FEDERAL COURT OF AUSTRALIA

SZNKO v Minister for Immigration and Citizenship [2010] FCA 297

Citation:	SZNKO v Minister for Immigration and Citizenship [2010] FCA 297
Appeal from:	SZNKO v Minister for Immigration and Citizenship [2009] FMCA 978
Parties:	**SZNKO v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND ANOR**
File number:	NSD 1222 of 2009
Judge:	**FLICK J**
Date of judgment:	30 March 2010
Catchwords:	**MIGRATION –** "*information*" communicated orally during Tribunal hearing – identification of the "*information*" communicated – context within which "*information*" appears – need to provide "*clear particulars*" of information - need to advise applicant he can seek additional time to comment or respond **Held:** Appeal allowed
Legislation:	*Migration Act 1958* (Cth) ss 424A and 424AA *Migration Amendment (Review Provisions) Act 2007*(Cth)
Cases cited:	*Minister for Immigration and Citizenship v SZLFX* [2009] HCA 31, 238 CLR 507, cited *Muin v Refugee Review Tribunal* [2002] HCA 30, 190 ALR 601, cited *NAVM v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 99, cited *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26, 235 ALR 609, cited *SZJBD v Minister for Immigration and Citizenship* [2009] FCAFC 106, 179 FCR 109, cited *SZLIQ v Minister for Immigration and Citizenship* [2008] FCA 1405, cited *SZLXI v Minister for Immigration and Citizenship* [2008] FCA 1270, 103 ALD 589, cited *SZMCD v Minister for Immigration and Citizenship* [2009] FCAFC 46, 174 FCR 415, cited *SZMOO v Minister for Immigration and Citizenship* [2009] FCA 211, cited

	SZMUK v Minister for Immigration and Citizenship [2009] FCA 1372, cited *SZNKO v Minister for Immigration and Citizenship* [2009] FMCA 978, reversed *SZNKX v Minister for Immigration and Citizenship* [2009] FCA 1407, cited. *SZNLT v Minister for Immigration and Citizenship* [2009] FCA 1332, cited
Date of hearing:	9 February 2010
Date of last submissions:	10 February 2010
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	34
Counsel for the Appellant:	Mr J R Young
Solicitor for the Appellant:	Simon Diab & Associates
Counsel for the First Respondent:	Mr Y Shariff
Solicitor for the First Respondent:	DLA Phillips Fox Lawyers

IN THE FEDERAL COURT OF AUSTRALIA
NSW DISTRICT REGISTRY
GENERAL DIVISION **NSD 1222 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZNKO**
Appellant

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

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **FLICK J**
DATE OF ORDER: **30 MARCH 2010**
WHERE MADE: **SYDNEY**

THE ORDERS OF THE COURT ARE:

1. The *Notice of Appeal* as filed on 28 October 2009 is allowed.
2. The orders of Raphael FM in the Federal Magistrates Court of Australia on 7 October 2009 be set aside.
3. An order in the nature of certiorari quashing the decision of the Second Respondent.
4. An order in the nature of prohibition prohibiting the First Respondent from acting upon or giving effect to or proceeding further on the basis of the decision of the Second Respondent.
5. The matter be remitted to the Second Respondent to be determined according to law.
6. The First Respondent is to pay the Appellant's costs of the proceeding before Raphael FM and of this 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.

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First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **FLICK J**
DATE: **30 MARCH 2010**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

1 The Appellant is a citizen of Bangladesh who arrived in Australia on 17 July 2008.

2 On 29 August 2008 he applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. A delegate refused to grant that visa by letter dated 24 November 2008 and on 1 December 2008 he applied to the Refugee Review Tribunal for review of the delegate's decision. On 4 March 2009 the Tribunal affirmed the decision not to grant the visa.

3 An application was filed in the Federal Magistrates Court on 7 April 2009 and on 7 October 2009 that Court dismissed the application: *SZNKO v Minister for Immigration and Citizenship* [2009] FMCA 978.

4 A *Notice of Appeal* was filed in this Court on 28 October 2009. The *Ground of Appeal* there advanced is stated as follows:

His Honour erred by not finding that the Second Respondent made jurisdictional error by failing to comply with sections 424AA or 424A in respect of information stated to be contained on a Departmental case file for a person other than the applicant.

5 The appeal is to be allowed.

SECTIONS 424A & 424AA

6 Section 424A of the *Migration Act 1958* (Cth) provides as follows:

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.

7 "[*I*]*nformation*" for the purposes of s 424A does not extend to information provided by an applicant in support of a claim for a protection visa or the "*thought processes*" of the Tribunal itself: *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26, 235 ALR 609. Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ there referred to a submission being addressed as to the construction of s 424A, and continued:

> [16] Four points must be noted about this submission. First, while questions might remain about the scope of par (b) of s 424A(3), it was accepted by both sides that information "that the applicant gave for the purpose of the application" did not refer back to the application for the protection visa itself, and thus did not encompass the appellants' statutory declaration. …

Their Honours continued:

> [18] Thirdly and conversely, if the reason why the tribunal affirmed the decision under review was the Tribunal's disbelief of the appellants' evidence arising from inconsistencies therein, it is difficult to see how such disbelief could be characterised as constituting "information" within the meaning of par (a) of s 424A(1). Again, if the Tribunal affirmed the decision because even the best view of the appellants' evidence failed to disclose a Convention nexus, it is hard to see how such a failure can constitute "information". Finn and Stone JJ correctly observed in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* that the word "information":
>
> > "does not encompass the tribunal's subjective appraisals, thought processes or determinations … nor does it extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the tribunal in weighing up the evidence by reference to those gaps, etc".
>
> If the contrary were true, s 424A would in effect oblige the Tribunal to give advance written notice not merely of its reasons but of each step in its prospective reasoning process. However broadly "information" be defined, its meaning in this context is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence. The appellants were thus correct to concede that the relevant "information" was not to be found in inconsistencies or disbelief, as opposed to the text of the statutory declaration itself.
>
> [19] Fourthly, and regardless of the matters discussed above, the appellants' argument suggested that s 424A was engaged by *any* material that contained or tended to reveal inconsistencies in an applicant's evidence. Such an argument gives s 424A an anomalous temporal operation. While the Act provides for procedures to be followed regarding the issue of a notice pursuant to s 424A *before* a hearing, no such procedure exists for the invocation of that section *after* a hearing. However, if the appellants be correct, it was only after the hearing that the Tribunal could have provided any written notice of the relevant passages in the statutory declaration from which the inconsistencies were said to arise, as those inconsistencies could not have arisen unless and until the appellants gave oral evidence. If the purpose of s 424A was to secure a fair hearing of the appellants' case, it seems odd that its effect would be to preclude the Tribunal from dealing with such matters during the hearing itself.

See also: *Minister for Immigration and Citizenship v SZLFX ("SZLFX")* [2009] HCA 31 at [20] to [22], 238 CLR 507 at 513 per French CJ, Heydon, Crennan, Kiefel and Bell JJ; *SZJBD v Minister for Immigration and Citizenship ("SZJBD")* [2009] FCAFC 106 at [98] to [99], 179 FCR 109 at 131 to 132 per Buchanan J (Perram J agreeing), at [25] to [26], 179 FCR at 115 per Spender J (diss).

8 Section s 424AA provides the following:

> **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.

Section 424AA "*creates no imperative duties; rather, it is an enabling provision which permits the Tribunal, if it wishes, to give particulars at an oral hearing*": *SZMUK v Minister for Immigration and Citizenship* [2009] FCA 1372 at [22] per Perram J.

9 The evolution of these two provisions has been recounted by Tracey and Foster JJ in *SZMCD v Minister for Immigration and Citizenship* [2009] FCAFC 46, 174 FCR 415 at 429 to 430. After having done so, their Honours observed:

> [71] The policy and purpose reflected in s 424A is that the Tribunal should be compelled:
>
> (a) To put the visa applicant on fair notice in writing of critical matters of concern to the Tribunal;
>
> (b) To ensure that the visa applicant understands the significance of those matters to the decision under review; and
>
> (c) To give the applicant a reasonable opportunity to comment on or to respond to those matters of concern.
>
> [72] It is evident that the same policy and purpose underpin s 424AA.

Section 424AA is only engaged if there is "*information*" otherwise falling within s 424A.

10 Section 424A, it will be noted, is expressed in mandatory terms — the Tribunal "*must*" do those things there specified; s 424AA(a) conveys a discretionary power — the Tribunal "*may*" give the "*clear particulars*" there referred to orally to an applicant (*SZLXI v Minister for Immigration and Citizenship* [2008] FCA 1270 at [24], 103 ALD 589 at 593) and, if it does so, s 424AA(b) then uses the mandatory term "*must*". In this way s 424AA(b) attempts to ensure that the "*information*" communicated orally rather than in writing can be meaningfully addressed. Section 424AA(b)(i), it will be noted, is not an obligation of perfection; it is an obligation to ensure "*as far as is reasonable practicable*" that an applicant understands the relevance of the "*information*" in question. Written communication perhaps more readily allows an applicant an opportunity to assimilate information being brought to his attention and to respond; an oral communication of information during the course of what an applicant may regard as a formal hearing may not be susceptible of immediate response or comment. Section 424AA(b)(iii) ensures that an applicant is to be given an opportunity to

have "*additional time*" in which to respond or comment. "*[A]dditional time*" may be necessary to (for example) collate additional materials to answer the information about which he is being told for the first time or time in which to simply think about what "*comment*" should be made or how best to "*respond*". How much time will be needed will depend upon the nature of the "*information*" being communicated and an assessment of what is required to meaningfully "*comment on or respond*". On occasions, a Tribunal may conclude that the attempts it is making to communicate "*information*" orally are unsuccessful. In *SZMOO v Minister for Immigration and Citizenship* [2009] FCA 211 at [30] to [31] it would appear that the Tribunal initially sought to invoke s 424AA but gave up and resorted to communicating the information in writing. See also: *SZNLT v Minister for Immigration and Citizenship* [2009] FCA 1332 at [40] per Cowdroy J.

11 The procedural requirements imposed by s 424AA(b) remain valuable procedural safeguards.

12 But once the Tribunal has complied with s 424AA it is "*relieved of the obligation to comply with s 424A by the provisions of s 424A(2A)*": *SZNKX v Minister for Immigration and Citizenship* [2009] FCA 1407 at [20] per Lander J.

THE INFORMATION ON THE DEPARTMENTAL FILE

13 During the course of the hearing before the Tribunal in the present proceeding it became apparent that a matter of concern to the Tribunal Member was the fact that the present Appellant was seeking to rely upon a letter supporting his claim that he was a Christian. This letter, the Tribunal Member stated, was substantially the same as another letter he had come across in an unrelated proceeding. The concern was whether the letter relied upon by the Appellant was a letter "*made to order*".

14 The reasons for decision of the Tribunal clearly expose its conclusion that it did not find the Appellant to have given "*a truthful and credible account of his past experiences*". The concern as to the reliability of the letter only fuelled the reservations that the Tribunal Member had formed about the present Appellant's credibility.

15 Various extracts from the transcript of the Tribunal hearing are set forth in the reasons for decision of the Federal Magistrate. For present purposes, however, reference need only be

made to the following extract where the Tribunal Member was asking questions about the letter relied upon by the present Appellant, being a letter signed by the Chairman of a Union Council in Bangladesh.

Tribunal Member:	All right. I'd like to talk to you a little bit about your involvement with the BNP. Now, one of the things that you provided to support your claim of involvement with the BNP was this letter from the … Union Council. How did you organise this letter?
Applicant:	My friend send this one … Some of them send by … some of them send by …
Tribunal Member:	O K. Is the information in this letter true?
Applicant:	Yes. …when I came here after this I hand over all the thing.
Tribunal Member:	So do you know Mohammed Abu Bak Amir?
Applicant:	…
Tribunal Member:	Abu Bak Amir, yes. And you know him?
Applicant:	Yes.
Tribunal Member:	And what he's written in this letter is true?
Applicant:	Yes.
Tribunal Member:	Right. I'm concerned about this letter and that has made me concerned about all of the documents in relation to your case, because I am reviewing a case by another person from Bangladesh and they have provided a letter from a different union council signed by a different person. Apart from the parts of this letter that identify you, that letter is identical to this letter. It uses identical phrasing and some of it is quite unusual phrasing. It, it says for example, this, "For this he falls into the livered eye of the forbidden religious organisations." And it appears to me hard to believe that two different people in Bangladesh would write exactly the same letter in relation to members of the BNP. Can you think of any reason why there would be another letter that's essentially identical to this one and only except it claims to come from a different union council?
Applicant:	No, no. This is my union.
Tribunal Member:	Mmm. Well, what it could suggest to me is that you have got letters made to order and there just happens to be two letters got by two different people made to order and they happen to be identical. And in relation to two other letters of yours, they are also extremely similar to other material supplied by other applicants. That might make me question whether the documents you provided are genuine.
Applicant:	Yes … I provide all the genuine documents.

Tribunal Member:	I suppose the problem for me is partly I need to assess whether I think I'm being told the truth about a situation, and when you tell me today that between 2006 and 2008 you lived in Dhaka and but your application tells me you lived in your village during that time and when you tell me you did no work during that time but your application form tells me you worked in business during that period and when I think that this letter talking about your experience and your fears is identical to another letter purportedly written by somebody else, that might indicate to me that I'm really not being given a truthful account of your past experiences.
Applicant:	No, no, no, it is …
Tribunal Member:	Well, can you offer me some other explanation for why there's differences between this materials and what you're telling me today and there's similarity between your letter and this other person's?
Applicant:	No, no. I think it is all same, because few mistake, they're done by the solicitors.

16 At no time did the Tribunal Member disclose to the present Appellant details of the person who wrote the other letter referred to, the identity of the Union Council from whence it had come, or its date.

17 The two questions which arose for resolution before the Federal Magistrate, and which again arise on appeal, may be expressed as follows:

(i) do such details constitute "*information*" for the purposes of s 424A and s 424AA or is "*information*" confined to such details as were in fact disclosed by the Tribunal member during the course of the hearing?; and

(ii) if the "*information*" that may be given orally to the present Appellant during the course of the hearing is confined to the details in fact disclosed, has the Tribunal member complied with s 424AA(b) and, in particular, s 424AA(b)(iii) and (iv)?

18 The "*information*" to which ss 424A and 424AA refers is confined to "*information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review*".

19 In the present proceeding it is considered that the details not disclosed to the present Appellant concerning the person who wrote the other letter, the Union Council from which it had come, and its date constituted:

- "*information*" for the purposes of s 424A;

and that:

- "*clear particulars*" of such information had not been communicated orally for the purposes of s 424AA(a).

Prior versions of s 424A, it may be noted, referred merely to "*particulars of any information*" being communicated to an applicant. The requirement that "*clear particulars*" be provided was introduced by the *Migration Amendment (Review Provisions) Act 2007* (Cth). But neither the *Second Reading Speech* to the *Migration Amendment (Review Provisions) Bill 2006* (Cth) nor the *Explanatory Memorandum* in respect to that Bill throw any light on the transition from the requirement that "*particulars*" be provided to the requirement that "*clear particulars*" be provided. Despite this, the change in the language employed by the legislature and the effect of this on the character of the particulars that are to be provided cannot be ignored. And, given the inquisitorial functions entrusted to the Tribunal, it is not a phrase to be construed necessarily by reference to the purpose that "*particulars*" may serve in (for example) a statement of claim filed in this Court. What falls within the phrase as employed in s 424A and s 424AA is, however, not without some ambiguity. It is a phrase also employed in s 359A and s 359AA of the 1958 Act.

20 It is not considered that "*information*" falling within s 424A was intended to be confined to the similarity in the content of the two letters such as to provoke concern as to whether the letter relied upon by the now Appellant was "*made to order*". The content of the two letters and the similarity in their content, it has been correctly concluded, "*would be … part of the reason, for affirming the decision*" to refuse the visa. The similarity in the two letters was, at the very least, part of the basis upon which the Tribunal Member expressed the concern that they may have been "*made to order*".

21 But "*information*" for the purposes of s 424A in the present proceeding is not to be so confined.

22 Moreover, and irrespective of whether it is s 424A or s 424AA which is the means invoked whereby "*information*" is communicated to an applicant, both s 424A(1)(a) and s 424AA(a) impose the requirement that "*clear particulars*" of the information in question be "*give[n]*".

23 There may be circumstances in which the requirement to "*give*" information to which s 424A applies may not extend to a requirement to disclose the entirety of any document in which such "*information*" is contained. In those cases it may not matter for the purposes of making a decision affirming a refusal of a protection visa that the "*information*" in question is but part of a document or report touching other matters or containing diverse other matters. In those cases the disclosure of that specific part of a much lengthier document may be sufficient. But "*information*" for the purposes of s 424A cannot in all cases be clinically divorced from the context it which it appears. How much of that surrounding context must also be disclosed must necessarily depend upon the facts and circumstances of each individual case. In some cases it may be necessary to identify the "*source*" from which information has been obtained. Thus, in *SZLIQ v Minister for Immigration and Citizenship* [2008] FCA 1405 Buchanan J concluded that extracts from a published book and the source of that material should have been disclosed. Indeed, the extent of disclosure may not necessarily be confined to the disclosure of material which ensures that a particular part is not rendered misleading; the touchstone is that s 424A and s 424AA require the disclosure of so much as to ensure that the opportunity to "*comment… or respond…*" is meaningful. In some cases the disclosure of the "*substance*" of information may be sufficient (*NAVM v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 99 at [33]); in other cases "*clear particulars*" may require more.

24 In some cases it may impose an "*impossible*" burden upon a tribunal member to require the disclosure of the source of material relied upon. The practicality of requiring a tribunal member to disclose information that may have been accumulated as a result of years of experience must constantly be borne in mind. In *Muin v Refugee Review Tribunal* [2002] HCA 30, 190 ALR 601 Hayne J, for example, observed at 661:

> [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.

25 But in the present proceeding and where the "*information*" is contained within a comparatively short letter which has come to the attention of a Tribunal Member, and which was presumably readily available, it is respectfully considered that details as to who wrote that other letter, the capacity of the person who wrote that letter and its date must be disclosed if "*clear particulars*" of that letter are to be given. Other than the similarity in the content of the two letters, the only other "*particulars*" disclosed in respect to that other letter are that it emanated "*from a different union council*" and was "*signed by a different person*". That is not sufficient in the present case.

26 Although the concern of the present Tribunal Member that such letters can be "*made to order*" may not be without substance, such limited procedural protections as remain within Part 7 Division 4 of the *Migration Act* are to be given full force. Sections 424A and 424AA ensure that the decision-making function of the Tribunal in respect to "*information*" that forms "*a part of the reason*" for affirming the decision under review is assisted by an applicant's "*comment … or respon[se]*".

27 A meaningful opportunity to "*comment … or respond*" in the present proceeding required the disclosure of information that was withheld. An explanation may have been forthcoming if the applicant had been told more about the other letter that the Tribunal Member had come across. The reservations of the Tribunal Member, especially given his other concerns as to the credibility of the now Appellant, may not have been misplaced. No further "*comment … or respon[se]*" may in fact have been forthcoming. But the opportunity to "*comment … or respond*" is the very procedural safeguard which enables an applicant to at least have an opportunity to address those reservations. An opportunity to "*comment … or respond*" to the other letter is only a meaningful opportunity if there has been disclosure of such particulars as enables an applicant to put that other letter into context. Letters in the same terms, but dated years apart, may be more difficult for an applicant to explain (for example) than letters written relatively contemporaneously in much the same circumstances.

28 Although it is thus unnecessary to resolve the further contention that there has been a contravention of s 424AA(b), it is perhaps prudent that the contention be briefly addressed.

29 Compliance with s 424AA(b)(iii) and/or (iv), does not require a Tribunal Member to repeat the very words employed in s 424AA(b)(iii) in some ritualistic or "*parrot-like recantation*". Indeed, cases may be envisaged where to do so may not meaningfully convey to an applicant the opportunity sought to be secured by those provisions. Compliance with those provisions must necessarily depend upon the facts and circumstances of the claims being advanced before the Tribunal, the ability of any particular applicant to properly avail himself of the opportunity to be heard before the Tribunal, and the limited procedural protections prescribed by the Commonwealth legislature.

30 In the present proceeding, and as noted by the Federal Magistrate, two of the exchanges before the Tribunal as recorded in the transcript were as follows:

> Tribunal Member: Right. Mr [XX], I will now talk with you about some things that could be seen as negative to your application. Now, these are things that are of concern to me and that might be a reason for finding that the Department of Immigration's decision was correct. I haven't made my mind up about these things. What I want is your comments in relation to them, because I need to consider all of the available material. If you would prefer to not comment on those things today, then let me know and we can talk about how you might comment on them in the future.

And later the following exchange occurred:

> Tribunal Member: Right. Could I have someone in Room 11, please. Right. I didn't have anything else I wanted to ask you about. Is there anything we haven't talked about that you think is important that you'd like to tell me?
>
> Applicant: As far as I know that I am telling the truth. All the incident … all are true. I know that you people don't believe in this but at least you can try to prove it, that whatever I'm telling, it is all the truth.
>
> Tribunal Member Again I'd indicate to you, I haven't made my mind up about that. I need to think about what you've said today and the other evidence that's available, but it's important you have the opportunity to comment on things that I'm thinking about. Now, I'm conscious that Mr Brown wasn't able to give his evidence. What happens after today is, I need to think about everything and reach a decision about your case. I need then to type up the reasons for the decision I reach. Up until the time I have typed up, finished and signed that decision, you can give me any material you would like me to consider. And what I can indicate to you is, I will not have finished your decision before Tuesday of next week. So if, if there are things that Mr Brown wishes he had been able to tell me or anything else you think of that you think is important, you can write that down and give it to me before Tuesday of next week. So if tonight you think of something you wish you had said, then by all means, get that written down and provide that to me. Do you understand that?

31 The statement that the present Appellant need not "*comment on those things today*", if he preferred not to, reverses the requirement imposed by s 424AA(b)(iii). If s 424AA(a) is invoked, s 424AA(b)(iii) imposes a requirement that an applicant be positively advised that he may seek additional time in which to respond. How that advice may be effectively communicated may be left to be resolved by reference to the facts and circumstances of individual cases. But compliance is not achieved by a statement which merely implicitly conveys to an applicant that he may seek and be given "*additional time*". Nor can non-compliance with s 424AA(b)(iii) necessarily be excused or cured by reason of "*additional time*" in fact being extended. Non-compliance with s 424AA(b)(iii) may not in all cases be equated with a consideration of whether there may be discretionary reasons for refusing relief.

CONCLUSIONS

32 Unlike the situation in *SZLFX*, supra, the other letter to which reference was made by the Tribunal in the present proceeding was "*information*" relied upon by the Tribunal – at least in part – for the purposes of its decision affirming the decision under review. The matters not disclosed to the present Appellant formed part of the "*information*" relied upon and no "*clear particulars*" of that information were communicated to the Appellant either in writing pursuant to s 424A or orally pursuant to s 424AA.

33 The appeal is to be allowed.

ORDERS

34 The Orders of the Court are:

1. The *Notice of Appeal* as filed on 28 October 2009 is allowed.
2. The orders of Raphael FM in the Federal Magistrates Court of Australia on 7 October 2009 be set aside.
3. An order in the nature of certiorari quashing the decision of the Second Respondent.

4. An order in the nature of prohibition prohibiting the First Respondent from acting upon or giving effect to or proceeding further on the basis of the decision of the Second Respondent.

5. The matter be remitted to the Second Respondent to be determined according to law.

6. The First Respondent is to pay the Appellant's costs of the proceeding before Raphael FM and of this appeal.

I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate:

Dated: 30 March 2010