FEDERAL COURT OF AUSTRALIA

CAR15 v Minister for Immigration and Border Protection [2019] FCAFC 155

Appeal from:	*CAR15 v Minister for Immigration & Anor* [2018] FCCA 2286
File number:	VID 1465 of 2018
Judges:	**ALLSOP CJ, KENNY AND SNADEN JJ**
Date of judgment:	9 September 2019
Catchwords:	**MIGRATION** – appeal from Federal Circuit Court of Australia – judicial review of decision of the Administrative Appeals Tribunal affirming refusal to grant a protection (class XA) visa – whether tribunal committed jurisdictional error – reasonableness of relocation – whether reasonableness assessed in respect of the appellant or her parents – whether clear particulars given of information that the tribunal considered would be dispositive – whether tribunal failed to consider a material contention – appeal allowed
Legislation:	*Migration Act 1958* (Cth) Pt 7, ss 5H, 5J, 36, 417, 422B, 424A, 425, 471, 476 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) item 7 *Federal Court Rules 2011* (Cth) r 36.03
Cases cited:	*AHK16 v Minister for Immigration and Border Protection* (2018) 161 ALD 457 *Applicant S301/2003 v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 155 *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 *CRI028 v Republic of Nauru* (2018) 92 ALJR 568 *CSO15 v Minister for Immigration and Border Protection* (2018) 260 FCR 134 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 *ELX17 v Minister for Immigration and Border Protection* [2018] FCA 1372 *Hay v Minister for Home Affairs* [2018] FCAFC 149 *Lafu v Minister for Immigration and Citizenship* (2009) 112

ALD 1

M55 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 131

Minister for Home Affairs v Buadromo (2018) 362 ALR 48

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323

Minister for Immigration and Citizenship v Brar (2012) 201 FCR 240

Minister for Immigration and Citizenship v Chamnam You [2008] FCA 241

Minister for Immigration and Citizenship v SZLFX (2009) 238 CLR 507

MZZQV v Minister for Immigration and Border Protection [2015] FCA 533

NAIZ v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 37

NBHH v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1198

Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437

SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294

SZATV v Minister for Immigration (2007) 233 CLR 18

SZBYR v Minister for Immigration and Citizenship (2007 81 ALJR 1190

SZCBQ v Minister for Immigration and Multicultural Affairs [2006] FCA 1538

SZGGT v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 435

SZGPS v Minister for Immigration and Citizenship [2007] FCA 639

SZSSY v Minister for Immigration and Border Protection [2014] FCA 1144

Telstra Corporation Ltd v Australian Competition and Consumer Commission (2008) 176 FCR 153

Tickner v Chapman (1995) 57 FCR 451

Viane v Minister for Immigration and Border Protection (2018) 263 FCR 531

VUAV v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1271

VWBF v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 154 FCR 302

Date of hearing: 16 May 2019

Registry:	Victoria
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	80
Counsel for the Appellant:	Mr A Aleksov
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Solicitor for the First Respondent:	Sparke Helmore Lawyers
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice save as to costs

ORDERS

VID 1465 of 2018

BETWEEN:	**CAR15 BY HER TUTOR MZZTE** Appellant
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent
JUDGES:	**ALLSOP CJ, KENNY AND SNADEN JJ**
DATE OF ORDER:	**9 SEPTEMBER 2019**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the Federal Circuit Court of Australia dated 7 September 2018 be set aside and, in lieu thereof, it be ordered that:
   (a) a writ of certiorari be issued quashing the decision of the second respondent made on 9 September 2015 in case number 1412486;
   (b) a writ of mandamus be issued directed to the second respondent requiring it to determine the application for review of the decision made by a delegate of the first respondent on 3 July 2014 according to law; and
   (c) the first respondent pay the applicant's costs of and incidental to the application filed by or on behalf of the applicant on 7 October 2015.
3. The first respondent pay the appellant's costs of and incidental to the appeal, as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

BACKGROUND

1 The appellant was born in Australia on 14 November 2013. Her parents are both Nigerian by nationality, as is she. The appellant, then an infant, made a valid application (via her mother) under the *Migration Act 1958* (Cth) (hereafter, "**the Act**") for a protection (class XA) visa on 24 December 2013. That application came for consideration before a delegate of the first respondent (hereafter, "**the Minister**"), who, by written notice dated 3 July 2014, rejected it.

2 On 16 July 2014—again, through the agency of her mother—the appellant applied to the Refugee Review Tribunal, now the Administrative Appeals Tribunal (hereafter, "**the Tribunal**"), for a review of that decision under Pt 7 of the Act. On 9 September 2015, the Tribunal affirmed the Minister's decision not to grant the appellant a protection visa.

3 On 7 October 2015, the appellant applied (again through her mother) to the Federal Circuit Court of Australia (hereafter, the "**Federal Circuit Court**") under s 476(1) of the Act to have the Tribunal's decision set aside and re-determined according to law. That application was twice amended (in June and then August of 2018) and heard in August 2018. The appellant contended in that court that the Tribunal's decision was a product of jurisdictional error and, as such, that she was entitled to the relief claimed. On 7 September 2018, the Federal Circuit Court dismissed the appellant's application, with costs.

4 The orders of the Federal Circuit Court are the subject of the present appeal.

PROCEDURAL HISTORY

The administrative findings

5 At the time of the Tribunal's decision, the appellant was the younger of her parents' two daughters. Her mother, father and older sister had all been the subject of a similar application for protection visas. That application had already (and unsuccessfully) navigated the same process of review through which the appellant's own application had traversed.

6 Both of those protection claims—that of the appellant (on the one hand), and that of her parents and older sister (on the other)—were built upon common foundations. Central to them was the contention that the family could not safely return to Nigeria because of the presence there of a man referred to hereafter as "S". The appellant's parents, both of whom gave evidence and

other information to the Tribunal for the purposes of both applications, maintained that, prior to their arrival in Australia:

(1) S and the appellant's mother—the former a man of Islamic faith, the latter a Christian of Igbo ethnicity—had been the subject of an arranged marriage, organised or agreed to in part by the latter's father (the appellant's maternal grandfather), in the family's village homeland in the state of Abia, in southern Nigeria;

(2) the appellant's mother opposed her forced marriage to S;

(3) by reason of that opposition, the appellant's mother was subjected to appalling violence (including sexual violence) at the hands of S and his associates;

(4) in early 2008, after her father (the appellant's maternal grandfather) died, the appellant's mother fled to Lagos, where she remained in hiding from S for approximately nine months;

(5) in October or November 2008, the appellant's maternal grandmother was arrested at S's insistence and tortured until she disclosed her daughter's (the appellant's mother's) whereabouts;

(6) in November 2008, S (or his associates) located and abducted the appellant's mother;

(7) during the course of her abduction:

   (a) S told the appellant's mother that she could not run away from him, that he had connections with the "Secret Service", and that if she attempted to marry anybody other than him, he would have them and any children they fathered with her killed; and

   (b) the appellant's mother was beaten, detained (at least initially) in a room without bedding, lights or a toilet, and given only bread and water to sustain her;

(8) after spending nearly a year in S's captivity, the appellant's mother escaped back to Lagos;

(9) with the assistance of a friend, the appellant's mother secured work in Lagos as a lawyer;

(10) in June 2010, the appellant's mother met the appellant's father, who is also an Igbo Christian, albeit one who hails from the Osu sub-group or tribe;

(11) in December of that year, the appellant's father asked her mother to marry him;

(12) soon thereafter, the appellant's mother and father ventured back to her mother's home village, where they were physically beset upon by family members and others apparently unhappy that her mother proposed to marry a man who was not S and who was of Osu extraction;

(13) a month later, the appellant's father returned to his then fiancé's village by himself, apparently to seek her family's blessing of their marriage—again, he was met with violence, an event that convinced the appellant's parents to marry without her mother's family's approval;

(14) approximately one week after they were married (which occurred in August 2011), the appellant's father was kidnapped—it is unclear by whom but, in any event, he was returned eight days later;

(15) when the appellant's parents went to the police to complain about her father's kidnapping, their complaint was dismissed and they were told, instead, that they should flee the country;

(16) with the help of a friend, they fled to nearby Togo, where they stayed for approximately three months; and

(17) remaining apprehensive that S would find them in Togo, they obtained a tourist visa and, in late December 2011, flew to Australia.

7 Additionally, in her own application, the appellant claimed that, if returned to Nigeria, she faced a real prospect of being subjected to female genital mutilation (hereafter, "**FGM**").

8 By a decision dated 26 August 2013, the Tribunal affirmed a decision of the Minister's delegate to deny the appellant's parents and sister's application for protection visas. The Tribunal did not accept the evidence given by the appellant's parents about S and the threat that he posed to them and her sister. It found that S did not exist, and that the appellant's parents had concocted their story about him and about the threat that he or his men posed to them.

9 Equivalent findings were made in the present case: the Tribunal similarly found that S did not exist; and, therefore, that the appellant's mother had never been promised to him in marriage and that neither of her parents had suffered any harm at his initiative or on account of their marriage to each other, as they both had claimed. It followed, so the Tribunal concluded, that the appellant did not face a real prospect of being persecuted or subjected to significant harm by S, by anyone associated with S, by either of the appellant's parents' families or by anyone else as a result of the appellant's mother's decision to marry her (the appellant's) father.

10 The Tribunal did, however, accept that the appellant would, if returned to Nigeria, be placed at risk of significant harm in the form of FGM. FGM, it found, was prevalent in Nigeria; including amongst those of Igbo ethnicity. That notwithstanding, the Tribunal considered that the risk that the appellant would be subjected to FGM was not one that she would face throughout Nigeria and that it would be reasonable for her to relocate to Lagos, where the practice was less prevalent.

Application for judicial review

11 The appellant applied to the Federal Circuit Court for prerogative relief directed to the Tribunal's decision. She contended that it was the product of jurisdictional error. Of the several grounds advanced in that court in support of that contention, only three were incorporated into the present appeal. The others need not be adverted to.

12 The three relevant grounds were (in summary form) that the Tribunal:

(1) failed to consider the appellant's contention that, if returned to Lagos, she would be homeless;

(2) failed, contrary to the requirements of s 424A(1) of the Act, to provide the appellant with clear particulars of information that it considered would be the reason, or part of the reason, for its affirming the decision of the Minister not to grant her a protection visa; and

(3) misapplied s 36(2B)(a) of the Act by conflating the reasonableness of the appellant's relocation with the reasonableness of her parents' relocation.

13 The Minister resisted the application in the court below. The Tribunal filed a submitting appearance. The application did not succeed: the learned trial judge did not accept that the Tribunal's decision was a product of jurisdictional error.

Appeal to this court

14 The appellant did not appeal to this court within the 21-day timeframe for which, at the time, r 36.03 of the *Federal Court Rules 2011* (Cth) provided. By orders made with the parties' consent on 3 May 2019, the court granted the appellant an extension of time to lodge her notice of appeal.

15 By that document, she advances in this court the same three grounds summarised at [12] above (which, for the sake of nomenclature consistent with the notice of appeal, the parties' written

submissions and the oral argument, are hereafter and respectively referred to as "ground 1", "ground 2" and "ground 6"). The grounds of appeal before this court are, in substance, the same as the grounds upon which the appellant sought prerogative relief in the court below. Although the notice of appeal does not strictly do so in terms, the appellant contends (and the appeal proceeded on the contention) that the court below erred by not accepting the grounds that she advanced there in favour of the grant of prerogative relief. For that reason, it is not necessary to examine the Federal Circuit Court's decision in any detail.

16 For the reasons that follow, we dismiss ground 2 but uphold ground 6. Although it may well found appellable error in its own right, ground 1 is subsumed by our conclusion on ground 6. It is convenient to deal with that ground first.

GROUND 6: REASONABLENESS OF RELOCATION

17 Ground 6 of the notice of appeal reads:

> The Tribunal failed to comply with s 36(2B)(a) of the Act by conflating the issue of the reasonableness of the [appellant's] relocation with the reasonableness of her parent[s'] relocation.

18 As stated above, the error alleged is that the court below was wrong not to conclude that the Tribunal's decision was the product of jurisdictional error manifest in the conflation to which ground 6 refers.

19 Section 36 of the Act stipulates criteria that an applicant must satisfy in order to qualify for a protection visa. Subsections 2(a) and 2(aa) of that section prescribe two such criteria. The first, for which s 36(2)(a) provides, is that the applicant is a non-citizen in Australia to whom the Minister is satisfied that Australia owes certain protection obligations because the person is a refugee. The second, to which s 36(2)(aa) gives voice, is that the applicant is a non-citizen in Australia in respect of whom the Minister has substantial grounds for believing that, if removed from Australia, there is a real risk that he or she will suffer significant harm. The latter are typically referred to as **complementary protection** obligations.

20 As seen, ground 6 of the appeal is limited to the issue of relocation within the meaning of s 36(2B)(a) in the application of the complementary protection criterion in s 36(2)(aa) of the Act. For the purposes of the complementary protection criterion, "significant harm" is defined in s 36(2A) to include subjection to torture, and subjection to cruel or inhuman treatment. Section 36(2B)(a) relevantly qualifies that definition as follows:

> … there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
>
> (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm.

21 In the present case, the Tribunal accepted that the appellant, if returned to either of her parents' home villages in Nigeria, faced a real chance of subjection to FGM. That, in turn, translated to her being exposed to a real chance of relevant persecution. That persecution, it was said, would arise by reason of her membership of one or more social groupings (namely, Nigerian women and girls, Nigerian women and girls who hail from tribal groups where FGM is accepted or "the norm", and Nigerian women and girls who are of Igbo extraction). The Tribunal also accepted, on account of that potential exposure to FGM, that returning the appellant to Nigeria would place her at risk of "significant harm".

22 The Tribunal then considered whether that chance of persecution and that risk of exposure to significant harm extended throughout Nigeria or, in either case, was localised to the appellant's parents' home villages. It concluded that it was localised; or, more accurately, that it could be avoided if the appellant was taken to Lagos, where there would be "no real chance or real risk" that she would be subjected to FGM.

23 Ground 6, as outlined above, alleges that the Tribunal conflated the issue of the appellant's reasonable relocation with that of her parents'. The Tribunal erred, so it is said, by concluding that the appellant and her parents could return to Lagos without actually finding that they would. In the case of a child, it was said to be necessary for the Tribunal to have done the latter; and, by not doing that, the conflation to which ground 6 refers was exposed. The Tribunal could not, so the appellant contended, have found that she could safely and reasonably relocate to Lagos if her parents were, instead, minded to return with her to one of their home villages.

24 By her submissions to this court, the appellant contended that the Tribunal's decision was premised upon a finding that her "home" region was one or other of her parents' home villages. That phraseology is, perhaps, inapt insofar as the appellant had never been to Nigeria. Nonetheless, the Tribunal was satisfied that the appellant faced a relevant, well-founded fear of persecution and a relevant exposure to significant harm; and also that that fear and that exposure were limited to her parents' home villages. It is in that sense that the Tribunal might

be understood implicitly to have found that the appellant's "home region" was one or other of her parents' home villages.

25 The relevant parts of the Act do not speak of an applicant's "home" region; nor does the Convention relating to the Status of Refugees, to which the Act gives expression. Nonetheless, it is common in "internal flight" cases for such assessments to be made: in other words, for administrative decision makers to assess, first, whether there is a risk of significant harm or a well-founded fear of persecution that attaches to a place with which an applicant has some history; and then, if there is, to have regard to whether or not there are other places to which they are likely to return in the country of their nationality in respect of which that risk or that fear do not arise.

26 In *CRI028 v Republic of Nauru* (2018) 92 ALJR 568, the High Court (Gordon and Edelman JJ, with whom Bell J agreed) made the following relevant observations (at 575-576):

> The concept of a "home area" or a "home region" is not derived from the Refugees Convention. These terms have been used from time to time in judicial reasoning. There is nothing inherently objectionable or remarkable about their use in that context. But the sole function is as concise descriptors, which may be convenient in considering whether a person could reasonably be expected to relocate from one area in the country of their nationality to another. These terms do not displace the relevant and necessary inquiry.

27 In *CSO15 v Minister for Immigration and Border Protection* (2018) 260 FCR 134 (Tracey, Mortimer and Moshinsky JJ), a Full Court of this Court observed (at 144-145):

> The correct question is: to where will an applicant return, or be returned? Identifying a place which may have, in the past, been a person's "home area" or "home region", may assist in answering that question. But it is not, in and of itself, the answer to the question which must be asked for the statutory task to be lawfully performed. That is because under both Art 1A and the complementary protection regime, what is to be examined is the place to which a person will be returned, and what risks a person faces on return to that place. At least one location within a country of nationality must be identified for this task to be undertaken. Ascertaining a person's former "home area" or "home region" may be an important step along the way in a decision-maker's fact-finding, but it is not the end of the task.

28 As the appellant contends, the Tribunal's decision in this case proceeded upon a finding that her "home region"—or, more accurately, the place to which she would be taken if removed from Australia—was one or other of her parents' home villages. From there, the Tribunal considered whether there was another place within Nigeria where the appellant might avoid the persecution that she properly feared and the significant harm of which she was at real risk. It found that Lagos was such a place. In its written decision record, the Tribunal noted:

> [129] On the evidence before it, the Tribunal finds that the [appellant] will have a normal life with her parents in Lagos and she will grow up in a loving and caring environment. She will not face a real chance of persecution for any Convention reason…
>
> …
>
> [133] …[T]he [appellant] can relocate with her parents to Lagos…
>
> …
>
> [145] Having assessed the [appellant's] claims individually or cumulatively, the Tribunal finds that the [appellant] will be able to live a normal life with her parents in Lagos and she will not face a real chance of persecution for any Convention reason.

29 Those observations culminated in the Tribunal's conclusion (at [153]) that, "…on all the evidence before it and taking into account the individual circumstances of the [appellant], her parents and her sister…it would be reasonable for the [appellant] to reside in Lagos with her parents."

30 Without intending undue criticism, the inconsistency in the language of the passages extracted above is problematic. On the one hand, the Tribunal could be understood as finding that the appellant and her family *would*, upon their return to Nigeria, assume residence in Lagos. As much is implicit from its use of the definitive "will" in [129]. Yet the other passages—and, in particular, the Tribunal's conclusion at [153]—are expressed inconclusively: they are observations about what the Tribunal considered would be possible or achievable; not what it was satisfied would, in fact, happen.

31 The Minister contended that, on a fair reading of its decision, the Tribunal should be understood to have found that the appellant would, in fact, return to Lagos. That contention sits uneasily with, first, the observations above about what the Tribunal must be understood to have found was the appellant's "home" region (or, more precisely, the place within Nigeria to which she would be taken if removed from Australia); and, second, the aspirational language in which parts of the decision (and [153] in particular) is expressed.

32 The better view is that the Tribunal, having found that the appellant would return (or move) with her parents and sister to one of her parents' home villages (where there existed a well-founded fear of persecution for a convention reason and a relevant risk of significant harm), was nonetheless of the view that the appellant was not entitled to a protection visa because there was another place in Nigeria (namely, Lagos) where the appellant could avoid that fear and that risk, and to which the appellant *could* reasonably relocate.

33 In order that an applicant might be disqualified from complementary protection, s 36(2B)(a) requires "satisfaction" that "it would be reasonable for [a visa applicant] to relocate…" Prior to the introduction of s 5J into the Act by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), a similar criterion was part of s 36(2)(a) of the Act: see *SZATV v Minister for Immigration* (2007) 233 CLR 18, 27 (Gummow, Hayne and Crennan JJ); *AHK16 v Minister for Immigration and Border Protection* (2018) 161 ALD 457, 468 (Mortimer, Moshinsky and Thawley JJ); *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437, 442-443 (Black CJ), 452-453 (Beaumont J), 453 (Whitlam J); *MZZQV v Minister for Immigration and Border Protection* [2015] FCA 533, [42]-[43] (Barker J). Consideration of the reasonableness of relocation, in any given case, requires consideration of the practical realities for, or impact upon, an applicant of relocating to an area of a receiving country where the relevant fear or risk is absent: *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18, 25 (Gummow, Hayne and Crennan JJ); *NAIZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 37, [23] (Branson J, with whom North J agreed); *SZSSY v Minister for Immigration and Border Protection* [2014] FCA 1144, [26]-[28] (Jagot J); *ELX17 v Minister for Immigration and Border Protection* [2018] FCA 1372, [19] (Perry J).

34 If, as the appellant contends, the Tribunal concluded as it did because it assessed the reasonableness of the relocation of anybody other than the appellant, it will be shown to have misunderstood the statutory task with which it was entrusted and, thereby, to have committed jurisdictional error.

35 The appellant, as a child, had no independent agency of her own and there was nothing in any of the material before the Tribunal that recorded any contention that she might relocate to Lagos (or anywhere) without her parents. It is clear beyond doubt that the Tribunal's consideration of Lagos as a location to which the appellant *could* reasonably be expected to relocate proceeded upon the assumption that she would do so at her parents' initiative. As much is clear from (amongst other things) the Tribunal's reliance upon the evidence that each of her parents had formerly lived and worked in Lagos.

36 It is in that sense, then, that the vice of which ground 6 complains—namely, that the Tribunal conflated the reasonableness of the appellant's relocation with that of her parents'—is apparent. There were no areas within Nigeria to which the infant appellant could reasonably relocate herself in order to avoid her well-founded fear of persecution or the real risk of exposure to

significant harm that were the subject of the Tribunal's findings. Although there may be cases in which a child might be thought to possess reasonable relocation options of the kind presently under consideration, they are likely to be few and far between. This case—proceeding, as it did, on the basis that the appellant would relocate at her parents' initiative—is not one of them.

37 Having found that her return to Nigeria would engage a well-founded fear of persecution and subject the appellant to the real risk of significant harm, the Tribunal either needed to grant the application or make a finding pursuant to which it could be said that the appellant (as opposed to her parents) had or would have had open to her (as opposed to them) a reasonable opportunity to relocate to Lagos. As stated above, it is difficult, although not impossible, to conceive of circumstances in which it might be proper for the Tribunal to make the latter finding. It very likely would not have been in this case.

38 That observation highlights, with respect, the circularity inherent in the Minister's submission. If, as he contended, the Tribunal had found that the appellant would (as opposed to *could*) return with her parents to Lagos rather than to one of her parents' home villages, then there would have been no apparent basis for its conclusion that her return to Nigeria would enliven a well-founded fear of persecution or visit upon her a real risk of significant harm sufficient (in either case) to sustain her claim for protection.

39 The above observations are not to be understood as an acceptance that, in a case where a protection claim is advanced on behalf of a child, the child's parents might secure protection simply by saying, "if we are forced to leave Australia, we will take our child to a place where [he or she] will be persecuted, or where there is a real risk that significant harm might befall [him or her]". A statement to that effect, if accepted, will go a long way to sustaining a protection claim. But the Tribunal might, in the orthodox way, not accept it. There may be any number of bases upon which it might decline to do so; and upon which a decision maker might instead find that the child will more likely than not be taken to a place where an otherwise well-founded fear of persecution might be avoided, or where there is no real risk of subjection to significant harm.

40 That did not occur in the present case. Instead, the Tribunal misunderstood the state of satisfaction that it was to form under s 36(2B)(a) of the Act and, consequently, directed itself to the wrong question: namely, whether it was reasonable for the appellant's parents to relocate to Lagos with her and her sister. It proceeded to determine whether the appellant was at risk of "significant harm" for the purposes of s 36(2)(aa), without properly understanding in what

circumstances s 36(2B)(a) of the Act recognised that she might not be. In so doing, it failed properly to exercise the jurisdiction that was conferred upon it. Its decision can rightly be described as a product of jurisdictional error.

41 The Federal Circuit Court was wrong to conclude otherwise and the appeal should be allowed on account of that error.

GROUND 2: PROVISION OF CLEAR PARTICULARS

42 Given the conclusion above, it is not strictly necessary for us to consider the remaining grounds in the notice of appeal. Nonetheless, given that they were fully and skilfully argued, we propose to do so.

43 Ground 2 of the notice of appeal alleges that the Tribunal failed to satisfy, in respect of the hearing that was afforded to the appellant under s 425 of the Act, the requirements of s 424A. That failure is said to manifest in the Tribunal's having not provided "clear particulars" (or, alternatively, "clear" particulars) of information that it considered would be the reason, or a part of the reason, for affirming the decision of the Minister's delegate to refuse the appellant a protection visa.

44 The information in question consisted of the Tribunal's ruling on the application made by the appellant's parents and sister (respectively, the "**Previous Tribunal Decision**" and the "**Previous Tribunal Application**"). As stated above at [9], the Tribunal in the appellant's case made the same findings with respect to S and the threat that he posed as it did in the Previous Tribunal Decision (namely, that he did not exist and, therefore, posed no threat, neither directly nor derivatively through the appellant's parents' families).

45 The possibility that equivalent findings would be made in the appellant's case was adverted to during the appellant's hearing before the Tribunal (albeit in a manner that ground 2 challenges). The transcript of that hearing, of which evidence was led in the court below, records a lengthy exchange between the Tribunal member and the appellant's representative about the significance of the Previous Tribunal Decision. That exchange assumes some importance and it is appropriate to record it (without correction of typographical and other errors):

> MEMBER: I have carefully assessed the evidence [from the previous Tribunal hearing] for myself and I may agree with many of the previous Tribunal's findings. In particular I may not accept the claims relating to [S], including that either of you was harmed in the past, that either of you was abducted, that you had to flee Togo, that your relatives were opposed to your marriage and that you have a subjective fear of returning to Nigeria. If I do not accept these claims I may find that [S] does not exist,

and that your daughter, [the appellant], is not going to be persecuted or subjected to significant harm by [S] by anyone associated with [S] or by your family, either of your families for not marrying [S] or for getting married to each other. I may further find that [the appellant] is not going to have to hide from anybody, whether it's [S], anyone associated with [S] or your families. And I may find that you may relocate to Lagos where you will be able to look for employment and [the appellant] will be able to go to school when she is the right age and receives medical care as she needs it. Based on the evidence from the previous hearing, the previous case, I may also find that you're not credible witnesses. The information we've accepted would be a reason or part of the reason for affirming the decision of the Department in relation to [the appellant]. Do you understand, what the adverse information is do you understand why it's relevant?

REPRESENTATIVE: So you're saying that the entire decision and the assessment previously is the adverse information?

MEMBER: Yes.

REPRESENTATIVE: Rather than assessing any of it individually, they need to respond to an entire previous assessment even though we have put forward responses already to that?

…

What in particular from [the previous Tribunal member's] findings do you support in relation to her findings that they've not been credible witnesses given all of the submissions we've put in to show that those findings are not based on anything concrete? Is there anything in particular that you find they've been inconsistent on or reasons why their claims aren't credible aside from the plausibility findings which are a lot of the findings?

MEMBER: Look I think with the exception of [the previous Tribunal member's] harsh assessment of [another] witness, I do not consider that the other allegations you have made about the errors [alleged to have been made by the previous Tribunal member] are actually supported by the evidence.

REPRESENTATIVE: So do you not accept that [S] exists at all and not take on board any of the medical material, or we sort of right back to that, I'm not sure exactly what issues in particular are going to lead you to making an adverse credibility finding unless it's just [the previous Tribunal member's] opinion, a lot of the decision was her opinion. And likewise a lot of the decision was the [Minister's delegate's] opinion, so it's hard to I guess make a follow-up submission in relation to your new assessment of their credibility unless it is just a case of everything that they ever said is not credible… [I]t's hard to know exactly which issues in particular the applicants have, you think the applicants have not been credible on…

MEMBER: Well, if your view is that this is way too general and you cannot respond, I might have to go away and write a very long 424A letter outlining each individual issue that is of concern and most of them would be issue that were of concern to [the previous Tribunal member] and give you an opportunity to respond to them, but my view is that most, that things have been covered to an incredible level of detail and so -

REPRESENTATIVE: I have concern in relation to the fact that so many of the findings were based on opinion and plausibility, not actual inconsistencies and material facts, and those then affecting your ability to make your own plausibility finding because they've been previously made by a different Member is of concern. And it's

obviously something that we can't even respond to, because there is no ability for us to have it considered based on what we are saying now, by you as a fresh mind then there's no real need for us to actually respond any further, because we've put it as highly as we can…All the findings [of the previous Tribunal] in relation to plausibility are placing a value judgement on [the appellant's parents'] claims and I just I just don't see that we can then respond again to the decision if that's sort of how the adverse information is put. Because that's what we've done in preparing the applicants case at the Department in this case. And also in responding -

MEMBER: Which also begs the question though what I could do if I say that I have reviewed all the evidence, what I could do, and what would be the purpose of me writing to you and covering ground that has been covered by the previous Tribunal?

…

REPRESENTATIVE: So you're following the findings of the previous Tribunal, rather than assessing it –

MEMBER: Well, I'm following the finding of the previous Tribunal, I may follow a finding from the previous Tribunal because I may agree having looked for myself at all the evidence, not because, not because she's another Tribunal member and therefore I think that I must follow it without turning my own eye to all the evidence.

REPRESENTATIVE: But we then put in further submissions and evidence to contradict her findings, those then need to be what's responded to rather than the step before that which were her findings before that new information was submitted. So I guess my, my request would be that we clearly understand or the applicants clearly understand what um in response to what we've raised in response to those previous decisions, what concerns you then have in terms of our responses? If it's that just you don't accept them, some understanding of why so that we can respond to that, would be the only way we can actually respond to this adverse information.

MEMBER: Well my view is that, that would be probably lead to you covering ground that you have already covered but I'm, I'm, I'm, I can see the difficulty from your point of view as well. But in a sense when I look at it, its, its almost as if there has been a change of Tribunal members and it's still the same case. You would ordinarily expect that a new Tribunal member who picks up the case from a previous Tribunal member has to cover all the claims from beginning to end.

REPRESENTATIVE: But we aren't asking you to do that.

MEMBER: Based on the concerns of the previous member.

REPRESENTATIVE: We're not, I guess the applicants aren't putting forward their previous case and saying assess this and make a different decision.

MEMBER: That is exactly what is happening.

…

I'm not saying that [the previous Tribunal member] is a very experienced Member that court didn't overturn the decision, therefore I can just take copy and paste her decision into my decision and say that's it, and I don't have to turn my mind to all the claims for myself.

REPRESENTATIVE: I guess there's nothing further we can put in responding to her decision if that is the adverse information being put to us. Because that's essentially how [the appellant's] case has been run, is both a response to that previous decision

> and also of course raising the claims that relate to her as the applicant. So if that is the only adverse information, there is no further response we can put forward that hasn't been done in the submissions, and the statements to the Department and now the submission to your Tribunal and of course here at the hearing today.

46 Section 424A of the Act is relevantly in the following terms:

> (1) Subject to subsections (2A) and (3), the Tribunal must:
>
> > (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
> >
> > (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and
> >
> > (c) invite the applicant to comment on or respond to it.
>
> …
>
> (2A) The Tribunal is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 424AA.
>
> (3) This section does not apply to information:
>
> > …
> >
> > (b) that the applicant gave for the purpose of the application for review; or
> >
> > (ba) that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department…
>
> (4) A reference in this section to affirming a decision that is under review does not include a reference to the affirmation of a decision that is taken to be affirmed under subsection 426A(1F).

47 The appellant's complaint under ground 2—that is to say, the jurisdictional error that she says the lengthy transcript extract set out at [45] above exposes—is neatly summarised in the following oral submission of her counsel:

> MR ALEKSOV: But what we submit the tribunal is doing here is saying, "In those pages, you will find a lot of adverse information. I am not giving you any particulars of that information because I'm just telling you that's where you will find it, and I'm inviting you to deal with it."
>
> …
>
> MR ALEKSOV: …at that moment in time, the tribunal thought that everything in the previous decision would be a reason or part of a reason [for affirming the Minister's decision not to grant the appellant a protection visa]...

48 Section 424A of the Act is engaged when the Tribunal possesses information (other than information to which one or more of the exclusions apply) that it considers is sufficient to warrant, either by itself or in combination with other matters, an affirmation of a decision reviewable under Pt 7 of the Act. In those circumstances, the section confers upon the Tribunal an obligation to make an applicant aware of that information and to give him or her an opportunity to address it. It is an unremarkable incident of what, but for s 422B of the Act, would be the Tribunal's obligation to afford procedural fairness to a protection visa applicant in respect of whom a hearing under s 425 is convened: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 ("***SAAP***"), 320 (McHugh J). A decision that proceeds upon a failure to observe the requirements of s 424A will be judicially reviewable as a product of jurisdictional error: *SAAP*, 321-322 (McHugh J), 345-346 (Kirby J), 354-355 (Hayne J).

49 In *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 ("***SZBYR***"), the High Court (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) observed (at 1195):

> Section 424A does not require notice to be given of every matter the Tribunal might think relevant to the decision under review. Rather, the Tribunal's obligation is limited to the written provision of "particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review".
>
> …
>
> [T]he operation of s 424A(1)(a) is to be determined in advance – and independently – of the Tribunal's particular reasoning on the facts of [any given] case.

50 Section 424A is engaged in respect of information that the Tribunal considers "would"—not "could" or "might"—be the reason, or part of the reason, why a decision under review is affirmed: *Minister for Immigration and Citizenship v SZLFX* (2009) 238 CLR 507 ("***SZLFX***"), 514 (French CJ, Heydon, Crennan, Kiefel and Bell JJ). Information will not answer that description unless it serves to reject, deny or undermine an applicant's claimed entitlement to protection: *SZLFX*, 513 (French CJ, Heydon, Crennan, Kiefel and Bell JJ); *SZBYR*, 1195-1196 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

51 Subsections 424A(3)(b) and (ba) exclude from the requirements of subsection (1) information that an applicant "gave" for the purposes of his or her application (whether at first instance before the Minister or on review before the Tribunal). To be understood to have "given" information, an applicant need not provide it in some physical or direct form (for example, by means of a document or by oral representation). Information may be given by reference

incorporated into other information: *Applicant S301/2003 v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 155, [17] (Heerey, Mansfield and Emmett JJ); *SZGGT v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 435 ("***SZGGT***"), [36] (Rares J); *M55 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 131, [25] (Gray J); *VUAV v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1271, [11]-[13] (Merkel J); *NBHH v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1198, [12] (Lindgren J); *VWBF v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 154 FCR 302, 312 (Heerey J); *SZCBQ v Minister for Immigration and Multicultural Affairs* [2006] FCA 1538, [12] (Bennett J); *SZGPS v Minister for Immigration and Citizenship* [2007] FCA 639, [12]-[13] (Rares J).

52 In order to determine whether, for the purposes of ss 424A(3)(b) or (ba) of the Act, information is "given" by incorporated reference (or by "republication", to use the term that some authorities employ), it is necessary to make an objective assessment of what an applicant must be understood to have intended thereby. In *SZGGT*, Rares J observed (at [36]):

> …the question whether an applicant for review has given information for the purpose of the application within the meaning of s 424A(3)(b) when it is sought to say that he or she 'republished' something which had been provided at a different time by him or her, it is necessary to make an objective assessment as to what a reasonable person in the position of an observer of the interchange would have understood.

53 Information that, for the purposes of ss 424A(3)(b) or (ba) of the Act, is "given" to the Tribunal or the Minister need not be information that an applicant advances in support of his or her case, or upon which an applicant relies. It can equally be information that is damaging to the applicant's cause: *Minister for Immigration and Citizenship v Brar* (2012) 201 FCR 240, 259 (North, Greenwood and Besanko JJ); *Minister for Immigration and Citizenship v Chamnam You* [2008] FCA 241, [22] (Sundberg J).

54 Assuming that the Previous Tribunal Decision amounts to information of the kind to which s 424A(1) refers—itself a difficult question upon which, for reasons that will become clear, we need not decide—two questions arise for the court's consideration: first, should the appellant be understood to have "given" it to the Tribunal; and, second (assuming that the answer to the first question is "no"), did the Tribunal comply with the obligation conferred by s 424A(1) to provide "clear particulars" related to that decision?

Did the appellant give the Tribunal the previous decision?

55 The Minister maintains that, by the submissions that she made to his delegate and to the Tribunal—and, in particular, by the numerous and extensive references made throughout them to the Previous Tribunal Decision—the appellant should objectively be understood to have conveyed to the Tribunal in her own case that it should consider (and reject) that decision. In doing so, she should be understood to have given it to either or both of the Minister and the Tribunal, such that it falls within the exemptions contemplated by ss 424A(3)(b) and (ba) of the Act.

56 The appellant denies that she should be understood to have given to the Tribunal the Previous Tribunal Decision. She maintains that the references contained throughout her submissions to that decision were not included as (and ought not objectively to be read as extending) an invitation to the Tribunal to consider it; quite the opposite, she says that they were included in order to discourage (and should objectively be understood as discouraging) any reliance upon it in her own case. That being so, she maintains that she ought not to be understood to have "given" the Previous Tribunal Decision to either of the Minister or the Tribunal.

57 In order to properly assess what the appellant should be understood, objectively, to have intended by her submissions about the Previous Tribunal Decision—that is, whether they were tendered as an invitation to consider it or as an insistence that it should not be considered—it is necessary first to identify what she said.

58 In support of her application for a protection visa, the appellant submitted to the Minister (or, more specifically, to his delegate) two statutory declarations: one from each of her parents, each made on 26 May 2014. Her mother's statutory declaration states, as a matter preliminary to the bulk of its content, that she:

> …stand[s] by all previous claims made during [her] Protection visa application and confirm[s] that [her] daughter [the appellant] is also at risk due to those claims.
>
> …[and that she]…will respond to [her] Refugee Review Tribunal decision and explain why the DIBP should substitute a more favourable decision [and] will also outline additional information explaining why [her] daughter, specifically, is at risk of serious harm in Nigeria.

59 The declaration then continues, under the heading, "Summary of procedural history", as follows:

> I arrived in Australia on 26 December 2011. I applied for protection on 27 February 2012. The Department of Immigration and Border Protection (DIBP) refused to grant me and my family Protection visas and so we applied to the Refugee Review Tribunal

> (RRT) in September 2012. We were unsuccessfully [*sic*] at the RRT. Despite the findings of the RRT Member in her decision, I maintain that my protection visa claims are true and that myself and my family, including the [appellant], face a real risk of serious harm if we are forced to return to Nigeria.

60 There is then, under the heading, "Response to RRT process and decision" a comprehensive rebuttal of the findings that the Tribunal made in the Previous Tribunal Decision. That rebuttal extends across nearly eight pages, throughout which the appellant's mother is at pains to explain why the findings in the Previous Tribunal Decision about her and her husband's credibility ought not to be followed or repeated. Amongst other things, she states:

> I think the [previous Tribunal] Member had problems in understanding my accent and so she repeatedly asked me the same questions and then concluded that I was not telling [the] truth.
>
> …
>
> [The previous Tribunal member's] misunderstanding during the hearing has [led] me to the conclusion that she was biased against me and did not conduct the hearing with a free mind.
>
> …
>
> [T]he [previous Tribunal member] either did not read any of my previous statements or my husband's previous statements or was trying to decide this matter on a previously held view. I feel that the [previous Tribunal member] never liked me and my family and was trying everything within her power to deny us protection.
>
> …
>
> [T]he [previous T]ribunal hearing was not conducted fairly and the [previous Tribunal member] did not make a fair decision. I maintain my claims for protection and maintain the fact that myself and my family will be killed if we return to Nigeria.
>
> …
>
> I have provided a number of health and mental health reports throughout my Protection visa application. What was it going to take for the [previous Tribunal member] to believe that something so traumatic must have happened to me to cause me to change so much as a person from who I once was to who I am now? [The previous Tribunal member] did not place adequate weight on this medical evidence, or she doesn't believe the Australian qualified medical practitioners who have given me a clinical diagnosis. Either way, she did not make a correct finding regarding my mental health and the cause for my mental deterioration.
>
> …
>
> [The previous Tribunal member] had already made up her mind not to consider the application properly and just to follow the DIBP decision.
>
> …
>
> [The previous Tribunal member] misinterpreted or misunderstood our evidence so many times. Her decision should not be followed.

61 The appellant's father's statutory declaration contains similar (albeit less voluminous) criticisms. His declaration commences with the same preliminary observations as did the appellant's mother's (above, [58]-[59]). It then continues as follows:

> During the Refugee Review Tribunal (RRT) process I had serious concerns about the way the decision maker handled our case and ultimately believe that she did not make a fair decision and did not make a decision with an open mind.
>
> …
>
> The [previous Tribunal member] wasn't fair.
>
> …
>
> [The previous Tribunal member] had such a high expectation of the level of detail she required for things that I cannot remember everything little detail about [*sic*].

62 Under the hearing, "Errors in the RRT decision relating to my evidence", the appellant's father set out some respects in which he challenged the Tribunal member's findings about his evidence in the Previous Tribunal Decision.

63 On 30 June 2014, the appellant's representative provided to the Minister (via his delegate) written submissions in support of her protection visa application. Paragraph 1.2 of that document reads as follows:

> We have set out below an outline of the [appellant's] claims to refugee status and the procedural history of her family's application. [The appellant] was born after her family's application for review by the Refugee Review Tribunal. We have set out a summary of the findings of the Refugee Review Tribunal, both favourable and adverse, in respect of the [appellant's] family. We have included relevant new country information, further claims specific to [the appellant] and a detailed response to the Tribunal's decision.

64 Those submissions later set out a very detailed assessment of the findings contained within the Previous Tribunal Decision, including those relating to the appellant's parents' credibility. The submissions conclude:

> We submit, in conclusion, that the delegate and the Tribunal were wrong to refuse her family's claim of protection, and that [the appellant] has a valid claim for refugee status and that any credibility issues in relation to the two key witnesses in her claim, [the appellant's father] and [the appellant's mother] should be assessed afresh by the current decision maker. As outlined above, it is essential that this assessment includes a thorough examination of the DIBP interview and RRT hearing audio from [the appellant's father] and [the appellant's mother]'s application in order to ensure any adverse credibility assessment made by a previous decision maker is not relied upon without full and proper reassessment. Failure to assess the case in this way would constitute failure to afford the [appellant] procedural fairness.

65 In addition to the statutory declarations and written submissions, the appellant provided to the Minister's delegate a copy of the written submissions that her parents and sister advanced in support of the Previous Tribunal Application.

66 On 16 July 2015—after the Minister's delegate refused the appellant's application and the appellant applied to the Tribunal for its review—the appellant provided an additional written submission (dated 15 July 2015) directly to the Tribunal. That document contained a table that outlined the appellant's responses to findings contained in the Previous Tribunal Decision. That table accounts for 15 of the document's 66 pages.

67 The written submission of 15 July 2015 culminates in the conclusion, "…that the Delegate and the [previous] Tribunal were wrong to refuse the [appellant's] family's claim of protection in the first instance, and that the [appellant] has a valid claim for protection in her own right". It also states that the appellant "[sought] to rely on" submissions "…relating to the family dated 21 May 2012, 15 January 2013 and 10 May 2013". Assuming that the reference to them in the submission of 15 July 2015 accurately describes those other submissions, each pre-dated the appellant's initial claim for protection and must, one presumes, have related to the Previous Tribunal Application. It is not apparent that the Tribunal was provided with those submissions. We do not assume that it was.

68 Pursuant to s 425 of the Act, the appellant was afforded a hearing before the Tribunal. That occurred on Wednesday, 29 July 2015. Later that day, the appellant's representative provided to the Tribunal a copy of a request that her parents made under s 417 of the Act requesting the Minister's intervention in the Previous Tribunal Application. That request, dated 31 March 2014, challenged the Previous Tribunal Decision. Amongst other things, the request states:

> This family has been the subject of unduly harsh assessments of their credibility at both DIBP and Tribunal level. The matters relied upon to impeach their credibility are capable of benign explanation and, had proper refugee decision making protocols been followed they would, and should, have been given the "benefit of the doubt" as is required by law.
>
> …
>
> In light of this overly critical, illogical process applied by the Tribunal in this family's case, it is submitted that the Minister should substitute a more favourable [decision].

69 On 25 August 2015, the appellant provided a further written submission to the Tribunal. Amongst other things, it states:

> [T]here are no substantial consistency issues in the [appellant's] parent[s'] evidence provided in support of their own Pro[t]ection visa application or this current review application. Most of the previous credibility concerns are born out of findings that the [appellant's] parent[s'] claims are not plausible. Many of the findings of the previous Tribunal Member and the two Delegates of the Department of Immigration and [B]order Protection…were based on opinion about plausibility, not actual inconsistencies in material facts.

70 Given the scale of the appellant's challenge to the Previous Tribunal Decision, and the comprehensive and global manner in which it was pursued, it is unrealistic to interpret the appellant's evidence and submissions to the Minister and the Tribunal (as extracted above) as anything other than an indication that the earlier decision should be considered and rejected. The appellant (through the agency of her parents and representative) was alive to the likelihood—if not the inevitability—that the Tribunal would have regard to the Previous Tribunal Decision. Rather than stand idly by as that happened, the appellant chose instead to pre-emptively attack it: to say, from the outset, that what the Tribunal decided vis-à-vis her parents and sister was wrong and should have no bearing upon her own application.

71 Strategically, that choice was both open and attractive. But a consequence of it is that the appellant must objectively be understood to have been extending to the Tribunal an invitation to consider (and not follow) the Previous Tribunal Decision. In that sense, we consider that that decision was information that she gave to both of the Minister and the Tribunal, and was, therefore, within the contemplation of each of ss 424A(3)(b) and (ba).

72 Assuming that it amounted to information that "…would be the reason, or a part of the reason, for affirming" the Minister's decision to decline the appellant's protection visa application, it did not enliven any of the obligations for which s 424A(1) provides. Whether it did so amount is, itself, a question open to debate; but, in light of what is said above, we need not express a view about that. Whatever might have been the information (if any) in respect of which clear particulars could have been given, its source was the Previous Tribunal Decision, which the appellant "gave" to both of the Minister and Tribunal.

Did the Tribunal comply with the obligation to provide "clear particulars"?

73 Given the conclusion above, it is not necessary to venture into whether or not the Tribunal provided clear particulars of any information contained within (or comprising of) the Previous Tribunal Decision.

Conclusion—no failure to comply with s 424A

74 It follows that there was no failure by the Tribunal in this case to observe the requirements of s 424A of the Act and its decision cannot, for that reason, be impugned as the product of jurisdictional error.

GROUND 1—FAILURE TO CONSIDER HOMELESSNESS

75 Ground 1 alleges that the Tribunal "…failed to consider an objection to relocation, being that the [appellant] would be homeless if returned to Lagos".

76 It is beyond dispute that the appellant contended that relocation to Lagos was not reasonably open to her because, if she went there, she would be homeless. That contention was sufficiently material that the Tribunal was obliged to consider it: *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389, 394 (Gummow and Callinan JJ, with whom Hayne J agreed); *NAIZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 37, [22] (Branson J, with whom North J agreed; RD Nicholson J dissenting); *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531, 537-538 (Rangiah J, with whom Reeves J agreed), 546-547 (Colvin J); *Hay v Minister for Home Affairs* [2018] FCAFC 149, [13] (Colvin J, with whom White and Moshinsky JJ agreed); *Minister for Home Affairs v Buadromo* (2018) 362 ALR 48, 58 (Besanko, Barker and Bromwich JJ). Doing so did not require that it record, in explicit terms, a finding one way or the other about whether or not the appellant would be homeless if returned to Lagos; but it did require that the Tribunal undertake an "active intellectual process directed at that claim": *Tickner v Chapman* (1995) 57 FCR 451, 462 (Black CJ), 476-477 (Burchett J), 495-496 (Kiefel J); *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352, 364 (Griffiths, White and Bromwich JJ); *Lafu v Minister for Immigration and Citizenship* (2009) 112 ALD 1, 7 (Lindgren, Rares and Foster JJ); *Telstra Corporation Ltd v Australian Competition and Consumer Commission* (2008) 176 FCR 153, 181-182 (Rares J). A conclusion that the Tribunal has not engaged in an active intellectual process vis-à-vis a contention advanced before it is one that this court will not lightly make: *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352, 364 (Griffiths, White and Bromwich JJ).

77 Whether the Tribunal engaged in an active intellectual process with respect to the appellant's homelessness claim is open to debate. The Tribunal, in its reasons, recounted the appellant's mother's submission that, if the family were to return (or, in the children's case, relocate) to Lagos, they would "have no house or employment". Its reasons adverted, if summarily, to the

appellant's claim that she "faces a real chance of persecution or real risk of significant harm in relation to…housing". It did not otherwise refer to the appellant's contention that relocation to Lagos was not reasonably available to her because she would be homeless there.

78 By its failure to explicitly refer to it in its decision, the Tribunal might be understood to have overlooked the appellant's homelessness claim: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 346 (McHugh, Gummow and Hayne JJ). Whether or not that is so is not easily determined. The Tribunal quite clearly *did* consider the future that would await the appellant were she to relocate to Lagos. It found that:

(1) her parents would be able to gain employment in Lagos, having previously lived there and being familiar with the city;

(2) that being so, it would not follow that the family would "become destitute" if they relocated to Lagos; and

(3) the appellant would lead a normal life in Lagos with her parents, and would grow up in a loving and caring environment there.

79 Whether that amounts to the Tribunal's having undertaken an active intellectual process with respect to the appellant's homelessness contention need not be answered. As is explained above, the Tribunal did not find that the appellant would be returned to Lagos. For reasons already outlined, it was not open to the Tribunal to find that it was reasonable for her to relocate anywhere. It is, then, not necessary that we should express a view on whether the Tribunal correctly assessed a point upon which the application before it did not properly turn.

CONCLUSIONS

80 For the reasons stated, we would allow the appeal. The orders of the Federal Circuit Court shall be set aside and, in their place, there shall issue writs of certiorari and mandamus respectively quashing the Tribunal's decision and requiring the Tribunal to determine the application made on the appellant's behalf according to law. We would also order that the Minister pay the appellant's costs, both in this court and below.

I certify that the preceding eighty (80) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop, Justice Kenny and Justice Snaden.

Associate:

Dated: 6 September 2019