FEDERAL COURT OF AUSTRALIA

SZLPO v Minister for Immigration and Citizenship [2009] FCAFC 51

MIGRATION – Refugee Review Tribunal – whether Tribunal made jurisdictional error by inviting a person to give Tribunal additional information under s 424(2) of *Migration Act 1958* (Cth) (the Act) without complying with s 424(3)'s requirement that the invitation be given in writing by one of the methods specified in s 441A of the Act – meaning of "additional information" in s 424(2) – circumstances in which s 424(2) is activated.

Migration Act 1958 (Cth) ss 424, 424A, 424B, 424C, 441A
Migration Regulations 1994 (Cth) regs 4.35, 5.02

Muin v Refugee Review Tribunal (2002) 190 ALR 601 followed
SZKCQ v Minister for Immigration and Citizenship (2008) 170 FCR 236 distinguished
SZKTI v Minister for Immigration and Citizenship (2008) 168 FCR 256 distinguished
Win v Minister for Immigration and Multicultural Affairs [2000] FCA 1363 discussed

SZLPO v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
NSD 1227 of 2008

SZLQH v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
NSD 970 of 2008

SZLPP v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
NSD 1486 of 2008

LINDGREN, STONE AND BENNETT JJ
SYDNEY
1 MAY 2009

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1227 of 2008**

BETWEEN:	**SZLPO** **Applicant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**LINDGREN, STONE AND BENNETT JJ**
DATE OF ORDER:	**1 MAY 2009**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the first respondent's costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 970 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZLQH** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGES:	**LINDGREN, STONE AND BENNETT JJ**
DATE OF ORDER:	**1 MAY 2009**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

THE COURT NOTES THAT:

2. There is no order for costs on the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1486 of 2008**

BETWEEN:	**SZLPP** **Applicant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGES:	**LINDGREN, STONE AND BENNETT JJ**
DATE OF ORDER:	**1 MAY 2009**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the first respondent's costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA **NSD 1227 of 2008**
NEW SOUTH WALES DISTRICT REGISTRY

BETWEEN: **SZLPO**
Applicant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

IN THE FEDERAL COURT OF AUSTRALIA **NSD 970 of 2008**
NEW SOUTH WALES DISTRICT REGISTRY

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZLQH**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

IN THE FEDERAL COURT OF AUSTRALIA **NSD 1486 of 2008**
NEW SOUTH WALES DISTRICT REGISTRY

BETWEEN: **SZLPP**
Applicant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **LINDGREN, STONE AND BENNETT JJ**
DATE: **1 MAY 2009**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

INTRODUCTION

1 These reasons for judgment relate to three proceedings: one in the appellate jurisdiction of the Court and two in the original jurisdiction of the Court.

2 The proceeding in the appellate jurisdiction is NSD 970/2008, in which SZLQH, who was represented on the hearing by Mr M Gibian, is the appellant. The appeal is from the Federal Magistrates Court of Australia. The appeal came on for hearing before Lander J on 20 August 2008. At the conclusion of the hearing his Honour indicated that he considered it appropriate that the appellate jurisdiction of the Court in relation to the appeal be exercised by a Full Court and he adjourned the hearing of the appeal. That jurisdiction is to be exercised by a Full Court: see *Federal Court of Australia Act 1976* (Cth) s 25(1AA)(b).

3 The Federal Magistrates Court transferred to this Court the other two proceedings; NSD 1227 of 2008 in which Mr C Mantziaris appeared for the applicant SZLPO, and NSD 1486 of 2008 in which Mr D Nagle appeared for the applicant SZLPP. In those proceedings, the Chief Justice ordered, pursuant to s 20(1A) of the *Federal Court of Australia Act 1976* (Cth) that the original jurisdiction of the Court be exercised by a Full Court.

4 In all three proceedings, Mr A Robertson SC with Mr S Lloyd SC appeared for the first respondent, Minister for Immigration and Citizenship (Minister), while the second respondent, Refugee Review Tribunal (Tribunal) filed a submitting appearance.

5 In each case the Tribunal had affirmed a decision of the delegate of the Minister not to grant a Protection (Class XA) visa to the applicant or appellant, as the case may be.

6 In the case of SZLPO (NSD 1227 of 2008), the delegate decided to refuse to grant the visa on 20 April 2007, and the Tribunal's decision affirming that decision was signed on 20 September 2007 and handed down on 11 October 2007. On 6 November 2007 SZLPO

applied to the Federal Magistrates Court of Australia for review of the Tribunal's decision. On 24 July 2008 Federal Magistrate Raphael ordered that the proceeding be transferred to this Court.

7 In the case of SZLQH (NSD 970 of 2008), the delegate decided to refuse to grant the visa on 11 September 2007, and the Tribunal affirmed that decision on 24 October 2007. On 25 June 2008, SZLQH's application to the Federal Magistrates Court of Australia for review of the Tribunal's decision was dismissed, and SZLQH was ordered to pay the Minister's costs. On 30 June 2008 SZLQH filed a notice of appeal to this Court.

8 In the case of SZLPP (NSD 1486 of 2008) the delegate decided to refuse to grant the visa on 25 July 2007 and the Tribunal affirmed that decision on 25 September 2007. On 7 November 2007, SZLPP applied to the Federal Magistrates Court for review of the Tribunal's decision. On 12 September 2008 Federal Magistrate Barnes ordered that SZLPP's application for review be transferred to this Court.

9 In various ways the three proceedings concern obligations that the *Migration Act 1958* (Cth) (the Act) imposes on the Tribunal in relation to the obtaining of information relevant to its review of the delegates' decisions.

10 The three proceedings raise one or more questions concerning the proper construction of s 424 of the Act, in particular, in the light of two previous decisions of Full Courts of this Court concerning that section: *SZKTI v Minister for Immigration and Citizenship* (2008) 168 FCR 256 (*SZKTI*) and *SZKCQ v Minister for Immigration and Citizenship* (2008) 170 FCR 236 (*SZKCQ*).

LEGISLATION

11 Part 8 of the Act is headed "Judicial review". For present purposes, unless they were affected by jurisdictional error, all three decisions of the Tribunal are "privative clause decisions" as defined in s 474(2) of the Act with the consequence that they are final and conclusive and neither the Federal Magistrates Court nor this Court has jurisdiction to entertain a challenge to them: see s 474(1) of the Act and *Plaintiff S157/2002 v*

Commonwealth of Australia (2003) 211 CLR 476. The question is whether they were affected by jurisdictional error.

12 Each decision of the delegate to refuse to grant a protection visa was an "RRT-reviewable decision": s 411(1)(c) of the Act.

13 Part 7 contains various provisions that are relevant, or potentially relevant, to the ways in which the Tribunal is to become informed in the conduct of a review.

14 First, s 414 provides that the Tribunal must review an RRT-reviewable decision if a valid application for review of the decision is made under s 412 and the Minister has not issued a conclusive certificate under s 411(3) in relation to it. It was not disputed that the Tribunal was required to review the present three decisions. The obligation to "review" may itself imply a power to get information, subject to any other relevant provisions of the Act.

15 Second, s 415(1) provides that the Tribunal may, for the purposes of the review of an RRT-reviewable decision, exercise all the powers and discretions that are conferred by the Act on the person who made the decision. In these three proceedings, that person was the Minister, acting through the respective delegates. Section 56 of the Act provides:

> (1) In considering an application for a visa, the Minister may, if he or she wants to, get any information that he or she considers relevant but, if the Minister gets such information, the Minister must have regard to that information in making the decision whether to grant or refuse the visa.
>
> (2) Without limiting subsection (1), the Minister may invite, orally or in writing, the applicant for a visa to give additional information in a specified way.

Again, the possibility must be considered that this power was available to the Tribunal, but it will have to be asked whether provisions within Pt 7, in particular s 424, exclude that possibility.

16 Third, s 418(3) within Div 2 of Pt 7 requires the Secretary to the Department of Immigration and Citizenship to give the Registrar of the Tribunal all documents within the Secretary's possession or control that the Secretary considers to be relevant to the review of the decision. Accordingly, the Tribunal will become seized of the information that is contained in those documents.

17 Fourth, s 425(1) requires the Tribunal, subject to certain exceptions, to invite the applicant to appear before the Tribunal to give evidence and present arguments. The Tribunal will acquire the information contained in the evidence given by an applicant who appears before the Tribunal pursuant to such an invitation.

18 Fifth, s 427 gives the Tribunal coercive powers to get information. Section 427(1)(d) empowers the Tribunal to require the Secretary to the Department to arrange for the making of an investigation or a medical examination, and to report on it to the Tribunal. Section 427(3) empowers the Tribunal to summon a person to appear before it to give evidence on oath or affirmation or to produce documents to it. Again, the Tribunal will acquire the information contained in such a report, such evidence or such documents.

19 Sixth, and finally, there are the provisions contained in ss 423, 424, 424A and 424B. They, and s 441A, which is referred to in ss 424 and 424A, were at the times relevant to SZLPO as follows (there were amendments to the Act by the times relevant to SZLQH and SZLPP but the amendments are not of present significance):

> **423 Documents to be given to the Refugee Review Tribunal**
> (1) An applicant for review by the Tribunal may give the Registrar:
> (a) a statutory declaration in relation to any matter of fact that the applicant wishes the Tribunal to consider; and
> (b) written arguments relating to the issues arising in relation to the decision under review.
> (2) The Secretary may give the Registrar written argument relating to the issues arising in relation to the decision under review.
>
> **424 Tribunal may seek additional information**
> (1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.
> (2) Without limiting subsection (1), the Tribunal may invite a person to give additional information.
> (3) The invitation must be given to the person:
> (a) except where paragraph (b) applies--by one of the methods specified in section 441A; or
> (b) if the person is in immigration detention--by a method prescribed for the purposes of giving documents to such a person.
>
> **424A Information and invitation given in writing by Tribunal**
> (1) Subject to subsection (3), the Tribunal must:
> (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the

reason, for affirming the decision that is under review; and

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

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

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

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

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

(3) This section does not apply to information:

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

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

(c) that is non-disclosable information.

424B Requirements for written invitation etc.

(1) If a person is:

(a) invited under section 424 to give additional information; or

(b) invited under section 424A to comment on or respond to information;

the invitation is to specify the way in which the additional information, or the comments or the response, may be given, being the way the Tribunal considers is appropriate in the circumstances.

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

(3) If the invitation is to give information, or comments or a response, at an interview, the interview is to take place:

(a) at the place specified in the invitation; and

(b) at a time specified in the invitation, being a time within a prescribed period or, if no period is prescribed, a reasonable period.

(4) …

(5) …

441A Methods by which Tribunal gives documents to a person other than the Secretary

Coverage of section

(1) For the purposes of provisions of this Part or the regulations that:

(a) require or permit the Tribunal to give a document to a person (the recipient); and

(b) state that the Tribunal must do so by one of the methods specified in this section;

the methods are as follows.

Giving by hand

(2) One method consists of a member, the Registrar or an officer of the Tribunal, or a person authorised in writing by the Registrar, handing the document to

the recipient.

Handing to a person at last residential or business address

(3) Another method consists of a member, the Registrar or an officer of the Tribunal, or a person authorised in writing by the Registrar, handing the document to another person who:

(a) is at the last residential or business address provided to the Tribunal by the recipient in connection with the review; and

(b) appears to live there (in the case of a residential address) or work there (in the case of a business address); and

(c) appears to be at least 16 years of age.

Dispatch by prepaid post or by other prepaid means

(4) Another method consists of a member, the Registrar or an officer of the Tribunal, dating the document, and then dispatching it:

(a) within 3 working days (in the place of dispatch) of the date of the document; and

(b) by prepaid post or by other prepaid means; and

(c) to:

(i) the last address for service provided to the Tribunal by the recipient in connection with the review; or

(ii) the last residential or business address provided to the Tribunal by the recipient in connection with the review.

Transmission by fax, email or other electronic means

(5) Another method consists of a member, the Registrar or an officer of the Tribunal, transmitting the document by:

(a) fax; or

(b) email; or

(c) other electronic means;

to the last fax number, email address or other electronic address, as the case may be, provided to the Tribunal by the recipient in connection with the review.

It will be noted that the terms of s 424(1) and (2) are identical, *mutatis mutandis*, to those of s 56(1) and (2) set out at [15] above, with the qualification that the method by which the Minister is to invite a visa applicant to give additional information under s 56 is "in a specified way", whereas the method by which the Tribunal is to invite a person to give additional information under s 424(2) is a method specified in s 424(3).

20 There are two regulations that need to be noted. First, reg 5.02 of the *Migration Regulations 1994* (Cth) (Regulations) provides:

> For the purposes of the Act and these Regulations, a document to be served on a person in immigration detention may be served by giving it to the person himself or herself, or to another person authorised by him or her to receive documents on his or her behalf.

21 Second, reg 4.35 provides:

> (1) This regulation applies, for subsection 424B (2) of the Act, if a person is invited to give additional information, or to comment on information, other than at an interview.
>
> (2) If:
>
> (a) the invitation relates to an application for review of a decision that applies to a detainee; and
>
> (b) the information or comment to which the invitation relates is to be provided from a place in Australia;
>
> the prescribed period for giving the information or comments starts when the person receives the invitation and ends at the end of 7 days after the day on which the invitation is received.
>
> (3) If:
>
> (a) the invitation relates to an application for review of a decision that does not apply to a detainee; and
>
> (b) the information or comment to which the invitation relates is to be provided from a place in Australia;
>
> the prescribed period for giving the information or comments starts when the person receives the invitation and ends at the end of 14 days after the day on which the invitation is received.
>
> (4) If:
>
> (a) the invitation relates to an application for review of a decision that applies to a detainee; and
>
> (b) the information or comment to which the invitation relates "is to be provided from" a place that is not in Australia;
>
> the prescribed period for giving the information or comments starts when the person receives the invitation and ends at the end of 28 days after the day on which the invitation is received.
>
> (5) If:
>
> (a) the invitation relates to an application for review of a decision that applies to a person who is not a detainee; and
>
> (b) the information or comment to which the invitation relates is to be provided from a place that is not in Australia;
>
> the prescribed period for giving the information or comments starts when the person receives the invitation and ends at the end of 28 days after the day on which the invitation is received.
>
> (6) A response to the invitation is taken to be given to the Tribunal when a registry of the Tribunal receives the response.

1. APPLICATION BY SZLPO (NSD 1227 OF 2008) – FACTS AND ISSUES

22 Conforming to the sequence in which the proceedings were addressed on the hearing, we will outline the facts and issues, first, in SZLPO's application (NSD 1227 of 2008), then in SZLQH's appeal (NSD 970 of 2008), and finally in SZLPP's application (NSD 1486 of 2008).

23 The Tribunal found that SZLPO was a citizen of Bangladesh. He arrived in Australia on 8 February 2007 and applied to the Department of Immigration and Citizenship

(Department) for a Protection (Class XA) visa on 26 March 2007. On 11 July 2007 SZLPO attended a hearing before the Tribunal on its review of the delegate's decision to refuse to grant the visa.

24 SZLPO claimed to be a member of the Ahmadiyya faith and to have been persecuted by Sunni Muslims in Bangladesh. Prior to the hearing he provided to the Tribunal a letter written on a letterhead that read: "Ahmadiyya Muslim Jamaat, Krora, Bangladesh". It purported to be signed by the President of that organisation, whose name was printed as "Md Asaduzzaman Bhuyan". The letter was addressed "To Whom It May Concern", was dated 15 April 2005, and stated, relevantly, in relation to SZLPO:

> He is a regular member of Ahmadiyya Muslim jamaat Krora Bangladesh. He was president of shreemongol upazilla Ahmadiyya Muslim Jamaat. His conduct and character is excellent is personali [sic] known to me.

We will call this letter "the letter of introduction". At the hearing, SZLPO said that he was happy for the Tribunal to make inquiries about his faith.

25 Following the hearing, on 12 July 2007 the Tribunal emailed a request to the Department of Foreign Affairs and Trade (DFAT) stating in relation to SZLPO, relevantly:

> The applicant is a citizen of Bangladesh and claims to be member of the Ahmadiyya faith. The Tribunal has asked for the applicant's permission to confirm his Ahmadi identity by conducting enquiries with the office of the National Ameer of the Ahmadiyya Muslim Jamaat of Bangladesh via the Ahmadiyya Muslim Association of Australian [sic] (AMAA). The applicant is unwilling to release his details to the AMAA but has given permission for the Tribunal to have DFAT make direct contact with the office of the National Ameer of the Ahmadiyya Muslim Jamaat of Bangladesh.

26 Under the heading "Questions", the Tribunal's email stated:

> 6. The RRT would be grateful for a response to the following question(s) (if possible, please also detail the nature of the sources consulted in forming this response).
>
> A. Please contact the office of the National Ameer of the Ahmadiyya Muslim Jamaat of Bangladesh to verify the authenticity of the applicant's letter and his claim to be a member of the Ahmadi community.

27 Later on the same day (12 July 2007) DFAT in Canberra forwarded a copy of the Tribunal's request to its Post in Dhaka stating:

> Please contact the office of the National Ameer of the Ahmadiyya Muslim Jamaat of Bangladesh to verify the authenticity of the applicant's letter and his claim to be a member of the Ahmadi community.

It will be noted that DFAT, Canberra, was passing on, *verbatim*, the Tribunal's request.

28 As appears below,

- at some time between 13 and 31 July 2007, one or more officers of the DFAT Post in Dhaka met with the National Ameer at his office in Dhaka;
- the National Ameer made his own enquiries referred to below; and
- on 31 July 2007 the National Ameer sent a letter to the DFAT Post in Dhaka reporting the result of his enquiries.

29 The DFAT Post in Dhaka reported on the National Ameer's response to DFAT in Canberra on 1 August 2007 as follows:

> Post contacted the office of the National Ameer of the Ahmadiyya Muslim Jamaat of Bangladesh in Dhaka. We received the following response on 31 July 2007 from the office in writing:
>
> Text Begins
> On receipt of your query on the captioned subject, we have investigated the case and came to the conclusion as under:
> **A.** The letter of introduction submitted **is false** and **not signed** by Mr. Asaduzzaman Bhuiyan, President, Ahmadiyya Muslim Jama'at, Krora.
> **B.** The applicant is **not a member** of Ahmadiyya Muslim Jama'at.
>
> **Sources**
> 1. Direct consultation with Mr. Asaduzzaman Bhuiyan, President, AMJ, Krora, who confirmed that he did not sign such letter and he never had such "Letter Pad".
> 2. Investigation from the nearby Jama'at of the applicant's birth place Sreemangal, Moulvibazar.
> 3. Our records.
> [Emphasis in original]

30 After DFAT in Canberra forwarded a copy of this advice to the Tribunal, the Tribunal wrote to SZLPO's representative on 2 August 2007 conveying the information it had received from DFAT and inviting SZLPO to comment in writing. The Tribunal's letter was clearly framed by reference to the terms of s 424A of the Act. We will refer to the letter as the "424A letter".

31 On 16 August 2007, SZLPO responded to the 424A letter at some length.

32 On 5 September 2007 (the copy in the Application Book says 2008, but this is clearly an error of transcription), the Tribunal advised DFAT in Canberra that "[as] a result of recent court decisions and in preparation for another matter before the courts the Tribunal requires further advice regarding this contact". The Tribunal asked the Post in Dhaka how it had contacted the office of the National Ameer, adding "(eg. Direct meeting, telephone conversations, written correspondence)".

33 On 9 September 2007 (the copy in the Application Book says 2008, but this is clearly an error of transcription), the response from DFAT in Canberra to the Tribunal was that the Post in Dhaka had advised that it had "met with the National Ameer of Ahmadiyya Muslim Jamaat of Bangladesh at his office in Dhaka".

34 In the light of these facts, SZLPO submits that the Tribunal's decision was affected by jurisdictional error because the Tribunal had, for the purposes of s 424(2) "invite[d] a person [the National Ameer] to give additional information" with the consequence that s 424(3) required the Tribunal's invitation to be given to the National Ameer by one of the methods specified in s 441A and to conform to reg 4.35 of the Regulations. A meeting by an officer or officers of the DFAT Post in Dhaka with the National Ameer in his office was not one of the methods specified in s 441A, and therefore did not satisfy s 424(3).

35 The grounds stated in SZLPO's second amended application for judicial review of the Tribunal's decision can be summarised as follows:

(1) the Tribunal failed to comply with ss 424 and 424B of the Act by inviting the National Ameer to give additional information to the Tribunal otherwise than by one of the methods specified in s 441A of the Act and reg 4.35 of the Regulations; and

(2) the Tribunal failed to comply with s 424A(1) of the Act by failing to give SZLPO adequate particulars of the information provided to the Tribunal by DFAT on 2 August 2007, advising that the letter of introduction was false and was not signed by the President of Ahmadiyya Muslim Jamaat, and that SZLPO was not a member of Ahmadiyya Muslim Jamaat.

The second ground, therefore, is that the 424A letter did not satisfy the requirements of s 424A.

2. APPEAL BY SZLQH (NSD 970 OF 2008) – FACTS AND ISSUES

36 The Tribunal was satisfied that SZLQH was a citizen of Pakistan. He arrived in Australia on 28 June 2007 and applied to the Department for a Protection (Class XA) visa on 24 July 2007.

37 SZLQH appeared before the Tribunal on 3 October 2007 to give evidence and present arguments.

38 SZLQH claimed that he was from the North West Frontier Province in Pakistan and feared that he would be persecuted by Islamic extremists if he were to return to Pakistan. He claimed that they viewed him as a political opponent who did not follow Islamic law in an appropriate manner. He claimed that he fled Pakistan after his brother was killed by members of a fundamentalist Islamic group which supported the establishment of an Islamic state in Pakistan.

39 On the hearing, SZLQH produced two documents to the Tribunal. It was the sequelae to that production that gave rise to the proceeding in the Federal Court Magistrates Court.

40 The first document purported to be a facsimile copy of the certificate of the death of SZLQH's brother. The Tribunal expressed surprise that it was in English, but SZLQH claimed that this was normal. The Tribunal pointed out that while the document was dated 12 September 2007, the date stamp on the facsimile was 2 July 2007. The Tribunal member told SZLQH that this anomaly might indicate that the document was "fabricated". SZLQH insisted that he had received the document at the Villawood Immigration Detention Centre (Detention Centre) only three days prior to the hearing.

41 According to its reasons for decision, the Tribunal told SZLQH that "if he had any more information or evidence that the death certificate was a genuine document, the Tribunal would consider it if it was received prior to the handing down of the decision which would not be before 28 days" (at 6).

42 The second document that SZLQH handed to the Tribunal was a facsimile copy of a "reference" from Biroom Khan of the Nazim Union Council in Charbagh, Pakistan, dated 1 August 2007 stating that SZLQH was being sought by terrorists. The Tribunal noted that the

date stamp on the facsimile was 1 July 2007, which was one month earlier than the date of the statement. The Tribunal undertook to make enquiries of the Detention Centre to see if there was a difficulty with the date stamp on its facsimiles. The Tribunal noted, however, that as SZLQH had not been detained there until 5 July 2007, it did not seem possible that he could have received a facsimile there four days earlier (on 1 July 2007). According to the Tribunal's reasons for decision, the management at the Detention Centre subsequently advised the Tribunal that the Detention Centre had not experienced any problem with its fax machine in July 2007 except in relation to the time, not the date. The Tribunal noted that it made no adverse finding in relation to "this conundrum".

43 On 23 October 2007 the Tribunal received a further statement from SZLQH which the Tribunal summarised in its reasons as follows:

> There are many Islamic political groups in Pakistan comprised of terrorists in the mask of Islam. These people can convince the uneducated to join them or kidnap those who don't and wage war against the USA and even Pakistan. There is an extensive underground network of these people and they are impossible to locate. I don't like them or their activities and could be a victim and forced to work for them and do the wrong thing for them if I am kidnapped by them.
>
> Songs, music and videos are prohibited in Islam and for this reason they burn my shop in the market and killed my brother. I ran away to save my life. Even Benazir Bhutto is not safe from these Muslim terrorist groups. They tried to kill her because they don't like women to rule as it is forbidden in Islam.
>
> If these people can kill so many for a small reason it will be very easy for them to kill me or at least kidnap me for selling videos.

44 The Tribunal stated that it took this statement into account in the formulation of its findings and reasons.

45 The Tribunal did not accept SZLQH as a witness of truth.

46 As noted earlier, the Tribunal's decision was made and a copy of it and of the Tribunal's reasons was dispatched to SZLQH's solicitors on 24 October 2007. That date was less than the 28 day period referred to by the Tribunal at the hearing on 3 October 2007 (see [41] above).

47 SZLQH's application to the Federal Magistrates Court was filed on 14 November 2007. SZLQH was not represented at the hearing before the Federal Magistrate. SZLQH relied on three grounds, only the third of which is presently relevant. As recorded by the Federal Magistrate, this was that the Tribunal had denied SZLQH natural justice. His Honour stated (at [9]):

> Finally, the applicant says that the Tribunal deprived him of natural justice. This application was one to which the provisions of s 422B and s 424AA of the Act apply. Thus, the scope of the natural justice hearing rule was restricted as set out. There can be no doubt that the applicant was properly invited to a hearing, that during that hearing the matters of concern were put to him, in particular, the Tribunal's concern about his credibility. The Tribunal offered the applicant the opportunity to seek extra time to comment on or respond to any information that the Tribunal discussed with him at the hearing. He was asked if he wished for a short adjournment so that he could contact his adviser and seek advice as to how he should proceed. The applicant did not require either of these favours. There are no particulars of the lack of natural justice provided to the applicant and in their absence I am unable to see where the claim originates.

Section 424AA was inserted into the Act by the *Migration Amendment (Review Provisions) Act 2007* (No 100, 2007) which commenced on 29 June 2007.

48 In his amended notice of appeal to this Court, SZLQH stated as his grounds of appeal that the Federal Magistrate erred in failing to find jurisdictional error in that the Tribunal:

> 1. … failed to comply with the requirements of section 424 of the *Migration Act* 1958 (together with section 424B and regulation 5.02).
>
> Particulars
>
> (a) The Tribunal's invitation made orally to the applicant in the course of the hearing on 3 October 2007 to provide further information that his brother's death certificate was a genuine document did not comply with the requirements of sections 424(2) and (3) and 424B of the Act and regulation 5.02 of the Regulations.
>
> (b) The Tribunal's invitation to the management of the Villawood Immigration Detention Centre made by an officer of the Tribunal by telephone to provide further information in relation to the operation of the Centre's facsimile machine during July 2007 did not comply with the requirements of sections 424(2) and (3) and 424B of the Act and regulation 5.02 of the Regulations.
>
> 2. … failed to comply with the requirements of regulation 4.35(4) of the *Migration Regulations* 1994 and sections 424 and 424B and further, or in the alternative, breached sections 414 and 425 of the Act.
>
> Particulars

(a) Whilst the invitation made by the Tribunal to the applicant to provide further information that his brother's death certificate was a genuine document indicated that information was to be provided within 28 days, the Tribunal proceeded to make and hand down its decision prior to the expiry of that period, namely, on 24 October 2007.

We set out reg 5.02 at [20] above.

3. APPLICATION BY SZLPP (NSD 1486 OF 2008) – FACTS AND ISSUES

49 The Tribunal accepted that SZLPP was a citizen of the People's Republic of China (PRC). He arrived in Australia on 21 April 2007 and applied to the Department for a Protection (Class XA) visa on 18 May 2007.

50 SZLPP applied to the Tribunal on 21 August 2007 for review of the delegate's refusal to grant the visa and attended a hearing before the Tribunal on 25 September 2007.

51 SZLPP claimed that he was a member of Falun Gong and had practised for many years.

52 At the hearing before the Tribunal, SZLPP claimed that he had been arrested, detained at a police station for two months and in a detention centre for five months, beaten, required to report each week to the police, subjected to surveillance by a neighbourhood committee and discriminated against when he sought employment, all on account of his being a Falun Gong practitioner. He said that he gave up practising Falun Gong and had not resumed the practice in Australia.

53 Prior to the hearing before the Tribunal, a Tribunal officer emailed the Department ("NSW OP-RRT Liaison Unit") on 29 August 2007 advising that the presiding member had requested SZLPP's original visitor visa application (not the Protection visa application) and a copy of the results of his health examination, if SZLPP had submitted those results as he had been requested to do by the Department in a letter of 31 May 2007.

54 A Departmental officer, "Antoinette Casie-Chitty", replied on 6 September 2007 advising that the documents had already been sent to the Tribunal on 4 September 2007.

55 Later on 6 September 2007, the Tribunal officer emailed this reply:

> "Thanks again, Antoinette, I received the copy of the case dump this afternoon. However, can I confirm in relation to the second part of the request that [SZLPP has not] submitted the results of his health examination yet?

56 On 12 September 2007 Ms Casie-Chitty emailed an officer of DFAT thanking that officer for the case dump and communicating the Tribunal's request for the results of the health examination. On the same day that officer of DFAT replied:

> As mentioned previously were unable to located the requested file. The medical reports were attached to this file and as such we also cannot locate them.

57 Apparently that response was then forwarded to the Tribunal.

58 It is convenient to set out the last three paragraphs of the "Claims and Evidence" part and the first three paragraphs of the "Findings and Reasons" part of the Tribunal's reasons for decision:

> I asked the applicant a number of questions about Falun Gong practice and beliefs. He was not able to answer one correctly. One concept, which is described in Falun Gong literature as the "top priority" of the practitioner, was entirely unfamiliar to him. He was unable to name the first exercise. He did not know how many exercises there were.
>
> The applicant said that he just practiced Falun Gong as an exercise and he saw it as a type of Kung Fu.
>
> I also put to the applicant information received by the Tribunal from the Australian Consulate General in Guangzhou about his employment prior to coming to Australia and the ostensible purpose of his visit. It conflicted with his written and oral claims and he did not accept the accuracy of the information.
>
> FINDINGS AND REASONS
>
> I accept that the applicant is a citizen of China.
>
> I do not accept the rest of his claims. I will ignore the discrepancies between the applicant's written and oral claims. I will also ignore the discrepancies between the claims the applicant made with respect to his employment prior to coming to Australia and what the Tribunal learned from the Consulate General. The reason is that there is a much more fundamental reason for not accepting the applicant's claims in their entirety.
>
> The applicant's lack of knowledge about Falun Gong is so comprehensive that I do not accept that he was ever a practitioner. To compare it to Kung Fu is bizarre. For this reason only, therefore, I do not accept that he went to Beijing for any purpose

> related to Falun Gong or that he was arrested, there or in Hebei, for reason of his practice of Falun Gong. I do not accept that he was beaten or in any other way mistreated for this reason.

59 In his second amended application, SZLPP relied on the following grounds:

> 1. The Tribunal acted without and in excess of jurisdiction because it made findings that were unsupported by any probative material or, in the alternative, were irrational, illogical and not based on findings of fact supported by logical grounds and failed to have regard to relevant considerations.
>
> **Particulars**
> (a) The Tribunal speculated that the practices of Kung Fu and Falun Gong were in no way related and that "to compare it [Falun gong] to kung fu is bizarre".
>
> 2. …
>
> 3. The Tribunal acted without and in excess of jurisdiction in failing to comply with ss 424, 424B and 441A of the *Migration Act* 1958.
>
> **Particulars**
> (a) The invitation to provide information given by the second respondent to a person within the Department of Immigration and Citizenship on 29 August 2007 and 6 September 2007 did not specify the following:
> (i) the method by which the information was to be provided;
> (ii) the time within which the information was to be provided.

Ground 1 is referable to the passage from the Tribunal's Findings and Reasons set out at [58] above. Ground 3 is referable to the Tribunal's emailed requests of the Department referred to at [53] and [55] above.

SZKTI and ***SZKCQ***

60 In *SZKTI* the Tribunal conducted a hearing in October 2006 at which SZKTI gave evidence. Three months later, in January 2007, the Tribunal invited him to provide additional information under s 424(2). SZKTI provided to the Tribunal a letter from two elders of his local church in Sydney which gave a mobile telephone number of one of them, Mr Cheah. Two months later, in early April 2007, the Tribunal telephoned Mr Cheah on his mobile telephone and questioned him about SZKTI, thereby obtaining information additional to that in the letter that Mr Cheah had signed. The Tribunal relied on that additional information in deciding to affirm a decision of the Minister's delegate to refuse the applicant a protection visa.

61 The Court described the "critical issue" as being "whether the tribunal could simply telephone Mr Cheah and ask him questions without having followed the procedures in ss 424(2), (3) and 424B of the Act" (at [35]).

62 It will be noted that the Tribunal's invitation was extended to Mr Cheah outside (several months after) the hearing. It will also be noted that the Tribunal already had in its possession information from Mr Cheah prior to its telephone call. If, as the Minister contends before us, the expression "additional information" in s 424(2) bears the meaning "information additional to information previously given by the person invited", the circumstances in *SZKTI* satisfied that meaning of the expression.

63 At [43], the Full Court stated:

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

64 At [46]-[49], the Full Court identified policy purposes served by ss 424(2) and (3) and 424B. It contrasted the safeguards inherent in a written invitation with the risks associated with an invitation made by an impromptu telephone call.

65 The Full Court held (at [54]) that the Tribunal's failure to follow the procedures required by s 424(2) and (3) and 424B was a jurisdictional error.

66 In *SZKCQ*, s 424 was considered by a differently constituted Full Court. In that case the Tribunal asked SZKCQ at the hearing to obtain from Pakistan "confirmation from leading party officials who knew him of his standing and situation" (at [12], [29]), and allowed him

four weeks in which to do so (at [12]). Twenty-eight days later, two documents were faxed to the Tribunal, one purporting to be a letter from a Mr Abbas, and the other purporting to be a document written by a Mr Khalid.

67 The two documents were referred to the Australian High Commission in Islamabad which was requested, first, to confirm their authenticity and to establish the identity of the authors; second, to investigate whether the authors had suffered as a result of their work for the relevant political party and if so to advise details of their claims; and third, to provide information from the authors "as to how exactly the applicant suffered as a result of his work for the party" (at [15]).

68 The High Commission responded by communicating the answers apparently given to it by Mr Abbas and Mr Khalid to these three questions. The Tribunal wrote to SZKCQ setting out verbatim the High Commission's response and allowing him a limited period in which to comment. The Tribunal's letter did not advise him of the terms of the questions that the Tribunal had asked the Commission to put to Mr Abbas and Mr Khalid. In particular, he was not told that those two men were to be asked "how exactly the applicant suffered as a result of his work for the party" (at [19]). SZKCQ was told only that the letters had been referred "for authentication and comment" (at [17]).

69 In his response, SZKCQ asserted that both Mr Abbas and Mr Khalid knew him and he requested an opportunity to provide further evidence.

70 The Tribunal affirmed the delegate's decision. In its reasons for decision it remarked that in his letter Mr Khalid had not mentioned that SZKCQ had been gaoled for his political activities – a claim that he had made. The Tribunal member concluded that SZKCQ had exaggerated his role and the harassment he had suffered.

71 SZKCQ applied unsuccessfully to the Federal Magistrates Court of Australia for judicial review of the Tribunal's decision. He was unrepresented before that Court.

72 In a Full Court of this Court, Buchanan J delivered reasons for judgment in favour of allowing the appeal. Stone and Tracey JJ (at [5]) agreed in this result because of the Tribunal's non-compliance with s 424A(1)(b) of the Act. Their Honours also agreed with

Buchanan J that the Court should depart from the Full Court decision in *SZKTI* only if it thought that that decision was plainly wrong. They expressed the view (at [6]) that it was not plainly wrong and that the construction of s 424 in *SZKTI* was correct.

73 At [29] Buchanan J summarised SZKCQ's contentions, excluding those relating to one ground that he was not permitted to raise for the first time on the appeal (see below). His Honour's summary of the ground of present relevance was as follows: (at [29]):

> (c) The RRT's request to the appellant to provide "confirmation from leading party officials who knew him of his standing and situation" was an invitation within the meaning of s 424(2) of the Act and was required to be provided to him in writing"

74 At [41] Buchanan J referred to the elements that must be present for the engagement of s 424(2), namely, an invitation; to a person; to give information; which is additional information. His Honour said (at [41]) that there was no doubt that all four elements were present so that s 424(2) was engaged and the Tribunal was required to give the invitation in writing.

75 Buchanan J rejected (at [43]) the Minister's submission that the purpose of s 424(2) and (3) is only to permit the Tribunal to proceed to make a decision (if the invited person fails to respond within the time specified) without taking any further step to obtain the information sought (see ss 424C(1), 425(2)(c), (3)). His Honour did not accept that it remained open to the Tribunal to make a "less formal" request for the same information from the same person under s 424(1). Buchanan J could not see why, as the Minister contended, the s 424(1) route would provide a less speedy procedure. His Honour considered that the intention of s 424(2) was to provide some formality when the Tribunal intends to seek additional information from an identified person, which might include the applicant or members of his family. He saw no room for any election by the Tribunal to do so informally under s 424(1).

76 His Honour referred to extracts from the Explanatory Memorandum to the *Migration Legislation Amendment Bill (No 1) 1998* and a copy of the Hansard Record of the Second Reading Speech on that Bill made by the then Minister, Mr Ruddock, in the House of Representatives. That Bill proposed to replace the then existing ss 424 and 425 with new ss 424, 424A, 424B and 424C, as well as a new s 425. The Explanatory Memorandum

referred to the provisions as a "code of procedure" which the Tribunal would be required to follow in conducting its review, and to the new ss 424 and 424A as ensuring that invitations were sent in a way that provided evidence of the date of dispatch.

77 The Minister's Second Reading Speech noted that "[t]he bill … includes certain safeguards for applicants by introducing a code of procedure …".

78 Buchanan J expressed the view (at [48]) that these indications, admittedly "somewhat general", far from supporting the Minister's argument, tended against it.

79 His Honour agreed (at [49]) that it would be "troubling" if, as submitted, the effect of his construction was that the Tribunal was obliged "to commit to writing every question which it wished to ask of an applicant (or presumably anybody else) during an oral hearing conducted in connection with a review". However, Buchanan J explained, by reference to ss 425(1) and 427 of the Act, why his construction did not have that effect. He opined that s 424 operated outside the environment of the oral hearing itself (at [51]).

80 We note, however, that the invitation to SZKCQ was in fact given to him by the Tribunal **at the hearing**. It was an invitation for him to obtain **after the hearing** additional information of a particular kind from persons not then identified but falling within a certain general description. Since the appeal succeeded (see below) we think that his Honour must have been distinguishing between that situation and the eliciting of the information at the hearing itself.

81 For reasons that his Honour gave (at [52]-[58]) but which we need not discuss, Buchanan J thought that a failure by the Tribunal to comply with ss 424(2), (3) and 424B, like a failure by it to comply with s 424A (cf *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294), constituted jurisdictional error.

82 In the result, the Full Court's conclusion was that the Tribunal's decision must be set aside.

83 It remains to note that the ground that was not allowed to be argued in *SZKCQ* concerned the obtaining of information from Messrs Abbas and Khalid through the High

Commission in Islamabad. At [74]-[75], Buchanan J expressed the view that the discussion in *SZKTI* as to why the Tribunal was required to act strictly in conformity with s 424 lent some support to the proposition that s 424(2) was engaged in relation to the "additional information" that had been sought from Messrs Abbas and Khalid.

THE RELEVANCE OF *SZKTI* AND *SZKCQ*

84 It is important to note again that the Minister disavows any attempt to persuade us that either *SZKTI* or *SZKCQ* is plainly wrong, and does not ask us to decide inconsistently with either of those cases. We therefore do not consider the question whether the decision in either of them is clearly wrong. We note, in passing, that the High Court granted the Minister special leave to appeal from the decision in *SZKTI* on 14 November 2008: *Minister for Immigration and Citizenship v SZLFX*; *Minister for Immigration and Citizenship v SZKTI* [2008] HCA Trans 389.

85 *SZKTI* and *SZKCQ* establish that:

(1) s 424 is **a** source of the Tribunal's power to get information (subs (1)) and is **the** source of the Tribunal's power to get "additional information" that falls within the meaning of that expression in s 424(2) (subs (2)), other sources for the getting of information having been noted by us at [13]-[19] above;

(2) where there is an invitation from the Tribunal to give "additional information" within the meaning of s 424(2), s 424(3) makes it mandatory for that invitation to be conveyed by a document given to the invitee by one of the methods specified in s 441A;

(3) failure to comply with s 424(3), where it applies, is jurisdictional error;

(4) unless it is provided in the course of the hearing, information will be "additional information" within s 424(2) at least if it is additional to information previously given by the particular invitee to the Tribunal.

The fourth proposition above leaves to be resolved by us the question whether information can be "additional information" within s 424(2) if it is additional to information obtained by the Tribunal from sources other than the invitee.

GENERAL ISSUES RAISED

86 The present proceedings raise the following four general issues which it is useful to discuss at the outset:

(1) Is information "additional information" within s 424(2) only where it is additional to information previously provided to the Tribunal by the invitee?

(2) Does the word "person" in s 424(2) mean only a natural person?

(3) Is the word "person" in s 424(2) limited by reference to a person whose identity is known at the time of the extending of the invitation?

(4) Is a document "information" and therefore "additional information" within s 424(2)?

87 These questions are not resolved by *SZKTI* or *SZKCQ*.

(1) Is information "additional information" within s 424(2) only where it is additional to information previously provided to the Tribunal by the invitee?

88 Contending that the answer to this question is "yes", the Minister submits as follows (para 63):

> The Minister contends that this construction of s 424(2) is to be preferred (on the present assumption that *SZKTI* is correctly decided). If this were not the construction, the ability of the Tribunal to obtain information from persons who had not provided addresses for the purpose of the particular review (which would include most persons) would be strictly limited. It is clear that, if a Tribunal member attends a library and finds information itself, be it country information or otherwise, it has no obligations under s 424(3). If the Tribunal member calls a library to ask it to send a book, it is not an invitation under s 424(2) because a document is being requested (…). If a Tribunal member calls a library or government agency to ask for information not pertaining to a particular review but just about a country, s 424(2) is likewise not engaged. It is also not engaged when a Tribunal contacts a library, agency or body that it has had no previous contact with in relation to a particular review because it is not seeking *additional* information from that person. It may be observed that, in such a case, the Tribunal will not have been provided with an address of and by that library, agency or body "in connection with the review", which would mean that the Tribunal would be unable to send a written invitation either by post, fax, email or even leaving it by hand at a business address (ss 441A(3)-(5)). In such a case, the Tribunal would be limited to giving the invitation by hand to the person (s 441A(2)). Given that such bodies will often be outside Australia and may not even be physical persons capable of being personally served, it is very unlikely that Parliament had in mind that this would be required. If s 424(2) is limited to persons who had previously given information to the Tribunal, the Tribunal is in a position to have obtained an address from the person that could be used if additional information is sought.

89 Subsection 424(2) presupposes that the Tribunal already has some information. The Minister's present submission would confine that information already possessed to information that had come from the proposed invitee.

90 Information may have already come to the Tribunal pursuant to the numerous provisions referred to at [13] – [19] above. These are ss 414(1) (in so far as applicable), 415(1) (in so far as applicable), 418(3), 423(1)(a), 424(1), 425(1) or 427(1)(d) or (3). Some of that information may be irrelevant. It cannot be assumed, in particular, that all information proffered by the review applicant will necessarily be relevant.

91 Some of the statutory provisions referred to sit comfortably with the notion of the Tribunal "getting" information that it considers relevant (eg ss 414(1), 415(1), 425(1), 427(1)(d), 427(3)) but others do not (ss 418(3), 423(1)(a)). In some cases information given to the Tribunal may be partly relevant and partly irrelevant. For example, information contained in documents given to the Registrar by the Secretary pursuant to s 418(3), and evidence given by the review applicant in the course of a hearing pursuant to ss 425-429A may include a mixture of relevant and irrelevant information.

92 General principles of administrative law require that the Tribunal take into account all information in its possession that is relevant, and not take into account any that is irrelevant (save, of course, for the purpose of deciding that the latter is irrelevant and is therefore not to be taken into account further). Those principles also require that the Tribunal **seek to get** only information that is relevant. Prior to getting it, the Tribunal may not know the precise nature of the information that will be obtained and may be able to describe it only in general terms or by reference to issues. The thrust of s 424(1), however, is that it is concerned with information that the Tribunal has decided is relevant to its conduct of the review and seeks to obtain.

93 Section 424(1) gives no indication as to the method by which the Tribunal may "get" that information. Arguably, the methods available are no more and no less than those that are expressed in or implied by the various sections mentioned above or implied by the general law. On this view, the role of s 424(1) is to make express that which the general law would imply, namely, that where the Tribunal seeks to get particular information or information of a

particular kind, the Tribunal must consider that information relevant to its conduct of the review and must take it into account once it is obtained.

94 The question arises why these express limitations are in subs (1), but not in subs (2) of s 424. In *Win v Minister for Immigration and Multicultural Affairs* [2000] FCA 1363 (*Win*), the Tribunal extended to the review applicant an oral invitation at the hearing to make any supplementary submission she wished to make within a limited time following the hearing. Experience suggests that such open-ended invitations by the Tribunal are not uncommon. The review applicant included in her supplementary submission new information in the form of a claim not previously made.

95 Lindgren J correctly rejected a submission that the obligation imposed on the Tribunal by s 424(1) to have regard to the information was attracted. The Tribunal was not seeking to get particular information or information of a particular kind. His Honour characterised the invitation as an invitation to give additional information under s 424(2), but it may have been preferable to characterise it as an invitation to make an additional submission, and not as an invitation to give information at all. As noted above, the invitation was extended to Ms Win at the hearing and was not in writing. No issue, however, was raised in this respect. The present ss 424(3) and 441A were inserted in the Act after the decision in *Win* by the *Migration Legislation Amendment* (*Electronic Transactions and Methods of Notification) Act 2001* (Cth).

96 The explanation of the distinction between subss (1) and (2) of s 424 may be that whereas subs (1) is concerned with the Tribunal's seeking to get information that the Tribunal considers relevant, subs (2) is concerned with invitations to give additional information that the invitee may consider relevant. On this view, subs (1) would apply in all cases where the Tribunal **actually seeks** particular information (including particular additional information) or information of a particular kind (including additional information of a particular kind), while subs (2) would apply to invitations to give any information that the invitee considers relevant and, as we decide below, that is additional to information that he or she has previously given to the Tribunal. It is difficult, however, to find a basis for this construction in the terms of the provisions.

97 The Minister's present submission is simply that the existing information already possessed must have come from the invitee. The submission does not require the Tribunal to have become possessed of it under any particular provision of the Act.

98 Section 424(3) is workable only if the methods of giving an invitation referred to in that subsection are themselves able to be used. There is no difficulty in relation to a person in immigration detention (see ss 424(3)(b)). Otherwise s 424(3) assumes, by reason of its reference to s 441A (set out at [19] above), that the invitee is either a person to whom the Registrar can hand the document (such as a person who has given evidence before the Tribunal) or whose address, of one kind or another, the Tribunal already has. Ordinarily this will be a person who has already given information to the Tribunal.

99 The view that "additional information" means "information additional to any information already possessed by the Tribunal, whether it came from the invitee or not" is problematic. The written invitation régime would then apply to all information that the Tribunal might invite a person to give after the Tribunal first became seized of any information at all unless a contrary indication could be found (cf *SZKCQ* at [49]-[51])). Presumably the first time the Tribunal becomes seized of information is when the Secretary sends documents to the Registrar under s 418(3). We suggest that a more limited meaning of "additional information" must be looked for. Again, that which suggests itself is "information additional to information previously given to the Tribunal by the invitee".

100 We construe the expression "additional information" accordingly.

101 It remains to note two matters. First, at the hearing there was discussion about the words "[w]ithout limiting subsection (1)" at the beginning of subs (2). Those words suggest that in their absence subs (2) might be thought to limit subs (1). A way in which subs (2) might be thought to limit subs (1) is by imposing on it the written invitation régime that is associated with subs (2) through subs (3). Another way in which it might be thought to do so is by requiring an "invitation" in all cases as distinct from permitting an exercise of the Tribunal's coercive powers to get information, for example, from the Secretary under s 427(1)(d) or from a person who appears before the Tribunal to give evidence under s 427(3).

102 Second, although we do not decide the question, we suggest that subs (2) is not a subset of subs (1). Certainly the terms of subs (2) are broad enough to permit an open ended invitation to give additional information provided only, as we have decided it must be, it is information additional to that which the invitee has previously given to the Tribunal.

(2) Does the word "person" in s 424(2) mean only a natural person?

103 In SZLPP's application, one ground on which the Minister seeks to distinguish *SZKTI* and *SZKCQ* is that the Tribunal's requests in those cases were addressed to "natural persons and not corporations or polities or government departments". The Minister submits that s 424(2) provides "the voluntary equivalent of the compulsive power to summon an identified person to attend the Tribunal and give evidence (s 427(3)(a))".

104 As will appear, we do not find it necessary to answer the question posed, but as it was fully argued we will express our view on it.

105 We think that the answer to the question posed is "yes".

106 First, we would be disposed to accept the Minister's submission outlined above.

107 Second, in s 441A the person to whom the document is to be given is called the "recipient". This is a person to whom it is possible to hand the document (s 441A(2)) or who has provided to the Tribunal an address of one kind or another (subss 441A(3), (4), (5)). In various ways subss 441A(3), (4) and (5) suggest that the recipient is a natural person.

108 Third, the kinds of issues into which the Tribunal is required to enquire suggest information that an individual is able to give concerning an individual. They are issues concerning the question whether the protection visa applicant falls within the definition of a "refugee" in the *Convention relating to the Status of Refugees* of 1951 as affected by the 1967 *Protocol relating to the Status of Refugees*.

(3) Is the word "person" in s 424(2) limited by reference to a person whose identity is known at the time of the extending of the invitation?

109 Again, we think that the answer is "yes". This answer is required by the answer to (1) above.

(4) Is a document "information" and therefore "additional information" within s 424(2)?

110 The answer to this question is "no".

111 The two words mean different things, although a document may convey information.

112 In his submissions the Minister refers to usages of the words "information" and "document" or "documents" in the Act which differentiate between them. He refers to ss 18, 305C, 308, 311EA, 359A, 375, 375A, 376, 377, 424A, 437, 438, 439 and 440. The Minister also refers to sections that protect the confidentiality of "information", such as, ss 336E, 503A.

113 Section 424B(1) provides that if a person is invited under, relevantly, s 424, to give additional information, the invitation must specify the way in which it is to be given. This requirement hardly makes sense if attempted to be applied to a document.

114 We accept the Minister's submission that s 424(2) does not apply to an invitation to a person to supply a document to the Tribunal.

1. APPLICATION BY SZLPO (NSD 1227 OF 2008) - CONSIDERATION

115 SZLPO's grounds of application were summarised at [35] above.

116 The Minister submits that it is incorrect to characterise the situation as the Tribunal's having, through its agent DFAT, invited the National Ameer to give information. The Minister emphasises that the Tribunal had no direct contact with the National Ameer, and requested DFAT to contact his office. According to the Minister, it was a matter for DFAT to undertake that task in such a manner as it saw fit according to its own processes (or not to undertake the task at all).

117 Indeed, the Minister submits that *SZKCQ* is inconsistent with the view that the Tribunal invited the National Ameer to give it information because in *SZKCQ* the Court held that when the Tribunal asked SZKCQ to obtain information from persons in Pakistan to corroborate his claim, the invitation was treated as an invitation to SZKCQ, who was not treated as a mere conduit through whom the Tribunal was extending invitations to persons in Pakistan.

118 We set out the relevant facts at [23] - [33] above. In *SZKCQ* the Tribunal's reasons for decision recorded the request to the appellant as being "to obtain from Pakistan confirmation from leading party officials who knew him of his standing and situation". The Tribunal left it to the appellant which leading "party officials" to approach. It could not be said that the Tribunal was extending an invitation to them.

119 By contrast, in the present case the person was identified – the National Ameer. Indeed, the *obiter dicta* in *SZKCQ* concerning the seeking of additional information from Messrs Abbas and Khalid through the High Commission at Islamabad is more akin to the circumstances here.

120 Whatever the factual position may be in other cases, on the facts here we are of the view that DFAT acted as agent for the Tribunal. The terms of the email from the Tribunal to DFAT state that SZLPO had given permission for the Tribunal "to have DFAT make direct contact with the office of the National Ameer …" and stated: "Please contact the office of the National Ameer …".

121 The Tribunal communicated to DFAT by one of the methods specified in s 441A, but some person or persons from the DFAT post in Dhaka "met with" the National Ameer at his office in Dhaka. We infer that the request to the National Ameer was made orally at that meeting. This inference can comfortably be drawn because the DFAT Post in Dhaka was asked specifically how it had contacted the office of the National Ameer "(eg. direct meeting, telephone conversations, written correspondence)". In the light of the words quoted, if the Post had put the questions to the National Ameer in writing, it would certainly have said so. The Tribunal's invitation to the National Ameer was therefore not given by one of the methods specified in s 441A.

122 For this reason we do not accept the Minister's first submission.

123 The Minister's second submission is that since neither DFAT nor the National Ameer had previously given information to the Tribunal in the course of its review, any invitation by the Tribunal was not an invitation to give "additional information", with the result that s 424(2) was not engaged.

124 For the reasons given at [88] to [102] above, we agree.

125 SZLPO's application should be dismissed with costs.

2. APPEAL BY SZLQH (NSD 970 OF 2008) – CONSIDERATION

126 SZLQH's grounds of appeal were set out at [48] above.

Ground 1(a)

127 The relevant paragraph in the Tribunal's reasons for decision was as follows (at 6):

> The Tribunal asked the applicant why he feared persecution if he was returned to Pakistan and he claimed that the TNSM had killed his brother and also wanted him dead. The applicant provided the Tribunal with a facsimile copy of a document [that] purported to be the death certificate of his brother. The Tribunal expressed surprise that an official document was prepared in English and the applicant claimed that this was normal. The Tribunal pointed out that the date stamp on the facsimile was 02 July 2007 whilst the document was dated 12 September 2007. The Tribunal pointed out that such an anomaly may indicate a fabricated document. The applicant claimed that he received the document three days ago at the detention centre. The Tribunal told the applicant that if he had any more information or evidence that the death certificate was a genuine document the Tribunal would consider it if it was received prior to the handing down of the decision which would not be before 28 days.

If it be assumed in favour of the Minister, as we have held to be the case above, that s 424(2) is engaged only where information has previously been given to the Tribunal by the invitee, that condition was satisfied here. The reason is that, as the paragraph set out above makes clear, SZLQH did provide some information concerning the genuineness of the death certificate by answering the Tribunal member's questions on that topic at the hearing. On that occasion SZLQH addressed the member's questions about the language in which the death certificate was written and the discrepancy between the facsimile date stamp of 2 July 2007 and the date of the document of 12 September 2007. Indeed, according to the passage

set out above, the Tribunal accepted that what was in issue was whether any "additional" information was to be forthcoming from SZLQH, since it referred to the question whether SZLQH had "**any more information** or evidence that the death certificate was a genuine document" (our emphasis).

128 The Minister submits that the Tribunal was not inviting SZLQH to give additional information within the meaning of s 424(2), but was affording him an opportunity to provide additional information. We think, however, that there was an "invitation". The terms in which the Tribunal recorded its communication are set out at [41] above. It is true that the Tribunal was not seeking to get from SZLQH particular additional information or additional information of a particular kind that it needed. The Tribunal made it clear that it thought it had sufficient information on which to make a decision, but wished to afford SZLQH the opportunity of providing additional information if he had any. Nonetheless, in our view this was an invitation to SZLQH to give additional information within s 424(2). It follows that as in *SZKCQ*, the Tribunal was required by s 424(3) to give the invitation by one of the methods specified in s 441A and also to comply with s 424B.

129 In relation to s 424B, we think that the Tribunal did specify the way in which the additional information might be given. By referring to **receipt** of the additional information, the Tribunal was indicating that the additional information was to be in writing. The suggested non-compliance with s 424B(1) is not established.

130 Non-compliance with s 424(2) is, however, established.

Ground 1(b)

131 An officer of the Tribunal (Mr Eddie Chiu) made an enquiry of the Detention Centre, apparently by telephone. Mr Chiu's file note dated 5 October 2007 read as follows:

> Contacted VIDC [the Detention Centre] regarding any possible discrepancies in the date stamp on their faxes. Officer Sergei Rioumin stated that after checking with colleagues the only discrepancy they could recall that occurred during July 07 was to do with the time but not the date of faxes.

The Minister contends, first, that the communication with the Detention Centre was not an invitation to a "person", and, second, that it did not seek "additional information" because the information sought was not additional to information previously provided by the invitee.

132 When Tribunal officer Chiu telephoned the Detention Centre, he probably did not have the intention of speaking to any particular individual there. He was seeking information from any responsible officer at the Detention Centre. The responsible officer turned out to be Sergei Rioumin.

133 We accept that the Minister's submission that the circumstances did not constitute an invitation given by the Tribunal to a person who had previously given information to the Tribunal. For the reasons we gave at [88] to [102] above, the telephone enquiry did not attract the régime imposed by s 424(3).

134 We do not decide in favour of the Minister on his "natural person" submission, although we would be disposed to accept it (see [103]–[108] above).

Ground 2

135 Ground 2 was set out at [48] above, and reg 4.35 was set out at [21] above. We accept the Minister's submission that it is not reg 4.35(4) but reg 4.35(2) that applies. SZLQH was a detainee. The terms of the Tribunal's invitation to SZLQH (set out at [41] above) were that "if he had any more information or evidence …" the Tribunal would consider it if it was received within the time specified. The terms of the invitation predicate that SZLQH already had the information or evidence. Therefore the information to which the invitation related was to be provided from a place in Australia, namely, SZLQH's place of residence at the Detention Centre. It is beside the point that he might choose to go outside the terms of the invitation by seeking information from Pakistan.

136 Accordingly, under the Regulations the prescribed period for giving the additional information started when SZLQH received the invitation and ended at the end of seven days after the date of that receipt.

137 Notwithstanding this, the Tribunal in fact assured SZLQH that he would have 28 days. We think that, having allowed that period, the Tribunal was bound by considerations of procedural fairness to allow SZLQH the full 28 day period. He was denied procedural fairness because the Tribunal signed its decision only 21 days later. This is so

even though there is no evidence that SZLQH would have given the Tribunal additional information or evidence if he had been allowed the full 28 days.

Discretionary considerations

138 The Minister submits that relief should be denied because it would be futile. This is because the Tribunal did not reject the authenticity of the death certificate but made its decision on the assumption that it was genuine. The Tribunal was not bound to seek the additional information in question, and if the matter were remitted to the Tribunal, the Tribunal would not be bound to invite SZLQH under s 424(2) to give it the additional information.

139 The Minister relies on the decision of a Full Court of this Court in *SZKGF v Minister for Immigration and Citizenship* [2008] FCAFC 84 at [13]-[15]. SZLQH relies on *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 (*NAFF*) at [25]-[26], [31]-[33]; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [18]; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 (*SAAP*) at [83]-[84]; and *SZIZO v Minister for Immigration and Citizenship* (2008) 172 FCR 152 at [95]-[98]. In reply the Minister relies on *SAAP* at [80].

140 The Minister does not challenge the Tribunal member's power:

- to allow SZLQH 28 days in which to provide any additional information or evidence that SZLQH might have had that the death certificate was genuine, or
- to give SZLQH the assurance that the information would be considered if received within that period (cf *NAFF* at [25]).

141 It is important to note precisely what the Tribunal member said in the "Findings and Reasons" section of his reasons for decision. He stated (at 9):

> "Even if the Tribunal accepts that the applicant's brother was "killed by a person" as stated on his death certificate, it does not necessarily follow that the TNSM [Tehreek e Nafaz e Shariat e Mohammadi; or Movement for the Enforcement of Islamic Laws] killed him or that they wished to kill him (the applicant). The death certificate in itself does not represent corroborative evidence of the applicant's claims and as such

> is not given any weight by the Tribunal. As the Tribunal has found that the applicant's account of the incident in which his brother was killed implausible, it follows that the Tribunal also finds that the applicant is not of adverse interest to the TNSM, or even known to them, such that they would have persecuted him in the past or that they would do so if he returned to Pakistan now or in the reasonably foreseeable future."

142 The Tribunal member was saying that on the assumption in favour of SZLQH that the death certificate was a genuine document, it did not corroborate SZLQH's claim. The words "killed by a person" did not point to the TNSM. SZLQH did not contend otherwise on the appeal.

143 The only additional information or evidence that SZLQH was invited to give to the Tribunal was information or evidence that the certificate was a genuine document. The passage from the Findings and Reasons set out above makes it clear that such information or evidence could not possibly have made any difference in the result.

144 SZLQH has pointed to no practical injustice that he suffered as a consequence of the making of the decision prior to expiry of the 28 day period. He contends that this does not matter. It does: where jurisdictional error is established, the granting of relief remains discretionary.

145 It is noteworthy that on 23 October 2007 SZLQH supplied to the Tribunal a letter dated 22 October 2007 which began by thanking the Tribunal member for giving SZLQH the opportunity to send some "support documents". The letter did not, however, touch on the genuineness of the death certificate (nor did it enclose any documents). In order to be within the terms of the Tribunal's invitation, any information or evidence supplied by SZLQH to the Tribunal would have had to be limited to information or evidence of the genuineness of the death certificate.

146 We would refuse relief on discretionary grounds.

Conclusion on the appeal by SZLQH (NSD 970 of 2008)

147 For the above reasons the appeal should be dismissed. SZLQH succeeded on the substantive issues, and the Minister on the issue of discretion. We will make no order for costs.

3. APPLICATION BY SZLPP (NSD 1486 OF 2008) - CONSIDERATION

148 It will be recalled (see [59] above) that the first ground of appeal related to the Tribunal's statement that for SZLPP to compare Falun Gong to Kung Fu was "bizarre". This was one aspect of the Tribunal's finding that SZLPP's lack of knowledge about Falun Gong was so "comprehensive" that the Tribunal member did not accept that SZLPP had ever been a Falun Gong practitioner.

149 The Minister relies on the following passage from the judgment of Hayne J in *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 at [263], [264] (footnotes omitted):

> 263 Unlike a court, the tribunal was not restricted to acting only on material that was expressly referred to in the course of a particular review. It was not bound by rules of evidence and its members were obviously expected to develop and rely on knowledge of affairs in the countries from which claimants come. It may very well be, therefore, that, as individual Tribunal members heard accounts given to them by a series of applicants for protection visas who came from a particular country, and as those Tribunal members read more widely about the country concerned, they developed a body of knowledge upon which their views about the country were formed. And as they become more knowledgeable their capacity comprehensively to identify the particular sources of their knowledge would ordinarily diminish.
>
> 264 There is, therefore, a very practical reason to doubt that procedural fairness required the Tribunal to identify the source, and the general nature, of every piece of material that led the member to form a view that a particular country was willing and able to protect its citizens. So to hold would impose an obligation that could not readily be performed and in some cases would be impossible. But the difficulty in the argument advanced by Mr Muin is even more deep-seated than that.

150 The Tribunal member had access to Falun Gong literature. He said (at 5):

> I asked the applicant a number of questions about Falun Gong practice and beliefs. He was not able to answer one correctly. One concept, which is described in Falun Gong literature as the "top priority" of the practitioner, was entirely unfamiliar to him. He was unable to name the first exercise. He did not know how many exercises there were.

151 We think that the passage from the judgment of Hayne J in *Muin v Refugee Review Tribunal* set out above answers the first ground of appeal. It was not required that the literature from which the Tribunal member had gained his knowledge of Falun Gong beliefs and practices be identified, let alone placed before the review applicant, if, indeed, either step was possible.

152 Some support for this view is given by s 424A of the Act. That section requires the Tribunal to give to a review applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision under review. But there are exceptional classes of information to which this requirement is declared not to apply, and one of these is "information … that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member". Falun Gong practitioners are such a class of persons.

153 It is consistent with the exception just noted that the Tribunal should be at liberty to act on the presiding member's expert knowledge, probably gained through a reading of Falun Gong literature over a period in the course of dealing with many Falun Gong cases, without the necessity of identifying that literature or putting it before each relevant review applicant.

154 The third ground of appeal (the second ground was not pressed), relates to what SZLPP characterises in his amended application as two invitations to provide additional information within the meaning of s 424(2) of the Act. It will be recalled that on 29 August 2007 a Tribunal officer wrote to "NSW OP–RRT Liaison Unit" communicating the Tribunal's request for SZLPP's "original visitor visa application" and "a copy of the results of the applicant's health examination, if the applicant [had] submitted them as requested by the Department in its letter of 31 May 2007".

155 On 6 September 2007, having received the "case dump" but not the results of the health examination, the same Tribunal officer wrote to a named officer in the "NSW OP-RRT Liaison Unit" asking whether the writer could "confirm in relation to the second part of the request that [SZLPP had not] submitted the results of his health examination".

156 SZLPP contends that there was a failure to specify the way in which the "additional information" was to be given, as required by s 424B(1) of the Act.

157 For the reasons that we gave at [110] – [114] above, s 424(2) does not apply to a request for a document, such as the results of the health examination.

158 In further support of this result, the Minister submits that the Tribunal does not need an express statutory power to request a document to be given to it, citing *Clough v Leahy*

(1904) 2 CLR 139 and *Day v Commissioner of the Australian Federal Police* (2000) 101 FCR 66 at [11]. We accept that the Tribunal's obligation under s 414(1) of the Act to review an RRT-reviewable decision in respect of which a valid application is made under s 412 of the Act, coupled with the Tribunal's power under s 415(1) of the Act to exercise for the purposes of the review all the powers and discretions that are conferred on the original decision maker, provide authority for the Tribunal to request or invite someone to produce a document (or, for that matter, to give non-documentary information) to the Tribunal, subject to any constraints to be found in the Act.

159 A second ground for distinguishing SZLPP's case from *SZKTI* and *SZKCQ* is that the request was not made to a person who had previously given information to the Tribunal (see [88] – [102] above).

160 A third ground of distinction is that there is no basis for the complaint that the Tribunal did not specify the method by which the information was to be provided. If, contrary to our view expressed above, a document is information, by requesting a copy of the health documents the Tribunal complied with that aspect of s 424B that requires that a method by which the information is to be provided be specified.

161 For all of the above reasons, the third ground of appeal is not made out.

162 SZLPP's application should be dismissed with costs.

163 Finally, although we do not decide on this ground, we note that rather than being made to a natural person, the request was made to an area within the Department. The request dated 29 August 2007 was addressed to "NSW OP-RRT Liaison Unit". The request of 6 September 2007 was addressed in the same way although the text of the email commenced "Thanks again, Antoinette …". Notwithstanding the reference to "Antoinette" we think that the request was to the RRT Liaison Unit. It was of no consequence to the writer, on either the first or second occasion, whether "Antoinette" or some other officer within the Department responded. If, as we are inclined to think, the word "person" in s 424(2) means a natural person, this would provide a fourth ground for distinguishing *SZKTI* and *SZKCQ* (see [103] – [108] above).

CONCLUSION

164 There will be orders in accordance with paras [125], [147] and [162] above.

I certify that the preceding one hundred and sixty-four (164) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Lindgren, Stone and Bennett.

Associate:
Dated: 1 May 2009

SZLPO v Minister for Immigration and Citizenship & Anor (NSD 1227 of 2008)

Counsel for the Applicant:	Mr C Mantziaris
Solicitor for the Applicant:	Chang, Pistilli & Simmons
Counsel for the First Respondent:	Mr A Robertson SC and Mr S Lloyd SC
Solicitor for the First Respondent:	Australian Government Solicitor
Date of Hearing:	3 November 2008
Date of Judgment:	1 May 2009

SZLQH v Minister for Immigration and Citizenship & Anor (NSD 970 of 2008)

Counsel for the Appellant:	Mr M Gibian
Counsel for the First Respondent:	Mr A Robertson SC and Mr S Lloyd SC
Solicitor for the First Respondent:	Australian Government Solicitor
Date of Hearing:	3 November 2008
Date of Judgment:	1 May 2009

SZLPP v Minister for Immigration and Citizenship & Anor (NSD 1486 of 2008)

Counsel for the Applicant:	Mr D H Nagle
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Solicitor for the First Respondent:	Australian Government Solicitor
Date of Hearing:	3 November 2008
Date of Judgment:	1 May 2009