FEDERAL COURT OF AUSTRALIA

MZYFH v Minister for Immigration and Citizenship [2010] FCA 559

Citation:	MZYFH v Minister for Immigration and Citizenship [2010] FCA 559
Appeal from:	MZYFH v Minister for Immigration and Citizenship & Anor [2009] FMCA 1067
Parties:	**MZYFH v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL**
File number(s):	VID 863 of 2009
Judge:	**BROMBERG J**
Date of judgment:	4 June 2010
Catchwords:	**MIGRATION** – appeal from Federal Magistrates Court of decision of RRT affirming a decision to refuse protection visa to appellant – whether RRT breached s 424A(1) of Migration Act by failing to comply with s 424AA – whether RRT failed to comply with s 424AA – whether RRT complied with the obligation to give clear particulars and to ensure that the visa applicant understood the relevance and consequence of the information that RRT had determined would be the reason or part of reason for affirming the decision under review – non-compliance with s 424AA – jurisdictional error – appeal allowed.
Legislation:	*Migration Act 1958* (Cth) s 424A, s 424AA
Cases cited:	*Minister for Immigration and Citizenship v SZLFX* (2009) 238 CLR 507 *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39 *Minister for Immigration and Multicultural Affairs v SZGMF* [2006] FCAFC 138 *MZXKH v Minister for Immigration and Citizenship* [2007] FCA 663 *MZYFH v Minister for Immigration and Citizenship & Anor* [2009] FMCA 1067 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26 *SZEOP v Minister for Immigration and Citizenship* [2007]

	FCA 807 *SZMCD v Minister for Immigration & Citizenship* (2009) 174 FCR 415 *SZMTJ v Minister for Immigration and Citizenship and Anor (No 2)* [2009] FCA 486 *SZNKO v Minister for Immigration and Citizenship* [2010] FCA 297
Date of hearing:	24 February 2010
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	72
Counsel for the Appellant:	The appellant appeared in person with the assistance of an interpreter
Counsel for the Respondents:	Ms Holt
Solicitor for the Respondents:	DLA Phillips Fox

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 863 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGE:	**BROMBERG J**
DATE OF ORDER:	**4 JUNE 2010**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by the Federal Magistrate Court of Australia on 13 November 2009 in proceeding number MLG751 of 2009 be set aside.

3. There be substituted for those orders, orders that:

   (1) a writ of certiorari issue, directed to the second respondent, removing into this Court the decision of the second respondent, dated 20 May 2009, in case number 0900851, for the purpose of quashing that decision.

   (2) the decision of the second respondent, dated 20 May 2009 in case number 0900851, be quashed.

   (3) a writ of mandamus issue, directed to the second respondent, requiring it to hear and determine the application of the appellant for review of the decision of a delegate of the first respondent to refuse to grant the appellant a protection visa, according to law.

   (4) the first respondent pay the appellant's costs of the proceeding in the Federal Magistrates Court of Australia.

4. The first respondent pay the appellant’s costs of 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 Federal Law Search on the Court’s website.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 863 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGE:	**BROMBERG J**
DATE:	**4 JUNE 2010**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

INTRODUCTION

1 The appellant is a citizen of India who arrived in Australia on 18 September 2008. The appellant and his family are Christians. The appellant claims that Hindu activists persecuted him and his family by reason of their religion.

2 This proceeding is an appeal from orders made by the Federal Magistrates Court on 13 November 2009 which dismissed an application for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal"): see *MZYFH v Minister for Immigration and Citizenship & Anor* [2009] FMCA 1067. The Federal Magistrate found no error in the decision of the Tribunal made on 20 May 2009. By its decision, the Tribunal affirmed the refusal dated 14 January 2009 of a delegate of the first respondent ("the Minister") to grant a protection visa to the appellant.

3 There is one ground of appeal pursued by the appellant before this Court. That ground alleges that the Tribunal's decision was in breach of s 424A of the *Migration Act 1958* (Cth) ("the Migration Act").

4 The Federal Magistrate rejected that contention. For the reasons which follow, I have concluded that that rejection involves appellable error. Accordingly, I have determined to allow the appeal.

BACKGROUND

5 The appellant is a 37 year old national of India. He arrived in Australia on 18 September 2008 and on 21 November 2008 applied for a protection visa. That application was refused by a delegate of the Minister. The delegate found that the appellant did not have a genuine fear of harm and that there was not a real chance of persecution occurring should he return to India. The delegate also found that relocation within India was a safe and reasonable option for the appellant. The delegate concluded that the appellant's fear of persecution was not well founded and refused to grant the appellant a protection (Class XA) visa.

6 On 9 February 2009, the appellant applied to the Tribunal for a review of the delegate's decision. On 30 March 2009, the Tribunal held a hearing at which the appellant was present.

THE LEGISLATION

7 The principal provisions of the Migration Act relevant to this appeal are ss 424A and 424AA which are in the following terms:

> **424AA Information and invitation given orally by Tribunal while applicant appearing**
>
> If an applicant is appearing before the Tribunal because of an invitation under section 425:
>
> (a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
>
> (b) if the Tribunal does so--the Tribunal must:
>
> (i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and
>
> (ii) orally invite the applicant to comment on or respond to the information; and
>
> (iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and
>
> (iv) if the applicant seeks additional time to comment on or respond to the information--adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to

the information.

424A Information and invitation given in writing by Tribunal

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

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

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

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

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

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

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

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

(3) This section does not apply to information:

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

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

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

(c) that is non-disclosable information.

THE EVIDENCE BEFORE THE TRIBUNAL

8 The Tribunal had before it the appellant's visa application, which was supported by a written statement made by the appellant. In that statement the appellant claimed that:

8.1 He and his family were Christians;

8.2 He and his family had received threats including threats that he and his family would be killed if they did not change their religion to the Hindu religion;

8.3 He was assaulted and threatened by Hindu activists and later his shop was damaged and he was beaten badly and left unconscious on 24 December 2007;

8.4 As a result, he and his family converted to Hinduism;

8.5 His wife became seriously sick and he was advised by the father at the Church that this was occurring including because he and his family had converted to Hinduism. He was told to remain Christian and to bring his wife to Church;

8.6 He did that and his wife recovered from her illness. He was convinced not to leave Christianity;

8.7 Through his Church he was encouraged to join a group travelling to Australia where the Pope was visiting (World Youth Day Conference);

8.8 He arrived in Sydney to attend the World Youth day Conference on 15 July 2008 and on 24 July 2008 he returned to India;

8.9 On 13 August 2008 his wife gave birth to twins;

8.10 A few days thereafter, Hindu activists came to his home and threatened his family. They told him to change his children's names to Hindu names or leave the country;

8.11 He felt very frightened. He spoke to the Father at the Church about the latest threats. The Father told him to leave and go back to Australia because Australia was a Christian country that would help his family. The Father told him that in the meantime the Church will take care of his family;

8.12 On 18 September 2008 he returned to Australia;

8.13 He believed that if he went back to India he would be killed by Hindu activists who have recently killed a lot of Christians in India.

9 During the hearing before the Tribunal, the appellant gave oral evidence and submitted various photographs and other documents. He was assisted by an interpreter. Of particular relevance to this appeal, the applicant was asked by the Tribunal to identify the Church that he was a member of and the names of the priests at that Church. The Church was identified as the Sacred Heart Church, also called the City Parish in Jalandhar. The applicant initially named father Mathew (whom he described as the previous priest) as the only priest he knew. Later he said the priests he knew were Father Peter, Father Mattar and Bishop Anil Qouto.

10 The appellant was also asked by the Tribunal to identify precisely where his wife and children were living at that time. The appellant told the Tribunal that they were initially living at the Church but that now they are staying at another rented property.

11 The Tribunal asked the appellant whether he had any objection to the Tribunal contacting the Sacred Heart Church. The appellant agreed to the Tribunal contacting the Church. In the presence of the appellant, the Tribunal telephoned the Sacred Heart Church. The following account of what then occurred is extracted from paragraphs [59] – [63] of the Tribunal's decision:

> *Evidence of Father Thomas*
>
> *59. The Tribunal spoke initially to a Father Thomas, who indicated that he was the parish priest at the Sacred Heart Church. The Tribunal explained that it was seeking to obtain confirmation of the applicant's claim, in particular: that he is a member of the church; that he was attacked by Hindus; and that his wife Meena and their children are being looked after by the church. Father Thomas immediately indicated that that was all lies; that nobody had been attacked by Hindus and nobody was being looked after by the church. He explained that he is only one of the Fathers at the church, and he thought it would be better if I spoke to Father Peter who had organised the trip to Australia. He connected the Tribunal to Father Peter who then asked to be telephoned back in 10 minutes so that he could return to his desk and have the relevant information in front of him.*
>
> *Evidence of Father Peter Kavumpuram*
>
> *60. The Tribunal took evidence from Father Peter who identified himself in more detail and indicated that he is the youth director of the Jalandhar Diocese. The Tribunal again outlined the applicant's claims to father Peter. He replied that the claims are absolutely wrong; that the applicant had been interviewed by many people here and was recommended to travel with the group. There was only one aim, to participate in the World Youth Day and he explained to them all to come back. He even has affidavits signed by the participants undertaking to return. He said it a case of fraud and that the applicant is attempting to bluff the Tribunal, and has applied because of pressure from advocates and a lot of money having been taken from them.*
>
> *Further Evidence of the Applicant*
>
> *61. The visa applicant was invited to respond to the evidence it had just heard from Father Peter. He observed that other people had been known to break their oaths, and that Father Peter is annoyed with the people who sought asylum here. Asked if he was implying other people who sought asylum here have put in false claims, he agreed that is the case. Asked if he was inviting the Tribunal to infer that his claim was the exception, he said that he could have escaped the first time he came here, but he went back and had problems and then he returned again.*
>
> *62. The applicant was then given a warning, pursuant to s.424AA of the Act; the Tribunal noting that the evidence of Father Peter and Father Thomas, as set out above, suggested that he had not, in fact, been attacked by Hindus and that his wife and children were not being looked after by the church. The Tribunal indicated that this was relevant because it undermined the applicant's protection claims, and could therefore form the reason, or part of the reason, for affirming the decision under review. The applicant was invited to comment*

> *on or respond to the information, and was also given the opportunity of requesting an adjournment, if he wished prior to responding.*
>
> *63. The applicant elected to respond immediately. He said that other people made these mistakes and Father Peter or the church is taking it out on him. The Tribunal noted that the applicant had said that his wife had been living in the church. He replied that it was other people, some of the City Parish members, who had helped her.*

THE TRIBUNAL'S REASONS

12 Of particular relevance to the ground of appeal are the findings that the Tribunal made in reliance upon the evidence received from Father Thomas and Father Peter. The Tribunal's review of and treatment of that evidence will be analysed later, when I set out my reasoning.

13 However, based largely on that evidence, the Tribunal found that the applicant had not been persecuted in the past for reason of his religion and that there is not a real chance that the appellant will experience serious harm (capable of amounting to persecution for the purposes of s 91R(2) of the Migration Act) in the reasonably foreseeable future if he returned to Punjab in India, whether by reason of his religion or for any other reason pertaining to the 1951 Convention Relating to the Status of Refugees as amended by the 1957 Protocol Relating to the Status of Refugees ("the Convention").

14 The Tribunal then dealt with an alternate basis for its decision, based upon its view that safe relocation within India was available to the appellant. The Tribunal said at [81]:

> Although the finding in the preceding paragraph disposes of this application, the Tribunal notes, in any event, that the country information set out above suggests to the Tribunal that there are parts of India where Christians are in fact in the majority, to which the applicant might reasonably be expected to relocate even if he were at risk of persecution on the basis of his Christianity. The details the applicant has provided with his protection visa application suggests that he has 10 to 12 years of education, speaks a number of languages, has some 10 years experience practising as a photographer, a trade which appears to the Tribunal to be quite portable, and on his own evidence he has still has savings in India. Against these factors, the Tribunal does not consider the fact that the applicant has a young family and that the children might get sick would make it unreasonable to expect him to relocate within India if he were at risk of persecution in Punjab for reason of his Christian religion, nor the fact that most of his relatives are in the Punjab. The Tribunal finds accordingly that in that eventuality, safe relocation would be reasonably open to the applicant.

15 The Tribunal concluded by declaring that it was not satisfied that the applicant was a person to whom Australia has protection obligations under the Convention. The Tribunal

determined that the applicant did not satisfy the criteria for a protection visa set out in s 36(2) of the Migration Act. The Tribunal affirmed the decision not to grant the applicant a protection visa.

THE FEDERAL MAGISTRATE'S DECISION

16 The application before the Federal Magistrates Court was based on the following grounds:

> 3. The grounds in the application are as follows:-
>
> a. That the tribunal's decision was in breach of section 424A(1) of the Migration Act 1958 (Cth).
>
> Particulars
>
> (a) There was certain adverse information used by the Tribunal to affirm the decision under review.
>
> (b) The tribunal did not disclose the information in accordance with s 424A(1).
>
> b. That the Tribunal made error of law and lack procedural fairness (sic) and therefore committed jurisdictional error.
>
> c. That the tribunal made denial of natural justice. Because it failed to provide further opportunity before the tribunal.

17 I need not deal further with grounds (2) and (3) of the challenge before the Federal Magistrate. It is not clear that either of those grounds were pressed before the Federal Magistrate. In any event, any decision in relation to those grounds is not under challenge in this appeal.

18 As to the challenge based upon an alleged breach of s 424A(1) of the Migration Act, the Federal Magistrate found that the Tribunal had complied with the requirements of s 424AA and therefore did not have to comply with the requirements of s 424A of the Migration Act.

19 Whilst the particulars of ground (1) referred to "certain adverse information" being used by the Tribunal to affirm its decision, the nature and content of that adverse information is not identified. It appears from the decision of the Federal Magistrate that the appellant relied upon the evidence of Father Thomas and Father Peter as being the adverse information in question.

20 Before the Federal Magistrates Court, the Minister conceded that the evidence received from the two Fathers was adverse to the applicant and was therefore relevant information within s 424A. The Minister, however, contended that the Tribunal was not required to comply with s 424A because the Tribunal had complied with s 424AA.

21 After setting out the relevant statutory provisions, the Federal Magistrate determined that the requirements of s 424AA had been complied with by the Tribunal. By reference to the decision of the Tribunal, the Federal Magistrate relied upon the following conclusions in determining that the requirements of s 424AA were complied with by the Tribunal:

- That the evidence of the Fathers had been put to the appellant and the relevance of it explained to him ([8] of the Federal Magistrate's judgment); and

- The appellant did not seek time to respond to that evidence ([9]-[10] of the Federal Magistrate's judgment).

APPEAL TO THE FEDERAL COURT

22 On 30 November 2009 the appellant filed a notice of appeal in this Court, appealing from the whole of the judgment of the Federal Magistrates Court. The appellant is self represented. The ground of the appeal specified in the notice of appeal is:

> 1. The FM failed to find that the tribunal's decision was in breach of s 424A of the Migration Act 1958 (Cth) and therefore fall (sic) under jurisdictional error.
>
> (a) There was certain adverse information used by the Tribunal to affirm the decision under review and the Tribunal did not disclose the information in accordance with s 424A(1).

23 On 8 December 2009, directions were made for the filing of written submissions. The appellant did not file any written submissions. Written submissions were filed by the Minister. On the hearing of the matter the appellant was assisted by an interpreter. He was given an opportunity to consider and respond to the Minister's submissions. A short adjournment was provided to the appellant for that purpose. On resumption, the appellant had no response to make. Despite the opportunity to do so, the appellant did not make any oral submissions of any substance. He did however tell the Court that he sought orders

setting aside the decision of the Federal Magistrate and that the matter be remitted for reconsideration by the Tribunal.

24 The Minister relied upon its written submission. In that submission the Minister accepted that the adverse information that the Tribunal received from Father Thomas and Father Peter was relevant information which attracted the operation of s 424A. The Minister, however, submitted that the Tribunal was not obliged to comply with s 424A as it had complied with s 424AA of the Migration Act. The Minister contended that the Tribunal engaged the provisions of s 424AA and complied with its requirements. In that respect, the Minister says the Tribunal informed the appellant that the evidence of Father Peter and Father Thomas was information that was relevant, as it undermined his claims. The Tribunal invited the appellant to comment and the appellant elected to respond immediately. Having complied with the requirements of s 424AA, the Minister contends that it was not necessary for the Tribunal to comply with the requirements of s 424A.

25 The Minister made no application for the exercise of the Court's discretion to decline the relief sought, in the event that the Court found appellable error: compare *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26 at [27]-[29] and [87]-[90].

REASONING

26 The Federal Magistrates Court has no jurisdiction to judicially review a decision of the Tribunal if the decision of the Tribunal in question is a privative clause decision. That constraint arises by operation of s 474 and s 476 of the Migration Act.

27 However, where a decision of the Tribunal is infected with jurisdictional error, the decision of the Tribunal is not a decision made "under the Act" and not within the exclusionary scope of the protection of the privative clause provisions of the Migration Act: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

28 The Federal Magistrate concluded that he had no jurisdiction to interfere with the Tribunal's decision because that decision was not infected with jurisdictional error. For the appellant to succeed on this appeal, I need to be satisfied that the Federal Magistrate erred in arriving at that conclusion.

29 The appellant's ground of appeal is that the Federal Magistrate failed to identify that the Tribunal had breached s 424A and that, consequently, its decision was infected with jurisdictional error. The Federal Magistrate rejected that challenge on the basis that compliance with s 424A was not necessary if there was compliance with s 424AA. The Federal Magistrate was satisfied that there was compliance with s 424AA.

30 Sections 424AA and 424A work in a complementary manner. If the Tribunal engages the provisions of s 424AA and complies with that section, it need not meet the requirements of s 424A(1). That is the effect of s 424A(2A) as explained by Moore, Tracey and Foster JJ in *SZMCD v Minister for Immigration & Citizenship* (2009) 174 FCR 415 at [88] and [104].

31 A failure to comply with the requirements of s 424AA does not constitute jurisdictional error: *SZMCD* at [74]-[75] and [93]-[101]. However, non-compliance by the Tribunal with the requirements of s 424AA will cast the Tribunal back to s 424A. In that event, the Tribunal must then comply with the provisions of s 424A(1): *SZMCD* at [92] and [103]. A failure to comply with the requirements of s 424A(1) does constitute jurisdictional error: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at [78], [173] and [208]; *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26 at [13].

32 In this case, the Tribunal sought to invoke s 424A(2A) and comply with the requirements of s 424AA. If it failed to comply with those requirements, in order to avoid jurisdictional error it was required to comply with the requirements of s 424A(1). The Tribunal took no steps to comply with s 424A(1). Therefore, if the Tribunal did not comply with the requirements of s 424AA, its decision will be infected with jurisdictional error by reason of its non-compliance with s 424A(1).

33 For the Tribunal properly to invoke the facility provided by s 424A(2) and proceed orally under s 424AA rather than in writing under s 424A, it must provide to the visa applicant "clear particulars" of any information that the Tribunal considers would be the reason, or part of the reason, for affirming a decision that is under review. Additionally the Tribunal must ensure that, as far as is reasonably practicable, the visa applicant understands why the information is relevant to the review and the consequences of the information being relied upon for the decision under review: s 424AA(a) and (b)(i): and see *Minister for*

Immigration and Multicultural Affairs v SZGMF [2006] FCAFC 138 per Branson, Finn and Bennett JJ at [31]. Thereafter, the visa applicant must be given a "meaningful opportunity" to comment and respond to the information, including by seeking additional time and, if the Tribunal considers it reasonably necessary, through an adjournment of the hearing: s 424AA(b)(ii)-(iv) and *SZNKO v Minister for Immigration and Citizenship* [2010] FCA 297 per Flick J at [23] and [27].

34 As the Full Court said in *SZMCD* at [71]-[72], the same policy and purpose underpins s 424AA as that which underpins s 424A. Relevantly, the policy and purpose is that the Tribunal should be compelled to:

(a) put the visa applicant on fair notice of critical matters of concern to the Tribunal;

(b) ensure that the visa applicant understands the significance of those matters to the decision under review; and

(c) give the applicant a reasonable opportunity to comment on or to respond to those matters of concern.

35 The requirements of the Tribunal under paragraph (a) and (b)(i) of s 424AA are not relevantly distinguishable from the requirements in s 424A(1)(a) and (b) (other than for the fact that the former deals with oral communication and the latter with written communication). Many of the authorities which I refer to deal with the Tribunal's obligations under s 424A. Given the common textual and purposive characteristics of s 424A and 424AA, those authorities are helpful to an analysis of the requirements of s 424AA.

36 Unlike many cases in this area, this is not a case where there is any issue as to whether s 424AA was enlivened. Given the largely subjective nature of the pre-condition for the provision becoming operative (found in the phrase "that the Tribunal considers"), it is obviously important to look at what the Tribunal said. The Tribunal told the appellant that he was being given a "warning" pursuant to s 424AA. Whilst that characterisation was inept, in this case the Tribunal was clearly of the view that there was information before it of the kind which had enlivened the operation of s 424AA. The Minister concedes that s 424AA was enlivened.

37 The real issue is whether the Tribunal met the obligations required of it by s 424AA. Relevantly, the issue for determination is whether the Tribunal complied with the obligation to give clear particulars and to ensure that the visa applicant understood the relevance and consequence of the information that the Tribunal had determined would be the reason or part of reason for affirming the decision under review.

38 The nature and content of the obligations upon the Tribunal under s 424A(1) were recently summarised by Flick J in *SZMTJ v Minister for Immigration and Citizenship and Anor (No 2)* [2009] FCA 486. I respectfully agree with his Honour's observations at [52] that each of the requirements of s 424A are not to be treated as though they were divorced one from the next. The greater degree of clarity in the particulars of any information provided, the less may be the exposition needed to convey the relevance of that information to the review being undertaken; the greater the uncertainty in the information being provided, the greater may be the need to explain why it may be relevant. The same observations are applicable to s 424AA.

39 In relation to s 424A(1)(a), Flick J at [45] emphasised that a visa applicant is to be provided with "sufficient specificity" of the information to be relied upon. Language which fails to identify information with "sufficient specificity" and which fails to set out information "unambiguously" may fail to comply with s 424A(1)(a): see for example *MZXKH v Minister for Immigration and Citizenship* [2007] FCA 663 at [20] per Tracey J.

40 In *SZNKO v Minister for Immigration and Citizenship* [2010] FCA 297, Flick J traced the legislative history of the requirement for particulars in s 424A. His Honour noted that prior versions of s 424A had referred merely to "particulars of any information". The requirement that "clear particulars" be provided was introduced by the *Migration Amendment (Review Provisions) Act 2007* (Cth). As his Honour noted, that change in language cannot be ignored. The change came at the same time that s 424AA was introduced and thus the facility provided to the Tribunal to communicate orally its intended reliance upon "information", rather than in writing under s 424A. Although the language of s 424A(1)(a) was also brought into line with that of paragraph (a) of s 424AA, it may be inferred that the change from "particulars" to "clear particulars" was somewhat motivated by the concern that extra care be taken in the giving of particulars, especially as particulars could now be given

orally. That concern recognises that the opportunity to reflect and digest particulars given orally is more limited than when particulars are given in writing.

41 As Flick J further noted at [44] of *SZMTJ*, s 424A(1)(b) imposes what has been said to be "strict requirements". His Honour referred to the decision of Rares J in *SZEOP v Minister for Immigration and Citizenship* [2007] FCA 807, where Rares J said that s 424A(1)(b) required the Tribunal to ensure, as far as reasonably practical, that it identified to the visa applicant why the information was relevant to the review. Such an identification is necessary to avoid the visa applicant being left to choose between uncertain inferences that might otherwise be available. The visa applicant needs to be told by the Tribunal why the information is relevant to the review. That obligation is not fulfilled if the Tribunal leaves it to chance that the visa applicant appreciates the relevance of the information from the course of the hearing, or from other circumstances surrounding the way in which the review was being conducted: *SZEOP* at [36].

42 It is necessary, in order to determine whether the Tribunal complied with its s 424AA obligations, to return to the Tribunal's decision and analyse the evidence given by the Fathers and see how it was dealt with by the Tribunal.

43 The Tribunal's telephone conferences with each of the Fathers appear to have been relatively short. The Tribunal asked each of Father Thomas and Father Peter for confirmation of what the Tribunal said were the following claims made by the applicant:

- That the applicant was a member of the Church;
- That "he was attacked by Hindus" (no specific event or events were referred to); and
- That his wife Meena and their children were being looked after by the Church (what "looked after" meant was not specified).

44 Father Thomas' response to the Tribunal's characterisation of the appellant's claims, was that it was "all lies". He went further. He said that "nobody had been attacked by Hindus and that nobody was being looked after by the Church". Father Thomas then said

that it would be better if the Tribunal spoke to Father Peter who had organised the trip to Australia.

45 The Tribunal did not ask Father Thomas to give the basis for his knowledge. It did not follow up with the obvious question as to how Father Thomas even knew the appellant when it appears that he refuted the appellant's claim to have been a member of his Church. Father Thomas' referral of the Tribunal to Father Peter "who had organised the trip to Australia", suggests that Father Thomas' comments were made in the context of some prior knowledge by him of claims for refugee status being made by persons who had visited Australia on a trip organised by his Church.

46 When the three claims were put to Father Peter, he replied "that the claims are absolutely wrong". He gave no further detail. The Tribunal had not identified when and how the attacks by Hindus had been claimed to have occurred and Father Peter, like Father Thomas before him, asked for no specification.

47 His evidence immediately moved to the World Youth Day trip and was to the effect that the appellant had travelled to Australia for World Youth Day and that all participants had been told to come back and had undertaken to do so in affidavits. Father Peter said that it was a case of fraud, and that the appellant was attempting to bluff the Tribunal and had applied for a visa because of pressure from advocates who were motivated by money.

48 These were serious allegations. It is not clear how Father Peter knew of them. He was not asked by the Tribunal to explain the basis of his knowledge or expand on his understanding, including as to the attack or attacks which he was refuting. Clearly Father Peter was labouring under the mistaken view that the appellant had not returned to India after his trip with the Church for World Youth Day. Despite that fact being known to the Tribunal, the Tribunal made no attempt to disabuse Father Peter of it or otherwise clarify the position.

49 There was a fair inference to be drawn that Father Peter's views (and perhaps those of Father Thomas), including his denial of what the Tribunal said were the appellant's claims, may well have been tainted by his mistaken view that, despite undertakings given to the Church by the appellant, the appellant had failed to return to India after World Youth Day. The Tribunal made no attempt to explore that obvious possibility.

50 The Tribunal made no attempt to explore the basis upon which Father Peter knew that the appellant's wife and children were not "being looked after by the Church". The appellant's prior evidence that initially the appellant's wife and children were living in the Church but were now staying "in another rented property", was not put to Father Peter nor to Father Thomas.

51 Despite the presence of the appellant during the telephone conferences, he was not given any opportunity to ask any questions of the Fathers.

52 The appellant was, however, immediately invited to respond to the evidence of Father Peter. His response was to the effect that Father Peter had said what he had said because he was annoyed with those who had breached their oath and had failed to return to India. The appellant tried to emphasise that his position was different to those that Father Peter had spoken of. He had returned to India.

53 At that point, the Tribunal says in its decision that it gave the applicant "a warning, pursuant to s 424AA of the Act". In that context, the Tribunal referred to the evidence of Father Peter and Father Thomas and noted that their evidence suggested that the applicant had not, in fact, been attacked by Hindus and that his wife and children were not being looked after by the Church. The Tribunal "indicated this was relevant because it undermined the applicant's protection claims, and could therefore form the reason, or part of the reason, for affirming the decision under review". The appellant was invited to comment on or respond to the information and was also given the opportunity to request an adjournment, if he wished, prior to responding.

54 The appellant elected to respond immediately. In his response, the appellant again asserted that Father Peter's evidence was tainted by the conduct of others who had refused to return to India after World Youth Day. He said that Father Peter didn't know anything about what had happened to him. More detail of the response is set out at paragraphs [63]-[70] of the Tribunal's decision.

55 In its decision, the Tribunal accepted that the applicant and his family were Christians as claimed. The Tribunal, however, found that the appellant's claim to have been a victim of anti-Christian violence in the past, and his evidence generally, was unconvincing for three

reasons. One of those reasons, and arguably the most potent of the reasons relied upon, was the evidence given by Father Thomas and Father Peter. In that regard, the Tribunal said at [78]:

> - key aspects of the applicant's claims, namely that he has been the victim of attacks by the Hindu extremists and that, as a consequence, the church he belongs to had provided accommodation for his wife and children, were refuted by church officials from whom the Tribunal took evidence during the hearing.

56 As the Tribunal said at [79], for reasons including the reason set out in the extract above, the Tribunal did not find the appellant's claims and evidence to be credible. The Tribunal did not accept that the appellant had been attacked and threatened, nor that he had been beaten unconscious and his shop ransacked after having been warned to change his religion or leave the country. The Tribunal did not accept that the appellant had been persecuted in the manner claimed, including by threats requiring the appellant to change his children's names to Hindu names or leave the country. Further, the Tribunal did not accept that the appellant's family had sought sanctuary from the church and that his family and mother are currently living in church property.

57 In my view, the Tribunal did not provide to the appellant clear particulars of the information it considered would be a reason or part of the reason for affirming the decision under review. There was not sufficient specificity and further, as Tracey J said in *MZXKH* at [20], the wording employed by the Tribunal lacked the necessary clarity.

58 In giving its s 424AA "warning", the Tribunal referred to the evidence of Father Peter and Father Thomas and said that that evidence suggested that the appellant had not in fact been attacked by Hindus and that his wife and children were not being looked after by the Church. Was the Tribunal here saying that the entirety of the evidence given by the Fathers was the basis for these suggestions? Conversely, was the Tribunal trying to say that only the evidence of the Fathers that dealt directly with the claims put to them was relevant?

59 If, in the words of the Full Court in *SZMCD* at [71], the Tribunal was required to put the appellant "on fair notice of critical matters of concern to the Tribunal", the Tribunal was here required to identify whether its concern related to the whole of the evidence of the Fathers, or simply that part of it which directly refuted what was said by the Tribunal to be the appellant's claims. Given that the entirety of the evidence of the Fathers was adverse to

the appellant and given that the Tribunal's acceptance of the appellant's evidence was obviously going to depend, to some extent, on whether the Tribunal believed the appellant, all of the evidence given by the Fathers was potentially relevant to the claim about attacks by Hindus, and also to the claim that the appellant's family was being looked after by the Church. The Tribunal failed to identify clearly the information that it was concerned about. The appellant was not in a position to know whether his response should deal with the entirety of the evidence of the Fathers (including allegations of fraud and that the appellant was bluffing the Tribunal and pressured to do so by people motivated by money), or simply Father Thomas' response that "that was all lies" and Father Peter's response that "the claims are absolutely wrong".

60 Further, the Tribunal failed to ensure that the appellant understood why the information (whether in its entirety or more limited form) was relevant to the review. For the Tribunal to say that "this was relevant because it undermined the applicant's protection claims" is to do no more than indicate that the information was adverse to the appellant's claim for a protection visa. What was required was an explanation as to "why the information is relevant to the review". To simply say that the information undermines an applicants case is far too general, and does not satisfy the requirement of s 424AA(b)(i) to ensure that the visa applicant "understands *why* the information is relevant to the review".

61 It is not clear whether the Tribunal meant to indicate that the information was relevant to the specific claims refuted by the Fathers, or to each and every claim made by the appellant, or something in between. Ultimately, the Tribunal used the information to reject all of the claims made by the appellant identified earlier in paragraph [56]. It did that because it found that the appellant was not a credible witness. Yet, the Tribunal did not say that the information suggesting that the appellant was not attacked and that his family were not being looked after by the Church, was relevant to whether or not the Tribunal would accept other claims made by the appellant.

62 Furthermore, paragraph (b) of s 424AA speaks of both the relevance and the consequences of the information. Rather than ensuring that the appellant had an understanding of the consequences of the information being relied upon by the Tribunal, the appellant was here misled as to what that consequence would be. Given that the Tribunal had come to the view that s 424AA was enlivened and thus that it had information before it which

it considered "would" be the reason or part of the reason for affirming the decision that was under review, it was misleading of the Tribunal to tell the appellant that the information "could" form the reason or part of that reason.

63 In *Minister for Immigration and Citizenship v SZLFX* (2009) 238 CLR 507 French CJ, Heydon, Crennan, Kiefel and Bell JJ said at [25]:

> As observed equally correctly by Heerey J in *MZXBQ v Minister for Immigration and Citizenship* (2008) 166 FCR 488 at [29], s 424A speaks of information which "would", not which "could" or "might", be the reason or part of the reason for affirming the decision under review.

64 In *MZXBQ*, Heerey J noted the conditional characteristic of s 424A(1)(a). I agree that a conditional characteristic is found in that paragraph, as it is in s 424AA. With respect to Heerey J, I would express the condition slightly differently. The Tribunal's satisfaction that the information would be the reason is conditional upon the Tribunal being persuaded to the contrary by the opportunity provided to a visa applicant to comment or respond to the information. As Heerey J said at [28], that is the point of giving the applicant the opportunity to rebut, qualify or explain the information.

65 In that context, in order to meet its obligation to ensure that the visa applicant understands the consequence of the information, it is incumbent on the Tribunal to tell the visa applicant that the information which it has particularised would be the reason, or part of the reason, for affirming the decision under review, unless it is persuaded not to do so by any response that the applicant can make to the information. The visa applicant should be invited to comment on or respond to the information, including by seeking additional time, for that purpose. Thus, having clearly particularised the information in question, the Tribunal might invite the visa applicant to "comment on information that the Tribunal considers would, subject to any comments you make, be the reason, or part of the reason, for affirming the decision under review". That formulation appears to have been utilised by the Tribunal in other cases: see for example *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39 at [6] and *MZXKH* at [20]. It was not utilised here.

66 By telling the applicant that the information "could" form the reason or part of the reason, the Tribunal failed to ensure that the applicant understood the view that the Tribunal had arrived at, and the full gravity of the consequence of that view upon his claim. In the

absence of a proper understanding, the appellant was not put in a position to understand how critical it was for him to respond and to do so convincingly.

67 In the circumstances of this case, the appellant may well have taken the view that the Tribunal would regard the evidence of Father Thomas to be of little consequence. As I have said already, it is unclear from the evidence that Father Thomas gave that he even knew of the appellant. Similarly, in relation to evidence of Father Peter, the appellant may well have thought that the Tribunal would not give that evidence very much weight. The evidence was unspecific, the basis for the assertions made was not given and the evidence was obviously tainted by Father Peter's misconception that the appellant was one of the oath breakers who had not returned to India.

68 In those circumstances, and because he was told that the evidence of the Fathers could, rather than would, be the reason or part of the reason for affirming the decision under review, the appellant may well have elected to respond immediately rather than take the benefit of the opportunity provided by s 424AA to seek additional time to provide his response. A full understanding of the gravity of what he was facing may well have impacted upon both the timing and the content of any response that the appellant chose to make.

69 For that reason as well, the Tribunal's approach failed to ensure that the appellant was put into a position where he could understand both the relevance and consequence of the information. That failure denied the appellant the proper opportunity to comment on or respond to the information, which s 424AA intends that he should have.

CONCLUSION

70 The Federal Magistrate erred in failing to identify that jurisdictional error existed. The Federal Magistrate should have held that because the Tribunal failed to comply with s 424AA, it was required to comply with s 424A(1) and did not. The Federal Magistrate should have held that the decision of the Tribunal was not a privative clause decision and should have issued the writs of certiorari and mandamus which the appellant sought**.**

71 These conclusions lead to the result that the appeal must be allowed. The orders made by the Federal Magistrate should be set aside and be substituted by orders that provide

remedies by way of certiorari and mandamus directed to the Tribunal. Those remedies will have the effect of quashing the decision of the Tribunal and requiring the Tribunal to hear and determine, according to law, the appellant's application for review of the decision to refuse his application for a protection visa.

72 In accordance with the usual principle, costs should follow the event. Orders will be made for the first respondent to pay the appellant's costs before the Federal Magistrates Court and of the appeal.

I certify that the preceding seventy-two (72) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg.

Associate:

Dated: 4 June 2010