FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZKJT v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 876*

MIGRATION – Review of Refugee Tribunal decision – additional information sought by Tribunal – non-compliance with statutory code of procedure – breach of procedural fairness – jurisdictional error – writs issued.

Migration Act 1958 (Cth), ss.420, 430, 424A, 425, 424B, 427, 426, 441C, 441G
Migration Regulations 1994 (Cth), reg.4.35

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152; [2006] HCA 63
SZKTI v Minister for Immigration and Citizenship [2008] FCAFC 83
SZKCQ v Minister for Immigration and Citizenship [2008] FCAFC 119
Minister for Immigration and Citizenship v SZLFX [2008] FCAFC 125
SZGBI v Minister for Immigration and Citizenship [2008] FCA 599
SZMBS v Minister for Immigration and Citizenship [2008] FMCA 847
SZGBI v Minister for Immigration and Citizenship [2008] FCA 599
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294; [2005] HCA 24
Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88; [2005] HCA 72
Minister for Immigration and Multicultural Affairs v Lay Lat (2006) 151 FCR 214; [2006] FCAFC 61
SZCIJ v Minister for Immigration and Multicultural Affairs [2006] FCAFC 62
SZFDE v Minister for Immigration and Citizenship (2007) 237 ALR 64; [2007] HCA 35
SZIZO v Minister for Immigration and Citizenship [2008] FCAFC 122

Applicant:	SZKJT
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 947 of 2007
Judgment of:	Nicholls FM

Hearing date:	25 February 2008
Date of Last Submission:	30 July 2008
Delivered at:	Sydney
Delivered on:	28 August 2008

REPRESENTATION

Counsel for the Applicant:	Nil
Solicitors for the Applicant:	Nil
Counsel for the Respondents:	Mr R Foreman/Mr G T Johnson (written submissions)
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) A writ of certiorari issue, quashing the decision of the second respondent.

(2) A writ of mandamus issue, requiring the second respondent to redetermine the matter according to law.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 947 of 2007

SZKJT
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application made under the *Migration Act 1958* (Cth) ("the Act") on 20 March 2007, seeking review of the decision of the Refugee Review Tribunal ("the Tribunal") signed on 1 February 2007, and handed down on 13 February 2007, which affirmed the decision of a delegate of the respondent Minister to refuse the grant of a protection visa to the applicant.

Background

2. The first respondent has put a bundle of relevant documents before the Court in this matter (the Court Book ("CB")) from which the following background may be discerned.

3. The applicant is a citizen of the People's Republic of China ("China") who arrived in Australia on 17 April 2006 and applied for a protection visa on 22 May 2006. (The application is reproduced at CB 1 to CB 27

with annexures.) On 9 August 2006, a delegate of the respondent Minister refused to grant the visa. (That decision record is reproduced at CB 30 to CB 35.) On 7 September 2006, the applicant applied to the Tribunal for review of the decision. (The application to the Tribunal and covering letter are reproduced at CB 36 to CB 40.)

4. The applicant attended a hearing before the Tribunal on 15 November 2006 (CB 50). The Tribunal's account of what occurred at the hearing is set out in its decision record. (The decision record is reproduced at CB 107 to CB 116. In particular, see CB 110 to CB 111.) The Tribunal also wrote to the applicant by letter dated 3 January 2007 seeking his written comments on certain material that it said would be the reason, or part of the reason, for deciding that he was not entitled to a protection visa (CB 56 to CB 60). The applicant's response is reproduced at CB 61 to CB 101, with annexures. The annexures include what appears to be a copy of the "Criminal Procedure Law" of China (CB 61).

5. Throughout the process of the review, the applicant was assisted by a registered migration agent (CB 36, CB 37, CB 105).

The applicant's claims to protection

6. The applicant's claims to protection in Australia arise from his having to pay a fine for breaching the birth control policy of China (in 1994) and other debts arising from family medical expenses, and his claimed fear of harm from the Chinese authorities, whom he claimed threatened, detained, and tortured him because they believed he had encouraged his fellow villagers not to pay certain "donations" for road construction to the government. He claimed that when he was detained, he was forced to sign a confession admitting that he had participated in anti-government activities. Upon being released, he encouraged the villagers to question the "donations" and to obtain an explanation as to why they had to be paid, and organised demonstrations in protest. He was questioned by the police and was told not to engage in these activities. He had heard that police planned to detain him again

The Tribunal

7. The applicant appeared before the Tribunal on 15 November 2006 to give evidence and present arguments. During the course of the hearing, the applicant submitted four documents (with translations) in support of his claims (see CB 46 to CB 49). The Tribunal also took evidence from a "friend" of the applicant's father-in-law in China. The documents were a "Summons" from the local Public Security Bureau, a receipt from the Fujian Province "Public Affairs Administration" in relation to "donation to the road construction", and two receipts, described as "Payment as the Penalty for the Birth of Child not Permitted by the Birth Control Program" (dated 6 June 1990, and 3 March 1994, respectively).

8. The Tribunal identified the applicant's claims as being that he had said that he was active in opposing Chinese authorities with regard to "some of their policies", and that he had protested against "fines" and "donations" that he had to pay. That after inciting local people to also protest he had been detained, and physically abused, by the Chinese authorities. The Tribunal noted that the applicant had tendered documents in support of his claims (CB 115.9).

9. The Tribunal was persuaded by what it said was a "detailed assessment" by the Australian Department of Foreign Affairs and Trade ("DFAT") that the documents tendered by the applicant were "fraudulent", which led the Tribunal to find that the applicant's claims were also "fabrications". It also found that it was strengthened in that finding by the results of its own investigation (CB 116.1). The Tribunal found that in light of this finding about the applicant's evidence, it was not satisfied that the applicant had a well-founded fear of persecution within the meaning of the Refugees Convention, and that the applicant was not a person to whom Australia owed protection obligations under the Refugees Convention. It therefore affirmed the decision under review.

Application to the Court

10. In his application made on 20 March 2007, the applicant put forward the following grounds:

"- *There was an error of law in the Tribunal's decision constituting a jurisdictional error;*

- *There was procedural error in the Tribunal's decision constituting an absence of natural justice."*

11. The applicant has also set out "particulars" which on their face appear to be the grounds of the application:

"*1. The Tribunal failed to comply with its obligations under s.420 of the Act."*

[particulars]

"2. The Tribunal failed to comply with its obligations under s.430 of the Act."

[particulars]

"3. The Tribunal failed to comply with its obligations under s.424A(1) of the Act.

[particulars]*"*

Before the Court

12. At the hearing before the Court, the applicant appeared in person. He was assisted by an interpreter in the Mandarin language. Mr R Foreman of Counsel appeared for the first respondent.

13. Before the Court the applicant read from a prepared statement which he said had been drafted with the assistance of "a friend". He pressed the following:

1) A breach of s.420 of the Act. The applicant submitted that s.420 requires the Tribunal to pursue a mechanism that provides a "just, fair, and economical review mechanism", and that it was unfair of the Tribunal to find that the documents submitted in support of his application were forged in the absence of any "material direct evidence" in support of that finding.

2) A breach of s.430 of the Act. The applicant explained that the Tribunal refused to consider his explanation for the information provided by DFAT (that is, his response to the Tribunal's

s.424A letter). Further, the Tribunal did not set out the reasons for this, and the evidence it relied upon ("the Tribunal did not specify on what basis it behaved in such a way and in accordance with what evidence").

3) The Tribunal breached its obligations pursuant to s.424A(1) of the Act. The applicant submitted that the Tribunal did provide him "with relevant information" (the information from DFAT and the other information the Tribunal relied on), but that the Tribunal, "without any reason", refused to consider his explanation in response to this information. The applicant also submitted that this led him to "question the sincerity of the Tribunal". (This may also have been a complaint of an apprehension of bias (see the applicant's written submissions provided subsequently – see [16] of this judgment).)

4) that the Tribunal acted in bad faith – see [16] of this judgment.)

14. Given that the applicant was unrepresented before the Court, during the course of the hearing I raised the following matters with Mr Foreman:

1) In relation to the applicant's second ground, whether the question may better have been posed as whether the Tribunal properly considered all of the applicant's claims.

2) Whether, in light of *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; [2006] HCA 63 ("*SZBEL*"), the Tribunal complied with its procedural fairness obligations pursuant to s.425 of the Act.

3) In relation to the applicant's third ground, whether a breach of s.424A of the Act occurred in relation to the oral evidence obtained by the Tribunal via telephone.

15. The parties were given the opportunity to make written submissions (in the case of the first respondent, further written submissions) in relation to these issues, and were granted leave to provide any further evidence (for example, a transcript of the Tribunal hearing) that may be relevant to consideration of these issues. The orders provided for the respondent to file and serve such material first, and then for the applicant to respond.

16. In this regard, the first respondent filed supplementary written submissions, and the affidavit of Ms Nicola Johnson of 31 March 2008, annexing a transcript of the hearing before the Tribunal held on 15 November 2006. The applicant subsequently filed written submissions in which he argued an apprehension of bias on the part of the Tribunal.

17. Neither party sought any further directions, or hearing, in this matter. (The opportunity was provided by way of orders made at the hearing.) In these circumstances it was understood that the Court would then proceed to consider all the material before it, and proceed to hand down its judgment.

18. However, having done so, but just before judgment could be handed down, the Full Court of the Federal Court handed down its judgment in *SZKTI v Minister for Immigration and Citizenship* [2008] FCAFC 83 ("*SZKTI*") (per Tamberlin, Goldberg and Rares JJ). This was followed by the Full Court of the Federal Court decision in *SZKCQ v Minister for Immigration and Citizenship* [2008] FCAFC 119 ("*SZKCQ*") (per Stone, Tracey and Buchanan JJ) and *Minister for Immigration and Citizenship v SZLFX* [2008] FCAFC 125 ("*SZLFX*") (per Branson, Bennett and Flick JJ).

19. The issue relevant in *SZKTI* and *SZKCQ* to the case currently before the Court is the application of s.424 of the Act. In these circumstances, I did not proceed to hand down judgment, but gave the parties the further opportunity of making further submissions on this issue. Submissions have been received from the first respondent in this regard.

Section 424 of the Act: The Authorities

20. In *SZKTI* the Full Court had before it an appellant (applicant) who claimed to fear persecutory harm if he we were to return to his home country because, whilst in that country, he had been suspected of having organised the distribution of "illegal religious propaganda materials" ([6]). He also claimed in support of his application that he had participated in relevant religious activities since his arrival in Australia (see [18]-[19]). The Tribunal conducted a hearing pursuant

to s.425 of the Act (at [2]), and subsequently some time later wrote twice to the applicant. One letter sought his comment on information pursuant to s.424A of the Act, and the latter (and relevant to the case currently before the Court) sought additional information under s.424(2) of the Act (see [2] and [21]).

21. In response to the latter, the applicant provided a letter in support of his claims to have engaged in relevant religious practice in Australia. The applicant claimed that he worshipped regularly in Australia, and provided a letter from two elders of the Church. The applicant's letter invited the Tribunal to contact either of the two elders if the Tribunal had any questions, and the letter enclosed from the two elders provided a mobile telephone number for one of the authors of the letter with the statement: "please do not hesitate to contact …" (see [24]).

22. The Full Court found that the Tribunal did not invite the author (Mr Cheah) of the letter to provide it with information under s.424(2) of the Act, that instead it "simply telephoned Mr Cheah on his mobile phone and questioned him about the appellant, thus obtaining information additional to that in the letter …" (at [3]). The Court found that the Tribunal "relied on that information on deciding to affirm the decision of the Minister's delegate to refuse the appellant a protection visa" (also at [3]).

23. The Full Court identified (at [4]) that the "question of statutory construction raised in this appeal is whether, when the Tribunal telephoned Mr Cheah on his mobile phone, it invited him to give additional information. If it did, it is common ground that the mandatory requirements of s 424(3) were not followed because he had not been invited in writing to do so by the Tribunal sending him a letter, fax, email, or using other electronic means to transmit the writing (ss 424(3)(a), 441A(5))"

24. The Full Court set out the relevant statutory provisions (at [9]-[11]), and said at [12]:

> *"If a person were invited under s 424 to give additional information, the invitation had to specify the way in which the additional information may be given, being the way which the tribunal considered was appropriate in the circumstances. The invitation also had to specify a particular period for that to occur,*

or if no period were specified, then the tribunal had to give the person a reasonable period (s 424B(1) and (2)).”

25. In short, the facts before the Court in *SZKTI* were, relevantly:

1) At [23], the applicant responded to the Tribunal through his migration agent to the Tribunal’s request pursuant to s.424 of the Act, and enclosed a letter from the elders of his church in Australia, and told the Tribunal to contact the elders if it had any questions, and a mobile phone number was provided for that purpose.

2) At [26], two months later, the Tribunal did contact one of the authors of the letter, and further, sent a letter pursuant to s.424A of the Act providing the applicant with the opportunity to respond to the additional information that it obtained from the author of that letter ([26] and [27]). The Tribunal’s letter also informed the applicant why that information was relevant to its review.

3) The Tribunal did not accept that the applicant had been involved in a Christian church in China ([30]), and in relation to the evidence and letter from the church elder in Australia, the Tribunal said that this “shed little light”, and gave “scant support” to the applicant having been an active Christian in China ([31]). The Tribunal described the comments from the author of the letter as “superficial comments”, and the Full Court found that the Tribunal’s telephone conversation was part of the reason for rejecting the applicant’s claim for a protection visa ([35]).

4) The Full Court stated as the “critical issue” as being “whether the Tribunal could simply telephone (the author of the letter) and ask him questions without having to follow the procedures in ss 424(2), (3) and 424B of the Act” (also at [35]).

5) The Court answered that question in its consideration appearing at [36]-[54], and I note relevantly the following:

i) At [40], in the circumstances, the Tribunal’s telephone call to the author of the letter “amounted to an invitation to him to give additional information to the Tribunal”. (In part, the Court relied on what was subsequently contained in the

Tribunal's s.424A letter to find that what the author provided was information "additional" to that contained in his letter. In these circumstances, s.424(2) was engaged.)

ii) At [41] that in the circumstances the Tribunal invited the author to provide new information additional to his letter, and in speaking to him on the telephone the Tribunal was not acting under its powers under s.427(3)(a) since it did not summons the author to give evidence before it.

iii) At [43]: "… the Parliament did not authorise the tribunal to get additional information from a person pursuant to its general power under s 424(1) without complying with the code of procedure set out in ss 424(2) and (3)".

iv) At [46] that there are "important consequences" which might flow from a failure to comply with the code of procedure.

v) At [47] that "[a]n impromptu telephone call received by a person who can provide the tribunal with information could be regarded by the recipient with suspicion or reserve", and that this therefore could create difficulties, which is one of the reasons "why Div 4 of Pt 7 of the Act provides a detailed procedure for seeking such information which a person is invited to provide".

vi) At [48] the Full Court found that the Tribunal drew an adverse inference against the applicant based on what was said to be the author's "superficial knowledge" of the applicant's profile in China and his "'understanding' that the appellant [applicant] had been a Christian there".

vii) At [50]: "[w]hile the tribunal was at liberty to choose among the methods provided Div 4 of Pt 7 by which it might obtain the information sought from Mr Cheah, it was not at liberty simply to telephone him, without warning, and ask him questions".

viii) At [51] the Tribunal noted that *SZGBI v Minister for Immigration and Citizenship* [2008] FCA 599 ("*SZGBI*")

was not of assistance in the circumstances of the case before it. In that case, it was held that s.424(2) did not apply where the Tribunal acted on a request by the applicant to obtain oral evidence under s.426(2). At [53]: "[i]n our opinion, if the tribunal requires additional information to be provided by a person it must follow the procedures that the Parliament has laid down to obtain that information. One mechanism that the tribunal can use is to invite the applicant or the person to a hearing and obtain evidence from them on oath. It can then invite the applicant to provide further information. The procedure is, after all, inquisitorial. It is not an unusual feature of inquisitorial procedures, that proper enquiry takes time and care. The tribunal will naturally seek to contain the extent of its enquiries, consistently with its performance of its duties having regard to s 420."

ix) At [50] the failure of the Tribunal to follow (in relation to the conversation and information obtained from the author of the letter) the procedures set out in s.424(2)(iii) and 424B, was a jurisdictional error.

26. In *SZKCQ* the appellant (applicant) before the Court was a citizen of Pakistan who claimed to fear persecutory harm because of his political activities (see [8]). At a hearing before the Tribunal, the Tribunal: "'asked him to obtain from Pakistan confirmation from leading party officials who knew him of his standing and situation and allowed him four weeks to do so'" (at [12]). In response, two documents were sent by facsimile transmission to the Tribunal ([12]-[13]). The two documents were subsequently referred "to the Australian High Commission in Islamabad" by the Tribunal ([14]) and, amongst other things, the overseas "post" was asked to confirm the authenticity of the letters and establish the identity of the authors, and to obtain further information from them (at [15]).

27. It appears that the High Commission did so, and provided answers to the Tribunal's questions ([16]). Subsequently, the Tribunal wrote to the applicant setting out the response provided by the High Commission ([17]). (Noting that the applicant "was not advised of the terms of the

questions which the High Commission was asked to put to the two persons in Pakistan ([19].)

28. The Full Court considered the appellant's (applicant's) contention that the oral request made to him during the hearing was required by s.424 of the Act to be in writing. In rejecting the Minister's submission in reply, the Court did not accept the Minister's construction of s.424 of the Act, that the Tribunal could proceed pursuant to s.424(1) rather than s.424(2) to obtain information, and did not need to do so in writing ([39]-[40]). At [41]:

> *"The elements which must be present for the engagement of s 424(2) are: an invitation; to a person; to give information; which is additional information. There is no doubt that these elements were present in the case under consideration. Prima facie, therefore, s 424(2) was engaged and the Tribunal came under an obligation to give the invitation in writing."*

29. At [49]:

> *"It was submitted that upon the construction which I favour the RRT would be obliged to commit to writing every question which it wished to ask of an applicant (or presumably anybody else) during an oral hearing conducted in connection with a review. The prospect is certainly a troubling one. However, I think there are sufficient reasons to conclude that the obligation does not apply to information which is provided by way of evidence or argument in an oral hearing."*

30. At [51]:

> *"Section 427 sets out the powers of the RRT. Amongst its powers are a power to take evidence on oath or affirmation, to summon persons to appear before it to give evidence, to require a person appearing to give evidence and to administer an oath or affirmation. In my view the power to take evidence on oath or affirmation and to require evidence to be given on oath or affirmation necessarily carries with it the power to put questions and require answers. That power is not affected, much less limited, by s 424 which clearly operates outside the environment of the oral hearing itself. Outside the oral hearing the scheme of Division 4 of Part 7 of the Act appears to me, in various ways, to establish as a necessary procedure that certain steps must be taken in writing. It does so in the context set by s 422B which provides that the Division 'is taken to be an exhaustive statement*

> *of the requirements of the natural justice hearing rule in relation to the matters it deals with'. Significance and weight must therefore be attached to the safeguards for applicants which the procedural requirements, particularly those in ss 424, 424A and 424B, represent."*

31. At [54], that once the Tribunal takes the step:

> *"[P]ermitted to it of inviting a person to give additional information. At that point the language of s 424 becomes imperative. Such an invitation* 'must be given to the person' *in one of the ways then specified"*.

32. At [58] that:

> *"[T]he RRT failed to comply with a mandatory obligation which fell upon it when it asked the appellant 'to obtain from Pakistan confirmation from leading party officials who knew him of his standing and situation and allowed him four weeks to do so'"*.

(That is, that the Tribunal failed to ask the applicant to obtain this additional information in a manner consistent with the statutory scheme.)

33. In relation to submissions made to it by the Minister regarding *SZKTI*, the Court found that (at [63] per Buchanan J, with whom Stone and Tracey JJ agreed (at [6])):

> *"[N]one of the matters advanced by the Minister provide a reason to doubt the correctness of the construction of s 424 of the Act determined by the Full Court in* SZKTI. *Far from being wrong, much less clearly wrong, the construction approved by the Full Court in* SZKTI *was correct."*

34. In this regard, see further another judgment of the Full Court in *Minister for Immigration and Citizenship v SZLFX* [2008] FCAFC 125 (per Branson, Bennett and Flick JJ (at [3])), in which the appellant (in that case, the Minister):

> *"[F]ormally submitted that SZKTI was wrongly decided. However, we agree with the judgment of the Full Court delivered this morning in SZKCQ v Minister for Immigration and Citizenship [2008] FCAFC 119 that SZKTI is not plainly wrong. This Court should therefore follow it. The first respondent's contention succeeds."*

(The first respondent was the applicant for a protection visa.)

35. At [63] of *SZKCQ*, Buchanan J continued:

> *"In* SZKTI *the Full Court rejected the contention that the RRT could elect to obtain information from a person, as contemplated by s 424(2), without engaging the operation of s 424(2) and (3). That is the view to which I have come independently. Notwithstanding the attack made on it in the Minister's supplementary submissions, I am fortified in my view by the analysis and discussion in* SZKTI*."*

36. As referred to in *SZKCQ*, the construction relating to the operation of s.424 of the Act was set out by the Full court in *SZKTI* at [43]-[45]:

> *"43 In our opinion in its natural and ordinary meaning s 424(2) provides a means by which a person may be 'invited' to give additional information to the tribunal, that is, information which that person has not already provided to the tribunal or which the tribunal has not obtained in another way, such as pursuant to the use of its powers under s 427(3) to summons a person to give evidence. The introductory words to s 424(2), namely 'without limiting subsection (1)', identify one of the means available under s 424(1) which the tribunal may employ to get information, but then s 424(2) prescribes the mode and limitations governing how it may invite a person to give it additional information. The Parliament provided a code in ss 424, 424A, 424B and 424C which made extensive provision for the tribunal to obtain information including by means of an invitation to a person to provide it. Those provisions specified the means by which the information was to be sought, and the consequences for its non-provision. We are of opinion that the Parliament did not authorise the tribunal to get additional information from a person pursuant to its general power under s 424(1) without complying with the code of procedure set out in ss 424(2) and (3).*
>
> *…*
>
> *45 In our opinion, the Minister failed to provide any plausible alternative legal meaning to ss 424(1) and (2) which allowed the tribunal to act as it did when inviting Mr Cheah to provide additional information without complying with ss 424(3) and 424B. Here, the tribunal's*

obligations under s 424(3) were enlivened. Since those obligations were not complied with, the tribunal failed to follow the procedure specified in the Act for the provision by a person invited to give additional information of that information and committed a jurisdictional error."

37. I should just note that at [73], [74] and [75] of *SZKCQ*, the Full Court addressed submissions on an issue also relevant to some of the factual circumstances before the Court in the current case:

> *"73 The Full Court judgment in* SZKTI *raises another possible question concerning the facts of the present case. …*
>
> *74 In* SZKTI *the RRT sought information from a person known to the applicant. It sought the information by telephone. The Full Court held that was impermissible. In the present case the RRT sought information, not only from the appellant but also, through the High Commission in Islamabad, from Mr Abbas and Mr Khalid. Although the request to the High Commission was in writing there is nothing to suggest that the invitation to provide information which was extended to Mr Abbas and Mr Khalid was in writing. It could only have been an invitation as both gentlemen were beyond the reach of any compulsive power possessed by the RRT. Prima facie, therefore, the provisions of s 424(2) were engaged also with respect to the additional information sought from each of them."*

(Ultimately, the Court stated it was not necessary to decide this additional argument put forward by the appellant (applicant) in that case.)

Consideration in the Current Case

38. In the light of the above, two matters in the current case give rise to the need for consideration:

1) During the course of the hearing with the applicant, the Tribunal questioned, by telephone, a friend of the applicant's father-in-law, who was in China.

2) At the hearing conducted with the applicant, the applicant submitted "four purported original documents" (CB 110.4) in

support of his claims. Subsequent to the hearing, the Tribunal sent these documents to DFAT in a letter sent by email, and asked certain questions in relation to the documents.

Material Relevant to this Consideration

39. The matters relevant to these matters are:

1) The applicant appeared before the Tribunal at a hearing on 15 November 2006 "to give evidence and present arguments" (CB 109.3) (see also CB 50).

2) The Tribunal's account of what occurred at the hearing is set out in its decision record (CB 110.4 to CB 111.3). Also before the Court is a transcript ("T") of the hearing annexed to the affidavit of Nicola Johnson, a solicitor in the employ of the solicitors for the first respondent.

3) During the course of the hearing, the applicant submitted "four purported original documents with translations" to the Tribunal (see CB 110.4, and T 2.4). (The translation of the documents is reproduced at CB 46 to CB 49.)

4) During the course of the hearing, the applicant gave evidence that he was assisted by "the friend of my father-in-law" who organised a business visa for him which was the visa that he used to come to Australia (T 4.2).

5) The Tribunal questioned the applicant about this friend of his father-in-law and asked him whether the friend knew of his difficulties with the authorities in China (see T 4). (See also CB 110.6.)

6) The Tribunal continued to question the applicant about events in China and, again, evidence was given concerning assistance from the friend of the father-in-law (T 7.8). (And see generally T 4.10 to T 10.5.)

7) Relevant to the issue of the telephone call to the friend is the following from the transcript of the hearing, at T 10.8:

"MR WITTON [the tribunal member]: And the friend of your father-in-law, does he have a phone?

THE INTERPRETER: Yes.

MR WITTON: Could I phone him?

THE INTERPRETER: Yes.

MR WITTON: Do you have his number?

THE INTERPRETER: Yes.

MR WITTON: Okay, what time is it in China now?

THE INTERPRETER: Three hours backward.

MR WITTON: That's all right, that's seven o'clock.

THE INTERPRETER: Yes.

MR WITTON: Okay. Your – what is this man's name?

….

MR WITTON: But he knew you were in trouble with the police.

THE INTERPRETER: He knew that; little.

MR WITTON: If I rang him now would he be able to tell me why you had to leave the country?

THE INTERPRETER: Yes, he can.

MR WITTON: Right, is it okay if I ring him?

THE INTERPRETER: Yes.

MR WITTON: Okay, now before I'll just look at the documents you gave me. What are the receipts for?

THE INTERPRETER: The receipts of fine and the donations.

MR WITTON: Okay and the fines are because of extra children, yes?

THE INTERPRETER: Yes.

MR WITTON: And the other one is the donation to the road?

THE INTERPRETER: Yes.

MR WITTON: If I thought it was necessary could I ask the Australian Embassy to secretly ask if these are genuine?

THE INTERPRETER: Australian Embassy?

MR WITTON: Yes, in Beijing.

THE INTERPRETER: Yes.

MR WITTON: It would be all right?

THE INTERPRETER: Yes.

MR WITTON: Okay, well okay because I hear your story and what you're saying and it's very hard for me to know whether you are telling the truth or not so you have given me two ways to try and get a bit of extra evidence about this. One is to speak to your – the friend of your father-in-law and I think because that's easy I will do that straight away and then I will think whether it is necessary to check the documents. Okay, before I talk to Xi Mao Tung, is there anything else you want to tell me?"

8) The transcript continues at T 12.9:

"MR WITTON: Okay, all right, can you tell me the number for Xi Mao Tung?

THE INTERPRETER: Sir, I do not call him often.

MR WITTON: No, it's a mobile is it, or home phone?

THE INTERPRETER: Mobile phone.

MR WITTON: Okay. Do you know, for phoning overseas there's 0011, what comes after that for China, do you know?

THE INTERPRETER: Yes.

MR WITTON: Can you write it?

THE INTERPRETER: Yes.

MR WITTON: What does he – what do you think he knows about why you had to leave the country?

THE INTERPRETER: He's not very – he's not very familiar with what happened.

THE INTERPRETER: [This appears to be an error in the transcript and it was Mr Witton] But he knows that you were in trouble with the authorities?

THE INTERPRETER: Yes, he knew a little.

MR WITTON: What little, what would he know?"

9) At T 14.3, the transcript continues:

"MR WITTON: Okay, when we ring him I think I'm going to tell the interpreter what is perhaps the best thing for her to say to this man first. So – and I'll get her to tell you what I'm saying. So what I would like you to do is for you to say that this is – we're ringing from Australia about Mr – I'm not sure how to pronounce Chinese names, Xue, is it, how do you pronounce X-u-e?

THE INTERPRETER: Sher.

MR WITTON: Sher, okay, you would see Xue Jin Ng, is that how – is that how you pronounce – have you got his name there?

THE INTERPRETER: No.

MR WITTON: Sorry.

THE INTERPRETER: Xue Jin Ng, yes.

MR WITTON: Xue Jin Ng.

THE INTERPRETER: Mm.

MR WITTON: And would you call your friend Jin Ng?

THE INTERPRETER: Xue Jin Ng.

MR WITTON: The whole lot?

THE INTERPRETER: Yes.

MR WITTON: Okay, so if – does this man know that you are asking for a protection visa?

THE INTERPRETER: I didn't tell him?

MR WITTON: Okay, I think it would be good for us to explain to him that we are talking about your need to stay in Australia and that we are having a private confidential information that won't be told to anyone and we will tell him that you are here as well and I will ask you to say hello to him so he knows you are there and the interpreter will say that I would like to ask this man a few questions and then I will ask him why did you have to leave the country. Is that okay?

THE INTERPRETER: Yes.

MR WITTON: Do you think he would be frightened by the phone call?

THE INTERPRETER: Because of this phone call he might be.

MR WITTON: Yes, so I would like to reassure him but it is very important for me to get this information from him because that will help me believe you. So you can say to him I really need you to tell them about why I had to leave China but it is very important that you don't give him any information. You can't say, tell them that I was detained by the police because that would not help me but it's enough if you say, I would like to you to tell them what you know about my situation, something like that."

THE INTERPRETER: I want to ask for clarification; the sentence before the last sentence you mentioned the police; I was wanted by the police. You are talking about the police in China or in Australia?

MR WITTON: No, no, no, in China. I'm only interested in – I want to hear from him why you had to leave China. Okay, yes. Does he have contact with your wife?

THE INTERPRETER: He has no contact, I mean not often.

MR WITTON: Okay. When he answers maybe it's best for you to talk to him first and if you tell him there's someone who needs to talk to him and that there is an interpreter here as well. Okay? All right, we'll try.

(…Music playing…)

MR WITTON: It must be busy. This is usual? No connection. We'll try again.

(…Music playing…)

MR WITTON: Yes, it's Ron Witton in the hearing room. It's okay, everything is all right, thanks. Say hello.

APPLICANT CONVERSING IN CHINESE WITH XUE MAO TUNG

THE INTERPRETER: I don't understand the language.

MR WITTON: Okay.

APPLICANT CONVERSING IN CHINESE WITH XUE MAO TUNG

THE INTERPRETER: I don't understand.

MR WITTON: What is happening?

THE INTERPRETER: He was afraid so he didn't pick up.

MR WITTON: Okay, can you …

APPLICANT CONVERSING IN CHINESE WITH XUE MAO TUNG

THE INTERPRETER: The immigration officer.

MR WITTON: What language is it?

THE INTERPRETER: Dialect.

MR WITTON: And what were you speaking before?

THE INTERPRETER: Mandarin.

MR WITTON: Can he talk Mandarin?

THE INTERPRETER: He said we usually talk with each other in our dialect.

MR WITTON: All right, can you tell him there's a Mandarin interpreter.

APPLICANT CONVERSING WITH XUE MAO TUNG

THE INTERPRETER: He said I will – he said I was arrested – he said, no, no, he said I was not arrested.

MR WITTON: Okay, can you say that someone wants to talk – I'm an interpreter and I need to talk – someone wants to talk to you.

THE INTERPRETER: Yes. Yes, yes.

MR WITTON: Hello, Xue Mao Tung, hello. I have [the applicant] here and I need to ask you some questions. He's not in any trouble at all but I just need some information. Is that all right if I talk to you?

THE INTERPRETER: Yes, yes.

MR WITTON: Okay, look he has said that he had to leave China and I wanted to know from you why he had to leave China. Any information you tell me is confidential and won't be passed on to anyone but this might be able to help him stay in Australia. So he's said that he had to leave China, can you say why?

THE INTERPRETER: I can't hear. What did you say?

MR WITTON: Okay, he said that he had to leave China, why did he have to leave China?

THE INTERPRETER: I have no idea, how can I know?

MR WITTON: Do you want to ask him to help you explain because we need this information?

THE INTERPRETER: He said, yeah, you tell him, you can tell him.

MR WITTON: Did he have any problems with the police?

THE INTERPRETER: Yes.

MR WITTON: What was his problem?

THE INTERPRETER: I have no idea, it seems to something about one child policy.

MR WITTON: And how did he get – manage to leave China, did you help him?

THE INTERPRETER: I didn't. He used to run a company before; he was rich.

MR WITTON: Okay, but this was on the form, yes but I think he was actually a carpenter, is that right?

THE INTERPRETER: What did you say, what did you say?

MR WITTON: Yes, that was on the form that he ran a factory but I think really he was a carpenter, wasn't he?

THE INTERPRETER: He used to be a carpenter. Yes, I have no idea, yeah, he used to be a carpenter.

MR WITTON: Okay, and you helped him because his wife's family used to help you, is that right?

THE INTERPRETER: No.

MR WITTON: No, why did you help him?

THE INTERPRETER: Because before his wife and my family has some – some kind of relative isn't that right?

MR WITTON: Okay, is there anything else I can ask him?

THE INTERPRETER: Our Chinese telephone line is under surveillance you know. Our conversation might be under surveillance you know.

MR WITTON: Okay, all right then so there's nothing more we can talk?

THE INTERPRETER: If you asked him something sensitive you might bring him some trouble.

MR WITTON: Yes, I can understand. Well look it was good talking to you.

THE INTERPRETER: Okay …."

10) Then finally at T 19.3:

"MR WITTON: Yes, of course. What I will do next is I will see if we can make some secret enquiries about these documents, especially this one.

THE INTERPRETER: Yes.

MR WITTON: And I will ask the embassy if they can have someone look at secretly, not from the government, and for them to look at it and give an opinion if it looks genuine. If they say it is genuine or it looks genuine then I think that makes it easy for me to believe you. If they cannot do it soon or if they cannot give an opinion I will think about everything that you have told me and also that you allowed me to ring this man and I will try and decide if that is enough for me to grant a protection visa. Is that clear? Okay, are you able to work at present?"

11) Following the hearing, by letter sent by email on 29 November 2006 (CB 51 to CB 53), the Tribunal sent "scanned copies of these documents" to an officer in DFAT, and asked the following questions (at CB 53.4):

"6. The RRT would appreciate it if post would provide answers to the following:

A. ***Can you determine if the attached documents are genuine, or alternatively make any comments about whether any features of these documents are not typical?***

B. ***In relation to the 'Penalty for the birth of the child' receipts, the receipt numbers are almost sequential (001940 and 001942) despite being issued six years apart. Is there any reasonable explanation for how this could happen if the documents are genuine.****"*

12) I note further that the request ends with (at CB 53.5):

"8. Please be aware that any information you provide may form part of the information used by the Tribunal to review applications for refugee status …"

13) The response, again by email, is at CB 54 and is dated 25 December 2006. Essentially, the advice was:

i) In relation to the summons, that there were some features not normally expected and that "this would suggest that the document provided is not genuine".

ii) In relation to one of the receipts and advice obtained from "an accountant" with the relevant city council "that the

receipt number … does not exist in the office's database", and further, with regard to the other two receipts, advice obtained from an official of the relevant city council that ultimately led to "the advice from local government officials suggests that the documents are not genuine". The Tribunal wrote to the applicant by letter dated 3 January 2007 inviting comment on this information (CB 56 to CB 60). The applicant's response is at CB 61 to CB 101, with annexures.

40. The Tribunal's reasoning is brief. It made reference to the applicant's claims, and then said (at CB 115.10 to CB 116.3):

> *"In support of his claims he has tendered documents.*
>
> *The Tribunal has considered the assessment by DFAT of the documents tendered by the applicant, and is persuaded by their detailed assessment that the documents are fraudulent. The Tribunal is strengthened on this finding by the results of the Tribunal's own investigations with regard to available information as also cited above and notes that this available information also indicates the prevalence and availability of fraudulent documents in China. The Tribunal has considered the applicant's submission with regard to the above assessment but is not persuaded by it that the documents are anything but fraudulent documents procured and submitted by the applicant to strengthen his claims for a protection visa. The Tribunal finds that the oral evidence from the person provided by phone at the hearing was insufficiently strong to provide corroboration for the applicant's claims and the weight of evidence with regard to the documents being fraudulent, leads the Tribunal to find that the applicant's claims are fabrications."*

The Minister's Submissions: The Questioning of the Tribunal

41. In relation to the questioning during the hearing of the friend of the applicant's father-in-law, the Minister makes the further submissions:

    1) That the current circumstances can be distinguished from the circumstances in *SZKTI* in that the information in that case was sought outside the Tribunal hearing. The Minister relies on *SZKCQ* at [49] and [51] to submit that the Tribunal's obligations under ss.424(2) and (3), and 424B do not apply to information

which is provided by way of evidence or argument in an oral hearing, and that s.424 "clearly operates outside the environment of the oral hearing itself".

2) In this regard, the Minister also relies on what was said in *SZMBS v Minister for Immigration and Citizenship* [2008] FMCA 847 ("*SZMBS*") at [24]-[25] per Driver FM.

3) That s.429A of the Act was a source of the power of the Tribunal to act as it did, and that section empowers the Tribunal to allow the giving of evidence by any person by telephone.

4) That the Court "might also consider" that s.426(2) of the Act authorised the Tribunal to take oral evidence from the father-in-law's friend. In this regard, the first respondent refers to T 12 to T 14, and T 16, for the submission "that the applicant wanted evidence to be taken from the friend". In support of the argument that s.426(2) of the Act supplied this authority, the first respondent refers to *SZGBI v Minister for Immigration and Citizenship* [2008] FCA 599 ("*SZGBI*") at [6]-[7], [23]-[37], and *SZMBS* at [25].

42. In all, therefore, the first respondent submits that this was not a case where s.424(2) of the Act was engaged because of any one of the "independent" reasons set out above.

Consideration: The Telephone Call

43. It is clear, given the extract of the Tribunal's decision record above (see [40]), that what the father-in-law's friend told the Tribunal was a part of the reason for the Tribunal affirming the decision under review. What DFAT told the Tribunal (based on what was advised from the overseas post) was also a part of the reason for affirming the decision under review.

44. Dealing first with the questioning of the father-in-law's friend. Based on *SZKTI*, therefore, the question for the Court in the current circumstances is whether, when the Tribunal telephoned the father-in-law's friend, it invited him to give additional information (or whether the invitation was to give evidence or argument), and whether the

Tribunal acted pursuant to s.424(2) of the Act. If so, whether the procedures set out in s.424(3) and s.424B were met. A failure to follow the procedures in ss.424(3) and 424B would be jurisdictional error (see *SZKTI* at [54]).

45. The Minister seeks to distinguish the circumstances of the current case with what was found in *SZKTI* in that the Minister submits the information in that case was sought outside of a Tribunal hearing, whereas in the current case, the information was sought during the Tribunal hearing. The Minister relies on what was said *SZKCQ* at [49] and [51], to argue, in effect, that s.424 of the Act is not engaged when such a telephone call occurs during the course of a hearing.

46. In this regard, I note that at [49] the Full Court said in *SZKCQ*:

> *"… I think there are sufficient reasons to conclude that the obligation does not apply to information which is provided by way of evidence or argument in an oral hearing."*

47. Clearly, in *SZKTI* the telephone call took place some two months after the provision of the initial letter, and did not take place during the course of the hearing, as it did in the current case. However, this simple distinction, in my view, does not provide the complete answer to this issue.

48. In *SZKCQ* the Court said that the obligation does not apply to information which is provided "by way of evidence or argument in an oral hearing". The issue therefore is whether what the father-in-law's friend told the Tribunal is either evidence or argument or neither.

49. It cannot be said that the information provided by the father-in-law's friend was provided by way of argument. In any event, with reference to the relevant statutory code (Division 4 of Part 7) the capacity to "present arguments" appears to be that of the applicant (see s.425(1) of the Act). I cannot see that the statutory code provides for anyone other than an applicant to provide such argument. (Noting also of course, specifically and relevantly, the provisions of s.276(1)(d) of the Act as they apply to a person providing immigration assistance to an applicant before the "review authority" (in context, the Tribunal.)

50. Nor, in my view, can the information provided by the father-in-law's friend to the Tribunal at the hearing be categorised as evidence taken by the Tribunal pursuant to s.427 of the Act.

51. I should also note that the first respondent's submission as to what was said at [51] of *SZKCQ* to found the argument now that there is a distinction to be drawn between telephone conversations at a hearing and telephone conversations outside a hearing, needs to be seen (with respect), in context, with what the Court was addressing at that part of its judgment.

52. The Court's focus was on dealing with one of the Minister's submissions in that case that the statutory construction favoured by the Court would require the Tribunal to commit to writing every question that it wished "to ask 'of an applicant' during an oral hearing" (see at [49]). The Court then noted the provisions of s.425(1) (at [50]), and then (at [51]) noted that amongst the powers set out at s.427 of the Act is the power to take evidence on oath or affirmation, to summon persons to appear before it to give evidence, and to require a person to appear to give evidence and to administer an oath or affirmation. That this power carries with it the power to put questions and require answers.

53. It was in that context that the Court said that that power "is not affected, much less limited, by s.424 which clearly operates outside the environment of the oral hearing itself".

54. With respect, what I understood the Court to be saying therefore is that there are essentially two ways, relevantly, that the Tribunal could obtain "information". One is to take evidence pursuant to s.427 which enables the Tribunal to put questions and require answers, and that that power is not affected or limited by s.424, which is a separate power which enables the Tribunal to invite a person to give "additional information".

55. A clear distinction is drawn between the giving of information and the giving of evidence. It is in that context that I understood the Court to be saying that s.424 operates outside the "environment" of the hearing itself. That is, that within the "environment" of the oral hearing, that is, the environment which operates for the applicant to give evidence

(s.425), or another person to do so (s.427), is to be distinguished from the different environment where a person gives information (and clearly, this may include the applicant himself) outside of giving evidence at a hearing. I understood, with respect, that given the context in which the Court gave its consideration, that the distinction was a conceptual distinction between the giving of evidence and the giving of information, and not necessarily a temporal or simply a "geographic" or locational distinction that allows anything that is given at a hearing to be categorised as evidence and, presumably, anything that is given outside of a hearing as not being evidence. Section 427 is part of the "environment" and its relevant provisions would have to be complied with such as to exclude the operation of s.424. It is in that sense that I understand s.424 to operate outside the environment of the hearing.

56. The first respondent also relies on what was found by FM Driver in *SZMBS* in distinguishing the case before his Honour from what was before the Court in *SZKTI*. In that case, his Honour found the relevant circumstances to be that evidence was taken orally at the Tribunal hearing with the prior consent of the applicant. His Honour was prepared to infer from the Tribunal's reference to taking "evidence", that notwithstanding that he provided evidence by phone, a formal procedure was followed and that the Tribunal administered an oath or affirmation pursuant to s.427(1)(a).

57. In those circumstances, his Honour relied on what was said in *SZGBI* per Middleton J where an oral request by applicants to take evidence from a particular person resulted in the Tribunal receiving written evidence after the hearing was. In those circumstances s.424(2) was not engaged. The Courts said that the Tribunal was entitled to act as it did pursuant to s.426 or its general powers where there was an informal request to receive evidence (with reference to *SZGBI* at [32]-[33]).

58. The view taken by FM Driver was that s.424, in the circumstances before him, was not engaged, and that the Tribunal obtained oral evidence with the concurrence of both the applicant and the person from whom the evidence was obtained, and that in those circumstances the Tribunal was proceeding pursuant to its general powers, and to the extent necessary, pursuant to ss.427 and 429A which authorise the

giving of evidence and that this can be done by telephone. His Honour found that there was therefore no breach of the Act.

59. In the circumstances of the case before me, I am not prepared to draw the inference drawn by his Honour that a formal procedure was followed which resulted in the taking of "evidence" from the friend by telephone. In the current case, a transcript of what occurred at the Tribunal hearing has been put before the Court. It is clear, with reference to the transcript of the hearing, that no procedure pursuant to s.427(5) was undertaken (see in particular T 15 to T 18). This can be plainly contrasted with the applicant making an affirmation pursuant to s.427(5) to give evidence (see T 2.3).

60. The Tribunal's reference to "further evidence" (CB 111.4) must therefore be seen as the use of loose language on the part of the Tribunal, given that the evidence before the Court shows that the necessary steps for the giving of evidence (which the Tribunal could have arranged) pursuant to s.427 were not followed. Remembering, of course, that s.427 of the Act is part of Division 4 of Part 7 of the Act.

61. I note in this regard, and indeed more generally for the purposes of the current consideration, the Full Court's emphasis on the Tribunal following the "code of procedure" enacted by Parliament as the exhaustive statement of the natural justice hearing rule in Division 4 of Part 7. See *SZKCQ* at [44]-[47], [51] ("significance and weight must therefore be attached to the safeguards for applicants which the procedural requirements … represent"), [55], and the reference at [56] to *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294; [2005] HCA 24 at [77] per McHugh J ("strict compliance").

62. See also *SZKTI* at [44], and the reference at [50] to *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88; [2005] HCA 72 at [16], per Gleeson CJ, Gummow, Kirby, Hayne and Hayden JJ:

> *"that principles of natural justice, or procedural fairness, 'are not concerned with the merits of a particular exercise of power but with the procedure that must be observed in its exercise'. Because principles of procedural fairness focus upon procedures rather than outcomes, it is evident that they are principles that*

govern what a decision-maker must do in the course of deciding how the particular power given to the decision-maker is to be exercised. They are to be applied to the processes by which a decision will be reached."

63. The current case can also be further distinguished from what was the situation in *SZGBI* and *SZMBS*. The first respondent posits that the Court might also consider that the Tribunal was authorised by s.426(2) to take oral evidence from the friend because the indication, it is said in the transcript at T 12-T 14 and T 16-T 19, is that the applicant wanted evidence to be taken from the friend.

64. I do not agree with this reading of the transcript. Any plain reading of the transcript reveals that the idea of ringing the friend of the father-in-law originated with the Tribunal itself (at T 10.7):

"MR WITTON: And the friend of your father-in-law, does he have a phone?

THE INTERPRETER: Yes.

MR WITTON: Could I phone him?

THE INTERPRETER: Yes."

65. It is clear that the applicant did agree to the Tribunal telephoning the friend (see T 10.8 to T 11.7), but there was clearly no request by the applicant for the Tribunal to do so.

66. Nor can it really be said that the applicant felt that the friend could be of great assistance to his case: see T 13.4:

"THE INTERPRETER: He's not very – he's not very familiar with what happened.

THE INTERPTER: [In context, the Tribunal] But he knows that you are in trouble with the authorities?

THE INTERPTER: Yes, he knew a little."

67. Nor had the applicant put forward the friend of his father-in-law as someone greatly knowledgeable about his activities in China. The issue of the friend of the father-in-law arose in circumstances where the applicant gave evidence that the friend arranged for his obtaining a

business visa to enable him to "escape from China" (T 4.3). Noting in particular (at T 4.3):

> *"THE INTERPRETER: No.*
>
> *MR WITTON: Did this friend of your father-in-law, did he know that you wanted to escape from China?*
>
> *THE INTERPTER: Yes, he knew a little.*
>
> *MR WITTON: What did he know?*
>
> *THE INTERPTER: He knew at that time now I'm wanted."*

Noting further again what was said at T 13.4. (See [65] above.)

68. The first respondent's submission that the Court might also consider that the Tribunal was authorised by s.426(2) of the Act to take oral evidence from the friend also fails in my view, with reference to s.426(2) itself. That provision clearly provides for an applicant, within seven days: "after being notified under subsection (1), give the Tribunal written notice that the applicant wants the Tribunal to obtain oral evidence from a person or persons named in the notice".

69. There is no evidence before the Court that the applicant gave any such notice in writing. I note the reference to *SZGBI* where the view was reached that s.426(2) did provide the relevant authority, even though the time limit referred to in sub-s.426(2) had expired. However, the circumstances of that case can be distinguished from what is before the Court now in that in that case the applicants had indicated that they wished the Tribunal to take evidence from two unnamed witnesses in accordance with s.426, and had done so in writing in their response to the hearing invitation (see *SZGBI* at [6]). I note further that the Court said (at [7]):

> *"[t]here is no doubt that the Tribunal at the specific request of the appellants obtained evidence from the witnesses and, as is apparent from the extracts of the Tribunal's reasons which I set out later, treated the letters as evidence before it."*

70. Critically in *SZGBI* (at [33]):

> *"In my view, there is a distinction to be drawn between the Tribunal on its own initiative inviting a person to give additional*

> *information and the Tribunal obtaining evidence at the request of an applicant. In this case, the position is clear that the appellants did in fact request that the three witnesses give evidence, and that the Tribunal made no 'invitation' to any person to actually give additional information pursuant to s 424(2). This conclusion follows in the circumstances of this case whether or not the requirements of s 426 were adhered to by the appellants, or even possibly waived by the appellants."*

(I note that in *SZKTI* specific reference was made to *SZGBI* (at [51]), and with reference to the circumstances in that case, the Full Court in *SZKTI* found that that decision was not of assistance in addressing the circumstances before it.)

71. In my view, in this regard, the circumstances currently before the Court are closer to those in *SZKTI* than those in *SZGBI* (and for that matter in *SZMBS*).

72. I understand that distinction drawn by his Honour, Middleton J in *SZGBI* is a distinction to be drawn between the circumstances of the current case and what appears to have occurred in *SZGBI*. That is, the applicants in that case clearly asked the Tribunal to obtain evidence, and that it be from certain witnesses, and did so in writing.

73. There is no evidence that this occurred in the current case. See in particular the "Response to Hearing Invitation form" completed by the applicant and reproduced at CB 45 where there is no request by the applicant for the Tribunal to obtain oral evidence from any witnesses. Nor is there any other evidence before the Court to that effect. In fact quite to the contrary. A plain reading of the transcript, as referred to above, reveals that it was the Tribunal, not the applicant, who initiated, and in some senses it must be said, insisted, on the telephone call to the father-in-law's friend.

74. I note also in particular what was said by the Full Court in *SZKTI* at [50], that the Tribunal is at liberty to choose amongst the methods provided in Division 4 of Part 7, but it is not at liberty to simply telephone a person without warning, and ask him questions. The procedures in Division 4 of Part 7 in this regard must be followed.

75. In the current case, it cannot be said that the father-in-law's friend gave evidence on oath or affirmation pursuant to s.427(5) such that it could

be said that what the friend said to the Tribunal (albeit, during the course of the hearing) can be seen to be "evidence" for the purposes of s.427.

76. In these circumstances, therefore, the fact that s.429A permits the Tribunal to take evidence by telephone does not assist the first respondent in the current case because the friend of the father-in-law did not give "evidence". As no other provision of Division 4 of Part 7 can be said to have been relevantly engaged, then the information obtained by the Tribunal from the friend did engage s.424(1). But in doing so the Tribunal did not meet its obligations pursuant to s.424(2) and 424(3). The failure to follow the procedures set out in those subsections is, as was said in *SZKTI* at [54], jurisdictional error.

77. The Tribunal's telephone calls to the friend of the father-in-law was an invitation to him to give additional information and plainly, the Tribunal's decision record reveals that what he told the Tribunal was relied on by the Tribunal as part of the making of its decision adverse to the applicant. The Tribunal found that what the friend told it was "insufficiently strong to provide corroboration for the applicant's claims".

78. The circumstances of this case also illustrate, in my view, the dangers identified by the Full Court in *SZKTI* in a Tribunal engaging in "an impromptu telephone call" (see *SZKTI* at [47]), and emphasise the need therefore for compliance with Division 4 of Part 7 as a means of ensuring procedural fairness: "… That is one reason why Div 4 of Pt 7 of the Act provides a detailed procedure for seeking such information which a person is invited to provide".

79. In this regard, I note in particular the transcript at T 15.7 (see more fully at [39] above) that when the attempt was made to first telephone the friend, some time was taken with "…Music playing…", and then what the friend in China would have heard:

> *"Yes, it's Ron Witton in the hearing room. It's okay, everything is all right, thanks. Say hello"*.

80. With respect, the words used in *SZKTI* at [47]: "an impromptu telephone call received by a person who can provide the tribunal with information could be regarded by the recipient with suspicion or

reserve", appears most apt in these circumstances. This is made very clear at T 16.3:

> *"MR WITTON: What is happening?*
>
> *THE INTERPRETER: He was afraid so he didn't pick up."*

81. The exchanges at various parts pf the transcript at T 16 only reinforce the difficulties faced in making such impromptu or "out of the blue" telephone calls. This was compounded at T 17.3:

> *"THE INTERPRETER: I can't hear. What did you say?"*

82. Ultimately, a very real issue arose as to the difficulties of such impromptu telephone calls, particularly when such calls are made to persons living in countries with authoritarian governments, is revealed at T 18.4:

> *"MR WITTON: Okay, is there anything else I can ask him?*
>
> *THE INTERPRETER: Our Chinese telephone line is under surveillance you know. Our conversation might be under surveillance you know.*
>
> *MR WITTON: Okay, all right then so there's nothing more we can talk?*
>
> *THE INTERPRETER: If you asked him something sensitive you might bring him trouble.*
>
> *MR WITTON: Yes, I can understand. Well look it was good talking to you.*
>
> *THE INTERPRETER: Okay.*
>
> *MR WITTON: And thank you very much. Do you want to give greetings?"*

83. With great respect to the Tribunal member, I cannot help but notice the casual indifference of the Tribunal to this very real problem.

Consideration: The Request to DFAT

84. In relation to the letter sent by email by the Tribunal to an officer of DFAT on 29 November 2006, the Tribunal supplied ("scanned copies")

of four documents provided by the applicant in support of his claim, and essentially asked DFAT to ascertain from the (overseas) "post" whether the documents were "genuine".

85. It would appear that the Minister's latest submissions (at [18]) concede that: "there may not have been minute compliance with all of the requirements of sections 424(3) and 424B in seeking information from the overseas officer". There is also reference to: "literal non-compliance with section 424B or section 424(3)" (at [17]). The submission appears, therefore, to focus on this being "an exceptional case" in which relief should be refused on a discretionary basis.

86. In my view, clearly, the Tribunal was seeking information that it considered to be relevant to the review and which ultimately formed a part of the reasons for affirming the decision under review. That is, that the weight of: "evidence with regard to the documents being fraudulent leads the Tribunal to find that the applicant's claims are fabrications" (CB 116.3).

87. The Tribunal's letter was sent by email (CB 51.2). It involved the obtaining of information from a place outside Australia. In my view, in all the circumstances (and I do not understand the Minister's submissions to argue against this), this was a request for information pursuant to s.424. The applicant was not in immigration detention. The invitation was given to the person in DFAT pursuant to one of the methods set out in s.441A (for the purposes of s.424(3)), that is, s.441A(5)(b).

88. In this regard, the Minister's submissions recognise (at [14]) that there "might also be an issue whether the email address used by the Tribunal to send the letter was 'provided to the Tribunal by the recipient in connection with the review'". As required by s.441A(5), the transmission in these circumstances by email, would be to, relevantly, last email address "provided to the Tribunal by the recipient in connection with the review".

89. The Minister's submission is that there is no evidence before the Court that the email address used by the Tribunal was not provided to the Tribunal by the recipient. To the extent that the submissions seek to rely on circumstances where an address might be provided by such a

person to the Tribunal for the purposes of "all reviews" then the wording in s.441A(5) does not assist this submission. It talks of the address being provided "in connection with *the* review".

90. In *SZKCQ* the Court noted (at [73]) that the Full Court judgment in *SZKTI* raises another possible question concerning the facts of the present case. This was explained at [74] as being relevant to the facts also found in *SZKCQ*, in addition, that the Tribunal in that case also sought information "through the High Commission in Islamabad" of two other witnesses. (That is, the involvement of the overseas "post".) At [75], the Court made reference to the appellant's (applicant's) supplementary submissions about *SZKTI* made to the Court in *SZKCQ* (and relevant to the current case), the Court noted that: "the discussion by the Full Court explaining why the RRT was required to act strictly in conformity with s 424 gives support to the submission.". I note, however, that for the reasons given, this issue was not pursued by the Court.

91. What clearly remains as relevant to the current circumstances is the endorsement, at the very least by what was said in *SZKCQ* of what the Court said in *SZKTI* about the need for the Tribunal to act strictly in conformity with s.424.

92. By sending the letter by email the Tribunal did engage the provisions of s.424 in seeking to obtain information. I note in this regard that s.424B(1)(a) provides that if a person is invited under s.424 to give additional information (as was the circumstance in the current case, that is, the DFAT officer was invited to give information) that: "the invitation is to specify the way in which the additional information, or the comments or the response, may be given, being the way the Tribunal considers is appropriate in the circumstances".

93. That the Tribunal was seeking "information" is made clear by paragraph 8 of the letter (CB 53.6). The letter, however, contrary to s.424B(1)(a), does not specify the way in which the information may be given. The letter is silent in this regard. That the response (see CB 54), and see also the Tribunal's letter of 3 January 2007 to the applicant (CB 56 to CB 57), would suggest that the response given by DFAT was given in writing.

94. However, this does not assist on the issue of whether the Tribunal conformed with the obligation set out in s.424B(1)(a) of the Act. The invitation "is to specify the way in which the additional information, or the comments or the response, may be given". The Tribunal's letter, (sent by email), contains no such specification.

95. I note in this regard in particular that s.424B of the Act is also part of Division 4 of Part 7 of the Act, and note again for this purpose the relevance of the reasoning of the Full Courts in *SZKTI* and *SZKCQ* of the need to follow "strictly in conformity" the procedural code.

96. Section 424B(2) of the Act provides that:

> *"If the invitation is to give additional information, or comments or a response, otherwise than at an interview, the information, or the comments or the response, are to be given within a period specified in the invitation, being a prescribed period or, if no period is prescribed, a reasonable period."*

97. Regulation 4.35 of the *Migration Regulations 1994* (Cth) ("the Regulations") provides for prescribed periods relevant to s.424B(2) of the Act. As the information sought by the Tribunal was to be provided from a place outside Australia, the relevant part of reg.4.35 is sub-reg.4.35(5). (Noting that the application for review applied to the applicant who was not a detainee.) In these circumstances, the prescribed period for the giving of the information or comments starts when the person receives the invitation, and "ends at the end of 28 days after the day on which the invitation is received".

98. In its letter, the Tribunal did provide a time within which the response was to be given ("Routine (20 working days) – response due by 4 January 2007" (CB 53.2)). It is true, as the Minister's submissions state (at [11]), that the time allowed, being 20 working days, was in the circumstances actually longer than the period of 28 days from receipt. I note that given that the letter was sent by email, that the provisions of s.441C(5) provide that the person is taken to have received the email at the end of the day on which the document is transmitted. In this case, therefore, that was 29 November 2006. The 28-day period therefore ended on 27 December 2006, which was clearly short of the time set by the Tribunal, namely 4 January 2007.

99. The difficulty for the first respondent, however, is found with reference to the wording of s.424B(2) of the Act. The response is: "… to be given within a period specified in the invitation, being a prescribed period or, if no period is prescribed, a reasonable period". The difficulty in this case is that there is a prescribed period (that specified in reg.4.35(5)) and that what is required is that that prescribed period be the period specified in the invitation. Plainly, the Tribunal did not specify in its invitation the prescribed period, but prescribed some other period which might be otherwise described as a "reasonable period". But the prescribing of a reasonable period in the invitation is only open to the Tribunal if no period is prescribed.

100. That the information received from DFAT was itself the subject of a "s.424A" invitation addressed to the applicant does not assist in showing that there was compliance with the provisions of ss.424B(1)(a) and 424B(2).

101. The Minister's submissions, again, ask the Court to note that the applicant was made aware at the Tribunal hearing that the Tribunal was going to make enquiries involving the documents he had submitted, and that "he did at least acquiesce". The submissions refer the Court to T 13 to T 14, and T 19. (See [16] of the submissions.)

102. The issue of the need to check on the documents was first raised by the Tribunal at the hearing (see T 12.4):

> *"MR WITTON: Okay, well okay because I hear your story and what you're saying and it's very hard for me to know whether you are telling the truth or not so you have given me two ways to try and get a bit of extra evidence about this. One is to speak to your – the friend of your father-in-law and I think because that's easy I will do that straight away and then I will think whether it is necessary to check the documents …"*

103. I cannot see that what is set out at T 13 to T 14 is of assistance in this regard, given that this part of the transcript shows that the focus was on ringing the father-in-law's friend and no mention is made of the documents and the need to check on them.

104. It may be, however, that applicant's acquiescence in the Tribunal obtaining further information about the documents can be gleaned from the following at T 19:

> *"MR WITTON: Yes, of course. What I will do next is I will see if we can make some secret inquiries about these documents, especially this one.*
>
> *THE INTERPTERET: Yes.*
>
> *MR WITTON: And I will ask the embassy they can have someone look at secretly, not from the government, and for them to look at it and give an opinion if it looks genuine. If they say it is genuine or it looks genuine then I think that makes it easy for me to believe you. If they cannot do it soon or if they cannot give an opinion I will think about everything that you have told me and also that you allowed me to ring this man and I will try and decide if that is enough for me to grant a protection visa. Is that clear? Okay, are you able to work at present?"*

105. That the applicant was aware that the Tribunal was going to make these enquiries does not, in my view, assist as to the issue of whether the Tribunal complied with the requirements in s.424B(1) or (2) of the Act.

106. With reference to relevant authorities, the guidance I draw from these authorities, is that the Parliament has enacted a code of procedure at Division 4 of Part 7 of the Act, which is the exhaustive statement of the natural justice hearing rule (with reference to s.422B). The Tribunal is required, in the procedures it engages in the conduct of the review, to comply, and to conform, with what is set out there. The Tribunal did not do so in at least two regards in relation to the invitation to obtain information from the person at DFAT in relation to the documents submitted to the Tribunal by the applicant.

107. This also, therefore, reveals jurisdictional error on the part of the Tribunal.

Discretion

108. The Tribunal decision is affected by jurisdictional error, therefore, in relation to both issues identified at [38] above in this regard.

109. The Minister submits that in relation to the first, that is, the telephone call, that if the Court does not accept the Minister's submissions, that relief should be denied on discretionary grounds by reason of the extent to which the applicant concurred with the course taken by the Tribunal, and the absence of any resultant unfairness. In this regard, I do not agree that the applicant concurred with the course taken by the Tribunal to the extent as submitted by the Minister. But in any event neither that, nor the absence of any resultant unfairness, in my view, would be sufficient to deny the relief sought by the applicant.

110. I say this for two reasons. The first, sufficient in itself, as the relevant authorities emphasise, the issue is not about the fairness of the outcome, but the fairness of the process. This requires strict conformity with the procedural code which Parliament has enacted as the "exhaustive statement" relevant to this review.

111. The second reason, however, is that in any event, in my view, there was a resultant unfairness. The Tribunal found that what the father-in-law's friend said via telephone was "insufficiently strong to provide corroboration for the applicant's claims". The circumstances of the making of the telephone call, as referred to variously above, and what occurred during the telephone call (the clear reticence of the father-in-law's friend given, amongst other things, the security concerns), and also noting that the applicant did not seek that the Tribunal obtain corroboration from the friend, whom he, in any event, said did not know much about his circumstances (as opposed to his reliance on the documents that he provided) all, in my view, reveal a resultant unfairness in the way the Tribunal then used what was told to it over the telephone adversely to the applicant.

112. In my view, it is not appropriate, in all the circumstances, that the applicant be denied the relief that he seeks in this regard.

113. In relation to the letter sent by email seeking additional information about the applicant's documents, the Minister submits that although there may not have been: "minute compliance with all of the requirements of sections 424(3) and 424B", that this is "an exceptional case" in which relief should be refused. The Minister relies on *SZIZO v Minister for Immigration and Citizenship* [2008] FCAFC 122

("*SZIZO*"), a case which the Minister says concerned a breach of s.441G.

114. The Minister refers to what was said in *SZIZO* said at [97]:

> *"It should be only in exceptional circumstances that a Court should refuse to issue the constitutional writs once the Court has determined that the Tribunal had failed to comply with its imperative statutory obligations to an applicant seeking the review of a decision of the delegate refusing the applicant a protection visa. If it were otherwise, and the Court were required to inquire into the extent to which the failure by the Tribunal to comply with its statutory obligations to accord an applicant a fair hearing prejudiced the applicant, the imperative obligation imposed on the Tribunal might well be blunted."*

115. I note, first, that s.441G is not part of Division 4 of Part 7 of the Act. It is in fact part of Division 7A.

116. In any event, with respect, as I understand it, when read in context, the import of what the Full Court said in *SZIZO* (while clearly making reference to "exceptional circumstances that a Court should refuse to issue" the relief sought by an applicant) was nonetheless to focus on the Tribunal's obligation in meeting its "imperative statutory obligations", and that the Court refusing relief where such obligations have been breached, or have not been met, or complied with, may well serve to "blunt" these imperative obligations imposed on the Tribunal.

117. In my view, with respect, this is far more consistent with what is set out in *SZKTI* (and endorsed in *SZKCQ*) about the need to ensure that the Tribunal complies with statutory requirements than the use the first respondent's submissions seek to make of the words used by the Court. This is particularly so in circumstances where the Parliament has said that such statutory obligations are created to the exclusion of any obligations at general law.

Conclusion

118. As the Minister submits, there may well be exceptional cases where the relief should be denied. However, I cannot see, for the reasons set out above, that this is such a case. I will therefore make the orders sought

by the applicant, and return the matter to the Tribunal for reconsideration.

Postscript

119. Prior to the Full Court handing down *SZKTI*, and subsequently, *SZKCQ* (and *SZLFX*), I had given consideration in drafting my judgment in this matter to the issues that arose by way of what was pleaded by the applicant in his application to the Court, and what arose at the hearing of this matter before the Court. In light of the above, having found jurisdictional error in two separate instances in the Tribunal's decision, it is not necessary to reproduce further that consideration. I note, however, that I could not find jurisdictional error as was said to arise from the grounds put forward by the applicant, and as pleaded.

I certify that the preceding !Syntax Error, **and** !Syntax Error, **(119) paragraphs are a true copy of the reasons for judgment of Nicholls FM**

Associate: A Douglas-Baker

Date: 28 August 2008