FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZNJT v MINISTER FOR IMMIGRATION & ANOR *[2009] FMCA 730*

MIGRATION – RRT decision – Bangladeshi claiming political persecution – delegate assumed an immaterial part of the claimed history – Tribunal rejected all parts of history – applicant not denied an opportunity to address the issues arising in the review – Tribunal's acknowledgement of review application – advice to send information to the Tribunal immediately – not an invitation 'to give additional information' within s.424(2) – no 'additional' information requested – any jurisdictional error was of no consequence – application dismissed.

Migration Act 1958 (Cth), ss.421, 424, 424(1), 424(2), 424(3), 424B, 424B(2), 424C(1), 425, 425(1), 425(2)(a), 425(2)(c)

Minister for Immigration & Multicultural & Indigenous Affairs v Sun (2005) 146 FCR 498, [2005] FCAFC 201
MZXRE v Minister for Immigration & Citizenship [2009] FCAFC 82
NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2) (2004) 144 FCR 1
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs (2006) 228 CLR 152
SZHKA v Minister for Immigration & Citizenship (2008) 172 FCR 1
SZKTI v Minister for Immigration & Citizenship (2008) 168 FCR 256
SZLPO v Minister for Immigration & Citizenship [2009] FCAFC 51
SZMBS v Minister for Immigration & Citizenship [2009] FCAFC 65
SZMOE v Minister for Immigration & Anor [2009] FMCA 116
SZMZX v Minister for Immigration & Anor [2009] FMCA 343
SZNAV & Ors v Minister for Immigration & Anor [2009] FMCA 693

Applicant:	SZNJT
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG743 of 2009
Judgment of:	Smith FM

Hearing date: 27 July 2009

Delivered at: Sydney

Delivered on: 27 July 2009

REPRESENTATION

Counsel for the Applicant: Ms B Tronson

Counsel for the First Respondent: Mr M P Cleary

Solicitors for the Respondents: Clayton Utz

ORDERS

(1) The application is dismissed.

(2) The applicant must pay the first respondent's costs in the sum of $5,865.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG743 of 2009

SZNJT
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. The applicant came to Australia on a visitor's visa in July 2008, and on 28 July 2008 he applied for a protection visa. He was assisted by his relations, but not by a professional migration agent. He set out in a statement attached to his application reasons why he feared persecution if he returned to his country of nationality, Bangladesh.

2. In his statement, he referred to joining the student wing of the Bangladesh Nationalist Party ("BNP") while at college, and to becoming in 2000 *"the joint secretary of the College Committee Chatradal"*. He claimed to have *"worked very hard"* in that office and to have *"influenced many students to join"*. He said that he led demonstrations against the Awami League opposing political party, and was attacked and injured by *"a group Awami goons"* in February 2000. He claimed that a false case was also filed against him at that time, and he started hiding. In the October 2001 election, he assisted a BNP

candidate, and *"on a number of occasions I was threatened by Awami goons"*. His candidate won the election, and the BNP won a landslide victory and formed government. He claimed that *"my ceaseless work with the people put me in a leadership position"*. In 2003 he became the organising secretary of a branch of the BNP, and in 2005 he became an executive member of a city committee of the party.

3. The applicant's statement referred to political chaos which occurred in 2007, leading to a caretaker government which arrested *"more than 200,000 political leaders and activists in Bangladesh. Most of them from BNP"*. His statement said:

> *After arrival of the current government I could not live at home. I was hiding for 1 and half year within the country. Finally, my sister thought about my life and sponsored me to come to Australia. I paid huge bribe at the airport, which enabled me to leave the country.*

The delegate's decision

4. The applicant was invited by the delegate to an interview, and he attended. However, the delegate was not persuaded that he was eligible for a visa, and refused the visa application on 15 September 2008. The delegate referred to the applicant's claims, and said:

> *However, at interview, I found the applicant to be lacking in knowledge about BNP programs and ideology. I also found him to be not knowledgeable of the procedures being taken when conducting meetings of political parties.*

5. The delegate explained weaknesses in the applicant's evidence, and concluded that the applicant was *"making up what he was saying"*. The delegate was not satisfied *"that the applicant ever served a leadership [sic: role] in the BNP as he claimed"*. The delegate continued:

> *I may accept that the applicant was a member or supporter of the BNP. However, I find that he was not a high profile member or that he was wanted by the caretaker government for being a BNP member.*

6. The delegate referred to country information indicating that it was local leaders and activists in the main parties who were the focus for arrest and detention by the caretaker government. The delegate noted that the applicant had not been arrested or even questioned, and that he had been able to leave Bangladesh on his passport issued in 2006. The delegate concluded:

> *After considering the materials before me, I have concluded that the applicant was not an actively involved member of the Bangladesh Nationalist Party. He was not of adverse interest to the authorities of the caretaker government of Bangladesh. He was not a victim of any abuse by the authorities and there is no indication that he will suffer persecutory treatment on return. The applicant only has a remote chance of being persecuted should he return to Bangladesh.*

The proceedings in the Tribunal

7. The applicant lodged an application for review by the Tribunal on 22 September 2008. His application contained his name, telephone number, and a residential and correspondence address, but no information or documents or submissions concerning his refugee claims were forwarded to the Tribunal with the application. In this respect, I note that the application form contained the following advice:

> *You should provide with this application any information, documents or submissions that you want the Tribunal to consider in support of your application, or send them to us as soon as possible. You should have any documents that are not in English translated by a qualified translator and give us the translations with the original documents. You should also advise the Tribunal if there are any alterations or additions you want to make to the information supplied in your protection visa application and accompanying documents.*

8. The applicant received from the Tribunal an acknowledgment letter dated 23 September 2008. It is relevant for me to extract it in full, since it is now contended to contain an invalid s.424(2) invitation *"to give additional information"*:

> ***ACKNOWLEDGEMENT OF APPLICATION***
>
> *We received your application on 22 September 2008*

This letter explains what we will do next and what we expect you to do. Please read it carefully.

What will the Tribunal do now?

We have asked the Department of Immigration and Citizenship (the Department) to send us its file so that the Tribunal can review your application for a protection visa.

When we get your file, we will decide if we can consider your review application. If we can consider it, a Member of the Tribunal will look at the information you and the Department have given us and information about your country.

Will I be invited to a hearing of the Tribunal?

After looking at this information the Member may either:

- *make a decision in your favour; or*
- *invite you to attend a hearing of the Tribunal*

The Member may also:

- *write to you for more information*
- *ask you to comment on information that the Tribunal has*

What is a hearing and why is it important?

A hearing is your opportunity to give the Tribunal evidence to support your application.

Evidence can include:

- *what you tell the Member at the hearing*
- *information or documents you give the Tribunal*
- *information or documents you ask others to give the Tribunal*

When and where will the hearing take place?

We will tell you the date and time of the hearing and where the hearing will be held. Hearings can take place in person at the Tribunal's offices in Sydney or Melbourne, but in some circumstances hearings may be conducted by video or telephone links.

What does the Tribunal expect me to do?

You should:

- *tell us immediately if you change your contact details (such as your home address, your mailing address, your telephone number, your fax number or your email address) or if there is any change in the contact details of your authorised recipient. If you do not, you might not receive an invitation to a hearing or other important information and your case may be decided without further notice. We have enclosed forms to use when advising us of changes to your contact details. (You should also inform the Department of any change in these details)*

- *use your RRT file number when you contact us. Your file number is: xxxxxxx*

- *immediately send us any documents, information or other evidence you want the Tribunal to consider. Any documents not in English should be translated by a qualified translator.*

Do I have to pay a fee for the review by the Tribunal?

A fee of $1400 is payable if the Tribunal decides you are not entitled to a protection visa.

Where can I get more information?

If you have any questions you can call me on the number below. You can also call our information line on 1300 xxx xxx (local call charges apply from anywhere within Australia, except when calling from mobile telephones). For assistance in your language, please contact the Translating and Interpreting Service (TIS) on 131 xxx. You can also obtain general information from our website at www.rrt.gov.au.

9. The applicant was then by letter dated 2 October 2008 invited to a hearing on 20 November 2008. After various exchanges, which it is unnecessary for me to detail, the applicant did attend a later hearing on 11 February 2009.

10. Before his attendance, the applicant had made three written submissions to the Tribunal enclosing various documents, including press cuttings concerning events in Bangladesh.

11. In all of his written submissions, the applicant asserted his *"involvement with the BNP"* and his claim that this involvement was at a level of activity which brought him within a group of people at risk as political activists if he returned to Bangladesh. Thus, in his submission of 10 November 2008, he said:

> …
>
> *I submit that I was involved with the BNP politics in Bangladesh and occupied various positions within the party. I started politics during my study at college. Since my party, BNP released power to the Caretaker government, the political torture came to our life who was involved in politics. The BNP activists and supporters are the more sufferers among them. When the police started to search me I was absconding and arranged a visa for Australia. Finally I came to Australia to safe my life.*
>
> *I am also involved with the BNP politics in Australia.…*

12. In his submission of 27 November 2008 he said:

> …
>
> - *I submit that I was involved with the BNP politics in Bangladesh and occupied various positions within the party. I am also involved with the BNP politics in Australia. I attend various demonstrations those held in Sydney and Canberra against the Caretaker government in Bangladesh.*
>
>   …
>
> - *I request to the Tribunal that I fear to go back in Bangladesh because I have the bitter experience in the past. I had been beaten and harassed by the hand of the political opponent of Awami League during my politics for BNP in Bangladesh. Under present Caretaker government my name was on the list. The police was searching me to arrest. To avoid arrest and detention I came to Australia and lodged for protection visa application. My relative in Bangladesh advised me that the police are still searching me.*
>
>   *The present Caretaker government filed a lot of false cases against the BNP leaders and activists including our party leader, C. Many of our leaders and activists fled from Bangladesh to avoid arrest like me.*

I believe that under the present Caretaker government regime my life will not be in safe in Bangladesh for two reasons:

1. I was involved in BNP politics; and

2. The police are searching me to arrest and detain.

I am also in fear that the present Caretaker government is in favour of Awami League. I believe that in the forth coming general election the Awami League will come into power by the support of Caretaker government.

I am in fear that if the Awami League will come into power I have to suffer again as like as past. I believe that not only me, the political situation will go far against all the leaders and activists who were involved in BNP politics. …

13. His third submission to the Tribunal of 22 January 2009 was made after the caretaker government had held parliamentary elections in December 2008, which had been won by the Awami League. The applicant referred to these events:

> *At present Bangladesh Awami League is in power in Bangladesh after won in the parliamentary election held on 29 December 2008. Since their win the Awami League goons attacked on BNP activists and lootings of theirs shops and houses continued to happen across the country. They also filed false and fabricated cases against many of our leaders and activists. Many times our leaders called upon the government to stop post-election violence, killings and atrocities across the country but the Awami League did not listen to our leaders.*
>
> *Accordingly I believe that our leaders and activists are not safe by this Awami League government. I am in fear that if I go back Bangladesh now or near future I will be persecuted by the Awami League activists and by the Awami League administration as like as in the past.*

14. The five newspaper reports all concern reports of the outcome of the election, and of attacks on leaders and activists of the BNP. One report at Court Book page 100-101 details such attacks. It also includes the following paragraph which was relied on in a manner to which I shall refer below:

In Pabna, some Awami League activists attacked the house of local BNP supporter, Saheb Ali, 40, in Sadar Upazila around 9.30 am and stabbed him to death, police and locals said.

15. Attached to the applicant's submissions were two letters of reference purporting to be from office holders of the BNP, asserting that the applicant was *"influential leader of our party"* (see Court Book page 64) and *"a dedicated activist of our local BNP"* (see Court Book page 108).

16. A transcript of the hearing held by the Tribunal is in evidence, and it appears to me that the Tribunal's description of the hearing is consistent with the transcript. A reading of the transcript also perhaps better explains why the Tribunal came to disbelieve the applicant's evidence of his involvement in politics. The Tribunal questioned the applicant concerning his employment history, his involvement in politics from when he joined the BNP in college, his later holding of offices and participation in elections, the persecution he claimed to have encountered, and his claim to have been in hiding. The Tribunal also interviewed his brother-in-law, who gave evidence to corroborate the applicant's involvement in politics and that he might be wanted by police.

The Tribunal's decision

17. The Tribunal made a decision on 6 March 2009 which affirmed the delegate's decision. In its *"Findings and Reasons"*, the Tribunal addressed the history presented by the applicant to the Tribunal and made findings upon it.

18. The Tribunal accepted that the applicant had attended college during 2000 and 2001, and it addressed his evidence that while at college he had met student leaders and been influenced to join the student wing of the BNP and to become active in politics. The Tribunal said:

104. When asked at the hearing about the reasons for joining the BNP, the applicant was circuitous and vague. At various points in his evidence, he cited that the BNP was well known in the area; that it was a way of "climbing the ladder", meaning becoming a leader and serving his country; and because of its philosophy. However, when asked about the

ideals of the BNP he appeared to recite by rote the phrase "nationalism, faith in religion and neutralism".

105. *When asked at the hearing for details of his involvement in the BNP while at the Barisal City College, the applicant was vague. He said that he inspired and motivated others. He worked to reduce the price of books. When asked what activities he did, he said that he could not remember specifically. He said he was joint secretary but could not recall when he was appointed to this position.*

106. *The applicant was vague about the responsibilities as joint secretary. The applicant said that he followed up the secretary's orders. He presided at meetings when the secretary was away. He would delegate tasks to others. He had to look after the meetings, make sure the others were doing their jobs, inspire others to join. He delivered anti-Awami League speeches. He would photocopy or write out the joint secretary's speech.*

107. *He claims to have led many demonstrations against the Awami League during the time of the political move to oust the Awami government from power. He did not elaborate on this at the hearing, despite being asked several times to specify the activities in which he was involved.*

108. *In summary, the applicant's evidence on his involvement with BNP at the Barisal City College was vague, unspecific and did not demonstrate the depth of knowledge which would be expected of a person with a lengthy involvement, including in a leadership capacity, in the BNP. While the Tribunal accepts that the applicant may not be able to recall the specific dates on which he attained positions such as joint secretary, he was not able to give even an approximate time frame for what were presumably significant events.*

19. The Tribunal identified unsatisfactory aspects of his evidence about his responsibilities in the political offices he claimed to have held, and of the two letters of corroboration. In relation to each of these, it identified reasons for not accepting them *"as supporting the claims and evidence of the applicant"*.

20. The Tribunal then addressed the applicant's evidence to have been attacked by Awami goons in 2000. It identified inconsistencies in his

evidence about this, and in his evidence about being in hiding and being subject to police charges.

21. The Tribunal referred to the applicant's claim *"that he was active in the BNP politics in Australia"*. It said that at the hearing the applicant had only identified his activity of working in the shop of his brother who was *"a BNP supporter"*. The Tribunal said that it *"does not view this as indicating any membership of, or involvement in, the BNP in Australia"*.

22. The Tribunal then recorded a general conclusion as to the applicant's credibility, based on these findings:

> *127. Having considered all the information before it, the Tribunal is of the view that the applicant is not a reliable or credible witness. The Tribunal is therefore unable to rely on the applicant's evidence to find that his claims are genuine.*

23. The Tribunal then applied its conclusion on credibility to all the elements in the applicant's claimed history:

> *129. Given the lack of credibility of the applicant and the lack of any supporting evidence, the Tribunal finds that the applicant was not a member of, or involved in, Chatradal or the BNP while at the Barisal City College. It is not satisfied that he was joint secretary of the Chatradal or BNP at the Barisal City College.*
>
> *130. The Tribunal is not satisfied that the applicant was a member in [the Branch] or [the City Branch] or held any leadership positions in them.*
>
> *131. The Tribunal is not satisfied that the applicant was attacked by Awami League supporters in February 2000 or that he sustained his injuries in that claimed attack.*
>
> *132. The Tribunal finds that the applicant did not go into hiding.*
>
> *133. The Tribunal is not satisfied that the applicant was involved in the election in 2001 or that he was attacked by Awami League supporters because of this.*
>
> *134. The Tribunal finds that the applicant does not face charges in Bangladesh.*

> 135. *The Tribunal finds that the applicant is not a member of, or involved in, the BNP or any activities associated with the BNP, in Australia.*
>
> 136. *The Tribunal is not satisfied that the applicant has been politically active in Bangladesh or Australia. There is nothing to indicate that he is of interest to the authorities in Bangladesh. There is no information before the Tribunal to indicate that the applicant would become involved in political activities if he returned to Bangladesh. The Tribunal is not satisfied that the applicant would be involved in the BNP if he returned to Bangladesh in the future. The Tribunal is not satisfied that he would suffer harm or persecution in Bangladesh should he return there.*

24. The Tribunal concluded that it did not accept that there was a real chance of the applicant suffering a Convention-related harm in Bangladesh in the reasonably foreseeable future.

Ground 1 of the application for judicial review

25. The applicant has applied to this Court to set aside the Tribunal's decision and to remit the matter for further consideration. I have power to make these orders only if the Tribunal's decision was affected by jurisdictional error. I do not have power myself to decide whether the applicant should be believed or whether he qualifies for a protection visa or any other permission to stay in Australia.

26. The applicant was represented by counsel at the hearing before me, and it is sufficient for me only to address the two grounds of review presented in a further amended application filed at the hearing.

27. The first ground is:

> 1. *The Second Respondent breached section 425 of the Migration Act 1958 (Cth).*
>
> ***Particulars***
>
> a. *In his decision, the delegate of the First Respondent did not reject the Applicant's claim to be a member of the Bangladesh National Party (**BNP**), but only took issue with his claims as to the extent of his involvement and his position within the BNP.*

> b. *While during the hearing, the Second Respondent expressed some scepticism as to the extent of the Applicant's membership and his position within the BNP, it never took issue with his claim that he was a member of the BNP.*
>
> c. *It would not have been apparent to the Applicant that his membership of the BNP was an issue before the Second Respondent.*
>
> d. *There was evidence before the Second Respondent that harm was suffered not only by high-level and ranking members of the BNP, but also by members of the BNP generally, and also supporters of the BNP.*
>
> e. *The Second Respondent therefore erred in rejecting the Applicant's claim that he was a member of the BNP without giving the Applicant an opportunity to give evidence and make submissions on that issue.*

28. This ground asserts a failure to afford the element of procedural fairness which the High Court found in *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 228 CLR 152 to be implicit in s.425 of the *Migration Act 1958* (Cth). That is, the obligation on the Tribunal to give an applicant *"the opportunity of ascertaining the relevant issues"* which will be addressed by the Tribunal when making its decision on the review of the delegate's decision.

29. I have above extracted the reasoning of the delegate which included the statement *"I may accept that the applicant was a member or supporter of the BNP"*, and I have explained the context of the Tribunal's finding that *"the applicant was not a member of, or involved in, Chatradal or the BNP while at the Barisal City College"*.

30. In support of this ground, paragraphs (d) and (e) of the particulars suggest that one of the issues before the Tribunal was whether members or supporters of the BNP party who were not active in politics were at risk of persecution merely by reason of their party membership or inactive support. In effect, it is contended that there was information before the Tribunal presented by the applicant which, if it did not articulate that claim, sufficiently raised it as an element in the applicant's refugee claims so as to require consideration by the

Tribunal (compare *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [63]). It is therefore suggested that the truth of the applicant's claims to have been a member of the BNP or its student wing was an 'issue' in the review, as a matter of jurisdiction. It was therefore necessarily an 'important' issue which required the Tribunal to give notice that it might not accept its factual premise, which had been accepted or assumed by the delegate.

31. However, I do not consider that there was any such material before the Tribunal, nor that the applicant ever presented such a claim for its determination. The only information which was submitted by the applicant's counsel to have raised such a claim was in the single paragraph from one of the press reports presented after the December 2008 election, which I have extracted above, which referred to a *"local BNP supporter"* having been murdered in an attack on his house.

32. However, there was nothing in the press report to show that this incident, like all the other events narrated in the report, did not also involve a BNP party activist, and the context of the paragraph suggested that it probably did. Moreover, there was nothing in the applicant's covering submission when he forwarded the press report to the Tribunal which relied upon that paragraph of the report in particular, and it certainly did not claim that inactive members and supporters of the BNP were at risk. Rather, the body of the covering submission shows that the applicant was associating himself with the people referred to in the report as *"activists of BNP"*. As I have set out above, all his written submissions to the Tribunal, and the history which he presented to the delegate and to the Tribunal, made refugee claims based on the premise that a risk of persecution attached to people actively involved in the BNP political party and did so because of that active involvement.

33. I therefore do not accept that the material before the Tribunal necessarily raised an issue as to the applicant's inactive membership of the BNP, in the sense of an issue required to be addressed by the Tribunal to fully address the refugee claims before it. Nor had any such issue been raised before the delegate, or addressed by the

delegate. There was, therefore, no obligation on the Tribunal to alert the applicant to the existence of such an issue, arising from the refugee claims which were before the delegate and it.

34. If the applicant's mere membership of the BNP was not an issue requiring a determination by the Tribunal in the exercise of its jurisdiction, it is necessary for the applicant to characterise it as having become an 'important' issue by reason of the path of reasoning which was followed by the Tribunal when addressing the applicant's claim that he was at risk as a political activist. The obligation found by the High Court in *SZBEL* to warn an applicant that a fact accepted or assumed by a delegate might not be accepted or assumed by the Tribunal, does not extend to a subordinate or insignificant fact whose existence did not require a determination by the Tribunal or which was not important to its reasoning.

35. This becomes clear on an analysis of the High Court's judgment. In *SZBEL* their Honours at [19]-[20] identified three parts of the applicant's claimed history which became, in their description, 'important' to the reasoning of the Tribunal when it rejected the applicant's claim to be at risk as a Christian or perceived Christian. They became important because the Tribunal's reason for rejecting the applicant's refugee claims was its characterisation of the applicant's narration of these events as 'implausible', and not only because this evidence had not previously been doubted by the delegate. The denial of procedural fairness which was identified by the High Court arose from the fact that, because this evidence had not been doubted by the delegate, the applicant would not have appreciated that its truth might become important in the mind of the Tribunal when evaluating his claims. As the High Court explained:

> *43. The delegate had not based his decision on either of these aspects of the matter. Nothing in the delegate's reasons for decision indicated that these aspects of his account were in issue. And the Tribunal did not identify these aspects of his account as important issues. The Tribunal did not challenge what the appellant said. It did not say anything to him that would have revealed to him that these were live issues. Based on what the delegate had decided, the appellant would, and should, have understood the central and determinative question on the review to be the nature and*

> *extent of his Christian commitment. Nothing the Tribunal said or did added to the issues that arose on the review.*

36. In the present case, whether the applicant was a member of the BNP was not an issue to which the Tribunal gave any importance in its reasons for affirming the delegate's decision. Rather, it was of no significance in its reasoning. The Tribunal rejected the applicant's claims because it disbelieved the applicant's evidence of being an officer and active member of that party, with the claimed involvement which the Tribunal thoroughly canvassed with the applicant at the hearing. It rejected all his claims because it arrived at a conclusion that he was generally an unreliable witness. At no stage did the Tribunal put any emphasis upon the discrete action of joining the BNP party as a test of his veracity, nor as a test of the truth of his refugee claims. The Tribunal's reasons for finding against the applicant's general veracity concerned the inadequacy of his responses concerning his political activities, in which his mere membership of the BNP was peripheral.

37. I therefore do not consider that there is a direct analogy between the present case and the reasoning of the Tribunal in *SZBEL* which disclosed a breach of procedural fairness. I do not consider that the present Tribunal's reasoning, when compared with that of the delegate, discloses that it was under any obligation to warn the applicant that its findings might include disbelief of his evidence that he joined the BNP as well as disbelief of all the political involvement upon which his refugee claims were based.

38. The applicant's counsel referred me to the judgment of Besanko J in *SZHKA v Minister for Immigration & Citizenship* (2008) 172 FCR 1, with which Gray J agreed at [2], explaining the effect of *SZBEL*. His Honour said that whether a matter constitutes an 'issue' which might need to be brought to the attention of an applicant depends upon two requirements:

> *114 The first is that the matter play a part in the Tribunal member's decision on the application for review. Matters not playing any part cannot, in my view, be said to arise* **in relation to the decision**.
>
> *115 The second question is that the matter be substantial enough to constitute an* **issue**. *That depends, obviously enough, on*

> *the interpretation of the word* **issues** *in s 425(1). On a narrow interpretation,* **issues** *might be defined only as the main elements of an applicant's claim. I do not think that such a narrow interpretation would be correct. In* SZBEL *228 CLR 152, the High Court said that the reasons given by a delegate for refusing to grant an application identify the issues that arise in relation to that decision. Matters much more specific than the main elements might become issues in relation to a delegate's decision by virtue of the delegate's reasons. Equally, matters much more specific than the main elements, which the Tribunal considers to be in question irrespective of the delegate's reasons, may constitute* **issues arising in relation to the decision under review** *within s 425(1). In my view, issues, relevantly, are all matters not of an insubstantial nature which the Tribunal considers to be in question.*
>
> (emphasis in original)

39. In *SZHKA*, the issue which his Honour found had not been adequately warned to the applicant was again a factual issue which was given prominence in the reasoning of the Tribunal, supporting its conclusion that the applicant was not a genuine Falun Gong practitioner (see [74]-[78]). In my opinion, that case, as with *SZBEL*, is distinguishable from the reasoning of the present Tribunal in relation to the applicant's mere membership of the BNP. In the language of Besanko J, I consider that the applicant's membership was not a matter which 'played a part in the Tribunal's decision', or, if it did, it was of such an 'insubstantial nature' as not to require any warning that it might be covered by the Tribunal's adverse findings of fact.

40. Moreover, if I am wrong in my characterisation of the significance in the Tribunal's reasoning of this finding, I consider that there are two other reasons for rejecting Ground 1. The first is that I do not consider that the delegate's decision, when read as a whole, would reasonably have caused the applicant to misapprehend that the whole of his claimed involvement in the BNP would not be in issue before the Tribunal, including his membership of the BNP. Particularly in the light of the delegate's obvious dissatisfaction with the applicant's credibility as to any involvement in the BNP party, I would not read the qualified statement by the delegate, *"I may accept that the applicant was a member or supporter of the BNP"*, as showing an acceptance as

true of that part of the claimed history, or a suggestion that its truth was not questionable. Rather, the delegate explained a course of reasoning which made it unnecessary for him to address the truth of this assertion when addressing the claims of the applicant to be a refugee. This was because his claims to be a refugee depended on acceptance of other parts of his history, being that he was an activist and office holder, which the delegate firmly rejected. Read fairly, I do not consider that reasoning of the delegate rendered surprising the possibility that the Tribunal might regard the whole of the applicant's claimed history of political involvement in the BNP as untrue. I can find nothing in the submissions later made by the applicant to the Tribunal which shows that he acted under any such misapprehension arising from the delegate's decision, and he has not claimed this in evidence given to this Court.

41. Secondly, I do not accept that the Tribunal did not sufficiently canvas with the applicant at the hearing the possibility that it might not accept the whole of his evidence as to his involvement in the BNP party, including his claim to have become a member while at college. The transcript shows that the Tribunal at an early point in its questioning gave a general warning to the applicant that his general credibility was in issue, after it detected a possible inconsistency in his evidence about his college studies:

> *TRIBUNAL:* *Now, it is important that you understand that I have [to] assess your claim that you face harm and persecution in Bangladesh. Now, to a large extent in your case I will be relying on what you tell me to decide whether what you are telling me has actually happened and is the facts. Now, in deciding or assessing whether the claims about persecution are true I will be assessing whether I accept you as being an honest and truthful witness. Now, I am not saying that this is the case, but it is possible that if there are important gaps and omissions and changes in your evidence as you go along that may lead me to think, well, is he is making this up as he goes along, it is actually not truthful.*

42. I accept that this general warning was not in the context of the applicant's narration of his involvement in the BNP party, however, it

preceded the Tribunal's questioning about that involvement. This started with the general question, *"Now, can you tell me what political involvement you had whilst you were at college?"* The applicant then started with a narration of being politically inspired and *"I joined them"*. The Tribunal clearly did not accept this assertion as uncontroversial, but tested it by trying to elucidate what inspired him. The applicant was questioned about his knowledge of the BNP political party's principles and his involvement in its political activities. While no specific warnings were given in the course of this questioning that any particular parts of his evidence might not be accepted as true, or that the whole of it might not be accepted as true, I do not consider that this needed to be expressly warned. In particular, because the applicant's submissions to the Tribunal appeared to show his awareness that all of his claimed involvement in the BNP was in issue, and also because he had already received one warning that all of his evidence might not be believed. Later in the hearing, the applicant was given a further warning that the Tribunal might assess his general credibility based on particular defects in his evidence (see transcript page 29), and he was given two opportunities to give general evidence to the Tribunal after it had finished its questioning (see transcript pages 31 and 38).

43. In this context, I consider that the present is a case where the High Court's statement in [47] of *SZBEL* can be applied:

> *47 First, there may well be cases, perhaps many cases, where either the delegate's decision, or the Tribunal's statements or questions during a hearing, sufficiently indicate to an applicant that everything he or she says in support of the application is in issue. That indication may be given in many ways. It is not necessary (and often would be inappropriate) for the Tribunal to put to an applicant, in so many words, that he or she is lying, that he or she may not be accepted as a witness of truth, or that he or she may be thought to be embellishing the account that is given of certain events. The proceedings are not adversarial and the Tribunal is not, and is not to adopt the position of, a contradictor. But where, as here, there are specific aspects of an applicant's account, that the Tribunal considers* **may** *be important to the decision and may be open to doubt, the Tribunal must at least ask the applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted.*

(emphasis in original)

44. As I have pointed out in at least one other case, there are very good reasons under principles of apprehended bias why a Tribunal should not be expected repeatedly to remind an applicant in the course of a hearing or otherwise that the credibility of every part of his claimed history might be in doubt (compare *SZMOE v Minister for Immigration & Anor* [2009] FMCA 116).

45. For all the above reasons, I do not accept that the jurisdictional error argued in relation to Ground 1 has been made out.

Ground 2 of the application for judicial review

46. Ground 2 of the further amended application contends:

> *2. The Second Respondent breached section 424B(2) of the Migration Act 1958 (Cth).*
>
> ***Particulars***
>
> *a. On 23 September 2008, in purported accordance with section 424(2), the Second Respondent sent the Applicant a written invitation to give it additional information.*
>
> *b. The invitation did not comply with section 424B(2) as it did not specify that the information had to be provided within the specified period.*

47. There have been amendments to s.424 which commenced on 15 March 2009, but at the relevant time it provided:

> ***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.*

48. I have above set out the full contents of the Tribunal's letter of 23 September 2008, which I shall refer to as 'the acknowledgement letter'. The applicant focuses upon the statement at the end of the letter, under the heading *"What does the Tribunal expect me to do?"*, that *"you should ... immediately send us any documents, information or other evidence you want the Tribunal to consider"*. He contends that this constituted an exercise of the discretionary power given to the Tribunal under the provisions of s.424(2) to *"invite a person to give additional information"*. It is then contended that the formalities attaching to such an invitation were not complied with because the suggested timing of 'forthwith' for the sending of evidence was not *"a period specified in the invitation, being a prescribed period"* within s.424B(2). It is contended that this amounts to jurisdictional error, requiring the quashing of the Tribunal's decision.

49. The Minister concedes that Federal Court authorities have held that the ss.424(3) and 424B formalities attach to every action of the Tribunal which can be characterised as an exercise of the s.424(2) power, although this proposition is currently the subject of reserved judgment in the High Court in an appeal from *SZKTI v Minister for Immigration & Citizenship* (2008) 168 FCR 256. The Minister also concedes that the challenged statement in the present acknowledgement letter did not comply with s.424B(2). However, he contests that the statement should be characterised as an exercise of the s.424(2) power. He also submits that, if the letter contained an invalid s.424(2) invitation, it should not result in the quashing of the Tribunal's decision.

50. This ground was raised at very short notice, as a result of the publication last Thursday of the judgment of Raphael FM in *SZNAV & Ors v Minister for Immigration & Anor* [2009] FMCA 693, in which his Honour held that an indistinguishable acknowledgement letter did not follow requirements attaching to s.424(2), and granted relief to the

applicant. It is therefore understandable that neither counsel might have been able to give the full research and consideration to the point which it deserves. Nor am I able to give the point raised as a result of Raphael FM's decision the full reflection which I might otherwise have preferred. This is because his Honour's reasoning identifies a jurisdictional error in an acknowledgment letter invariably sent by the Tribunal in matters coming before it, and if his Honour's judgment is to be followed, it is likely to have application in every migration matter coming into my list this week and in the subsequent weeks. I consider it desirable for me to decide today whether I should follow it, without waiting upon elucidation from the Federal Court and from my other colleagues on this Court in relation to the point, and without waiting for the High Court's judgment in *SZKTI*. As I shall explain, I have decided that I should not follow *SZNAV*.

51. The Minister presents what I understand to be four alternative contentions in answer to this ground:

   i) The acknowledgement letter was sent before the Tribunal commenced to 'conduct' the review within the language of s.424(1), so that nothing in its advice to the applicant could constitute the exercise of power under that subsection, nor under s.424(2) if it is read as implicitly being subject to the opening qualifying words of s.424(1).

   ii) The statement in the acknowledgment letter is incapable of being characterised as an invitation 'to give additional information' within s.424(2), even if it constitutes the 'getting of relevant information' within s.424(1).

   iii) In the circumstances of this case, the statement did not invite the giving of 'additional' information, since the applicant had not previously given to the Tribunal any information relevant to the Tribunal's review.

   iv) If the reference to 'immediately' rather than to the 14 days prescribed period under s.424B(2) was a procedural irregularity, it did not have jurisdictional consequences, or should not attract relief by Constitutional writs, since no prejudice was suffered by the applicant.

52. The Minister's first contention was that the acknowledgement letter was not sent while the Tribunal was 'conducting the review' within s.424(1), because no member had been appointed at that time to constitute the Tribunal *"for the purpose of [the] particular review"* under a direction by the Principal Member under s.421 of the Migration Act. I was invited to draw an inference as to this from the chronology and content of the acknowledgement letter. However, without further evidence as to the Tribunal's procedures in relation to constituting the Tribunal after the lodgement of an application for review, either generally or in this particular case, I would not draw this inference. It is therefore unnecessary for me to examine the other elements in this contention. I note that an undeveloped form of this contention was submitted to Raphael FM in *SZNAV*, and that he rejected it upon an opinion that the Tribunal should be regarded as 'conducting the review' from its inception upon the receipt of a valid application for review (see [22]-[25]). I have not been persuaded today that his opinion was clearly wrong.

53. The Minister's second contention assumes that the acknowledgement letter might involve the 'getting of information' within s.424(1), but submits that it cannot be characterised as an invitation 'to give additional information' falling within the statutory language and intent of s.424(2). It is submitted that Raphael FM's reasoning did not take into account the structure of s.424(1) and (2) and dicta in the Federal Court suggesting that not all statements of the Tribunal to an applicant or other person about the giving of information to the Tribunal are to be characterised within s.424(2).

54. I have previously referred to these authorities, in a judgment published on 8 April 2009 subsequent to *SZKTI*. In *SZMZX v Minister for Immigration & Anor* [2009] FMCA 343, I said:

> *33. The facts before the Full Court in* SZKTI *were very dissimilar from the present request to the Secretary. They did not require the Full Court to identify when the Tribunal may "get" information under its general power in s.424(1) without, in the language of s.424(2), making an invitation* "to give additional information".
>
> *34. As Siopis J suggests in* SZLTR v Minister for Immigration & Citizenship *[2008] FCA 1889 at [33], sub-section 424(2)*

> *has* "application only in limited circumstances". *His Honour was inclined to think that those circumstances would not include a request by the Tribunal for information from the Department of Foreign Affairs & Trade. However, it was not necessary for him to form a clear opinion whether requests for information from government departments would not come within s.424(2), since in the matter before him* "the record does not reveal the manner in which the Tribunal communicated with DFAT in respect of the information in question". *It was therefore not possible to assess whether the formal requirements attaching to a 424(2) invitation were or were not complied with (see [37]).*
>
> *35. In the course of a later Full Court judgment in which he maintained the correctness of the Full Court's judgment in* SZKTI*, Buchanan J appears to suggest that requests for information in the course of the conduct of researches by the Tribunal may not come within s.424(2) (see* SZKCQ v Minister for Immigration & Citizenship *(2008) 170 FCR 236 at [40]). However, this is not clear, although his Honour does refer to s.424(2) being engaged in* "more limited circumstances".

55. The point which was made by Siopis and Buchanan JJ was that invitations for 'additional information' under s.424(2) are a subset of the getting of information under s.424(1), and that the subset may be a limited subset. I consider that the point remains correct, and is consistent with the confining approach of the later Full Court in *SZLPO v Minister for Immigration & Citizenship* [2009] FCAFC 51 to the construction of s.424(2). I also consider that it is consistent with the reasoning of *Minister for Immigration & Multicultural & Indigenous Affairs v Sun* (2005) 146 FCR 498, [2005] FCAFC 201 and *MZXRE v Minister for Immigration & Citizenship* [2009] FCAFC 82, cited by Raphael FM.

56. A confining approach is also reflected in the most recent judgment of the Full Court which considered the application of s.424(2). In *SZMBS v Minister for Immigration & Citizenship* [2009] FCAFC 65, the Tribunal had telephoned a witness at the invitation of the applicant. The Full Court said:

> *37 In making the telephone call to Brother Poh, the Tribunal was doing no more than taking up the invitation extended by the letter of 3 February 2009 to contact Brother Poh. The*

Tribunal was simply responding to the offer made by the letter. The appellant acquiesced in that response. The transcript quoted above indicates, if anything, that the appellant encouraged the Tribunal to make the telephone call to Brother Poh as suggested by the Tribunal. When the Tribunal accepted the invitation in the letter, addressed to the world at large, to contact Brother Poh if there was any further enquiry, the Tribunal may have been attempting to get information. However, the Tribunal was not inviting Brother Poh to give additional information within the meaning of s 424(2). At most the Tribunal was making an enquiry as to whether Brother Poh had relevant information to give to the Tribunal. It did not invite him to give information, much less additional information.

57. My previous acceptance of a construction of s.424(2) which would not encompass all statements made by the Tribunal inviting an applicant or other person to provide information to the Tribunal explains one of my reasons for disagreeing with the reasons of Raphael FM for characterising the present acknowledgement letter. He said:

> *26. Section 424 is also the only source of power in the Act by which the Tribunal can obtain additional information by invitation from a person. A* "person" *means a natural person;* SZLPO v Minister for Immigration *[2008] FCAFC 51 at [103-108]. ...*
>
> *30. I should also express my concern about the apparent denomination of some letters as* "not amounting to an invitation under s.424". *What exactly is the status of such letters? Clearly, if such a letter is written before a hearing and is not responded to the Tribunal would be exceeding its authority to proceed without providing a hearing under s.424C(1). But what is the situation with regard to letters of acknowledgement such as the one written in the instant case? In those circumstances the letter would not be an invitation under s.424, what then is it? I can see that there are attractions in designating it a non-invitation. If it is, none of the requirements of s.424B are invoked but the Tribunal would still have to have regard to any information provided because of s.424(1). Whilst this might secure the result wished for by the drafter of the letter, it does appear to fly in the face of the intention of this section of the Act, namely, to ensure a modicum of procedural fairness in relation to the gathering of information. Avoiding those responsibilities by deliberately designing a letter that*

> *effectively infringes a requirement (s.424B(2)) would, to my mind, be a most unsatisfactory way of securing the intended outcome.*
>
> *31. There are two ways in which the outcome could be legitimately obtained. The first is by a robust application of the purposive doctrine of statutory interpretation. A Court could hold that it was the intention of the legislature to restrict s.424 to "particular" information identified by the Tribunal and not a request for "general" information of the type contained in the letter. Buchanan J examined the intent of the legislature in bringing in these amendments in* SZKCQ v Minister for Immigration *[2008] FCAFC 119 and concluded that he was little assisted by either the second reading speech or the explanatory memorandum. It could be suggested that the differentiation in the regulation 4.35 between information from within Australia and information from overseas might indicate such particularity but it does not behove this Court to posit such an interpretation given the very clear wording of s.424 and the interpretation placed upon additional information in the authorities. The second method would be by legislative amendment.*
>
> *32. It follows from the above that I am of the view that the appropriate description of the acknowledgement letter is that it is a letter written pursuant to s.424 to which the provisions of s.424B(2) apply and that by requiring the information* "immediately" *the writer did not require it to be given within the prescribed period. This caused a breach of s.424B(2). The question I must now consider is whether such a breach constituted a jurisdictional error.*

58. In this reasoning, Raphael FM adopts a *"robust application of the purposive doctrine of statutory construction"*, and assumes that the getting of information from an applicant was intended by the legislature normally, if not always, to be performed through an invitation complying with the formalities of s.424(2). However, I do not agree with that reasoning, nor that such a policy can be distilled from s.424 or any other part of the Migration Act. As I have indicated, I consider that the Federal Court authorities tend against, rather than in support, of such an approach to the application of s.424(2).

59. I respectfully disagree that it is an approach which carries obvious benefits to review applicants before the Tribunal in terms of procedural

fairness. The central right of procedural fairness under the Act concerns the important opportunity under s.425(1) *"to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review"*. That right is not at all assisted by the approach taken by Raphael FM, but in my opinion it may be significantly weakened.

60. I consider that characterising the advice that the applicant should immediately forward his evidence to the Tribunal in the present acknowledgement letter as an invitation under s.424(2) brings a significant disadvantage to an applicant, even if 'immediately' had been replaced by 'within 14 days'. The disadvantage arises from the provisions of s.425(2)(c) read with s.424C(1), by which an applicant loses his or her rights under s.425 if there is a failure to respond to a s.424(2) invitation within the specified time. I can conceive of many applicants to the Tribunal who would not be in a position to present their evidence within the prescribed time under s.424B(2) measured from the receipt of an acknowledgement letter, yet on the approach suggested by Raphael FM, all such persons would run the gauntlet of losing their entitlement to participate in a hearing, unless the Tribunal removed all suggestions from its acknowledgement letter that they should not delay sending their information to the Tribunal. I do not consider that the latter course would improve fairness to applicants, if only because they may then be more exposed to findings of 'recent invention'.

61. In my opinion, the penal aspect to a s.424(2) invitation given to an applicant provides a potent reason for being slow to find such an invitation in a preliminary acknowledgement letter sent upon the lodgement of every application for review. Contrary to Raphael FM's opinion, I can see an excellent reason both in terms of administration, and fairness to applicants, for 'deliberately designing' such a letter so that it does not amount to an invitation under s.424(2), and for the Court to be slow to characterise the letter as containing such an invitation.

62. I have arrived at a clear opinion that the challenged statement in the acknowledgement letter, when read in the context of the remainder of the letter and in the light of the stage of the proceedings before the

Tribunal, should not be characterised in terms of s.424(2). In my opinion, the statement did no more than is suggested by the heading under which it appeared. It strongly advised the applicant that he should immediately send to the Tribunal *"any documents, information or other evidence you want the Tribunal to consider"*. This was good advice as to how the applicant should exercise his rights to present his evidence to the Tribunal, but it did not amount to the Tribunal 'getting' information from the applicant, and was not an 'invitation' that he 'give information' to the Tribunal, whether additional or not. The letter was, in my opinion, purely informational as to the Tribunal's expectations of an applicant, in the message which it was intended to convey to the applicant.

63. For the above reasons, I accept the submission of the Minister that the statement in the acknowledgement letter to the applicant advising the applicant to *"immediately send us any … information … you want the Tribunal to consider"* was not an invitation intended by s.424 to come within s.424(2). There was therefore no procedural irregularity, whether jurisdictional or otherwise, arising from the Tribunal's advice that the applicant should present his evidence 'immediately' rather than within 14 days.

64. I also accept the Minister's third contention listed above. That is, that s.424(2) could not have been enlivened in the present case, because the acknowledgement letter cannot be construed as inviting the giving of any 'additional' information. The Full Court held in *SZLPO* (supra at [99], applied at [124], [128], [133], and [159]), that the reference to 'additional information' in s.424(2) is to be read as *"information additional to information previously given to the Tribunal by the invitee"*.

65. In the present case, the challenged statement in the acknowledgement letter was plainly inviting the applicant 'to send' to the Tribunal his evidence relevant to the matters which were the subject of the application for review, that is, his refugee status and the delegate's decision concerning it. At the time that the acknowledgement letter was sent, the applicant had given to the Tribunal, as distinct from the Department, nothing capable of amounting to 'information' on these matters. Any response to the Tribunal's advice that he should provide

his evidence in support of his application might have produced 'information' from him on these matters, but it could not have been 'additional information' as construed in *SZLPO*. The applicant had submitted only an application for review, which was unaccompanied by any evidentiary support. His form contained details of his name, address and telephone number, but these matters were not the subject of the Tribunal's advice about sending information immediately. They were covered by the earlier advice that he should *"tell us immediately if you change your contact details"*.

66. It is unclear whether this was the situation in the case before Raphael FM, or whether this point was argued by the Minister. His only reference to the element of 'additional' in s.424(2) is:

> *25. It seems to me to be clear that once an application is filed with the Tribunal the Tribunal is seized of it and any thing that it does in relation to the application is done in* "conducting the review". *The letter is significant. It invites the applicant to provide additional information (the original information which the applicant has provided being the information contained in the application to the Tribunal) and the information is required for a particular purpose. That purpose is for the Tribunal to consider whether or not it is prepared to make a decision in the applicant's favour without the necessity of inviting him to a hearing. This must be* "conducting the review". *The additional information provided pursuant to the request thus has a particular importance. It could be more convincing than the applicant himself. The Tribunal might be prepared, on the basis of that information, to grant a visa which it might have declined having heard the applicant. I am unable to accept the Minister's submissions on this point.*

67. If his Honour is suggesting that the acknowledgment letter was seeking additional information to the personal contact details in the form of application, then I would respectfully disagree with him. The acknowledgment letter was plainly, in my opinion, suggesting the sending of information relevant to the applicant's refugee case, not his contact details. However, it is possible that in *SZNAV*, the applicant had given the Tribunal information about his case when lodging his application. If so, *SZNAV* would be distinguishable on this point from the present case.

68. The Minister's fourth contention makes submissions such as I addressed and upheld in *SZMZX* at [43] and [45]. These invite the Court to consider the consequences of any procedural irregularity through the omission of the reference to a prescribed period for giving information. These may be considered when deciding if the procedural irregularity was of a nature that the legislature intended it to have jurisdictional consequences in the particular circumstances, applying principles of statutory construction in relation to procedural *ultra vires* in accordance with *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. Similar considerations are also relevant to deciding whether, in the exercise of discretion in relation to the making of Constitutional writs, relief should be denied because any irregularity made no practical difference to the Tribunal's proceedings and decision, applying the authorities I cited in *SZMZX*.

69. In the present case, the applicant was invited to attend a hearing after receiving the acknowledgment letter. He then was given ample opportunity to present all his written and oral evidence and submissions, and took advantage of that opportunity. He participated in a lengthy correspondence with the Tribunal, in which he presented three submissions on his refugee claims with supporting evidence, and he attended a hearing where he was given a further opportunity to give the Tribunal all his evidence relevant to the issues in the proceeding. There is no evidence before me that there was any evidence he withheld, or was prevented from presenting to the Tribunal, or which the Tribunal was deprived of considering, by reason of the absence of a reference to the prescribed period for the giving of information in the acknowledgement letter, rather than its suggestion that this should be done 'immediately'.

70. The only contention to give possible substance to a prejudice from the omission of reference to the prescribed period in the acknowledgement letter was that the applicant may have been deprived of an opportunity to obtain a favourable decision 'on the papers' arising from the Tribunal's power to dispense with a hearing if it is able to make such a favourable decision (see s.425(2)(a)). It was obliquely submitted that, if the Tribunal had given a prescribed period for giving information in the acknowledgment letter, it might have not forwarded an invitation or appointed a hearing on 2 October 2008, but might have deferred its

decision on whether a hearing invitation should be sent until the expiry of that period. However, there was no statutory obligation on the Tribunal to do that, even if the acknowledgment letter itself did contain a s.424 invitation for additional information.

71. In my opinion, in the circumstances of the present case, the suggested detriment to the applicant from the omission in the acknowledgement letter of reference to the prescribed period for giving information under s.424(2) is so remote as to be non-existent. On the evidence which the applicant had given the Department, and which he subsequently gave the Tribunal, there was never any prospect that the Tribunal might have made a favourable decision 'on the papers' without holding a hearing. I can therefore detect no detriment reasonably conceivable flowing to the applicant in the circumstances of the present matter through the omission of any such reference in the acknowledgment letter.

72. For that reason, in my opinion, any non-compliance with the formalities of ss.424(2) and 424B, if it occurred in this case, had no jurisdictional consequences. Alternatively, if a jurisdictional procedural error occurred, it was of such insignificance to the proceedings and decision of the Tribunal that the Court should not exercise its power to quash the decision.

73. In arriving at that conclusion, I have taken into account the reasoning of Raphael FM in *SZNAV* on this point. Every case in relation to discretion involves a consideration of different peculiar circumstances of the applicant before the Court. The present applicant shows in his dealings with the Tribunal that he was fully able to present his evidence and information to the Tribunal, and he has given no evidence that the procedural irregularity now relied upon was of any significance to his presentation of his case. I have arrived at a firm conclusion that he was not denied any real opportunity through the absence of reference to a prescribed period, rather than to 'immediately', in the advice in the acknowledgement letter that he should forward his evidence to the Tribunal.

74. For all the above reasons, I am not persuaded that either of the grounds of jurisdictional error argued in front of me is made out and I must therefore dismiss the application.

75. In relation to costs, the Minister seeks almost double the scale amount of legal costs awarded in migration matters in this court, on the ground that Ground 2 gave rise to substantial additional legal costs. This ground was first foreshadowed by the applicant's counsel on Friday (today is Monday) and, as I have explained, arose from a judgment delivered on Thursday by Raphael FM. It is submitted that the significance of the point to all pending matters in this Court was such that a great deal of legal consultation and advising was incurred by the Minister over the weekend, including the preparation by counsel of a supplementary written submission and the taking of instructions on its preparation.

76. I accept that substantial work has been undertaken in this matter in relation to briefing counsel on the *SZNAV* ground of review. The quantification of those additional costs is not a matter which I would be able to assume, and if I accepted that the additional costs should be reflected in a party/party costs award to the Minister, I would have made a costs order referring the Minister's costs for taxation under the Federal Court scales.

77. However, the applicant submits that the additional legal work relating to Ground 2 arose necessarily for the Minister when performing his responsibilities in administering the Migration Act and when giving instructions generally in migration litigation in this Court. It is submitted that justice between the parties in relation to costs, should give rise to no more than the usual order in relation to costs on the scale under the Federal Magistrates Court Rules.

78. I have decided that I should apply the normal scale in this matter. The applicant has reasonably explained the lateness of the raising of the Ground 2 point, and it was then reasonable for his counsel to rely upon it. It is a point which the Minister would have had to present in all of the matters in my docket for hearing this week, and presumably in numerous other matters. I consider that it is an accident of litigation that this applicant, rather than another applicant, has provided the vehicle whereby I have considered the issue raised by Raphael FM's judgment, whether or not this was the first time that another Federal Magistrate has considered it. In all the circumstances,

I consider that the scale amount provides the appropriate measure of the costs which should be awarded against this applicant.

I certify that the preceding seventy-eight (78) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 4 August 2009