FEDERAL COURT OF AUSTRALIA

VUAX v Minister for Immigration & Multicultural & Indigenous Affairs

[2004] FCAFC 158

MIGRATION – application for protection visa – Tribunal had regard to information from Lonely Planet Guide in rejecting aspect of appellant's claim – whether failure to provide appellant with opportunity to comment upon information constituted breach of s 424A of *Migration Act* 1958 (Cth) – whether information "the reason, or a part of the reason" for affirming decision under review – point raised on appeal having previously been abandoned at first instance – whether leave to rely upon proposed ground should be granted

WORDS & PHRASES – "the reason, or a part of the reason" – s 424A(1) of *Migration Act* 1958 (Cth)

Migration Act 1958 (Cth) ss 424A, 441A, 476(1), 481(1)

VEAJ of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 678 at [33]-[34] referred to
Minister for Immigration & Multicultural Affairs v Al Shamry (2001) 110 FCR 27 at 40-41 referred to
Baig v Minister for Immigration & Multicultural Affairs [2002] FCA 380 referred to
VHAJ v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 75 ALD 609 at [51]-[52] and [72] referred to
NARV v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 203 ALR 494 at [17], [24] referred to
SZADS v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1251 at [47] referred to
Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82 at 122 referred to
Stead v State Government Insurance Commission (1986) 161 CLR 141 at 145 referred to
Dagli v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 298 at [91] referred to
Tuncok v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1069 referred to
NATL v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 112 at [17] referred to
Paul v Minister for Immigration & Multicultural Affairs (2001) 113 FCR 396 [94] referred to
VAAC v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 74 at [27] referred to
H v Minister for Immigration & Multicultural Affairs (2000) 63 ALD 43 referred to
O'Brien v Komesaroff (1982) 150 CLR 310 referred to
Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd (2001) 117 FCR 424 at [20]-[24] and [38] referred to
Coulton v Holcombe (1986) 162 CLR 1 at 7 referred to
VAF v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 123 at [30], [33], [41] followed

NAMB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 718 at [80] referred to
Re Minister for Immigration & Multicultural Affairs; Ex parte Lam (2003) 195 ALR 502 at [37] referred to

C Beaton-Wells, "Disclosure of adverse information to applicants under the Migration Act 1958" (2004) 11 *AJ Admin L* 61 at 64-67

VUAX v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

V1027 of 2003

KIEFEL, WEINBERG & STONE JJ
15 JUNE 2004
MELBOURNE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **V1027 OF 2003**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**VUAX** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**KIEFEL, WEINBERG & STONE JJ**
DATE OF ORDER:	**15 JUNE 2004**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent's costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **V1027 OF 2003**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

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JUDGES:	**KIEFEL, WEINBERG & STONE JJ**
DATE:	**15 JUNE 2004**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

THE COURT

1 This is an appeal from a decision of a judge of the Court who, on 27 October 2003, ordered that an application for review under s 476(1) of the *Migration Act* 1958 (Cth) ("the Act") be dismissed. The application was for review of a decision of the Refugee Review Tribunal ("the Tribunal") made on 23 March 2001 that affirmed a decision of the respondent Minister, by his delegate, to refuse the appellant, his wife and children a Protection (Class XA) visa. It is common ground that the law to be applied is that which existed prior to the commencement of the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth).

THE BACKGROUND FACTS

2 The appellant is a Jordanian citizen of Palestinian ethnicity. He is 44 years old, and arrived in Australia on 6 August 2000. His wife and children arrived several weeks later, on 30 August 2000.

3 Upon his arrival in Australia, the appellant initially claimed to be stateless, maintaining that he had never held Jordanian citizenship. However, he later conceded that he was a Jordanian citizen. Indeed, he conceded that he had been granted a Jordanian passport

on four separate occasions. He arrived in Australia on a Jordanian passport issued on 4 April 2000, valid to 4 April 2005.

PROCEEDINGS BEFORE THE TRIBUNAL

4 The Tribunal, in its reasons for decision, referred to the appellant's educational, family and business background. It then set out his account of having joined, in 1991, the Islamic Resistance Movement ("Hamas"), the militant Palestinian body, now proscribed in this country as a terrorist organisation. It also summarised his account of having participated in demonstrations and other anti-government activities in support of the Palestinian resistance against Israel.

5 The appellant claimed that the Jordanian Government had been tolerant of Hamas until 1994, when its attitude towards the organisation changed. Demonstrations, marches and political speeches by Hamas members were banned, as the Government at that time supported peace initiatives between Israel and the Palestinian Authority.

6 The appellant claimed that since 1994 he had been repeatedly arrested and mistreated by Government officials. He stated that this had occurred about ten times in 1996, and again in 1997, and more frequently throughout 1998 and 1999. He said that in 1999, he was summoned to attend the Security Office in Amman where a high-ranking official told him that his life would be "destroyed" if he did not collaborate with the security forces against Hamas. He said that he was summoned again about ten days later, and that the security officer arranged for two Hamas members to see them together. This led to his being suspected by Hamas of being a traitor to the movement, and to his being threatened with death. According to the appellant, he was arrested a week later, taken to the same security building, and assaulted after he refused to assist the authorities. He claimed that some days later, two men and a woman broke into his house and attacked his wife, seriously injuring her.

7 The appellant said that in August 1999, the Jordanian Government had declared Hamas to be an illegal organisation. He claimed that he had repeatedly been arrested, detained and mistreated throughout the remainder of that year, and into the early part of 2000. He said that he eventually decided that he could no longer cope with this treatment, and told various members of Hamas that he intended to have nothing more to do with the organisation.

In May 2000, he obtained a tourist visa permitting him to enter Australia. At that time, he set about liquidating his various business interests.

8 The appellant claimed that on 3 August 2000, at about 4.00 pm, he was in his car when he discovered that he was being followed. He managed to elude his pursuers, and drove home. He parked his car in a side street, entered his house, closed the windows and locked the doors. His wife, who was working at his father's shop at the time, telephoned him to say that security officers had been inquiring about his whereabouts, and that they had threatened to kill him. They had handed her a "subpoena" directing him to attend court that day. The appellant claimed that it had dawned on him that this was a "set up" as it was already early evening. According to the appellant, his wife spoke to their lawyer who advised that he should leave the country as soon as possible. His wife then spoke to her sister who was employed at the Amman airport. She booked a ticket for him to Egypt, as there was no flight to Australia that day, and he could enter Egypt without a visa.

9 The appellant also claimed that his lawyer had advised him to check whether his name was on the security list. According to the appellant, it was. His lawyer somehow managed to bribe someone to have his name temporarily removed from the list so that he could leave the country. This cost him 150 dinars, a sum that his wife paid to the lawyer.

10 The appellant told the Tribunal that the drive from his home to Queen Alia international airport took about twenty minutes. He said that shortly thereafter, he flew to Egypt and purchased a ticket to Australia the next day. Meanwhile, according to the appellant, his wife was again harassed by the authorities who demanded to know his whereabouts. They threatened to close his father's shop. Eventually they did so. As indicated earlier, his wife and children joined him in Australia several weeks later.

11 In substance, the appellant based his claim for refugee status on grounds of actual and perceived political opposition to the Jordanian Government, his Palestinian ethnicity, and his membership of Hamas. A key aspect of his claim was the history of mistreatment that he recounted, resulting from his involvement with Hamas. An additional aspect of his claim was his account of having decided to leave Hamas. He maintained that because of that decision, he had come to be regarded as a traitor to that organisation. According to the appellant, Hamas was behind the attack upon his wife.

12 The Tribunal found that the appellant was a Jordanian citizen. It did not accept that he or his family had been subjected to any educational or economic discrimination by reason of his Palestinian ethnicity. According to the Tribunal, Hamas had been an armed organisation from its inception. It found that:

> *"…there was nothing persecutory about Jordanian authorities warning its citizens and residents about forms of political activity which were not deemed to be in Jordan's interest".*

13 The Tribunal accepted that the appellant had been involved with Hamas in the early 1990s. It also accepted the appellant's contention that by 1994, the attitude of the Jordanian authorities began to change because of the "rejectionist policies of some Palestinian organisations". It did not accept that this signalled a policy of suppression or oppression of Hamas members and supporters, although it was clear that the Government was interested in limiting Hamas and other Palestinian dissident activity. The Tribunal concluded that the Government was interested in "containing" Palestinian anti-Israeli activity, rather than banning it altogether.

14 The Tribunal rejected the appellant's claim that he was unaware that intelligence officers would be likely to be monitoring activities at mosques where rejectionist groups or individuals gathered. The appellant was highly educated, and politically astute. He was not a person likely to be naïve about government surveillance of dissident groups.

15 If the appellant's claims regarding the period from 1991 to 1995 were true, then he was detained for three days in 1995, warned about his political activities, and required to provide an undertaking that he would not continue with them. The appellant claimed that he had ignored this warning and continued with his activities, and that this had resulted in "very many" arrests, episodes of detention, and threats. If the appellant had engaged in activities that were inimical to the interests of the Jordanian Government, it could hardly be said that he was being persecuted simply because he was regularly being detained and questioned.

16 However, the Tribunal rejected the appellant's claim that he had been repeatedly detained from 1995 by reason of his pro-Hamas activities. He had claimed at least ten arrests in 1996, between ten and twelve in 1997, and an increase in 1998. On any reading, this would make him a "serial offender". It was utterly implausible that the authorities would not

have taken more serious action against him if these claims were true. It was unlikely that he would have been permitted to travel to Turkey and Thailand, as he had been in 1997 and 1998, if his account of his activities were true. In the words of the Tribunal:

> *"The Tribunal does not accept, that if he were an habitual detainee and therefore constantly under surveillance as he has claimed, that he would have been permitted to leave the country for his usual business trips. One of the aspects of Jordanian policy reported from various sources is that they have, on occasion, confiscated passports to prevent travel by known activists."*

17 It was for these reasons that the Tribunal concluded that the purported "subpoenas" were not genuine. It regarded them as either forgeries, or as having been fraudulently obtained.

18 The Tribunal then turned to the appellant's claim that the security authorities had been interested in persuading him to become an informant. While accepting that there would be informants among the Palestinian communities in Jordan, the Tribunal did not accept that the authorities would set about attempting to recruit an unwilling party who, on his own account, knew little about Hamas beyond his local precinct, and was not a significant figure within the organisation.

19 The Tribunal concluded that the fact that Hamas had been banned in Jordan did not mean that its members were relevantly persecuted. Hamas resisted any compromise on the Israeli-Palestinian issue, and had been a source of constant militant action against Israel. The Jordanian Government regarded this as detrimental to its national interests. Its "crackdown" against Hamas seemed not to have been violent, but rather the product of negotiation and mediation. It was a telling fact that the President of the Jordanian Bar Association led the defence panel representing Hamas leaders. In substance, the Tribunal concluded that there were "complexities and subtleties" in the relationship between the Government and Hamas rather than a relationship of government repression. It therefore rejected the appellant's claim that his membership of Hamas resulted in "constant and increasing harassment", amounting to persecution, forcing him to leave Jordan.

20 Strictly speaking, having rejected the appellant's primary claim, the Tribunal was not required to go on to make any findings regarding other aspects of his evidence before it.

However, the Tribunal went on to deal specifically with the appellant's account of his departure from Jordan. In relation to that issue, it made the following findings:

> *"The Tribunal also has considered the Applicant's account of his last day in Amman and finds it implausible. It has considered the alleged timetable but does not accept that he could accomplish all he claimed in the time he has stated, and all without arousing the attention of the authorities as to his whereabouts. It is implausible that if the security officers who allegedly shadowed him to the shop had been so concerned about his whereabouts that they would not have gone to his house to which he claimed he had returned. He told the Tribunal his wife returned there at about 6.30 pm, meaning that he did not leave the house until after that time. He was, therefore, readily available to them had they actually been looking for him. The Tribunal does not find his claim that he had shut the windows and locked the door means that he was protected from surveillance by the security authorities had they been interested in him* [indeterminate] *His wife entered the house. He allegedly left it has* [sic] *and travelled in his own car to the airport. That is, there was activity which would have alerted a security officer to his presence.*
>
> *The Tribunal also rejects his claim that he could have reached the airport within twenty minutes. According to the Lonely Planet Guide, Queen Ali* [sic] *international airport is 35 kilometres from the city of Amman. The Applicant claimed that he left his house sometime after 6.30 and travelled by his own car to the airport without the security forces knowing. The Tribunal finds this implausible as it does his claim that he was able to pass through all the necessary checks before boarding an international flight with some last minute bribery arranged by a lawyer. The fact that his sister-in-law worked at the airport could have been of some assistance in travel arrangements. The Tribunal is not satisfied that an association with one airport employee was sufficient for other usual checks to be by-passed."*

21 The Tribunal then repeated its earlier conclusion rejecting the appellant's claim that the authorities had tried to recruit him as an informant against Hamas. It did not accept that any threats to which he may have been subjected, or any attack upon his wife by unknown persons, would have been motivated by any perception that he was an informant. Indeed, it did not accept that any such attack had been perpetrated for a political reason, or that those who had carried it out were members of Hamas seeking revenge upon the appellant.

22 Finally, the Tribunal conclude that whatever factors may have led the appellant to sell his business, and to bring his family to Australia, they did not include any fear of persecution at the hands of government authorities or of Hamas, as he had claimed.

PROCEEDINGS BEFORE THE PRIMARY JUDGE

23 In his written submissions before the primary judge, counsel for the appellant made the point that the Tribunal had failed to consider relevant issues before rejecting the appellant's evidence regarding the time it had taken him to travel from his home to Queen Alia international airport on 3 August 2000. In those written submissions, it was contended that the Tribunal failed to provide the appellant with particulars of the information that it had relied upon concerning the distance between Amman and the airport. It was initially argued that the Tribunal's reliance upon this piece of information resulted in its decision being vitiated because the Tribunal failed to consider the distance of the appellant's house from the centre of the city, and whether the house was closer to the airport than the 35 kilometres noted. As such, the Tribunal either failed to have regard to a relevant issue, or arrived at a conclusion that was unsupported by any evidence.

24 However, when the matter came to be argued before the primary judge, counsel for the appellant expressly disavowed any reliance upon this point. Not surprisingly, therefore, her Honour found it unnecessary to allude to the matter when she dismissed the application for review of the Tribunal's decision.

THE APPEAL TO THIS COURT

25 The appeal was fixed for hearing on 25 May 2004. However, one week prior to that date, the appellant's solicitors wrote to the Court attaching a proposed amended notice of appeal. That notice of appeal contained two grounds, each of which raised essentially the same point. In substance, the appellant now seeks to contend that the Tribunal failed to comply with the requirements of s 424A of the Act, as that section stood prior to 2 October 2001, by not providing particulars of information that the Tribunal considered to be the reason, or part of the reason, for affirming the decision under review.

26 The appellant seeks to argue that the Tribunal thereby failed to observe the procedures required to be observed in connection with the making of the decision within the meaning of s 476(1)(a) of the Act. The appellant also seeks to argue that the Tribunal thereby committed reviewable errors under ss 476(1)(b), (c), (d) and (e).

27 Section 424A, as it formerly stood, provided:

"(1) Subject to subsection (3), the Tribunal must:
(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, 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
(c) invite the applicant to comment on it.

(2) The invitation must be given to the applicant by one of the methods specified in section 441A. However, this subsection does not apply if the applicant is in immigration detention.

(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; or
(c) that is non-disclosable information."

28 Section 441A, as it then stood, provided:

"(1) A document specified in subsection (3) is taken to be duly given to an applicant for review if:
(a) the document is sent (physically, electronically or otherwise) to:
(i) the last address for service provided by the applicant in connection with his or her application for review; or
(ii) the last residential address provided by the applicant in connection with his or her application for review; and
(b) the Tribunal has a receipt or other evidence indicating the date of dispatch.

(2) A document specified in subsection (3) is taken to be duly given to an applicant for review if the document is given:
(a) by giving it to the applicant or to a person authorised by the applicant to receive documents of that kind on behalf of the applicant; or
(b) by leaving it at the applicant's place of residence with a person who appears to live there and appears to have turned 16.

(3) The documents specified for the purposes of subsections (1) and (2) are:
(a) an invitation to an applicant under section 424 (other than an invitation to an applicant who is in immigration detention); and
(b) an invitation under section 424A (other than an invitation to an applicant who is in immigration detention); and
(c) a notice under section 425A (other than a notice to an applicant

> *who is in immigration detention); and*
> *(d) a notice under section 430A; and*
> *(e) a statement given under subsection 430B(6).*
>
> *(4) It is sufficient compliance with the requirement to give a document referred to in subsection (3) if a facsimile, or a certified copy, of the document is so given.*
>
> *(5) A document posted in accordance with paragraph (1)(a) must bear correct pre-paid postage and, if the document is posted to an overseas address, the postage must be at the full airmail rate."*

29 In substance, what counsel for the appellant now seeks to do on the appeal to this Court is to revive essentially the same point that was raised, and expressly abandoned, before the primary judge. There is one minor modification. Previously, the point was raised under the ambit of failure to have regard to relevant considerations, or a decision taken without any evidence to support it. Now, the same point is raised under the ambit of a denial of procedural fairness, seeking to invoke s 424A.

30 Counsel for the appellant who appeared on the appeal in this Court also appeared before the primary judge. He recognised that having expressly abandoned the point below, there would be difficulty in seeking now to rely upon it. He submitted, however, that if he had erred in abandoning the point below, the consequences of that error should not be visited upon the appellant.

31 Counsel for the appellant then turned to the merits of the proposed ground. He submitted that s 424A required the Tribunal to provide the appellant with particulars of any information that it considered was a part of the reason it affirmed the delegate's decision. This was to ensure that the appellant could understand why that information was relevant to the review, and to invite the appellant's further comments. Counsel noted that the information had to be provided in writing and reduced to particulars: *VEAJ of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 678 at [33]-[34].

32 Counsel for the appellant referred to the Minister's Second Reading Speech on the introduction of s 424A in support of the proposition that the purpose of that section was to "safeguard an applicant". He also relied upon a decision of a Full Court of this Court in *Minister for Immigration & Multicultural Affairs v Al Shamry* (2001) 110 FCR 27 in which it was noted at 40-41 that this purpose would be met by affording an applicant:

> *"…the opportunity to respond to the gravamen or substance of any adverse information upon which the [Tribunal] proposes to act, the significance of which the applicant may be unaware."*

33 Counsel for the appellant then drew attention to *Baig v Minister for Immigration & Multicultural Affairs* [2002] FCA 380 where GrayJ held that the Tribunal had failed to comply with s 424A in relation to information which was not "specifically about" the applicant, but which was relevant to a central issue upon which the applicant's case rested. An important aspect of the applicant's claims turned upon whether a by-election had been held at a particular place on a specific date, and whether the applicant had campaigned in that by-election. On that basis, his Honour held that such information was not "just about a class of persons".

34 Counsel for the appellant submitted that *Baig* had been cited with approval in subsequent Full Court decisions, and that the approach taken in that case should be followed. Counsel referred in particular to *VHAJ v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 75 ALD 609 at [51]-[52] and [72]; *NARV v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 203 ALR 494 at [24]; and also the judgment of Conti J at first instance in *SZADS v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1251 at [47].

35 Counsel submitted that the net effect of *VHAJ* and *NARV* was that information would only fall within the exception in s 424A(3)(a) if, when viewed within the scope of relevant issues before the Tribunal, the information was solely about a class of persons, and did not go to any other issue before the Tribunal. He submitted that the Tribunal had clearly taken a very broad view of s 424A(3)(a) as it had relied upon a wide range of country information in its decision without providing any particulars of that information to the appellant, or even raising it at the hearing.

36 Counsel submitted that the Tribunal's rejection of the appellant's account of the events of the day he fled from Jordan might have played a significant role in its ultimate decision to affirm the delegate's decision refusing a protection visa. The appellant's credibility was critical to his prospects of persuading the Tribunal that he had a genuine fear of persecution based on Convention grounds. Any finding that was adverse to his credibility might have impacted upon the Tribunal's overall rejection of his claims. A key step in the

Tribunal's rejection of his account of the events of 3August 2000, when the appellant fled Jordan, was its conclusion that he simply could not have reached the airport from his home within twenty minutes. That conclusion rested solely upon the statement in the Lonely Planet Guide that the airport was 35 kilometres from the city. The relevant passage from the Lonely Planet Guide was never drawn to the appellant's attention, and he was never given the opportunity to comment upon, or explain, the apparent difficulty with his account. The passage could not be regarded as being information about any "class of persons" in the sense described in s 424A(3)(a). Accordingly, the Tribunal contravened the requirements of s 424A(1).

37 Counsel next submitted that the appellant, having established a failure to comply with s 424A, did not have to lead evidence to explain precisely how he had been adversely affected by that contravention. If the appellant was not informed of the case that he had to meet, that was sufficient to establish "practical injustice" without his having to prove what he would have done had he been provided with that information. Counsel referred to *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 122 per McHugh J, citing *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145; *NARV v Minister for Immigration & Multicultural & Indigenous Affairs* at [17]; *Dagli v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 298 at [91]; and *Tuncok v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1069.

38 Notwithstanding that the appellant was not required to prove that he had an answer to the Tribunal's reliance upon the Lonely Planet Guide, counsel proffered an affidavit sworn by the appellant setting out what he might have said to the Tribunal had he been told that it would act upon the information in that Guide. The affidavit was tendered on the same basis as a similar affidavit that was received by the Full Court in *NARV*. See generally [19] and [40] of that judgment. The affidavit was said to indicate that, contrary to the Tribunal's assumption, the appellant did not live in the centre of Amman, but in the northwestern part of the city. Driving from his home to the airport involved travelling directly south along major roads and freeways, with only a few traffic lights. It was unnecessary, and in fact would take longer, to drive through the centre of Amman. Moreover, the afternoon rush hour was between 2.00 pm and 3.00 pm. The journey outside of peak hours would usually take about twenty minutes, as it had on 3August 2000.

39 Finally, counsel for the appellant submitted that even though the Tribunal had rejected the appellant as a credible witness for a number of reasons, it was possible that the finding regarding the time taken to drive to the airport had been "the straw that broke the camel's back". In that regard, he referred to the following observation by Gray J in *Baig* at [35]:

> *"…The Tribunal might then have taken a more benevolent view of the applicant's credibility if it had found in his favour on this issue. In turn, that view might have affected the view that the Tribunal took on the applicant's credibility in other respects. Whether it would have been sufficient to turn around the Tribunal's adverse opinion of the applicant and his story is another question. …The ultimate result is not, however, one for this Court to determine. This Court is not a trier of fact when exercising its jurisdiction to hear applications for judicial review of decisions of the Tribunal. I am left with the real possibility that the failure of the Tribunal to observe a procedure it was required to observe denied the applicant a successful outcome of his application. The proper course is to set aside the decision of the Tribunal and return the matter to the Tribunal, differently constituted, for reconsideration."*

40 Counsel for the respondent submitted that, in dealing with the ground of appeal upon which the appellant now seeks leave to rely, it would be necessary to consider the context in which the Tribunal had referred to the Lonely Planet Guide. Under the heading, "Departure from Jordan", the Tribunal considered the appellant's claims relating to events surrounding his departure from Jordan on 3August 2000. The Tribunal concluded that his account of the events of that day was implausible. More specifically, it did not accept that he could have accomplished all that he claimed to have achieved within the time parameters given without arousing the attention of the authorities. Moreover, it was improbable that the security officers, who were ostensibly concerned about his whereabouts, would not have gone to his home which he did not leave until about 6.30 pm. It was also implausible that he could have travelled to the airport in his own car without alerting those officers to his proposed departure, or that he could have passed through all the necessary checks before boarding an international flight merely through some last minute bribery arranged by his lawyer, with the aid of his sister-in-law. Finally, it rejected his claim that he could have reached the airport in about twenty minutes, and relied upon the location set out in the Guide as the basis for that conclusion.

41 Counsel for the respondent submitted that s424A(1) only requires the Tribunal to "give… 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". The section does not

require the Tribunal to provide an applicant with every item of evidence that it might take into account in arriving at its decision.

42 Importantly, counsel for the respondent submitted that it was clear from the Tribunal's reasons, when read as a whole, that the information regarding the location of the airport was not central to its reasoning. Nor was that information "sufficiently operative in the mind of the Tribunal to give rise to any obligation to give particulars under s 424A": see *NATL v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 112 at [17]. Counsel also referred to *Paul v Minister for Immigration & Multicultural Affairs* (2001) 113 FCR 396 where Allsop J, with whom Heerey J agreed, said at [94]:

> *"It is necessary to say something about s 424A. First, the word "would" is used, not "could". I see no warrant to view the section as "crystallising" or "enlivening" any obligation merely because the Tribunal member in considering the matter forms the view that information could, or could possibly, be relevant to the determination of the claims. The Tribunal must give the particulars which have a certain character: particulars of any information that the Tribunal considers* would *be the reason, or a part of the reason, for affirming the decision. It is not just a question of general adverse relevance…"*

43 In substance, counsel's submission was that the information regarding the location of the airport was not "the reason, or a part of the reason" why the Tribunal rejected the appellant's claim.

44 Counsel next submitted that even if there had been a failure to comply with s 424A, it was a "technical" breach that in no way bore upon the outcome of the application. By the time the Tribunal came to deal with the appellant's account of the events of 3 August 2000, it had already rejected his core claims. The reasoning surrounding the Tribunal's rejection of those claims could not be impugned. Accordingly, any denial of procedural fairness regarding the peripheral issue of whether the appellant's account of his last day in Jordan should be accepted made no difference to its critical finding that there was no basis for his belief that he would be persecuted. Counsel referred in that regard to the observations of the Full Court in *VAAC v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 74 at [27], and particularly to the use by that Court of the expression "the critical factor" on which the decision is likely to turn. As any denial of the opportunity to the appellant to deal with the particular information relied upon made no practical difference to

the outcome, the decision should not be vitiated. Counsel also referred to the fact that relief under s 481(1) was discretionary, and relied upon the comments of Merkel J, as a member of the Full Court in *Minister for Immigration & Multicultural Affairs v Al Shamry* at 41 in that regard.

45 Finally, counsel for the respondent submitted that the Court should refuse leave to argue this ground given that it had not been agitated before the primary judge, and indeed, had been expressly abandoned. He referred to the observations of the Full Court in *H v Minister for Immigration & Multicultural Affairs* (2000) 63 ALD 43, which were in turn endorsed in the Full Court in *VAAC*.

CONCLUSION

46 In our view, the application for leave to rely upon the sole ground of appeal now raised should be refused. Leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interests of justice to do so: *O'Brien v Komesaroff* (1982) 150 CLR 310; *H v Minister for Immigration & Multicultural Affairs*; and *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [20]-[24] and [38].

47 In *Coulton v Holcombe* (1986) 162 CLR 1, Gibbs CJ, Wilson, Brennan and Dawson JJ observed, in their joint judgment, at 7:

> *"It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish."*

48 The practice of raising arguments for the first time before the Full Court has been particularly prevalent in appeals relating to migration matters. The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused. In our view, the proposed ground of appeal has no merit. There is no justification, therefore, for permitting it to be raised for the first time before this Court.

49 It is clear from a reading of the Tribunal's reasons for decision as a whole that it affirmed the delegate's decision because it concluded that the appellant did not satisfy the requirements of the Refugees Convention. The Tribunal provided a number of reasons for coming to this conclusion. It found that the appellant's Palestinian ethnicity was not the source of any discrimination. It rejected the appellant's claim that the authorities had persecuted members of Hamas from about 1994. It rejected the appellant's claim to have been detained on a regular basis since 1995, and gave detailed reasons for doing so. It rejected his claim to have been served with "subpoenas", and regarded these documents as either forgeries or as having been fraudulently obtained. It rejected his account of having been offered the role of informant against Hamas. It did not accept that any threats to which he may have been subjected, or any attack that may have been made upon his wife, were motivated by any perception that he was an informant, or for any other political reason. It found that whatever led him to sell his business and bring his family to Australia, it was not because he faced a real chance of persecution by government authorities or by Hamas, as he claimed.

50 It was against the background of these findings, many of which had already been made before the Tribunal even considered the veracity of his account of his last day in Jordan, that the appellant's claim to be a refugee had been rejected. Even within the Tribunal's rejection of his account of that last day, the Tribunal concluded that most of that account was implausible for reasons that had nothing to do with the Lonely Planet Guide. Accordingly, although we accept that the Lonely Planet Guide contained "information" within the meaning of that term in s 424A(1), it cannot be said that the information regarding the location of the airport was "the reason, or a part of the reason" for affirming the decision under review.

51 In *VAF v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 123, the Full Court considered the meaning to be given to the expression "a part of the reason" in s 424A(1). In a joint judgment, Finn and Stone JJ said at [30]:

> *"The information concerning the appellant's behaviour clearly was not "the reason" for the Tribunal's decision. But was it "a part of the reason"? As we have indicated, the Tribunal considered it to have some relevance to the determination to be made. And the Tribunal's treatment of that information (i.e. the "significance" attributed to it) equally had a place in its reasoning process. However, it is not necessarily the case that for either or both of these*

reasons, the circumstances attract the obligation of s 424A(1)(a). The subsection itself requires identification of ***the reason*** *for affirming the decision under review."*

52 Their Honours continued at [33]:

"It commonly is the case that the detail and complexity of the case advanced by a visa applicant, and the information that is given and garnered for the purposes of considering it, results in the Tribunal being confronted with issues that may be of varying importance, relevance and centrality both to the decision to be taken and to the reasoning that in the event sustains that decision. While the reasoning process may advert to, and express views on, such issues, all will not necessarily constitute part of the reason for the Tribunal's decision. Tribunals, no less than courts, engage in their own species of dicta often enough for reasons related to haste and pressure in composition. When a Tribunal's reasons are to be evaluated for s 424A(1) purposes, the Court as a matter of judgment is required to isolate what were the integral parts of the reasons for the Tribunal's decision. That task, necessarily, is an interpretative one. In some instances the differentiation of the integral and the inessential may be by no means easy – and made the more so by less than explicit indications in the reasons themselves as to what the Tribunal itself considered to be integral."

53 Finally, their Honours concluded at [41] that the information in question ought to be regarded as "relatively minor and unimportant in the scheme of things". The information "was not so integral to the reasoning process rejecting the appellant's claim as to require as a matter of fairness that the appellant be told that information… and why it was relevant to the review".

54 We respectfully agree with their Honours' approach. See also the helpful discussion of this issue by Dr Caron Beaton-Wells in "Disclosure of adverse information to applicants under the Migration Act 1958" (2004) 11 *AJ Admin L* 61 at 64-67. Applying the approach taken in *VAF* to the present case, we consider that the decision to affirm the delegate's refusal to grant a protection visa had essentially been taken by the time the Tribunal came to deal with the appellant's claims regarding his departure from Jordan. In our view, the information regarding the location of the airport was neither "integral to", nor an important aspect of, the Tribunal's reasoning process.

55 In that regard, we note the structure of the Tribunal's reasons. It first set out the appellant's claims, and rejected them more or less in their entirety. It next arrived at the conclusion the appellant's claim that his membership of Hamas had resulted in constant and

increasing harassment, amounting to persecution, should be rejected. Having all but decided that he did not meet the requirements of the Refugees Convention, the Tribunal then stated that it had "also" considered his account of his last day in Amman and found it implausible. In substance, the Tribunal's findings under the heading "Departure from Jordan" played little, if any, part in its decision that the appellant was not entitled to a protection visa. They were merely additional findings about matters that were no longer centrally in issue given the findings already made regarding the critical issues in the case.

56 Jacobson J took a similar approach to this issue in *NAMB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 718. In that case, his Honour approached the matter of an alleged breach of s 424A upon the footing that the issue was whether denial of the opportunity to respond to the information in question could have made a difference. He referred to *Aala,* and to *Re Minister for Immigration & Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502 at [37], and observed at [80]:

> *"To ignore the question of whether a breach of s 424A could not have affected the outcome would be an entirely impractical approach."*

His Honour concluded that because the Tribunal in that case had several separate and independent reasons for rejecting the applicant's claims, any failure to comply with s 424A did not result in the invalidity of the decision.

57 It follows that the Tribunal did not contravene s 424A(1) by failing to draw to the appellant's attention its reliance upon the information contained in the Lonely Planet Guide. Even if that conclusion were erroneous, the Tribunal's breach of the section did not result in any practical injustice in the circumstances of this case. The Tribunal had already rejected the appellant's claims on justifiable grounds by the time it came to this part of its decision, and nothing that the appellant might have said could have affected the critical part of its reasoning. If necessary, we would have refused relief on discretionary grounds.

58 The Court acknowledges the assistance provided by pro bono counsel and solicitors. However, the appeal must be dismissed. The appellant must pay the respondent's costs.

I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Kiefel, Weinberg and Stone.

Associate:

Dated: 15 June 2004

Counsel for the Appellant:	Mr E J C Heerey
Solicitor for the Appellant:	Mallesons Stephen Jaques
Counsel for the Respondent:	Mr W S Mosley
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	25 May 2004
Date of Judgment:	15 June 2004