FEDERAL COURT OF AUSTRALIA

SZMKR v Minister for Immigration & Citizenship [2010] FCA 340

Citation:	SZMKR v Minister for Immigration & Citizenship [2010] FCA 340
Appeal from:	SZMKR v Minister for Immigration & Anor [2009] FMCA 825
Parties:	**SZMKR v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL**
File number(s):	NSD 1046 of 2009
Judge:	**GRAY J**
Date of judgment:	9 April 2010
Catchwords:	**MIGRATION** – visa – protection visa – obligation of Tribunal to provide particulars of information and explain how the information is relevant – Tribunal relied on failure of an informant to make a positive statement as an implicit negative statement – whether Tribunal obliged to provide particulars and explanation of the relevance of implied positive statement – whether Tribunal obliged to make further inquiries about the matter
Words and Phrases:	"*information*"
Legislation:	*Migration Act 1958* (Cth), ss 5(1), 36, 422B, 422B(1), 424AA, 424A, 424A(1), 424A(1)(a), 424A(1)(b), 424A(1)(c) *Convention relating to the Status of Refugees done at Geneva on 28 July 1951* *Protocol relating to the Status of Refugees done at New York on 31 January 1967*
Cases cited:	*Minister for Immigration & Citizenship v Applicant A125 of 2003* [2007] FCAFC 162 (2007) 163 FCR 285 cited *Minister for Immigration & Citizenship v SZIAI* [2009] HCA 39 referred to *NBKS v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 174 referred to *SZBYR v Minister for Immigration & Citizenship* [2007]

HCA 26 referred to
SZGSI v Minister for Immigration & Citizenship [2007] FCAFC 110 (2007) 160 FCR 506 referred to
SZIAI v *Minister for Immigration & Citizenship* [2008] FCA 1372 (2008) 104 ALD 22 cited
SZKCQ v Minister for Immigration & Citizenship [2008] FCAFC 119 (2008) 170 FCR 236 referred to
SZLPO v Minister for Immigration & Citizenship (No 2) [2009] FCAFC 60 cited
SZMKR v Minister for Immigration & Anor [2009] FMCA 825 cited
VAF v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 123 (2004) 206 ALR 471 referred to

Date of hearing:	18 November 2009
Date of last submissions:	9 December 2009
Place:	Melbourne (Via video link to Sydney)
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	43
Counsel for the appellant:	Ms S Mahmud
Counsel for the first respondent:	Mr HPT Bevan
Solicitor for the respondents:	Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1046 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGE:	**GRAY J**
DATE OF ORDER:	**9 APRIL 2010**
WHERE MADE:	**MELBOURNE (VIA VIDEO LINK TO SYDNEY)**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by the Federal Magistrates Court of Australia on 31 August 2009 in proceeding number SYG 862 of 2009 be set aside.

3. There be substituted for those orders orders that:

    (1) A writ of certiorari issue, directed to the second respondent, removing into this Court the decision of the second respondent, dated 18 March 2009 and delivered on 19 March 2009, in case number 0807819, for the purpose of quashing that decision.

    (2) The decision of the second respondent, dated 18 March 2009 and handed down or delivered on 19 March 2009, in case number 0807819, be quashed.

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

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

4. The first respondent pay the appellant's costs of the appeal.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
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ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGE:	**GRAY J**
DATE:	**9 APRIL 2010**
PLACE:	**MELBOURNE (VIA VIDEO LINK TO SYDNEY)**

REASONS FOR JUDGMENT

The nature and history of the proceeding

1 The principal question in this appeal is whether the absence of evidence about a particular fact in a particular document is "information" for the purposes of s 424A(1)(a) of the *Migration Act 1958* (Cth) ("the Migration Act"). The second respondent to the appeal, the Refugee Review Tribunal ("the Tribunal"), in the course of dealing with the appellant's application for review of a decision refusing him a protection visa, made inquiries of the Department of Foreign Affairs and Trade ("DFAT") about certain facts. The Tribunal received responses from DFAT. It complied with s 424A(1) of the Migration Act by writing to the appellant, giving him particulars of information in the replies that the Tribunal considered would be the reason, or a part of the reason, for affirming the decision under review, explaining why that information was relevant to the review, and inviting the appellant to comment on or respond to that information. The Tribunal did not give particulars by way of referring to the absence of any evidence about the particular fact. In its reasons for decision, the Tribunal relied on the absence from the reports from DFAT of evidence about the particular fact in finding against the appellant.

2 The appeal is from the judgment of the Federal Magistrates Court of Australia, given on 31 August 2009, and published as *SZMKR v Minister for Immigration & Anor* [2009] FMCA 825. The learned federal magistrate dismissed an application by the appellant for orders quashing the decision of the Tribunal and compelling the Tribunal to rehear the appellant's application for review of the decision to refuse him a protection visa. The Tribunal's decision and reasons for decision were dated 18 March 2009 and forwarded to the appellant and his migration agent with accompanying letters dated 19 March 2009.

3 The appellant is a citizen of Bangladesh. He arrived in Australia in March 1997 on a false passport in a name that was not his own. On 2 April 1997, he applied for a protection visa. This application was rejected by a delegate of the then Minister for Immigration and Multicultural Affairs (now the Minister for Immigration and Citizenship) (in both cases, "the Minister") by a decision dated 6 May 1997. The appellant then applied to the Tribunal, which affirmed the decision under review on 19 August 1998. On 22 November 2007, this Court, on appeal from the Federal Magistrates Court, quashed that decision of the Tribunal and ordered that the Tribunal review the decision of the Minister's delegate according to law. The Tribunal was reconstituted and, on 12 May 2008, again affirmed the decision of the Minister's delegate. On 7 November 2008, the Federal Magistrates Court made an order by consent, quashing the second decision of the Tribunal and directing the Tribunal to re-determine the matter according to law. The Tribunal was again reconstituted. The member constituting it conducted a hearing on 5 February 2009, at which the appellant gave evidence and presented arguments, and at which he was represented by his registered migration agent, who is also a solicitor.

4 By s 36 of the Migration Act, there is a class of visas to be known as protection visas. A criterion for a protection visa is that the person applying for it be a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. The terms "Refugees Convention" and "Refugees Protocol" are defined in s 5(1) of the Migration Act respectively to mean the *Convention relating to the Status of Refugees done at Geneva on 28 July 1951* and the *Protocol relating to the Status of Refugees done at New York on 31 January 1967*. It is convenient to call these two documents, taken together, the "Convention". For present purposes, it is sufficient to say that, pursuant to the Convention, Australia has protection obligations to a person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country

The legislation

5 Division 4 of Pt 7 of the Migration Act begins with s 422B. Section 422B(1) provides:

> This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.

6 Also found in Div 4 of Pt 7 of the Migration Act are ss 424AA and 424A. The former provides as follows:

> 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.

7 Section 424A provides, so far as is relevant to this proceeding, as follows:

> (1) Subject to subsections (2A) and (3), the Tribunal must:
>
> (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

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

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

...

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

(3) This section does not apply to information:

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

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

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

(c) that is non-disclosable information.

The appellant's claims

8 The appellant claimed to have a well-founded fear of persecution, if he should return to Bangladesh, for the reason of his political opinion. He said that he had been involved in the Freedom Party, and was in danger from members of the Awami League, who wanted to kill him. After a particular incident on 13 February 1995 near the Ghorasal Bazar Station bus stop, the appellant said he had to leave Bangladesh to save his life. He went to Botswana on 9 August 1995 and then to South Africa.

9 Among the claims that the appellant made was a claim that he had been joint secretary of the Freedom Party in a district called Narsingdi Palash from January 1994 to July 1995. Even after he had gone into hiding in Dhaka, following the Ghorasal incident on 13 February 1995, he had continued to hold this office and to perform its duties. Among the material on which the appellant relied was a letter dated 6 January 1998, purporting to come from one Abul [*sic*] Hossain, President of the Freedom Party Narsingdi District Unit.

The Tribunal's inquiries of DFAT

10 The Tribunal made inquiries of DFAT about a number of matters relevant to the appellant's claims, including a specific question about the authenticity of the letter submitted by the appellant. DFAT responded with a report dated 21 February 2008. That report contained the following general statements:

> In responding to this request, DFAT contacted a notable person from Narsingdi district, who seemed to be informed regarding the activities of the Freedom party, although his association with the party could not be confirmed. It should be noted, however, that it is difficult to confirm anyone's involvement with the party given its origins and history.

11 Some general information about the Freedom Party and its relationship with the Awami League after the latter formed government in 1996 followed. DFAT then provided answers to some specific questions, including the following:

> **Question 6A**
> **Please provide advice on the authenticity of the letter submitted by the applicant**
> DFAT's source was aware of the Freedom Party's local office at Nazrul Clinic, Narsingdi, but advised it had ceased operation long ago. Source was also able to recall the applicant…and was aware of his application for asylum in Australia. However, source was unable to identify anyone with the name Abul [*sic*] Hossain and confirmed that no one with that name had ever held the position of President in the Freedom Party's Narsingdi Unit.

12 The Tribunal sought clarification and further information from DFAT. It made further inquiries and received a further report dated 12 March 2008. The relevant parts of that report, which include the specific questions asked by the Tribunal, are as follows:

> **QUESTION 6A. Grateful if DFAT would provide further information about the manner in which its source recalled the applicant? In what manner did the source recall the applicant? Did he recall the applicant as a member of the Freedom Party? If so, did the source provide details about the level of the applicant's involvement with the Freedom Party and whether he had suffered any threats or mistreatment? The RRT is seeking clarification of DFAT's initial response as it was unclear as to whether DFAT's source knew the applicant because he was a member of the Freedom Party or whether he knew him through some other means.**
>
> **QUESTION 6B. Grateful if DFAT could provide any more detail as to how the source knew of the applicant's asylum application in Australia.**
>
> As stated in earlier Report 778, DFAT contacted a notable person from Narsingdi district regarding the activities of the Freedom Party. Contact was made on two occasions with this individual, the first time to elicit information regarding the RRT request, and the second time to confirm some of the information that had been provided.

> Although the person could not remember the applicant immediately, after checking (it was not clear from the conversation what had been referred to to jog the person's memory), he was able to recall the applicant. We understand that the person is well connected with a wide network of acquaintances. He could have used this network to ascertain the applicant's identity, could have referred to files, or could have made contact with the applicant himself to determine our bona fides etc.
>
> It was not clear how the source knew of the applicant's asylum application in Australia. When DFAT contacted the person a second time to confirm certain details, our contact became imprecise. He contradicted the fact that he had been a Freedom Party member, and stressed only that he had a wide network which gave him access to certain information.

The Tribunal's letter seeking comment

13 By letter dated 6 February 2009, pursuant to s 424A of the Migration Act, the Tribunal invited the appellant to comment on information that the Tribunal considered, subject to any comments the appellant may make, would be the reason, or a part of the reason, for affirming the decision to refuse him a protection visa. The relevant parts of the letter were in the following terms:

> The particulars of the information are as follows. You produced to the Tribunal a letter dated 6 January 1998 purporting to be from Abul [*sic*] Hossain, the President of the Narsingdi Zilla Unit of the Freedom Party, stating that you had been Joint Secretary of the party from January 1994 to July 1995. The Tribunal sought the assistance of the Australian Department of Foreign Affairs and Trade (DFAT) which contacted a person from the Narsingdi district who 'seemed to be informed regarding the activities of the Freedom party, although his association with the party could not be confirmed'. As referred to in the course of the hearing on 5 February 2009, the Department said that the person was able to recall you but that the person was unable to identify anyone with the name of Abul [*sic*] Hossain and confirmed that no one of that name had ever held the position of President in the Freedom Party's Narsingdi Unit (see DFAT Reports 778, dated 21 February 2008, and 792, dated 12 March 2008, copies attached).
>
> This information is relevant to the review because it suggests that the letter you produced purporting to be from Abul [*sic*] Hossain, the President of the Narsingdi Zilla Unit of the Freedom Party, is not genuine. Together with the other information discussed at the hearing on 5 February 2009 this casts doubt on whether you are telling the truth in your claims regarding your involvement in the Freedom Party. This information casts doubt on whether you have a well-founded fear of being persecuted for reasons of your political opinion if you return to Bangladesh now or in the reasonably foreseeable future. The information referred to above may therefore form part of the reason for affirming the decision under review refusing to grant you a protection visa.

14 Attached to that letter were copies of each of DFAT's reports dated 21 February 2008 and 12 March 2008.

The appellant's reply

15 In reply to the Tribunal's letter of 6 February 2009, the appellant submitted a statutory declaration, which contained the following:

> 2. I maintain the following:
>
> a. Abdul [*sic*] Hossain was the President of the Nasringdi [*sic*] District of the Freedom Party in Bangladesh;
>
> b. I was a member of the Freedom Party in Bangladesh; and
>
> c. Abdul [*sic*] Hossain provided me with the letter of support that I provided to the previous Tribunal.
>
> 3. In relation to the information that was obtained by DFAT, I contend that it would be possible for someone in the Freedom Party from the Nasringdi [*sic*] District to know me but not remember the President. As the General Secretary I was in many respects the face of the party. It is normally the case that the President and other more high-ranking officers are in hiding and do not often engage with the members of the party. It is more probable than not that this person would have had significantly more contact with me than the President of the party.
>
> 4. Furthermore, it may be that this person is from my area in Nasringdi [*sic*]. This would have meant that the person would have had a significant amount of exposure to me and would readily remember me as being involved in the party.
>
> 5. I contend that the fact that the member of the Freedom Party remembers me corroborates the statements that were made by Abdul [*sic*] Hossain. It also independently corroborates my claims that I was a member of the Freedom Party and implicitly that I was opposed to the BNP and the Awami League in Bangladesh.
>
> 6. I further contend that the fact that the person remembered me 13 years after I departed Bangladesh, corroborates my claim that I was a prominent member of the Freedom Party.
>
> 7. Understood in this way, the information provided by DFAT actually supports my claims that I continue to oppose the BNP and Awami League in Bangladesh and that if I were to return to Bangladesh that there is a real chance that I will be seriously harmed.

The Tribunal's reasons for decision

16 At [86] of its reasons for decision, the Tribunal said "that there are good reasons not to accept that the [appellant] was involved in the Freedom Party in Bangladesh as he claims." The first of these reasons was that the appellant appeared to know little about the Freedom Party and was unable to say very much about what he had done as a member. The second

was that the appellant had given two inconsistent accounts of the incident of 13 February 1995 at Ghorasal. Neither version was consistent with independent evidence that the Tribunal had about the incident. The third reason is the one of importance in this case. At [98]-[99] of its reasons for decision, the Tribunal said:

> Although the Department's contact in the Narsingdi district was able to recall the applicant, there is nothing in the Department's reports which confirms the applicant's claims that he was a member of the Freedom Party or that he was the Joint Secretary of the party in the Narsingdi district from 1994 to 1995. I do not accept that, as the applicant asserts, the evidence of the Department's contact corroborates the applicant's own evidence that he was a prominent member of the Freedom Party. To the contrary, as I put to the applicant in the course of the hearing before me and as referred to in the Tribunal's section 424A letter, I consider that the information which the Department obtained from its contact suggests that the letter which the applicant produced purporting to be from Abul [*sic*] Hossain, the President of the Narsingdi Zilla Unit of the Freedom Party, is not genuine because no one of that name ever held the position of President in the Freedom Party's Narsingdi Unit (see DFAT Reports 778, dated 21 February 2008, and 792, dated 12 March 2008).
>
> I do not accept that, as the applicant claims, the Department's contact might not have known the President because the President and other more high-ranking officers were in hiding and did not often engage with the members of the party. In the first place, if the applicant's own evidence (both at the hearing before the first Tribunal and at the hearing before me) were to be accepted, there were only 100 members of the party in the Narsingdi district, the locality where the applicant claims to have been Joint Secretary. Secondly, the Department's contact did not just say that he did not recall someone by the name of Abul [*sic*] Hossain but that no one of that name ever held the position of President in the Freedom Party's Narsingdi Unit (see DFAT Reports 778, dated 21 February 2008, and 792, dated 12 March 2008). I conclude on the basis of the inquiries made by the Department that the letter which the applicant produced in corroboration of his claim to have been Joint Secretary of the Freedom Party in the Narsingdi district from 1994 to 1995 is not genuine.

17 For these reasons, the Tribunal did not accept that the appellant was a witness of truth. It rejected specifically all of the claims that he had made and concluded that, if the appellant were to return to Bangladesh in the reasonably foreseeable future, it did not accept that there was a real chance that he would be persecuted for reasons of his real or imputed political opinion.

The application to the Federal Magistrates Court

18 The appellant's further amended application to the Federal Magistrates Court, filed in court pursuant to leave granted on 2 July 2009 (during the court's hearing) had three grounds. The first alleged failure to give adequate particulars of the information provided by DFAT to

the Tribunal, in accordance with s 424A(1)(a) of the Migration Act. There were seven particulars of this ground as follows:

> (a) The Tribunal noted that in response to the Tribunal's request for assistance DFAT contacted a person from the "Narsingdi district who 'seemed to be informed regarding the activities of the Freedom Party ... although his association with the Freedom Party could not be confirmed".
>
> (b) There was no attempt to divulge information about how and/or in what way the person contacted by DFAT "seemed to be informed".
>
> (c) The Tribunal also failed to divulge the name of the person contacted.
>
> (d) The Tribunal also failed to disclose that the person contacted was regarded by DFAT as "notable".
>
> (e) The Tribunal further failed to disclose the basis on which the person contacted was considered "notable".
>
> (f) The Tribunal also failed to disclose particulars of information concerning the steps taken to confirm or otherwise the notable person's association with the Freedom Party.
>
> (g) The Tribunal failed to inform the applicant in writing how and on what basis was the person contacted by DFAT "able to recall" the applicant.

19 The second ground alleged a failure to comply with s 424A(1)(b) of the Migration Act, by failing to ensure, as far as was reasonably practicable, that the appellant understood why the information provided by DFAT was relevant to the review. The particulars of this ground were the same as those for the first ground. The third ground alleged a failure to obtain important information on a critical issue, whether Abul [*sic*] Hossain ever held the position of President of the Freedom Party's Narsingdi Unit, which the Tribunal knew or ought reasonably to have known was readily available, before finding that the letter produced by the appellant was not genuine because no-one of that name ever held that position. Again, this ground was particularised in the same way as the first ground.

The federal magistrate's reasons for judgment

20 At [48] of his reasons for judgment, the federal magistrate characterised the appellant's first ground as relying on the judgment of the Full Court in *SZLPO v Minister for Immigration & Citizenship (No 2)* [2009] FCAFC 60. At [50], his Honour pointed out that copies of the DFAT reports were provided to the appellant, who therefore had access to the same information that the Tribunal did. The appellant, who was legally represented at the

time, replied by way of statutory declaration. At [51]-[52], his Honour distinguished *SZLPO*, a case in which the Tribunal had made an inquiry about a letter submitted to it and found that the letter was fraudulent, without giving particulars of the information it had acquired and seeking comment. The federal magistrate in the present case held that there was no failure to comply with s 424A(1)(a) of the Migration Act because the Tribunal had provided the information that it had to the appellant.

21 In relation to the appellant's second ground, at [56] and [58]-[59], his Honour held that the Tribunal's letter to the appellant dated 6 February 2009 did set out clearly why the information was relevant, because it went to the credibility of the appellant's account. The appellant understood this and replied to it.

22 The federal magistrate also rejected the appellant's third ground. At [61]-[62], his Honour held that there was no evidence that the information to which that ground related was readily available. There was no simple phone call or simple step that the Tribunal could have undertaken. His Honour distinguished the judgment of Flick J in *SZIAI v Minister for Immigration & Citizenship* [2008] FCA 1372 (2008) 104 ALD 22, a case in which a simple phone call may have been all that was required.

The grounds of appeal

23 The original notice of appeal filed in this Court on 21 September 2009 contained six grounds of appeal. Ground 1 alleged error by the federal magistrate in finding that there was no jurisdictional error on the part of the Tribunal by failing to comply with s 424A(1)(a) of the Migration Act. Ground 2 alleged error by the federal magistrate in failing to find that the Tribunal relied on the source of the information as part of its reason for affirming the decision under review, without giving the appellant clear particulars relating to that source. Ground 3 alleged that the federal magistrate erred in limiting the particulars required under s 424A(1)(a) of the Migration Act to those available to the Tribunal. Ground 4 alleged that the federal magistrate erred in failing to find that there was jurisdictional error by the Tribunal in failing to comply with s 424A(1)(b) of the Migration Act. Ground 5 alleged that the federal magistrate erred in failing to find that there was jurisdictional error on the part of the Tribunal in failing to comply with s 424A(1)(c) of the Migration Act. Ground 6 alleged that the federal magistrate "erred in failing to find that the Tribunal's failure to use its powers to inquire into material that was readily available and centrally relevant to the decision was so

unreasonable as to constitute jurisdictional error." All grounds except ground 3 were particularised by reference to the same six paragraphs of particulars appended to ground 1. It is unnecessary to refer in detail to those six paragraphs of particulars, as they were not pursued.

24 At the hearing of the appeal, counsel for the appellant sought leave to rely on a further amended notice of appeal. Grounds 3 and 5 in the original notice of appeal were deleted. The particulars to grounds 1, 2 and 4 were amended to the following:

> I. The Tribunal failed to give the appellant clear particulars relating to the source of information received from the Australian Department of Foreign Affairs and Trade ("DFAT") to the extent that:
>
> i. The Tribunal failed to give clear particulars of the basis of the knowledge held by the DFAT contact of the affairs of the Freedom Party
>
> II. Further, the Tribunal failed to give clear particulars identifying the lack of evidence in the DFAT reports corroborating the appellant's claims that he was a member or joint secretary of the Freedom Party as having been part of the reason for affirming the decision under review.

25 In ground 6, the reference to unreasonableness was deleted, so as to leave the ground alleging that the Tribunal's failure to use its powers to inquire into material that was readily available and centrally relevant to the question constituted jurisdictional error. New particulars were included. Particulars of inquiries that should have been made referred to inquiries into the basis of the knowledge held by the DFAT contact and the contact's credibility, and following up questions asked of DFAT that had not been answered. Particulars of the jurisdictional error were that the Tribunal's failure to conduct inquiries was unreasonable, and that that failure constituted a failure to undertake its statutory duty of review.

Section 424A of the Migration Act

26 Section 424A of the Migration Act is intended to codify an aspect of the Tribunal's obligations, as a decision-maker exercising statutory power in relation to important matters affecting the rights of people who come before it, to afford to those people procedural fairness. The fact that the obligation is codified is emphasised by s 422B of the Migration Act. The codification is in specific terms. Those terms impose on the Tribunal obligations that would not necessarily have fallen on it in the absence of codification of the obligation to

provide procedural fairness. In the absence of the codification, the provision to the person affected of all of the information that the Tribunal had might have been sufficient compliance. The codification requires a more detailed approach by the Tribunal. Not only does s 424A(1)(a) oblige the Tribunal to give "clear particulars" of the information, s 424A(1)(b) requires that the Tribunal give an explanation of its tentative reasoning processes in relation to the information, so as to ensure, as far as is reasonably practicable, that the person understands the relevance of the information. The federal magistrate failed to give sufficient attention to the specific requirements of s 424A(1). In taking the view that the Tribunal did all it had to do by providing to the appellant all of the information the Tribunal had from DFAT, his Honour overlooked the obligations to give particulars and to explain the relevance of that information.

27 To deal adequately with the first ground of the appellant's application to the Federal Magistrates Court, it was necessary for the federal magistrate to ask himself whether the Tribunal had given "clear particulars of any information" that the Tribunal considered would be the reason, or a part of the reason, for affirming the decision under review. It was necessary to examine all of the information the Tribunal had that answered that description and to examine the particulars given, to ascertain whether there had been compliance. The precise information that the Tribunal considered would be the reason, or a part of the reason, for affirming the decision under review is usually ascertained by reference to the Tribunal's reasons for decision. Any information on which the Tribunal has relied to come to a conclusion that is part of the reasoning of the Tribunal leading to its conclusion that the decision under review should be affirmed will be information that answers the description in s 424A(1)(a). Because the Tribunal has relied on information, there must have been a time at which that information came to be the reason, or part of the reason, for the Tribunal to affirm the decision under review. At that time, the Tribunal's obligation to provide particulars of that information, and an explanation of its relevance, came into being. It came into being whether or not the Tribunal had already complied with s 424A(1) in relation to other information.

28 Undertaking that kind of analysis in the present case leads to the crucial question in this appeal. That is the question whether the fact that the DFAT reports contained, as the Tribunal put it in [98] of its reasons for decision, "nothing...which confirms the [appellant's] claims that he was a member of the Freedom Party or that he was the Joint Secretary of the

party in the Narsingdi district from 1994 to 1995." Was the absence of such material in the DFAT reports information that the Tribunal considered would be the reason, or a part of the reason, for affirming the decision under review? If so, did the Tribunal comply with s 424A(1)(b), by ensuring that the appellant understood the relevance of that information and the consequences of it being relied on in affirming the decision under review?

29 The issue dividing the appellant and the Minister in the present case is whether the absence of information in a document received by the Tribunal from a third party can amount to "information" for the purposes of s 424A(1)(a) of the Migration Act.

30 In *NBKS v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 174, the Full Court dealt with a case in which the Tribunal had before it a report of a medical practitioner, Dr Nair. The Tribunal had made inquiries of Dr Nair, including asking him to give opinions on specific questions. Dr Nair failed to respond to one particular question. The Tribunal relied on that failure to respond in arriving at a finding adverse to the applicant in that case. The Tribunal did not comply with s 424A(1) of the Migration Act in relation to that failure. The question for the Full Court was whether the Tribunal was bound to comply with s 424A(1). Weinberg and Allsop JJ held that the Tribunal was so bound. Tamberlin J dissented on this issue, although agreeing in the result of the case. At [26]-[27], Weinberg J said:

> On the appeal to this Court, Allsop J is of the view that the absence of any statement in Dr Nair's report regarding the likely behaviour of the appellant in a confrontational situation was not treated by the Tribunal merely as a "gap", but as implicitly probative of the psychologist's view that there was no such danger. As his Honour observes, if the form of Dr Nair's report, including what it did not say, did not have this significance for the Tribunal there would have been no point in mentioning it.
>
> Allsop J is of the opinion that the Tribunal's use of the omission in Dr Nair's report was "information" that should have been the subject of a letter in compliance with s 424A. His Honour considers that the Tribunal's failure to comply with the strict requirements of that section is fatal, and that jurisdictional error has therefore been established.

31 At [73], Allsop J referred to the proposition, stated by Finn and Stone JJ in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 123 (2004) 206 ALR 471 at [24] that a gap or lack of evidence was not "information" for the purposes of s 424A(1). At [74], Allsop J said:

> As part of its reasons for not being satisfied that the appellant might react in a confrontational way upon his return to Iran, the Tribunal cited the fact that Dr Nair's report did not state that he might. This was not in answer to a proposition that Dr Nair's report did say that. Rather, it was a statement that the form of Dr Nair's report and its failure to say that the appellant would behave in this way was of assistance in concluding that he would not. That is, the absence of such a statement in Dr Nair's report was taken by the Tribunal as supportive of the conclusion that he would not behave in that way, implicitly a relevant proposition as to how the appellant would behave upon return to Iran was being extracted from the form of Dr Nair's report.

32 His Honour went on to say that care needs to be exercised in applying the proposition from *VAF*, to which his Honour had referred in [73]. His Honour then said:

> Here, the absence of something in Dr Nair's report was not merely taken as a gap, but was implicitly probative of Dr Nair's view that there was no such danger.

33 The facts of *NBKS* are relevantly indistinguishable from those of the present case. What the Tribunal relied on in [98] of its reasons for decision was not merely a gap in the reports from DFAT. The Tribunal's statement that nothing in the DFAT reports confirmed the appellant's claims that he was a member of the Freedom Party or its joint secretary in the Narsingdi district from 1994 to 1995 is a conclusion drawn from a reasoning process that relies on a number of implicit positive propositions. The first of those propositions is that the DFAT informant had the requisite knowledge to supply evidence about the appellant's claims as to membership and office-holding in the Freedom Party. The second is that, in response to DFAT's inquiries, the informant would have been likely to pass on this knowledge to DFAT when he was interviewed by a DFAT representative (which may involve the assumption that the DFAT representative would have asked the informant the right questions). Third, the informant did not pass on such knowledge to the DFAT representative. Fourth, the reason for the failure to pass on that knowledge was that the facts did not exist as the appellant asserted them, and therefore the informant did not know them. As was the case in *NBKS*, the absence of evidence from someone who would have been expected to be able to provide such evidence, and to provide it, was treated as an implicit positive statement, not merely as a gap.

34 Much of the argument in the present appeal focused on the question whether *NBKS* had been overruled by the subsequent judgment of the High Court of Australia in *SZBYR v Minister for Immigration & Citizenship* [2007] HCA 26. That case was concerned with reliance by the Tribunal on a prior statutory declaration of the two applicants in that case. The argument was that inconsistencies between the statutory declaration and the oral

evidence of the applicants to the Tribunal was "information", for the purposes of s 424A(1) of the Migration Act. At [16]-[20], Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ expressed several reasons for rejecting this argument. At [17], their Honours pointed out that it had not been demonstrated that the statutory declaration would be the reason, or a part of the reason, for affirming the decision under review in that case. At [18], their Honours said that it was difficult to see how the Tribunal's disbelief of the oral evidence, as a result of inconsistencies with the statutory declaration, could be characterised as constituting "information" within the meaning of s 424A(1)(a). Their Honours referred to the proposition of Finn and Stone JJ in *VAF* with approval. After quoting that proposition, their Honours said:

> 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.

35 At [19]-[20], their Honours pointed to the practical difficulty of regarding inconsistencies as information for the purposes of applying s 424A. In particular, at [20], their Honours referred to the ongoing need to comply with s 424A in respect of each new round of inconsistencies, arising from the last compliance with s 424A. Their Honours characterised this as a "*circulus inextricabilis*". At [21], their Honours concluded that the relevant parts of the statutory declaration were not information falling within s 424A(1)(a) of the Migration Act.

36 It is apparent from an examination of the reasoning of the majority in *SZBYR* that the Court was not dealing with the sort of implicit positive that was the subject of *NBKS* and is present in this case. The approval of the proposition from *VAF* is not inconsistent with the view of Allsop J in *NBKS* that care needs to be taken in applying that proposition. Most significantly, despite the fact that the majority in the High Court was citing authority of the Full Court of this Court (other cases were cited besides *VAF*) there is no express statement to the effect that *NBKS* should be overruled.

37 Subsequently, a number of judges of this Court have discussed the question whether *NBKS* has been overruled impliedly by *SZBYR*. So far as the researches of counsel in this case show, no judge has concluded that *NBKS* is no longer good law. A number of judges

have expressed the view that *NBKS* has not been overruled. The question was raised in the judgment of the Full Court in *Minister for Immigration & Citizenship v Applicant A125 of 2003* [2007] FCAFC 162 (2007) 163 FCR 285 at [71]-[75] but the Full Court left it unresolved. In *SZGSI v Minister for Immigration & Citizenship* [2007] FCAFC 110 (2007) 160 FCR 506, the Full Court held that the Tribunal had not failed to comply with s 424A(1) of the Migration Act in respect of the result of its inquiries of a clergyman at a church attended by the appellants in that case. The clergyman had said that he was unable to comment about certain matters. The Full Court held that this inability was not "information" for the purposes of s 424A(1)(a), but merely a gap in the evidence. At [43], Marshall J expressed agreement with the view of Weinberg J in *NBKS*. At [1], Moore J expressed agreement with the reasons for judgment of Marshall J on the relevant point. At [6], Finn J expressed agreement with Marshall J, except that his Honour refrained from expressing a view on whether, if at all, an omission could constitute "information" under s 424A. His Honour referred to *SZBYR* in this context. In *SZKCQ v Minister for Immigration & Citizenship* [2008] FCAFC 119 (2008) 170 FCR 236, the Full Court held that the Tribunal had failed to comply with s 424A(1)(b) of the Migration Act in respect of the results of investigations by the Tribunal through the Australian High Commission in Islamabad to officials of a political party in Pakistan. One member of the Full Court, Buchanan J, also held that there had been a failure to comply with s 424A(1)(a). In the course of his judgment at [85]-[93], Buchanan J discussed at some length the question whether *NBKS* had been impliedly overruled by *SZBYR* and expressed the view that no such overruling had occurred. The other two members of the Full Court, Stone and Tracey JJ at [1] declined to express any opinion on that point. To the extent to which opinions have been expressed, they favour the proposition that *NBKS* remains good law. I share that view, on the basis of my own reading of *NBKS* and *SZBYR*.

38 There can be no doubt that the Tribunal did form the view that the failure of the informant in Bangladesh to confirm the appellant's claims as to membership and office-holding in the Freedom Party would be part of the reason for affirming the decision under review. The Tribunal expressed precisely this reasoning in the first sentence of [98] of its reasons for decision. At [100], for reasons that included that failure, the Tribunal did not accept that the appellant was ever a member of the Freedom Party in Bangladesh, or that he was the joint secretary of the party in the Narsingdi District from 1994 to 1995. The implicit

assertion arising from the absence of material in the DFAT reports was used by the Tribunal to undermine the appellant's case.

39 The result is that, because the Tribunal relied on the failure of the informant in Bangladesh to confirm the appellant's membership or office-holding in the Freedom Party as an implicit assertion that the appellant was not a member or office-holder in that party, the Tribunal was obliged to comply with s 424A(1) of the Migration Act in respect of that information. It was obliged to give him particulars of the implied assertion of the informant. It was obliged to ensure, so far as was practicable, that the appellant understood why the information was relevant to the review and the consequences of it being relied on in affirming the decision under review. It was obliged to give the appellant an opportunity to comment on or respond to the information. The Tribunal did none of these things. It did not mention the information at all in its letter of 6 February 2009. Merely to pass on to the appellant the full text of the reports from DFAT did not operate to convey to him the implicit assertion on which the Tribunal relied or the way in which that assertion might be used to damage the appellant's case. The way in which the appellant responded to the letter of 6 February 2009 in his statutory declaration demonstrates that the significance of the implicit assertion did not occur to him. The terms of paras 3 and 4 of the statutory declaration show that the appellant was unaware that he had to deal with the proposition that he was not the joint secretary of the Freedom Party in the Narsingdi District, as a result of the material supplied by DFAT. Paragraphs 5 and 6 show that the appellant actually regarded the DFAT reports as corroborating his claim to membership of the Freedom Party.

40 There is obviously no substance in the argument of counsel for the Minister that this conclusion would give rise to a *circulus inextricabilis* of the kind referred to in *SZBYR*. An implied assertion is no different from any other item of information in the way in which s 424A(1) of the Migration Act impacts on it. In no sense does the requirement that the Tribunal comply with s 424A(1) in relation to such an item of information require the Tribunal to continue to notify an applicant of its reasoning processes, in the way in which applying s 424A(1) to every gap in the evidence identified by the Tribunal would do.

41 The Tribunal's decision in the present case was therefore tainted by jurisdictional error. Section 424A(1) imposed duties on the Tribunal. The Tribunal could not exercise its jurisdiction validly without performing those duties. It did not perform them. Its failure to

do so was of importance in the outcome of the case, because of the reliance the Tribunal placed on the fact that the DFAT reports did not confirm crucial elements of the appellant's case. The federal magistrate was in error in failing to find that this jurisdictional error existed. His Honour should have held that the Tribunal failed to comply with s 424A(1) in respect of each of its paras (a), (b) and (c), in relation to this aspect of the DFAT reports. The Tribunal did not remedy this deficiency by complying with s 424AA in relation to the information.

Failure to make inquiries

42 In relation to ground 6 of the amended notice of appeal, there was no error in the judgment of the federal magistrate. This was not a case in which the Tribunal was obliged to make further inquiries in relation to the content of the DFAT reports. There was nothing to show that such further inquiries would have produced any more information. The fact that the Tribunal had made two inquiries through DFAT without ascertaining further information, coupled with the information that the informant "became imprecise" on the second contact, suggests strongly to the contrary. It seems likely that any further attempt to obtain information from the informant would have led to even greater reluctance on the informant's part to provide such information. Although it would have been relatively easy for the Tribunal to ask further questions of DFAT, it would have been far from simple for DFAT to pursue its inquiries any further. While there are circumstances in which a failure to make further inquiries about a matter that could be cleared up simply may amount to jurisdictional error on the part of the Tribunal, this case appears to lie beyond the area of such required inquiries. In *Minister for Immigration & Citizenship v SZIAI* [2009] HCA 39 at [25], French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ characterised that area by saying:

> It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction.

In the present case, there was no obvious inquiry and no fact the existence of which could be ascertained easily.

Conclusion

43 The conclusion that there was jurisdictional error in the failure of the Tribunal to comply with s 424A(1) of the Migration Act leads to the result that the appeal must be allowed. The orders made by the federal magistrate must be set aside. For those orders, there must be substituted orders that provide remedies by way of certiorari and mandamus, directed to the Tribunal. The effect of certiorari is to remove into this Court the decision of the Tribunal for the purpose of quashing it, and quashing that decision. The effect of mandamus is to require the Tribunal to hear and determine the appellant's application for review of the decision to refuse him a protection visa according to law. Applying the usual principle, that costs follow the event, there should be orders in favour of the appellant for costs in respect of the proceeding in the Federal Magistrates Court and the appeal.

I certify that the preceding forty-three (43) numbered paragraphs are a true copy of the reasons for judgment herein of the Honourable Justice Gray.

Associate:

Dated: 9 April 2010