

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZMNP v MINISTER FOR IMMIGRATION & ANOR

[2009] FMCA 28

MIGRATION – Application to review decision of Refugee Review Tribunal – whether Tribunal failed to comply with statutory obligation to give information – where applicant informed of adverse information provided by third party but not informed that the original source of that information was alleged to be the applicant himself – whether this denied applicant opportunity to effectively respond to adverse information.

Migration Act 1958 (Cth), ss.91R(3), 424A

SZBYR & Anor v Minister for Immigration [2007] HCA 26

VEAL v Minister for Immigration [2002] 225 CLR 88

MZXBQ v Minister for Immigration [2008] FCA 319

Applicant:	SZMNP
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	SYG 1837 of 2008
Judgment of:	Raphael FM
Hearing date:	1 December 2008
Date of last submission:	1 December 2008
Delivered at:	Sydney
Delivered on:	23 January 2009

REPRESENTATION

Counsel for the Applicant: Mr J Gormly

Counsel for the First Respondent: Mr P Reynolds

Solicitors for the First Respondent: Clayton Utz

ORDERS

- (1) Application dismissed.
- (2) Applicant to pay the First Respondent's costs assessed in the sum of \$4,500.00.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 1837 of 2008

SZMNP
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The applicant is a citizen of China. He arrived in Australia on 27 October 2007 and applied to the Department of Immigration & Citizenship for a protection (Class XA) visa on 6 November 2007. On 1 February 2008, after an interview, the delegate refused to grant a protection visa and on 20 February 2008 the applicant applied for review of that decision by the Refugee Review Tribunal. The Refugee Review Tribunal held a hearing which the applicant attended with the assistance of a Mandarin interpreter on 23 April 2008. On 24 April 2008 the Tribunal wrote to the applicant inviting him to comment on or respond to information that the Tribunal considered would, subject to any comments or responses he might make, be the reason or part of the reason for affirming the decision under review. The applicant responded to the letter and then provided certain further information. The further information was taken into account by the Tribunal which, on 10 June 2008, determined to affirm the decision under review and handed that decision down on 19 June 2008.

2. The convention ground upon which the applicant claimed to be a person to whom Australia owed protection obligations was that of religion. The applicant told how that he had been a taxi driver since October 1992. In 2004 the assistant manager of the taxi company asked the applicant to drive him to a meeting and on the way the manager advised him that he was a Christian and encouraged him to believe in God. Through this introduction the applicant began to take an interest in Christianity and participate in family church groups which held activities every Friday evening from 7.00p.m. to 9.00p.m. at the manager's home. The applicant used his position as a taxi driver to introduce bible knowledge to customers. On 18 September 2006, when he was sending a bible publication to a customer, he was arrested and detained for fifteen days by the local police for propagandizing Christianity and disrupting social order. The applicant told in his protection visa application ("PVA") that after his release he was dismissed by the company and his wife became depressed. He left his home and began making a living selling baubles in a market stall in another town. Whilst in this town he got two named persons to join a church group and claimed in his PVA that they were nearly arrested several times but he avoided this. Because of a feeling that he was under a risk of being arrested he arranged to go abroad and came to Australia on 27 October 2007. Since being in Australia he has been an active participant at the West Sydney Chinese Christian Church. The applicant produced documents in support of his application from two persons connected with the West Sydney Chinese Christian Church.

3. At [CB 134] the Tribunal makes reference to a piece of information that is of critical importance in this decision:

"[31] There is on file a report from a third party essentially noting that the applicant had travelled to Australia with a tour and that a female (X) with whom he is in a relationship, had travelled with him. The information indicates that the applicant has known the female for many years and that their wedding is planned for the end of the year.

[32] There is information that female X had also absconded, that she had applied for a protection visa (on different grounds), that she has the same residential and postal address as the applicant and that she had engaged the same migration agent.

[33] *The applicant was interviewed by the Department on 6 December 2007 and during the interview, he provided the photograph located at folio 53. In the course of the interview, the applicant denied knowing the female who bears a striking resemblance to the female with whom he is in a relationship.*”

4. At the Tribunal hearing the applicant was asked whether he knew any person who was on the tour with him. He stated that he did not. The Tribunal then turned to the applicant’s claims of Christianity and he confirmed the history set out in his PVA. The Tribunal then asked the applicant about other Christian related activities in which he may have been involved and he spoke about going to family gatherings and disseminating Christian related information to customers. The Tribunal noted at [CB 135] at [40] his responses were vague and they appeared to be scripted. At [CB 135] at [41] the Tribunal noted that the applicant’s responses lacked detail and indicated to him that the lack of details and vagueness and the incoherency could raise doubts about the veracity of his claims. The Tribunal noted that the applicant claimed that he was nervous but did not give the appearance of being so. The Tribunal continued to question the applicant about his Christian activities in China and continued to remark upon the vagueness of the responses. It then turned to the circumstances of his detention. The Tribunal noted an inconsistency between his statement at hearing that he was caught giving a customer material in his car and the information provided in his PVA that he had been caught sending a publication to a customer. When the Tribunal asked the applicant when he was released and he gave a date the Tribunal noted that he had not given a date in his PVA. The Tribunal advised the applicant that it considered that the reason he had given for his detention “*propagandizing Christianity and disrupting social order*” appeared to be inconsistent with his oral evidence that he was arrested for disseminating illegal publications. The applicant advised the Tribunal that he had a warrant but the Tribunal noted that this had not been mentioned in his statement in support of his PVA.
5. The Tribunal asked the applicant when he had been dismissed from work and noted that in his response he had mentioned a date and that this date had not been mentioned in the PVA application statement. The Tribunal asked further questions about the applicant’s Christianity and made notes of further inconsistencies. The Tribunal asked the applicant the difference between the registered and

unregistered church and noted that he did not appear to know the fundamental differences between them and that this could raise serious doubts about his credibility.

“[59] The Tribunal suggested to the applicant that whilst he appears to have some knowledge about Christianity his knowledge appears to be limited which is inconsistent with his claims of being a Christian and that the limited knowledge could raise doubts about the veracity of his claims and his credibility generally. The Tribunal asked him to comment or respond. The applicant said that he admits that his knowledge is limited because one could spend their whole life on the bible and not finish.” [CB 139]

6. The Tribunal then moved on to discussions surrounding the information about the applicant travelling with another woman:

“[62] The Tribunal discussed with the applicant the photograph that he has provided to the Department (Folio 53). The Tribunal asked the applicant about the people in the photograph. He referred to Sister Li, Rev Wong, Brother Li, Sister Feng. The Tribunal asked him if he knew the woman in the middle back row and he said he does not know her, but now he recognises her. He said he recognises her because he got to know her after the photograph had been taken. The Tribunal asked him if he knew her name. He said he does not know her name. He said he does not always ask for names. The Tribunal indicated to the applicant that the Tribunal has information that he and the woman in the centre of the back row, know each other and that they have been in a relationship, that they came on the same tour, with the same group, that she had absconded, that she had lodged an application for a protection visa and that she has instructed the same migration agent. The applicant stated that he does not know the woman. He denied that he knows her or that he has ever known her or that he has ever been in a relationship with her.” [CB 139]

7. On 24 April 2008 the Tribunal sent to the applicant a letter under s.424A which is extracted at [CB 140]. The relevant parts of the letter is reproduced at [67]:

“...There is in the Departmental file a report from a third party essentially noting that you had travelled to Australia with a tour and that a female (X) with whom you are in a relationship, had travelled with you. For reasons of confidentiality and privacy, the Tribunal cannot release the name of the female. The information before the Tribunal suggests that you had known the female for many years that your wedding is planned for the end of the year. The information suggests that female (X) had also absconded, that she had applied for a protection visa (on different grounds), that she has the same residential and postal address as yourself and that she had engaged the same migration agent, Ms Weiming Qian.

This information is relevant because the above common features between your application and that of the other applicant could suggest fabrications of claims, which could raise doubts about your claims and your credibility generally.

You were interviewed by the Department on 6 December 2007 and during the interview, you provided a photograph showing you with five other people. In the course of the interview and the hearing, you denied knowing the female standing in the middle of the back row. The Tribunal notes that the female whom you denied knowing bears a striking resemblance to the female with whom it is alleged that you are in a relationship and had travelled with (i.e. female X as referred to above). The Tribunal showed you a copy of the photograph of the woman, contained in the Departmental file.

This information is relevant because your denial of knowing female X when there is information that could suggest the contrary, could raise doubts about your claims and your credibility generally ...”

The applicant responded to the Tribunal’s letter by his own letter dated 7 May 2008. The relevant parts of that letter are set out below:

“Dear Officer,

Regarding the female X in the photo, I definitely had no relationship with her at all. My friend in China found his friend to get visa for me. I did not know what he filled on the application form for visa. I told my friend that I have wife and a daughter. I went to Beijing on the day before the departure day. I just followed the group to the plane. I did not notice her on the way to Sydney as the group got more than 15 people. I only met her once on the day when the sisters and brothers in Church came to visit me at Auburn. She is there too.

On the interviewed at the Department on 6 Dec. 2007, I denied to knowing her. It is true. I did not know her, but I met her. It is true. If I did not meet her, how could we get photo together. Knowing and meeting is different. Knowing someone, I should get some information about him/her. Meeting someone means just meeting and no any information about him/her.

I did not know if she used the same address and postal address as me. But I did not live with her. I will find my friends to write letter for me to prove that I did not live with her after I came to Sydney, nor I know her in China.

Knowing her or meeting her seems not important for my claim. I was persecuted as my Christian belief. I lost job and I lived in fear. If I had peaceful life in China and have religious freedom. I won’t come to Australia and stay here. I missed Sisters and Brothers in our gathering, my wife, my daughter and my parents.” [CB 106]

8. The applicant also produced some further information prior to the handing down of the decision. This was a copy of a photograph of

himself with his wife and daughter and a marriage certificate and a letter from a friend. He said in the accompanying letter [CB 114]:

“I hope you could believe that I did not know X and met her once after I arrived in Sydney.

I was really persecuted in China. I have lovable wife and daughter. I had a taxi driver job. If I had religious freedom, I won't leave China, my family and my brothers and sisters in Christ.”

9. The letter from the friend states that he had been living at the same address as the applicant since July 2007:

“I can prove that applicant lived in the same address and moved out now. The lady in the photo is Ms X. I knew her in China. I proved that she never lived with applicant and they did not meet or know each other before they came to Sydney. Also they came from different city in H Province. Applicant is from A. The lady is from H. They could not know each other. Also applicant is much older than lady. They won't stay as loving couple.”

Finally the applicant provided the Tribunal with a copy of a baptism certificate indicating that he had been baptised at the Westmead Chinese Christian Church on 25 May 2008.

10. In the Tribunal's findings and reasons it set out in paragraphs [75 – 85] [CB 142 – 144] its views upon the applicant's testimony concerning his Christian activities in China and what had occurred to him there. The vagueness and inconsistencies previously referred to were reiterated and constituted the Tribunal's grounds for concluding that the applicant's testimony lacked credibility or veracity. In regard to the certificate of baptism the Tribunal noted that the applicant had not been baptised in China and the fact that he was baptised after the hearing raised issues about his intentions and could suggest that he had engaged in that conduct for the purposes of strengthening his application for a protection visa. The Tribunal's conclusions concerning the information that it had are contained at [CB 144]:

“[86] The applicant was interviewed by the Department on 6 December 2007 and during the interview, he provided a photograph showing the applicant with five other people. In the course of the interview and the hearing, he denied knowing the female standing in the middle of the back row. The Tribunal notes that the female whom he denied knowing bears a striking resemblance to the female with whom it is alleged that he is in a relationship and had travelled. Whilst the Tribunal may be in agreement with the applicant when in

the response to the s.424A letter, he said this issue was not relevant to his claims, this information is relevant because his denial of knowing female X when there is information that suggests the contrary, raises doubts about his claims and credibility generally. The distinction he made between knowing and meeting, whilst valid, does not explain his responses about this female. Relevantly, post-hearing, the applicant provided a letter from [friend] stating that the applicant had lived “in the same address and moved out now”, that the author of the letter had known in China the woman in the photograph, “female X” whom the applicant had not met prior to coming to Sydney, that the woman and the applicant had come from different areas in China and that they “won’t stay as loving couple”. The applicant also provided a letter reiterating his earlier advice that he did not know “female X” prior to meeting her in Sydney, a copy and translation of application/certificate of marriage and the photograph of the applicant with his wife and daughter.”

[87] There is before the Tribunal information that the applicant had travelled to Australia with a tour and that female (X) with whom he is alleged to be in a relationship, had travelled with him. The information suggests that he had known the female for many years and that his wedding is planned for the end of the year. The information suggests that female X had also absconded, that she had applied for a protection visa (on different grounds), that she has the same residential and postal address as the applicant and that she had engaged the same migration agent, Ms Weiming Qian. The Tribunal has carefully considered the applicant’s explanations that he did not know this person but finds them unconvincing. The Tribunal has also considered the letter from [friend] but given the credibility concerns and in consideration of the evidence as a whole, the Tribunal does not give the letter weight. The Tribunal is satisfied that the common features between the applications indicate fabrication of claims, raising doubts about the applicant’s claims and his credibility generally. Furthermore, this issue is one of the many concerns that the Tribunal has about this applicant.”

11. The Tribunal concluded that given the adverse credibility finding it could not accept that the applicant was a genuine Christian or any of his claims about his activities and persecution in China. The Tribunal found that it cannot be satisfied that the applicant had engaged in Christian related activities in Australia otherwise than for the purpose of strengthening his application for a protection visa and therefore disregarded that conduct pursuant to s.91R(3) of the *Migration Act 1958* (the “Act”).
12. The applicant filed an Amended Application in this court claiming that the Tribunal fell into jurisdictional error by failing to comply with the requirements of s.424A(1) and (2) of the Act:

“1. In relation to the following information:

Information that in a report (the ADS report) from the Beijing Xinhua International Tours Co. Ltd (the tour operator) that at a particular time, in a particular way, in a particular place and to particular persons the applicant gave other information (“the relationship information”) of an alleged relationship between him and a female in which the applicant had known female for many years and planned to marry her at the end of the year.

Particulars

In the ADS report the tour operator claimed that:

- Prior to the submission of the Approved Destination Status for the applicant;
 - it had contacted and spoken with the applicant;
 - by telephone on a number given by the applicant (and verified by the tour operator) registered in the 114 telephone inquiry number;
 - of his company [name];
 - which at the time (the tour operator verified) had its office in the [name] building;
 - Further, the applicant was the “legal representative” and chairman of the board of his company which exported wood materials to Japan and the US.
2. The information that the applicant was the alleged informant of the relationship information to the tour operator and the alleged circumstances of the giving of that information was known to the Tribunal and withheld from the applicant.
 3. The information undermined the applicant’s claims and was used by the Tribunal as part of the reason for affirming the decision under review in that the Tribunal used it to prefer the report’s allegations of a relationship to the testimony of the applicant that he did not know female (X).
 4. Because of this preference, the Tribunal found the applicant’s denials of a relationship raised doubts about his claims to be a persecuted Christian and about his credibility generally.
 5. Further, the Tribunal’s preference for the relationship information in the ADS report allowed it to see the alleged relationship as the basis for a commonality between the applicant’s and female (X)’s applications for protection, rather than the actions of the migration agent.

6. The Tribunal did not give clear (or any) particulars of the information and did not invite the applicant to comment on or respond to the information either orally pursuant to s 424AA or in writing pursuant to s 424A.

Orders sought by the Applicant

The applicant claims:

1. A writ of certiorari, directed to the Refugee Review Tribunal, removing into this Court to be quashed, the decision of the Tribunal made 10 June 2008 affirming the decision not to grant the applicant a protection visa;
 2. That the Tribunal's decision be quashed;
 3. A writ of prohibition restraining the first respondent from acting upon, or giving effect to, or proceeding further on the basis of the Tribunal's decision;
 4. A writ of mandamus, directed to the Tribunal, ordering that the applicant's application for review of a decision of a delegate of the respondent to refuse to grant a protection visa to the applicant be heard and determined according to law by the Tribunal differently constituted;
 5. An order that the respondents pay the applicant's costs;
 6. Such further orders the Court deems fit."
13. It is to be remembered that the Tribunal indicated in its decision (extracted at [6] of these reasons) that it had imparted the information that the applicant had left the tour group with a female person with whom he was having a relationship to him. The matter was also raised in the s.424A letter. What the applicant was saying to the court was that this was not all of the information and in particular it was not the information that the applicant himself had told the tour operator about his relationship with the female person. It is interesting, but probably not relevant, that the Tribunal did not question the applicant about the fact that the report indicated that he was not a taxi driver but the chairman of a company, the *bona fides* of which had apparently been checked through a telephone directory and a telephone call. This would have gone directly to the applicant's claims because it would be difficult for the applicant to have argued that he had a well founded fear of persecution as a result of distributing Christian tracts to customers of his taxi cab when he was not a taxi driver at all and that he had not been unemployed since August 2006 as claimed in his

PVA [CB 17] nor had he been selling baubles in a market and converted two named persons to Christianity.

14. The applicant submitted that:

“[19] At the hearing Tribunal confined itself to putting the relationship information to the applicant: transcript 28.3. The applicant denied that he knew the woman. He speculated that “a person who arranged my trip here did all this”, ie made up a story that he and the woman were getting married. The Tribunal asked the applicant what he told the person who arranged the trip. The applicant said he didn’t tell him anything. Despite that the matter was in issue the Tribunal did not inform the applicant he was the alleged source of the relationship information, nor did the Tribunal give any particulars of the circumstances of the giving of the relationship information: transcript pp28-29.”

15. In the transcript the applicant is questioned quite closely about his knowledge of the female. He eventually agreed that he recognised her from a photograph but did not know her name. He denied that he lived with the woman. At [T28] there is the following discussion between the Tribunal and the applicant:

“TM: The information I have is that both of you were on the same tour, both absconded, both applied for a protection visa. She has applied on different grounds though. You both engaged the same migration agent. These similar circumstances would raise serious doubts about your claims and credibility generally [name]. The Information I have [name] also suggests that you and this female in the photograph are a couple intending to marry.

A: I don’t know, maybe it was a person who organised my trip here did all this, I don’t know.

TM: Did what, what do you mean?

A: Arranged by him, it has to be arranged by him but I don’t know.

TM: What was arranged? I don’t understand.

A: That we are going to get married as a couple. I didn’t know it myself.

TM: Is that what you told him?

A: Who? Him who?

TM: The person who arranged your trip?

A: No.

TM: What did you tell the person who arranged your trip?

A: I didn't tell him anything?

TM: What did you say?

A: I didn't say anything but I'm only thinking if there is such things like this it has to be arranged by him.

TM: I will think about what you are saying more. The evidence before me suggests that you do know the woman.

A: No don't know her."

The applicant submits that this discussion establishes that the applicant was making a guess that the informant was the tour operator but was not given any information. The applicant says that the Tribunal relied on his alleged admission in the report about him being in a relationship with the female person to find that his denial of the relationship at the hearing raised doubts as to his veracity. It was also submitted that in relying on the information in the report the Tribunal preferred the disputed account of an alleged admission to the applicant's own testimony at the hearing and this preference for the information in the report over what it saw as the applicant's "*unconvincing*" testimony allowed it to see the alleged relationship as the basis for the commonality of features between the applicant's and the female's application for protection rather than e.g. as a result of the actions of the migration agent. The applicant submitted that because of the significance of this information s.424A obliged the Tribunal to provide the applicant with clear particulars of it including particulars as to the source of the information being his own statement to the tour operator.

16. The importance of the information that it was the applicant who told the tour operator about his relationship with the female, is that if the applicant had been told he could have provided an explanation. One readily springs to mind. The applicant could have said that he deliberately lied to the tour operator and invented the affair because he was concerned that there should be no suspicion he was trying to leave the country in order to escape persecution for his Christian beliefs.

17. The respondent points out that not all the information provided by the operator was derived solely from the applicant. The report is contained at [CB 46 – 48] and at [CB 47] it notes that “*the two guests registered to join the travelling to Australia together.*” That is information from the tour operator, not from the applicant. At [CB 48] the report states:

“The [male and female] are in relationship, sleeping on the same bed. Their wedding is planned to be held in the end of the year.”

There is no evidence that this information was provided by the applicant.

18. The ADS Report bears close examination. It is found at [CB 46 – 49]. The relevant part at [CB 47] says:

“[Applicant] told us this time he wanted to travel abroad with his lover X and disclosed that they knew each other for many years as a result of their business, their answers all kept in line with the enquiries before.”

19. The report certainly suggests that the information about the relationship came from the applicant. The Tribunal asked the applicant what he told the person who arranged the trip and the applicant said that he told the arranger nothing. That statement is an implicit denial of the allegation made in the report. It excludes the possibility that the applicant told the agent a deliberate lie in order to cover up the fact that he was escaping from China because of his religious convictions. The applicant told the Tribunal that he believed that the information which was contained in the report was all made up by the agent. A statement of that type impliedly includes an accusation that the agent had made up the source of the material. I have difficulty in accepting that the nature of the source of the material has any relevance to what the Tribunal was required to do. It was required to assess the credibility of the applicant. It told the applicant it had certain information about him which the applicant denied. It asked the applicant a relevant question about what he had told the agent and the applicant gave an answer. It was then up to the Tribunal to make an assessment. An assessment of a person’s credibility will take into account many factors, some of which may be articulated by the Tribunal and some possibly not. The assessment is

the Tribunal's job. As the majority said in *SZBYR & Anor v Minister for Immigration* [2007] HCA 26 at [20]:

“Moreover, supposing the appellants had responded to a written notice provided by the Tribunal after the hearing, if inconsistencies remained in their evidence, would s 424A then oblige the Tribunal to issue a fresh invitation to the appellants to comment on the inconsistencies revealed by – or remaining despite – the original response to the invitation to comment? If so, was the Tribunal obliged to issue new notices for so long as the appellants' testimony lacked credibility? If the appellants' desired construction of s 424A leads to such a *circulus inextricabilis*, it is a likely indication that such a construction is in error.”

20. The information which “*would be the reason or part of the reason for affirming the decision under review*” was that a report had been received indicating an alternative motive for the applicant wishing to come to Australia and the existence of that report cast doubt upon the credibility of the applicant. The existence of the report and the reason why it might be relevant in the decision making process was clearly explained to the applicant in the s.424A letter dated 24 April 2008 [CB 104]. The applicant provided a response [CB 106] and the Tribunal then exercised its powers to assess the credibility of the applicant. The Tribunal's reasons for not accepting the credibility of the applicant in relation to this particular aspect of the matter was:

“*The Tribunal is satisfied that the common features between the applications indicate fabrication of claims, raising doubts about the applicant's claims and his credibility generally. Furthermore, this issue is one of the many concerns that the Tribunal has about this applicant.*” [CB 144]

21. Whilst I am not satisfied that the matters raised by the applicant in his Amended Application constitute a jurisdictional error on the part of the Tribunal and must therefore dismiss the application I should express some concerns that I have about other material. It must be possible to argue that the Tribunal took into account or cannot be shown objectively not to have taken into account in its assessment of the applicant's credibility the whole of the ADS report and not just those parts that were the subject of the s.424A letter. This information includes the contradictory evidence about the applicant's employment as well as the additional evidence about his relationship. The respondent relied upon *VEAL v Minister for Immigration* [2002] 225 CLR 88 at [12] where their Honour said:

“It is as well to explain why that was so. As for s 424A, it is enough to notice that that provision is directed to “information that the Tribunal considers would be the reason or part of the reason, for affirming the decision that is under review”. The Tribunal said, in its reasons, that it did not act on the letter or the information it contained. That is reason enough to conclude that s 424A was not engaged.”

But in this case there was no express denial of reliance. And I note that even if there was the High Court went on to say at [18]:

“It follows that the Tribunal’s statement, that it gave no weight in reaching its decision to the letter or its contents, does not demonstrate that there was no obligation to reveal the information to the appellant and to give him an opportunity to respond to it before the Tribunal.”

22. The instant case has more in common with that considered by Heerey J in *MZXBQ v Minister for Immigration* [2008] FCA 319 where at [27-28] his Honour said:

“*SZBYR*, and in particular [17] of the majority judgment, essentially says that a court must assess the "information" in question in terms of its dispositive relevance to the Convention claims advanced by the applicant before the Tribunal. For example, let it be assumed an applicant claimed fear of persecution in a country because he was a Christian, and the Tribunal has a written statement from X that the applicant said to him he never was a Christian and had invented the claim in order to get a visa. If true, X’s statement, being "evidentiary material or documentation", would be a reason for the Tribunal’s affirming the refusal of a visa. It would "undermine" his claims to have well-founded fear of persecution by reason of religion. By contrast, a statement by Y that the applicant had worked in Australia under a false name would at best only go to the applicant’s credibility. If the Tribunal in either of these hypothetical instances had not given a s 424A notice the reviewing court would have to characterise the statements of X and Y and determine whether or not they attracted the s 424A obligation as at the time they came to the Tribunal’s attention. This assessment would not depend on the use the Tribunal subsequently made of the statements in its reasons.

Conditional clauses generally express a direct condition, indicating that the truth of the host clause is dependant on the fulfilment of the condition in the conditional clause: Greenbaum, *The Oxford English Grammar* (1996) p 340. The meaning conveyed by s 424A(1)(a) is that the Tribunal considers that if the information is true (conditional clause), it would be the reason, or a part of the reason, for affirming the decision (host clause). Ex hypothesi, the Tribunal does not know whether the information is true or not. That is the point of giving the applicant the opportunity to rebut, qualify or explain the information. That is why subsequent use made by the Tribunal in its reasons, on the basis that the information is true, is no guide to whether the Tribunal at the earlier point in time should or should not have applied s 424A.”

I note that his honour also said at [29]:

“It can also be noted that the section speaks of information that "would" be the reason etc, not "could" or "might". This is another indication that information merely going to credibility is not within the section.”

Whilst it seems to me that the actions of the Tribunal in regard to this material raise real issues they were not the subject of a ground in the amended application and were not fully argued before me. The applicant was represented and may well have had good reasons (including a better understanding of the issues than myself) for not specifically raising the matter.

23. The application is dismissed. The Applicant shall pay the First Respondent's costs which I assess in the sum of \$4,500.00.

I certify that the preceding twenty-three (23) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate:

Date: 23 January 2009