transcript p.22).

110. The Tribunal asked "*Has your family attended these activities?*". The applicant explained "*Because it was a Mass so my family, all my family, attend*". When asked "*What about the group sessions?*" he told the Tribunal that his family did not attend the group meeting (transcript p.23).

111. The Tribunal then asked: "*So your daughter would be attending Mass with you every Sunday?*" The applicant's response is shown in the transcript as:

My daughter – my daughter didn't go to Mass when she studied until the school time because during the school time she didn't leave her home.

112. According to the Tribunal's reasons for decision the applicant said that his daughter "*did not live at home*". This is consistent with the fact that the Tribunal's next question was "*Would she go to Mass on school holidays?*" to which the applicant responded "*yes*" (transcript p.23).

113. Relevantly, the Tribunal's questioning of the applicant's daughter began (transcript p.25) as follows:

TRIBUNAL: Have you been going to church in China?

APPLICANT'S DAUGHTER: Yes.

TRIBUNAL: How often have you been attending church?

APPLICANT'S DAUGHTER: Once a week.

TRIBUNAL: Once a week every week or at certain periods?

APPLICANT'S DAUGHTER: Every week.

TRIBUNAL: Were there any periods when you have not been attending church?

APPLICANT'S DAUGHTER: When I was about to come to Australia and then during periods when my dad was arrested and - - -

TRIBUNAL: So apart from those two periods when your father was detained and also when you were about to come to Australia, were you attending the church all the time?

APPLICANT'S DAUGHTER: Normally speaking, yes, but sometimes if I was – things happen (indistinct) *the government. If the government was* (indistinct) *strict during these periods, during this period then we will – we stayed at home and prayed at home.*

TRIBUNAL: ***So tell me about the times you attended the church at your home town.*** *On what days were you attending?*

APPLICANT'S DAUGHTER: Normally speaking, on Sundays.

TRIBUNAL: So what time on Sundays?

APPLICANT'S DAUGHTER: In the morning probably around 4.00 to 5 o'clock.

TRIBUNAL: So 4.00 to 5 o'clock in the morning?

APPLICANT'S DAUGHTER: 4.00 to 5 o'clock in the morning.

(Emphasis added.)

114. The Tribunal then asked (transcript pp.26 – 27):

TRIBUNAL: ***Have you attended at any other time?***

APPLICANT'S DAUGHTER: ***Yeah, sometimes evenings.***

TRIBUNAL: ***What happened in the evenings?***

APPLICANT'S DAUGHTER: ***On the evening, normally speaking, we have church gathering but sometimes – but sometimes we also have Mass.***

TRIBUNAL: Sorry, what were you attending in the morning at 4.00 or 5am?

APPLICANT'S DAUGHTER: Mass.

TRIBUNAL: ***So you would have Mass in the morning at 4.00 or 5.00, and then in the evenings you would have either gatherings or Mass?***

APPLICANT'S DAUGHTER: ***No.***

TRIBUNAL: I thought that's what you told me.

APPLICANT'S DAUGHTER: Well, normally speaking, the Mass held at probably around 4.00 to 5.00 in the morning but sometimes when – but ***sometimes on holidays we have Mass held in the evening.*** (indistinct) *on church holidays. For example, when the church holiday then we have Mass on the evening.*

TRIBUNAL: How long would the Mass go for?

APPLICANT'S DAUGHTER: One hour.

TRIBUNAL: ***Did you ever attend any other gatherings?***

APPLICANT'S DAUGHTER: ***I – normally, no.***

TRIBUNAL: What about your father?

APPLICANT'S DAUGHTER: Yes.

TRIBUNAL: What time were they held?

APPLICANT'S DAUGHTER: In 2005, my dad set up a secret group, secret church group, underground church group and he guide these people to do some church activities, for example, praying and learning and all – there is no fixed time and place for these activities.

TRIBUNAL: So there was no fixed time for the church gatherings that your father had organised?

APPLICANT'S DAUGHTER: No.

…

TRIBUNAL: Would you know why your father would think that the Mass was held at 3.00 or 4.00 and not at 4.00 and 5.00, that you didn't attend Mass during the school term, and that you did not go to the evening gatherings?

APPLICANT'S DAUGHTER: I think my mom - my dad is fail to (indistinct) *is normal because he hasn't been sleeping very well recently and during the school term I lived together with my auntie and my auntie took me to attend Mass and I didn't actually tell my dad about all this, so--*

(Emphasis added.)

115. In its reasons for decision the Tribunal set out three "*example*[s]" of what it regarded as "*significant inconsistencies between the applicant's and his daughter's oral evidence*". The fact of such inconsistencies was one of the "*concerns*" which led the Tribunal to find that the applicant and his daughter were "*not persons of credibility*" and that he had "*not been truthful in his evidence*" and "*had fabricated his claims for the purpose of his protection visa application*". On the basis of these concerns the Tribunal rejected the entirety of the applicant's claims, including his claim to have been a Catholic and to have had any involvement with the Church (registered or unregistered) in China.

116. The first two inconsistencies referred to in the reasons for decision related to evidence about whether there was a fixed time for church gatherings and to when the daughter attended Mass. The applicant does not dispute that the daughter's evidence in these respects was put

to him for comment (although, as discussed below, it is contended that the Tribunal failed to comply with s.424AA(b)(i) of the Act in relation to such information).

117. The third inconsistency was described in the Tribunal reasons for decision as follows:

> *The applicant said that his daughter did not attend the evening gatherings. The applicant's daughter stated that she sometimes attended gatherings in the evenings, later suggesting that she did not attend gatherings.*

118. The first respondent submitted first that the applicant's daughter's evidence did not on its face constitute a "*rejection, denial or undermining*" of the applicant's claims to protection (cf *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190; [2007] HCA 26 at [17] – [18]) and that the Tribunal was not obliged to put an inconsistency or its thought processes to the applicant (*SZBYR* at [18]). In the alternative, it was submitted that if this material was information, the Tribunal did in fact put particulars of such information to the applicant for comment.

119. As counsel for the applicant acknowledged, there is clear authority to the effect that inconsistencies in an applicant's evidence do not have to be put to the applicant pursuant to s.424A of the Act (see *SZBYR*). However in *SZBYR* the asserted "*information*" consisted of the content of the applicant's own statutory declaration which, as the High Court stated at [17], may have been thought to have been a reason for rejecting rather than affirming the decision under review. In other words, what was in issue in *SZBYR* was an inconsistency between the applicant's oral evidence and his written claims, not a discrepancy between something somebody else had said and that of the applicant.

120. It is also clear that the Tribunal is not obliged to give notice of each step of its prospective reasoning process and that its mental processes themselves do not constitute "*information*", within s.424A of the Act (*SZBYR* at [18]). However the underlying material to which the Tribunal applies its mental processes may constitute information. As in *SAAP*, the evidentiary material consisting of the daughter's evidence to which the Tribunal's thought processes could apply was capable of constituting information within s.424A(1) of the Act. Such evidentiary

material would have to be put to the applicant if the Tribunal considered it would be reason or part of the reason for affirming the decision under review. In *SAAP* the relevant "*information"* was "*testimony of the appellants' daughter*" about three events in Iran (the appellant's country of origin) that had been relied on by the appellant to support her claim for protection (see *SAAP* at [32] – [34] per McHugh J and *SZBYR* at [14]). In its reasons for decision the Tribunal in *SAAP* relied on information obtained from the daughter's evidence (in particular evidence that the appellant's children had attended school in Iran) in finding that the appellant had not established her claim that her children had been refused admission to a school and deprived of an education. The majority of the High Court in *SAAP* was of the view that s.424A of the Act required the Tribunal to give the appellant particulars of the information obtained from her daughter's evidence. While the decision in *SAAP* pre-dated the introduction of s.424AA of the Act it remains relevant to the determination of what constitutes "*information*" for the purposes of s.424A and hence to which procedure in s.424AA may be adopted by the Tribunal. If the Tribunal complies with the facultative requirements of s.424AA it need not comply with the requirements of s.424A of the Act. If it fails to do so, it must "*strictly comply*" with s.424A of the Act. (See *SZMCD v Minister for Immigration and Citizenship and Another* (2009) 174 FCR 415; [2009] FCAFC 46 at [73] – [90] per Tracey and Foster JJ).

121. While the Tribunal reasons in this case were expressed in terms of concern about inconsistencies between the evidence of the applicant and his daughter, the daughter's oral evidence was "*information*" in the sense considered in *SAAP* and can be distinguished from the notion of a mere inconsistency in the applicant's own evidence as considered in *SZBYR*. The Tribunal obtained information from the oral evidence of the applicant's daughter about religious activities in China given after his evidence on the same issue.

122. As Mr Karp for the applicant submitted, the High Court in *Minister for Immigration and Citizenship v SZLFX and Another* (2009) 238 CLR 507; [2009] HCA 31 acknowledged at [24] that: "*…s 424A depends on the RRT's "consideration", that is, its opinion, that certain information would be the reason or part of the reason for affirming the decision under review*" (see *SZKLG v Minister for Immigration and Citizenship*

and Another (2007) 164 FCR 578; [2007] FCAFC 198 at [33]). In *SZLFX* the High Court found in circumstances where a file note containing potentially adverse information was not referred to in the Tribunal's reasons and where matters addressed in it were not any part of what counted against the visa applicant that there was "*no evidence or necessary inference that the RRT had "considered" or had any opinion about the file note*" at [24]. This recognises that a "*consideration*" of evidence is needed to bring it within s.424A(1) of the Act albeit it is the evidence itself that is "*information*" within s.424A(1) of the Act.

123. In this case it can be inferred from the Tribunal reasons for decision that the Tribunal considered that the information consisting of that part of the daughter's evidence referred to in [78] of its reasons was part of the reason for affirming the decision under review (and see *SZMKR v Minister for Immigration & Citizenship* [2010] FCA 340 at [27] and [33] per Gray J). This is not a case in which the characterisation of the daughter's evidence as information within s.424A(1) would give rise to the sort of "circulus inextricabilis" referred to in *SZBYR* at [20].

124. Accordingly the Tribunal was obliged to put clear particulars of the information obtained from the daughter's evidence and referred to in [78] of its decision to the applicant for comment, either by utilising the procedure under s.424AA or under s.424A of the Act. In this case the Tribunal sought to utilise the procedure in s.424AA of the Act (see s.424A(2A)).

125. The first respondent submitted that the Tribunal put to the applicant the daughter's evidence insofar as that constituted "*information*" within s.424A(1) and s.424AA(1) of the Act. It was contended that in putting to the applicant his daughter's evidence that she had been attending Mass all the time except when he was in detention and just before they came to Australia, that the Mass started at 4 am or 5 am, that Mass was sometimes held in the evenings, and that the gatherings had no specific time, the Tribunal had put the issue of whether his daughter had or had not attended Church activities in the evenings to the applicant. The daughter's evidence that she attended Mass all the time was said to amount to evidence that she had attended gatherings in the evening, to the extent that Mass was in the evening.

126. However, what is in issue is whether the Tribunal put "*clear particulars*" of the parts of the daughter's evidence that formed the basis for its finding that she sometimes attended gatherings (a concept clearly distinct from Mass) in the evenings (and later suggested that she did not attend gatherings). No issue is taken with or arises about the manner in which the Tribunal put to the applicant his daughter's claims about her attendance at Mass.

127. The applicant's daughter said that she attended the church in her home town on Sundays in the morning. When asked if she attended at any other time she replied "*Yeah, sometimes evenings*". When asked what happened in the evenings her reply was "*On the evening, normally speaking, we have church gathering but sometimes – but sometimes we also have Mass*" (transcript p.26). It was open to the Tribunal to find that the daughter stated that she sometimes attended gatherings in the evenings on the basis of these responses, notwithstanding that she later told the Tribunal "*sometimes on holidays we have Mass held in the evening*" and then when asked if she ever attended "*any other gatherings*" replied "*– normally, no*" (which was not, on its face, the same as her earlier evidence) (transcript p.26). Had the Tribunal put this evidence to the applicant, he would have had the opportunity to clarify the position in relation to his daughter.

128. Contrary to the first respondent's submission, the inconsistencies identified by the Tribunal were not simply between the daughter's evidence that she attended in the evening when Mass was in the evening and the applicant's evidence that he was the only person to attend any church gatherings in the evening and that Mass was only ever held in the morning. Both the applicant and his daughter drew a distinction between Mass and other church activities. In particular the daughter stated "*On the evening, normally speaking, we have church gathering but sometimes – but sometimes we also have Mass*" (transcript p.26).

129. The relevant aspect of the daughter's evidence that was the information to which the Tribunal applied its thought processes, was the evidence that she sometimes attended gatherings in the evenings when (as she first stated), "*normally speaking, we have church gathering*" (although she also stated "*sometimes we also have Mass*" (transcript p.26)). The

Tribunal did not put the information from the daughter's evidence about attendance at "*gatherings*" to the applicant for comment. It can however be inferred from the Tribunal's reasons for decision, that the daughter's evidence about her attendance at gatherings (as distinct from Mass) was information that the Tribunal considered would be part of the reason for affirming the decision under review. It was one aspect of the evidence that went to what the Tribunal considered were "*significant inconsistencies*" which in turn undermined the applicant's claims.

130. "[C]*lear particulars*" of this evidence were not put to the applicant at the hearing. The fact that the Tribunal put to the applicant that his daughter's evidence was that Mass was sometimes held in the evenings (and also that she said she always attended Mass) did not suffice to put to him "*clear particulars*" of his daughter's evidence about attending evening gatherings (which both she and her father described as distinct from Mass). The extent to which the Tribunal put the daughter's evidence to the applicant at the hearing did not put him on "*fair notice*" of the matter of concern to the Tribunal in relation to the daughter's evidence about her attendance at Church gatherings in China (cf *SZMCD* at [71] – [72].

131. As Flick J pointed out in *SZMTJ v Minister for Immigration and Citizenship and Another (No.2)* (2009) 109 ALD 242; [2009] FCA 486 at [45] (albeit in relation to s.424A(1)(a)) information is to be identified with "*sufficient specificity*" and to be set forth "*unambiguously*". That did not occur in this case. The evidence of the daughter about her attendance at gatherings was not put to the applicant with sufficient specificity.

132. Moreover, as His Honour pointed out in *SZNKO v Minister for Immigration and Citizenship and Another* (2010) 184 FCR 505; [2010] FCA 297 at [23], the touchstone is that s.424A and s.424AA require the disclosure of so much as to ensure that the opportunity to "*comment and respond*" is meaningful (and see *MZYFH v Minister for Immigration and Citizenship and Another* (2010) 188 FCR 151; [2010] FCA 559 at [33] – [42] per Bromberg J).

133. In this case the manner in which the Tribunal put the daughter's evidence to the applicant at the hearing did not meet its obligation to

give "*clear particulars*" of her evidence about attending gatherings in the evenings. The Tribunal relied on this evidence in finding that there were significant inconsistencies between the oral evidence of the applicant and his daughter. It failed to put this information to the applicant in accordance with s.424AA of the Act. Hence s.424A(2A) was inapplicable and the Tribunal failed to comply with s.424A of the Act. Such a non-compliance constitutes jurisdictional error (see *SAAP*). On this basis the matter should be remitted to the Tribunal for reconsideration according to law.

Section 424AA(b) of the Act

134. As the Tribunal did not put clear particulars to the applicant of the aspect of the daughter's evidence referred to in particular (a) of this ground, it also failed to ensure that the applicant understood why such information was relevant to the review as required under s.424AA of the Act (and see *MZYFH* at [62] – [66] and *SZLFX* at [25]).

135. Beyond this, it was contended in particular (b) that "[t]*he Tribunal failed to ensure, as far as reasonably practicable, that the applicant understood that the information*" that was put to him at the Tribunal hearing under s.424AA of the Act "*was relevant to the issue of whether the applicant was a Roman Catholic*".

136. Whether the Tribunal puts information to an applicant in writing pursuant to s.424A or seeks to rely on the procedure specified in s.424AA (as to which see *MZYFH* at [31]), it is obliged not only to give clear particulars of the information but also to ensure, as far as reasonably practicable, that the applicant understands why it is relevant to the review and the consequences of it being relied on in affirming the decision under review (see ss.424AA(b)(i) and 424A(1)(b)).

137. The information that was put to the applicant under s.424AA of the Act consisted of the evidence that his daughter provided to the Tribunal about her attendance at Mass in China, about the time the Mass started and that it was sometimes held in the evenings and that the Church gatherings had no specific time. In relation to each of these items of information, the Tribunal also put to the applicant his contrary evidence. It described such information as information which subject to

the applicant's comments "*may be a reason, or a part of the reason for affirming the decision under review*" (cf *MZYFH* at [62] – [66]).

138. The Tribunal then stated that this information was relevant:

> *… because it might cause me to conclude that you and your daughter are not witnesses of truth and have not been truthful in your evidence. I may find that you have not been truthful about the events you have described in China and I may reject your claims. It is also relevant because it might cause me to conclude that you engaged in religious activities in Australia for the purpose of strengthening your claim to be a refugee. As I explained before, if I* (indistinct) *I must disregard those activities. Finally, the information is also relevant because it may cause me to conclude that the documents that you have provided with your application are not genuine documents.*

139. The applicant relied on the decision of the Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v SZGMF* [2006] FCAFC 138. In that case the applicant had provided the Tribunal with letters of support from senior Awami League members or past members. However the Tribunal obtained information from the Australian High Commission consisting of advice from a reliable senior Awami League member that while the particular Awami League documents that applicant had provided to the Tribunal were "*genuine*", the content of those documents was worded in such a way as to offer that applicant support to obtain economic status abroad, rather than to verify that he held any particular status within the Awami League (at [25] and [32]).

140. When the Tribunal in *SZGMF* wrote to the applicant under s.424A of the Act, it put to him that it had received reliable information that many members of the Awami League were prepared to offer documents on request in a humanitarian way to help former supporters and that these documents were worded in a way to offer support to obtain economic refugee status, rather than to verify any particular status within the Awami League. The Tribunal stated that this information was relevant because it may undermine the applicant's general credibility and may cause the documents he provided to be disregarded (at [33]).

141. The Full Court of the Federal Court was of the view that the Tribunal's conclusion that it gave no weight to the applicant's letters of support

because of the advice it received from the Australian High Commission must have been based on a conclusion that, notwithstanding that the letters were genuine (as the Australian High Commission had stated), the content of the letters was false.

142. The Full Court expressed the view in *SZGMF* (at [40] – [41]) that:

> *No practical or other difficulty stood in the way of the Tribunal telling the* [visa applicant] *that the information which it had received about his letters of support caused it to disbelieve or doubt the contents of those letters. Yet the s.424A letter did not explicitly tell the respondent that the relevance to the review of the information which it had received about his letters of support was that the information indicated that the content of the letters was false.*
>
> *The Tribunal's failure to state explicitly the relevance to the review of the information concerning the* [visa applicant's] *letters of support is of importance because of the opaque nature of the particulars of the information provided to the respondent by the s 424A letter; the use that the Tribunal could make of the information as particularised was not self-evident.*

143. In those circumstances the Federal Court concluded that "*it was reasonably open to the* [visa applicant] *to conclude from the s 424A letter that the information which the Tribunal had received was information about a class of documents rather than information specifically about his letters of support*" and that "[f]*or this reason he may not have understood that the relevance of the information to the Tribunal's review was that it caused the Tribunal to disbelieve or doubt the content of his letters of support*" (at [43]). Hence the Tribunal's s.424A letter did not ensure, as far as reasonably practicable, that the visa applicant understood why the information received by the Tribunal concerning his letters of support was relevant to the Tribunal's review within s.424A(1)(b) of the Act (at [44]).

144. In this case counsel for the applicant submitted that the Tribunal did not make it clear to the applicant that the information that it did put to him in the hearing was to be used in part to undermine his fundamental claims as to his Catholic beliefs since the use the Tribunal would make of the information "*was not self-evident*" (see *SZGMF* at [41]).

145. However, as counsel for the first respondent submitted, the circumstances in *SZGMF* can be distinguished from this case. In *SZGMF* what was in issue was the sufficiency of the explanation given by the Tribunal in relation to the specific fact that it was the content of the supporting letters with which the Tribunal had an issue (as opposed to the genuineness of the letters). In contrast, in this case the Tribunal specifically identified those inconsistencies it described between the applicant's evidence and that of his daughter. It explained that the information was relevant because it might lead the Tribunal to find that the applicant and his daughter were not truthful witnesses, that it may find the applicant had "*not been truthful about the events you have described in China*" and that it may reject his claims. In context this clearly encompassed all the claims he had made (including about becoming Catholic in China). This was reinforced by the fact that the Tribunal also explained that this information may cause it "*to conclude that* [the applicant] *engaged in religious activities in Australia for the purpose of strengthening* [his] *claim to be a refugee*" and the consequences of that conclusion and that it may "*conclude that the documents provided…*[were] *not genuine*".

146. The information put to the applicant was clear and not of an opaque nature (cf *SZGMF*). Having regard to the nature of the information, the particularity of the inconsistencies it gave rise to and the way in which those matters were put to the applicant, the Tribunal was sufficiently clear in relation to the information of concern to it and the significance of that information for the decision that it might make on review. The Tribunal is not required to put its provisional reasoning to an applicant for comment under s.424A or s.424AA of the Act. The information put to the applicant was not the only matter that formed the basis for the Tribunal's rejection of all of his claims. The Tribunal put to the applicant the specific relevance of this information to its view of his truthfulness and that of his daughter, as well as its more general relevance as a part of the reason for affirming the decision under review. I note in that respect that it was not contended that the Tribunal failed to comply with s.424AA(b) merely because it stated that the information "*may be*" rather than "*would be*" a reason or part of the reason for affirming the decision under review (cf *MZYFH* at [62]). In these circumstances the Tribunal was not obliged to summarise the applicant's claims about events in China (which included his claimed

adoption of Catholicism) which it may find untruthful on the basis of all its concerns. It did not fail to comply with s.424AA(b)(i) as contended in particular (b) to ground two in the application.

147. In the course of the hearing it emerged that the applicant also intended to contend that to comply with s.424A(1)(b) (or s.424AA(b)(i)) of the Act the Tribunal had to take into account the personal characteristics of the applicant in explaining the relevance of information to him. As this aspect of the applicant's contentions was raised for the first time in the hearing, the parties were given the opportunity to make post-hearing written submissions.

148. It was generally submitted for the applicant that there was "*no way that a person who ha*[d] *had but two years formal education*", as the applicant had disclosed in his protection visa application, "*could understand the importance or the relevance of the information*" that was given to him by the Tribunal at the hearing as he could not understand the particulars and hence could not understand the relevance to the decision to be made. It was pointed out that in *SZNKO* Flick J had pointed out at [23] that such a provision required the disclosure of "*so much as to ensure that the opportunity to "comment… or respond…" is meaningful*". Similarly in *SZEOP v Minister for Immigration and Citizenship* [2007] FCA 807 Rares J had said that s.424A(1)(b) "*required the tribunal to ensure, as far as reasonably practical, that it identified to the* [visa applicant] *why …the information was relevant to the review*". Such an identification was said to be necessary to avoid a situation in which the applicant had to "*choose between uncertain inferences that might otherwise be available*". That obligation was said not to be fulfilled if the Tribunal left it to chance that the applicant appreciated the relevance of the information "*from the course of the hearing, or from other circumstances surrounding the way in which the review* [wa]*s being conducted*". (See *SZEOP* at [36], *SZMTJ* at [44] and *MZYFH* at [41]).

149. In post-hearing submissions, the applicant contended that insofar as s.424A(1)(b) referred to the need for the Tribunal to ensure as far as reasonably practicable that "*the applicant*" understood, it was necessary to bear in mind that the applicant was the individual at the Tribunal hearing who was the subject of the application and "*not a*

hypothetical person", whether reasonable or otherwise. It was stressed that s.424A(1) was a statutory statement of part of the natural justice hearing rule and contended that it should be construed in conformity with the common law requirement that a person should be given the opportunity to deal with matters adverse to his or her interest (*Alphaone* at 591 – 592). The applicant submitted that this necessarily required the applicant to be put in a position to understand why the information was relevant and that in a particular case this may mean that the relevance of information had to be explained in terms that the particular applicant could understand.

150. Reference was also made to the remarks of Allsop J (as he then was) in *Paul v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 396; [2001] FCA 1196 at [104] (albeit those remarks were made in the context of s.424A(1)(a) of the Act). His Honour stated at [104]:

> *The evident purpose of s424A is to play its part in the provision of a procedural analogue to the common law of procedural fairness. I think s424A should be looked at with a purpose in mind of ensuring that the claimant is fairly informed of information adverse to his or her case (in the manner described by the section) so that investigation may be made, and steps may be taken, somehow, if possible, to meet it. The extent of particulars of any information should be looked at in a common sense way in the context of the matter in hand and with fairness to the applicant in mind. A consideration of these matters is obviously affected by the chosen approach of the Tribunal. Particulars of information need to be provided to the applicant so that the applicant understands what is the relevant information to the review.*

151. It was submitted that if the purpose of providing particulars was to fairly inform the applicant of information adverse to his case so that he may if possible meet it, it would follow that he had to be fairly informed in a way that he could understand why that information was relevant and that an applicant could only have a meaningful opportunity to comment or respond in the sense discussed by Flick J in *SZNKO*, if an attempt was made to advise him (and not a hypothetical person) of relevance. As Bromberg J held in *MZYFH* at [69], the Tribunal had to ensure so far as practicable that the applicant was put in a position where he could understand the "*relevance and consequence*" of the information.

152. The applicant contended that s.424A(1)(a) imposed a subjective requirement which required the Tribunal to look at the applicant and the information in question and to decide what, on the basis of what was before it, was appropriate in the circumstances. It was conceded that in ensuring as far as reasonably practicable that the applicant understood the Tribunal did not have to go outside the information before it. However it was submitted that the issue of what was reasonably practicable must take into account the Tribunal's actual or constructive knowledge about the applicant.

153. In this context it was asserted that it was unrealistic to expect a person of "*very limited education*" to "*connect the disparate elements*" of the Tribunal's disclosure and explanation throughout the course of the Tribunal hearing. It was said that notwithstanding that the Tribunal said that it had considered the applicant's limited education, the issue was whether it really did. Reliance was placed on the remarks of Kirby J in *Minister for Immigration and Ethnic Affairs v Guo and Another* (1997) 191 CLR 559 at 595; [1997] HCA 22 as follows:

> *…the judge, reviewing the decision which is impugned, must look beyond the inclusion in the reasons of the decision-maker of the relevant statutory provisions, the citation of relevant authority or the assertion that these have been taken into account. The judge must assess whether a real, as distinct from a purported, exercise of the power has occurred. Where it has not, there is a constructive failure to exercise jurisdiction which will constitute an error of law authorising the provision of relief.*

154. Section 424AA(b) must be construed in the context of the section as a whole and having regard to the other essential elements of the invitation to comment (see *SZMTJ* at [52]). Indeed the Tribunal's obligations under s.424AA must be seen in light of its s.424A obligation (see *SZNKO*). These provisions are directed to ensuring that, in addition to providing clear particulars of the information in question, the Tribunal explains both the relevance of the information to the decision under review and the consequences of the Tribunal relying on it so as to enable the applicant to comment on or respond to it. However, these sections do not require the Tribunal, at the time of issuing the invitation, to do more than is "*reasonably practicable*" to accommodate the personal circumstances of the applicant. Section 424AA(b)(ii) is "*not an obligation of perfection*" (*SZNKO* at [10]).

155. Section 424AA(b)(i) does not go so far as to oblige the Tribunal to make itself sufficiently aware of every applicant's personal circumstances in order to formulate any invitation to comment in a manner which ensures that any idiosyncrasies of the applicant in question are addressed or to ensure that the particular applicant in question in fact understands the relevance of the information and its consequences. It is unlikely that the legislature intended s.424AA to be construed in this manner. Indeed Counsel for the applicant acknowledged that the Tribunal's obligation was more limited. What is in issue is whether, having regard to the nature of the information in question, the manner in which particulars are given and the fact that the obligation is to "*ensure, as far as is reasonably practicable*" that the applicant understands why the information is relevant to the review and the consequences of it being relied on, the applicant is given a "*meaningful opportunity*" to comment and respond (see *SZGMF* at [31] and *MZYFH* at [33]). The restriction in s.424AA(b) to "*ensure, as far as is reasonably practicable*" limits the Tribunal's obligations in this respect. As Flick J stated in *SZNKO* at [10]:

> *Section 424A, it will be noted, is expressed in mandatory terms — the Tribunal "*must*" do those things there specified; s 424AA(a) conveys a discretionary power — the Tribunal "*may*" give the "*clear particulars*" there referred to orally to an applicant (*SZLXI v Minister for Immigration and Citizenship *[2008] FCA 1270 at [24], 103 ALD 589 at 593) and, if it does so, s 424AA(b) then uses the mandatory term "*must*". In this way s 424AA(b) attempts to ensure that the "*information*" communicated orally rather than in writing can be meaningfully addressed. Section 424AA(b)(i), it will be noted, is not an obligation of perfection; it is an obligation to ensure "as far as is reasonable practicable" that an applicant understands the relevance of the "*information*" in question. Written communication perhaps more readily allows an applicant an opportunity to assimilate information being brought to his attention and to respond; an oral communication of information during the course of what an applicant may regard as a formal hearing may not be susceptible of immediate response or comment. Section 424AA(b)(iii) ensures that an applicant is to be given an opportunity to have "*additional time*" in which to respond or comment. "*[A]dditional time*" may be necessary to (for example) collate additional materials to answer the information about which he is being told for the first time or time in which to simply think about what "*comment*" should be made or how best to "*respond*". How much time will be needed will*

> *depend upon the nature of the* "information" *being communicated and an assessment of what is required to meaningfully* "comment on or respond"*. On occasions, a Tribunal may conclude that the attempts it is making to communicate* "information" *orally are unsuccessful. In* SZMOO v Minister for Immigration and Citizenship *[2009] FCA 211 at [30] to [31] it would appear that the Tribunal initially sought to invoke s 424AA but gave up and resorted to communicating the information in writing. See also:* SZNLT v Minister for Immigration and Citizenship *[2009] FCA 1332 at [40] per Cowdroy J.*

156. Clearly, the clarity with which the Tribunal is required to provide particulars is a recognition of the need to provide a comprehensible explanation. However in this case the Tribunal set out the evidence in question with sufficient clarity and explained the possible relevance of the information. Apart from the information about the daughter attending church gatherings, the Tribunal put the applicant on fair notice of critical matters of concern to it consisting of "*information*" within s.424A(1) of the Act.

157. Early on in the Tribunal hearing, the applicant informed the Tribunal he had a very limited education. The Tribunal took that into account when assessing his credibility. It appears from the transcript of the hearing that the applicant was able to understand and respond to the Tribunal's questions. There is no evidence to the contrary. At the outset of the hearing, the Tribunal member told the applicant if he did not understand the interpreter or the member's questions, he should let the Tribunal know. Only on two occasions did he indicate that he had not fully understood what was being asked of him in specific respects.

158. The information the Tribunal put to the applicant at the hearing, being the evidence the applicant's daughter had given regarding her participation in the religious activities of the underground church of which he claimed to be a member and its significance (in particular the fact that it differed from the account the applicant had given which might cause the Tribunal to conclude that they were not witnesses of truth and, as a result, to reject the applicant's claims) was sufficiently put to the applicant. The applicant's response was not such as to suggest that he did not understand or that the Tribunal obligation to

ensure that he had a meaningful opportunity to comment on or respond to the information was not met.

159. It has not been established that the information in question and its relevance to the review was not within the intellectual grasp of a person of limited education. The Tribunal put the information to the applicant in plain terms and in a manner that could not have left him in any doubt as to its relevance or significance. (See *MZYFH*.) There is no indication in the transcript of the hearing that the applicant did not understand what was put to him. He did not seek clarification from the Tribunal and he commented on the information in a manner that was responsive. He did not seek to avail himself of the opportunity to adjourn the review or to respond at a later time.

160. Furthermore, the information was put to the applicant in the context of a hearing in which the fact that all of his claims (including his Catholicism in China) were in issue had already been made clear, as discussed in relation to ground one and as was reiterated by the Tribunal after it put the information to the applicant and before he commented. It has not been established that the Tribunal failed to ensure as far as reasonably practicable that the applicant understood the relevance of the information and the consequences of it being relied on. In particular it has not been established that the Tribunal failed to ensure, as far as reasonably practicable, that the information that was disclosed pursuant to s.424AA of the Act was relevant to the issue of whether the Tribunal accepted the applicant's claim that he was a Roman Catholic in China.

161. Hence even on the construction of s.424A(1)(b) contended for by the applicant, the Tribunal discharged its obligations (except in relation to the information referred to in particular (a)). Nonetheless as jurisdictional error is made out on the basis contended for in particular (a) to ground two the matter should be remitted to the Tribunal for reconsideration according to law.

I certify that the preceding one-hundred and sixty-one (161) paragraphs are a true copy of the reasons for judgment of Barnes FM

Date: 23 August 2011