# HIGH COURT OF AUSTRALIA

FRENCH CJ,
HEYDON, CRENNAN, KIEFEL AND BELL JJ

---

MINISTER FOR IMMIGRATION AND CITIZENSHIP APPELLANT

AND

SZKTI & ANOR RESPONDENTS

*Minister for Immigration and Citizenship v SZKTI* [2009] HCA 30
*26 August 2009*
S515/2008

**ORDER**

1. *Appeal allowed.*

2. *Set aside the orders made by the Full Court of the Federal Court of Australia on 28 May 2008, and in their place make the following orders:*

   *"(a) Appeal allowed in part.*

   *(b) Set aside Order 3 of the orders made by the Federal Magistrates Court of Australia on 22 October 2007, and in its place order that the first respondent to the application in that Court pay the applicant's costs, if any.*

   *(c) Appeal otherwise dismissed.*

   *(d) First respondent to pay the appellant's costs of the appeal."*

3. *Appellant to pay the first respondent's costs of the appeal to this Court.*

On appeal from the Federal Court of Australia

**Representation**

S B Lloyd SC with L A Clegg for the appellant (instructed by Sparke Helmore Lawyers)

R P L Lancaster with S J Free for the first respondent (instructed by Gilbert & Tobin Lawyers)

Submitting appearance for the second respondent

## CATCHWORDS

**Minister for Immigration and Citizenship v SZKTI**

Immigration – Refugees – Review by Refugee Review Tribunal ("RRT") – Person telephoned, for purpose of obtaining information from that person, without procedures set out in ss 424(3) and 424B of *Migration Act* 1958 (Cth) ("Act") being followed – Whether RRT breached ss 424(3) and 424B of Act.

Immigration – Refugees – After hearing, RRT obtained further information – Whether information raised new and additional issues – Whether RRT was obliged by s 425(1) of Act to invite first respondent to further hearing.

Words and phrases – "get any information", "invite", "issues arising in relation to the decision under review".

*Migration Act* 1958 (Cth), Pt 7 Div 4, ss 424, 424B, 425(1).

1 FRENCH CJ, HEYDON, CRENNAN, KIEFEL AND BELL JJ. This appeal, brought from the Full Court of the Federal Court of Australia (Tamberlin, Goldberg and Rares JJ) ("the Full Court")[1], and the appeal in *Minister for Immigration and Citizenship v SZLFX* ("*SZLFX*")[2] were heard together. This is because a common issue of statutory construction under the *Migration Act* 1958 (Cth) ("the Act")[3] arises in each appeal. What is said in these reasons on that issue applies also to *SZLFX*. The submissions in *SZLFX* concerning the common issue have been considered here.

2 The first respondent is a citizen of the People's Republic of China. A submitting appearance was filed by the second respondent, the Refugee Review Tribunal ("the RRT"). For the reasons that follow, this appeal should be allowed.

Summary of applicable legislation

3 It is necessary to summarise the applicable legislation in order to understand the issues of statutory construction, which are framed by reference to a number of provisions. A delegate of the Minister can decide whether to grant or refuse a protection visa. Part 7 of the Act provides for administrative review of such decisions by the RRT. Division 4 of Pt 7 (ss 422B-429A) is a code of procedure[4] for the conduct of that review (s 422B).

4 In conducting the review the RRT is given a general power to "get any information that it considers relevant" under s 424(1) of the Act. Section 424(2) provides that "[w]ithout limiting subsection (1), the Tribunal may invite a person to give additional information." As pointed out by Gleeson CJ in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* ("*SAAP*")[5], this must be additional to information obtained under s 418, which provides for

---

**1** *SZKTI v Minister for Immigration and Citizenship* (2008) 168 FCR 256.

**2** [2009] HCA 31.

**3** Reprint No 10 is the applicable version of the Act for both this case and *SZLFX*.

**4** See the Second Reading Speech on the Migration Legislation Amendment Bill (No 1) 1998: Australia, Senate, *Parliamentary Debates* (Hansard), 12 November 1998 at 214. See also the Explanatory Memorandum to the Migration Legislation Amendment Bill (No 1) 1998 (Cth) at [117].

**5** (2005) 228 CLR 294 at 299 [4]; [2005] HCA 24.

the supply of the file of the Secretary to the Minister's department ("the Secretary"), or under s 423, which provides for the supply of statutory declarations and written arguments. On the facts of this case, "additional information" also includes information additional to that obtained or provided during the course of a hearing under s 425. In this case nothing turns on whether "additional information" could be read down to mean no more than "additional" to that which has already been given by the person from whom additional information is sought[6].

5 Section 424(3)(a) relevantly provides that an invitation by the RRT to a person to give additional information under s 424(2) must be given by one of the methods specified in s 441A. That section specifies methods of service by which the RRT "gives documents" to a person. Therefore, an invitation "to give additional information" under s 424(2) must be in a document to conform with s 424(3).

6 Section 424B lays down certain requirements for any invitation so as to specify the methods and times by which a response to an invitation can be given.

7 Section 425 provides that, subject to certain exceptions which are not presently relevant, the RRT must invite the applicant for review to appear before it "to give evidence and present arguments relating to the issues arising in relation to the decision under review."

Issues

8 The central issue in this appeal, which is also the central issue in *SZLFX*, is whether the RRT may telephone a person, for the purpose of obtaining information from that person, without following the procedures set out in ss 424(3) and 424B, having regard to s 441A of the Act which is incorporated by reference into s 424(3). It is common ground between the parties in both matters that the relevant procedures in ss 424(3) and 424B were not followed. The issue of whether the RRT was required to "get any information" by an invitation in writing, turns essentially upon the construction of the relevant statutory provisions. There is also an issue concerning the application of s 425 which arose only in this appeal.

---

**6** Cf *SZLPO v Minister for Immigration and Citizenship* [2009] FCAFC 51.

The review by the RRT

9 On 23 April 2006, the first respondent arrived in Australia and, on 23 May 2006, he applied for a Protection (Class XA) visa.

10 The first respondent claims to fear persecution in China because he is a member of a religious group that the Chinese Communist Party refers to as the "Shouters" but which its members call the "Local Church". He alleges that his religious activities included spreading the Gospel while he was in China. He claims to fear that the Chinese authorities will arrest him if he returns to China because of his membership of the Local Church.

11 On 19 August 2006, a delegate of the Minister refused to grant a protection visa to the first respondent. On 18 September 2006, the first respondent applied to the RRT for review of the delegate's decision and he attended an RRT hearing on 25 October 2006.

12 At the hearing, the first respondent said that he participated in a Local Church group in Sydney. The first respondent gave the name of the most senior person of that Local Church group as "Tony" but he did not give any further details about that person. Following the hearing, on 24 January 2007, the RRT wrote two letters to the first respondent. One of the letters, which was headed "Invitation to Provide Information", included the following:

> "At your hearing, you gave some evidence about your religious practice in China. You also gave some evidence about your connection with the Local Church in Australia. You mentioned the name of the suburbs where church members meet; you described in general terms some of the activities that you participated in; and you named a few contact persons by first name, most prominent of whom was 'Tony'. The information you gave was extremely vague, and you did not provide details of witnesses or other material that might reasonably be expected to support your claims.
>
> The Tribunal requests that you provide the following additional information.
>
> …
>
> - The names, positions and any further details of the persons with whom you undertake religious activities, including 'Tony'. If any of these persons hold official positions within the church, you may also wish to provide statements from them describing their

> knowledge of and connection with you. You may also wish, in any response to this letter, to provide any other evidence to assist your case."

13 By letter dated 7 February 2007, the first respondent replied to both letters. Attached to his letter was a second letter, which bore the letterhead of "The Local Church in Sydney". The second letter stated:

> "This is to confirm that [the first respondent] has been meeting regularly with the church for the past nine months.
>
> Please do not hesitate to contact Tony Cheah on [mobile telephone number] should you have any further enquiry."

The letter was signed by Mr Tony Cheah and Mr David Foley, whom the first respondent referred to as "Elders" of the Local Church.

14 On 4 April 2007, some five months after the hearing, the RRT telephoned Mr Cheah on the mobile telephone number which was provided in that letter. Following this telephone conversation, the RRT wrote to the first respondent on 11 April 2007. That letter set out certain information and explained why, in the RRT's view, it was relevant to the first respondent's application in the following terms:

> "The Tribunal spoke to Mr Tony Cheah on 4 April 2007, to follow up the letter that he and Mr David Foley wrote on 5 February 2007, in which they 'confirm[… that you have] been meeting regularly with the church for the past nine months.' Mr Cheah confirmed the following:
>
> - He knows you personally;
> - He believes you come from Fuqing, Fujian;
> - He 'understands' that you were a Christian in China;
> - You attend the Local Church in Blacktown, and are involved in learning scripture, 'training' to assist in services and in setting up the meeting place.
>
> However, Mr Cheah said he did not know whether you were a member of any Local Church in China; where you had lived and worked in China; or whether you had experienced any problems there.

This information is relevant for the following reasons:

- It appears that Mr Cheah's knowledge of you is superficial. It is surprising that you have not had occasion to inform him of any association with the Local Church in China and your alleged experiences there.

- This may in turn suggest that you have become involved in the Local Church only in Australia (depending on the Tribunal's assessment of your claims with respect to China).

- Mr Cheah's statements that you are 'learning scripture', 'training' to assist with services and helping set up meeting rooms may also indicate that you are a newcomer to the church and possibly Christianity, and not a longer-term Christian as you claim.

- In assessing whether you have a well-founded fear of persecution in China, the Tribunal is required by s 91R(3) of the Act to disregard conduct that you have engaged in in Australia, unless it is satisfied that you have done so other than for the purpose of strengthening your claim to be a refugee. Factors that may influence whether the Tribunal is satisfied may include the credibility of your claimed experiences in China, and the nature of your activities in Australia."

The letter invited the first respondent to comment upon the information.

15 In a statutory declaration dated 26 April 2007, which the first respondent's migration agent provided to the RRT, the first respondent commented on the information. These comments included the following:

> "The reason why I have not informed Mr Cheah of my association with the Local Church in China as well as my sufferings and experiences there is that I am afraid of being misunderstood and I do not like being regarded as a person who may intend to use the Local Church as a vehicle for seeking protection in Australia.
>
> As a member of the Local Church, I am required to continue learning scripture every day, because studying [the] Bible is particularly important for a member of the Local Church. Also, I am obligated to contribute to the Local Church; and thus it is quite normal that I have accepted training to assist with services or helping set up meeting rooms."

16 The RRT affirmed the decision under review on 15 May 2007. The RRT concluded that the first respondent was not a person to whom Australia owed protection obligations and, therefore, the first respondent was not entitled to a Protection (Class XA) visa. In reaching this decision, the RRT found that the first respondent was not a practising Christian at the time of his departure from China. The RRT found that the first respondent did not have a genuine commitment to Christianity and therefore would not engage in, or need to refrain from, religious conduct in China that might give rise to a real chance of Convention-related[7] persecution.

17 In making these findings, the RRT relied upon the telephone call which it had made to Mr Cheah. In reasoning towards the conclusion that the first respondent was not a Christian when he left China, the RRT stated[8]:

> "The Tribunal finds that the applicant's documentary and witness evidence sheds little light on his claimed Christian practice in China. As noted in the Tribunal's letter of 11 April 2007, Mr Cheah's (and Mr Foley's) written and oral advice to the Tribunal revealed only a superficial knowledge of the applicant's profile in China, indicating an 'understanding' that he had been a Christian there. The absence of any reference to the applicant's activities in China, let alone his claimed past harm and future concerns, amounts to weak support for the applicant's claims. The applicant commented that he did not wish the church to view him as a person who was using them to advance his refugee application. This contrasts markedly with the applicant's reliance on the church in China, for financial, logistic and other assistance, in circumstances where the church itself faces considerable risks. Whatever the reason for the Local Church in Sydney knowing very little about the applicant, the Tribunal finds that it provides scant support for the applicant's claim to have been an active Christian in China."

Later in the RRT's reasons, it was also observed that, among other things, it was "the content and tenor of the superficial comments from Mr Cheah" that

---

**7** The Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

**8** Refugee Review Tribunal, Statement of Decision and Reasons, 15 May 2007 ("Reasons of the RRT") at 14-15.

suggested that "the applicant's exposure to Christianity is recent, superficial and limited."[9]

The Federal Court proceedings

18 The first respondent sought judicial review in the Federal Magistrates Court of the RRT's decision. He did not allege any breach of s 424 of the Act. His application was dismissed[10]. An appeal by the first respondent to the Federal Court of Australia came before Rares J on 4 March 2008. His Honour identified the issue at the centre of this appeal on his own motion and the matter was ultimately referred to the Full Court. The Full Court allowed the appeal on the basis that the RRT could not obtain information by telephone from Mr Cheah without complying with s 424(2) and (3) of the Act[11].

The appeal to this Court

19 The appeal to this Court mainly requires a determination of whether the RRT breached ss 424(3) and 424B and whether, if it did, that amounted to jurisdictional error, in which case relief would be available despite s 474 of the Act, which covers privative clause decisions[12]. Those questions turn on the construction of the provisions in the wider statutory context[13], particularly Div 4 of Pt 7, in order to determine both how ss 424(3) and 424B apply and the effect of any failures to comply with them.

20 There is also a Notice of Contention from the first respondent, asserting that the RRT was obliged to, but did not, issue a second invitation to the first respondent to appear before the RRT to give evidence and present arguments regarding what were said to be additional issues arising from the RRT's telephone enquiries of Mr Cheah. This was described as a failure to comply with

---

**9** Reasons of the RRT at 16.

**10** *SZKTI v Minister for Immigration* [2007] FMCA 1904.

**11** *SZKTI v Minister for Immigration and Citizenship* (2008) 168 FCR 256 at 270 [54].

**12** *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476; [2003] HCA 2.

**13** *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

s 425(1) of the Act and was said to be a jurisdictional error by reference to *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* ("*SZBEL*")[14].

Applicable legislation

21 It is necessary to give more detailed consideration to some of the provisions which are relevant to the task of construing s 424. Section 422B[15] provides that Div 4 of Pt 7 "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with" in respect of the RRT's conduct of its review. The general nature of the RRT's "way of operating"[16] is described in s 420(1)[17] as "fair, just, economical, informal and quick." The RRT "is not bound by technicalities, legal forms or rules of evidence" (s 420(2)(a)) and "must act according to substantial justice and the merits of the case" (s 420(2)(b)). Section 420 does not prescribe any particular procedure[18].

22 Section 424 relevantly states:

> "(1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.
>
> (2) Without limiting subsection (1), the Tribunal may invite a person to give additional information.

---

**14** (2006) 228 CLR 152; [2006] HCA 63.

**15** This section came into effect on 4 July 2002 and was inserted into the Act by the *Migration Legislation Amendment (Procedural Fairness) Act* 2002 (Cth).

**16** Heading to s 420; see *SAAP* (2005) 228 CLR 294 at 298 [1] per Gleeson CJ.

**17** In Div 3 of Pt 7, headed "Exercise of Refugee Review Tribunal's powers".

**18** *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 635 [74]-[77] per Gaudron and Kirby JJ, 664-668 [176]-[179] per Callinan J endorsing the reasons for judgment of Lindgren J in *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* unreported, Federal Court of Australia, 6 May 1997 at 40-47.

(3) The invitation must be given to the person:

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

..."

Section 441A specifies the methods by which documents can be served. Documents can be given "by hand" (s 441A(2)), or be provided by "[h]anding [them] to a person at [the] last residential or business address" who appears to be at least 16 (s 441A(3)), or be given by "[d]ispatch by prepaid post or by other prepaid means" (s 441A(4)) or by "[t]ransmission by fax, e-mail or other electronic means" (s 441A(5)).

23 Section 424A(1) provides for the RRT to give to the applicant for review, in any way that it considers appropriate, particulars of information that the RRT considers would be the reason, or part of the reason, for affirming the decision under review, to ensure, so far as is reasonably practicable, that the applicant understands why it is relevant, and to invite the applicant to comment on it.

24 Any invitation under s 424(2) is subject, not only to the formal requirements of s 424(3), but also to the formal requirements of s 424B, which is headed "Invitation to give additional information or comments". Section 424B relevantly provides:

"(1) If a person is:

(a) invited under section 424 to give additional information; or

…

the invitation is to specify the way in which the additional information … may be given, being the way the Tribunal considers is appropriate in the circumstances.

(2) If the invitation is to give additional information … otherwise than at an interview, the information … [is] to be given within a period specified in the invitation, being a prescribed period or, if no period is prescribed, a reasonable period.

(3) If the invitation is to give information … at an interview, the interview is to take place:

(a) at the place specified in the invitation; and

(b) at a time specified in the invitation, being a time within a prescribed period or, if no period is prescribed, a reasonable period.

…"

25 Section 424C provides that the failure of any person to respond within time to a formal invitation under s 424(2) does not prevent the RRT from proceeding to make a decision. It is also relevant to note that the RRT has a power to summon a person to give evidence and/or produce documents under s 427(3). It is an offence to fail to attend (s 432(1)) or to refuse to answer a question which the RRT requires to be answered (s 433(1)). A person who is summoned to appear before the RRT to give evidence is given the same protection as a witness in proceedings in the Administrative Appeals Tribunal (s 435(2)). The RRT is empowered to take evidence on oath or affirmation (s 427(1)(a)).

26 In the context of s 429A(a), which provides that evidence can be given "by telephone", the first respondent's complaint is not that the evidence of Mr Cheah was given by telephone; rather, the complaint is that the telephone call contained an *invitation* to give additional information which should have been in writing, and was not.

Submissions in this Court

27 That the review process followed by the RRT is inquisitorial has already been remarked by this Court[19]. In that context the Minister submitted that there were three powers by which the RRT could obtain information, with a descending order of consequences for any refusal to respond: first, by compulsory process (s 427(3)), a breach of which constitutes an offence; secondly, by formal invitation (s 424(2)), where a failure to respond to the

---

**19** For example, in *SAAP* (2005) 228 CLR 294 at 300 [8] per Gleeson CJ, 313-314 [55] per McHugh J, 330 [112] per Gummow J, 351 [197] per Hayne J. See also *SZBEL* (2006) 228 CLR 152 at 164 [40]; *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 230 CLR 486 at 491 [4]; [2006] HCA 49; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 17 [40] per Gummow ACJ, Callinan, Heydon and Crennan JJ, 46-47 [134]-[137] per Kirby J; [2006] HCA 53.

invitation allows the RRT to proceed to make a decision on the review without giving a hearing (ss 424C(1) and 425(2)(c)); and thirdly, by an informal process seeking voluntary answers, where no potential adverse consequences to the applicant for review are engaged. Section 424(1) was construed by the Minister as a general facultative power in aid of the inquisitorial functions of the RRT, distinguishable from both the compulsory process under the Act and the formal statutory process which could result in the loss of a right to a hearing.

28 By way of comparison, the Minister construed s 424(2) as a special or particular method (other than compulsory process) by which the RRT can obtain additional information. Failure by the applicant to respond to an invitation under s 424(2) carries the consequence that the RRT may make a decision on the review without inviting the applicant for review to appear at a hearing (ss 424C(1) and 425(2)(c)). The applicant in those circumstances is not entitled to a hearing (s 425(3)). That consequence distinguished this method of obtaining information from the general informal power to get information under s 424(1). Refusal to provide information under s 424(1) carries no adverse consequences for the applicant in respect of the right to a hearing under s 425. In support of his construction of s 424, the Minister relied on the statutory context, some historical matters, and the express language of relevant provisions. For the reasons which follow, these submissions of the Minister should be accepted despite an argument from the first respondent that emphasised procedural fairness and relied on the authority of *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* ("*Anthony Hordern*")[20]. That reliance will be discussed later in these reasons.

29 *Some historical matters.* Before the enactment of the *Migration Legislation Amendment Act (No 1)* 1998 (Cth), which inserted ss 424, 424A, 424B, 424C and 425 as they were substantially in operation for this case, the former s 424 contained a limit on what constitutes "the papers" in a review. As explained by Gummow J in *SAAP*[21]:

> "that expression ['the papers'] comprised only the documents given to the Registrar under s 418 (the file the Secretary to the Minister's department

---

**20** (1932) 47 CLR 1 at 7 per Gavan Duffy CJ and Dixon J, 20-21 per McTiernan J; [1932] HCA 9.

**21** (2005) 228 CLR 294 at 334 [128]. Gummow J was in dissent in the result but his Honour's observations quoted above are not controversial.

had supplied) and s 423 (statutory declarations and written arguments provided by the Secretary of the Minister's department and by the applicant in relation to the decision under review) of the Act."

30 The amendments permitted expansion of the documentary evidence before the RRT and linked an applicant's right to a hearing to compliance with an invitation to give additional information or comments on additional information.

31 In explaining the purpose of these changes in the Second Reading Speech[22], Senator Kemp said:

"This code [of procedure] includes such matters as the giving of a prescribed notice of the timing for a hearing, and a requirement that applicants be given access, and time to comment, on adverse material relevant to them."

32 In addition, he stated that the Bill contained a number of measures to allow for more flexible processes in both the Migration Review Tribunal and the RRT. These included:

"enabling the Tribunals to use telephone or other media to conduct personal hearings or to require other witnesses to appear before them; and allowing Tribunals to proceed to a decision without delay, if an applicant does not respond to a notice to attend a hearing or provide comment. Taken together, these changes mean that people with bona fide review applications will be given a decision more quickly and a better decision if the initial decision is wrong."[23]

33 *The statutory context.* Under s 415(1), the RRT is given all the powers and discretions that are conferred by the Act on the person who made the decision. These include the power to get information which is thought to be relevant (s 56(1)) and the power to invite an applicant to give additional information (s 56(2)). An invitation to provide information can be to provide it over the telephone (s 58(1)(e)) and the procedures in s 58 do not prevent the Minister from obtaining information from an applicant by telephone or in any other way (s 59(2)). The powers given under s 56 work simultaneously with the

---

**22** Australia, Senate, *Parliamentary Debates* (Hansard), 12 November 1998 at 214.

**23** Australia, Senate, *Parliamentary Debates* (Hansard), 12 November 1998 at 214.

powers given under s 424[24], although there is no constraint similar to that found in s 424(2) because under s 56(2) the Minister may "orally or in writing" invite an applicant "to give additional information".

34 Where an application for review is made to the RRT, the Secretary is obliged to give the Registrar of the RRT a statement about the decision under review and copies of the documents considered by the Secretary to be relevant to the review (s 418).

35 As already mentioned, Div 3 of Pt 7 is concerned with the exercise of the RRT's powers which are to be used in providing a review that is "fair, just, economical, informal and quick" (s 420(1)). Division 4 of Pt 7 is concerned with the conduct of the review. Division 5 of Pt 7 requires the RRT to prepare a written statement of reasons (s 430) and provides for provision of those reasons to both the applicant for review and the Secretary (ss 430A-430D). Division 6 of Pt 7 contains offences. It is an offence for a person served with a summons to attend to fail to attend (s 432(1)) or to refuse to answer a question that the RRT requires the person appearing to answer (s 433(1)). Division 7 of Pt 7 contains miscellaneous provisions and Div 7A of Pt 7 provides for the giving and receiving of review documents.

36 As to the conduct of the review, with which this case is concerned, an applicant for review is entitled to give the RRT a statutory declaration and written arguments (s 423(1)). The Secretary may also provide written arguments (s 423(2)). The RRT must invite an applicant for review to comment on adverse material (ss 424A and 424B). The RRT is authorised by s 424C to make a decision on the review if there is no response to an invitation to comment within the time allowed. Section 425(1) obliges the RRT to invite applicants to appear before it to give evidence and present arguments although that obligation ceases if an applicant fails to respond to an invitation (s 425(2)(c)). It can also be noted that the RRT can require the Secretary to arrange for the making of investigations and to report back to it (s 427(1)(d)) and, as already noted, the RRT may allow for the giving of evidence by telephone (s 429A).

---

**24** *SAAP* (2005) 228 CLR 294 at 333 [126] per Gummow J.

Section 424

37 Such is the historical and statutory context in which s 424 falls to be assessed. Section 424(1) confers a "general power"[25] on the RRT to "get any information that it considers relevant." The only limitation on that power is that the RRT "must have regard" to that information in making its decision. As pointed out by the first respondent, the general power is apt for the obtaining of country information which might involve research or utilisation of library resources or publicly available information on the internet. However, the language is plainly not confined so as to preclude the obtaining of information from a person by telephone. That process is consonant with the inquisitorial nature of the RRT and the statutory obligation upon it to adopt procedures which are not only "fair [and] just" but are also "economical, informal and quick."[26]

38 It is true, as was pointed out by the first respondent, that such a procedure does not require a record of the questions asked of Mr Cheah, a transcript or note of his response, or any other way to assess whether or not the RRT's summary of the conversation was accurate and complete. However, so much follows from the statutory silence in s 424(1) about how the RRT "may get any information that it considers relevant." Further, s 429A, which permits the giving of evidence by telephone, does not require any record of what is asked or of any response. What is important from the viewpoint of procedural fairness is that the applicant for review is given an opportunity to comment on the additional information. That was given in this case by the letter conforming with s 424A which was sent to the first respondent soon after the telephone call to Mr Cheah.

39 In support of his position that s 424(1) should not be construed as authorising the RRT to exercise the specific power in s 424(2) to "invite a person to give additional information", otherwise than in accordance with the mandatory language in ss 424(3) and 424B, the first respondent relied on the principle of construction enunciated in the *Anthony Hordern* case. *Anthony Hordern* concerned the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) and two powers for the making of an award relating to giving preference to unionists.

---

**25** *SAAP* (2005) 228 CLR 294 at 299 [4] per Gleeson CJ; see also at 312 [50] per McHugh J, 352 [199] per Hayne J.

**26** Section 420(1).

40 In *Anthony Hordern*[27], Gavan Duffy CJ and Dixon J said:

> "When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power."

41 In *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*[28], Gummow and Hayne JJ said:

> "*Anthony Hordern* and the subsequent authorities have employed different terms to identify the relevant general principle of construction. These have included whether the two powers are the 'same power', or are with respect to the same subject matter, or whether the general power encroaches upon the subject matter exhaustively governed by the special power. However, what the cases reveal is that it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power." (footnotes omitted)

42 In the context of the introductory wording of s 424(2), "[w]ithout limiting subsection (1)", *Leon Fink Holdings Pty Ltd v Australian Film Commission* ("*Leon Fink*")[29] was relied on by the Minister. That case concerned the powers of the Australian Film Development Corporation ("the Corporation") to make loans. Section 20(1) of the *Australian Film Development Corporation Act* 1970 (Cth) provided that "[t]he functions of the Corporation are to encourage the making of Australian films and to encourage the distribution of Australian films both within and outside Australia." Section 21(1)(a) provided that "without limiting the generality of the foregoing" the Corporation "has power … to make loans … to producers of Australian films". The Corporation made loans to borrowers in circumstances where neither the borrower, nor the guarantor of the loan, was a producer of Australian films.

---

**27** (1932) 47 CLR 1 at 7.

**28** (2006) 228 CLR 566 at 589 [59]; [2006] HCA 50.

**29** (1979) 141 CLR 672; [1979] HCA 26.

43 After referring to *Anthony Hordern*, Mason J said[30]:

> "In this case the words 'without limiting the generality of the foregoing' evince an intention that the general power should be given a construction that accords with the width of the language in which it is expressed and that this construction is not to be restricted by reference to the more specific character of that which follows. The clause therefore operates to negative the restrictive implication which might otherwise have been derived from the presence of the specific power to lend contained in par (a) [of s 21(1)]."

44 The first respondent countered the Minister's reliance on the reasoning of Mason J in *Leon Fink* by pointing to *Dainford Ltd v Smith*[31], in which Brennan J held that similar words, namely, "[w]ithout limiting the generality of any other provision of this section", did not displace the *Anthony Hordern* principle.

45 The first respondent's submission turns on the proposition that s 424(1) and (2) cover the same powers, that s 424(2) is encompassed within, or is a subset of, the general power in s 424(1). There is a difficulty with that submission. Section 424(1) puts into statutory form a power to obtain information by asking questions. This is an obvious power to give to an inquisitorial body. Subject to not interfering with the liberty of another, making an enquiry with no power to compel an answer is not an unlawful activity[32]. No adverse consequences flow against the applicant for review if the applicant, or any other person questioned, fails to co-operate or to give the information sought. By comparison, the specific power in s 424(2) governed by ss 424(3) and 424B, to give an invitation in writing to provide additional information, results in the adverse consequence that an applicant who fails to respond to an invitation in writing is deprived of the entitlement to a hearing. These critical distinctions emphasise the fact that the powers in ss 424(1) and 424(2) are, in law, significantly dissimilar.

46 The general power to "get" information and the specific power to "invite" in writing the giving of additional information are capable of co-existing without the latter being repugnant to the former. Further, an oral request for information

---

**30** (1979) 141 CLR 672 at 679.

**31** (1985) 155 CLR 342 at 361-362; [1985] HCA 23.

**32** *Clough v Leahy* (1904) 2 CLR 139 at 157 per Griffith CJ; [1904] HCA 38.

would be authorised not only by s 424(1) of the Act but also by s 56(1), by reason of the operation of s 415 which has been explained above.

47 The Full Court gave prominence and weight to the view that ss 424(2) and (3) and 424B were important provisions in relation to procedural fairness. So they are. However, nothing in those sections detracts from the obvious purpose of s 424(1), the general terms of which permit the getting of information from a person by telephone. It would be cumbersome to require the RRT to telephone a person for the purpose of getting information only after an invitation in writing to give additional information is given to that person. Such a requirement would seem inimical to the RRT's way of operating as "economical, informal and quick."[33]

48 Given all the considerations described above, the phrase "[w]ithout limiting subsection (1)", as it occurs in s 424(2), means that the procedural restrictions on the specific power to issue an invitation to give additional information do not qualify the RRT's general power in s 424(1) to "get any information that it considers relevant". Accordingly the circumstances of this case did not involve a breach of either s 424(3) or s 424B.

Section 425

49 A further issue, and one which did not arise in *SZLFX*, arose in relation to s 425(1) of the Act, which provides:

> "The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to *the issues arising in relation to the decision under review*." (emphasis added)

It was contended by the first respondent in his written submissions that the information given by Mr Cheah raised new and additional issues and accordingly the RRT was obliged to issue an invitation to a second hearing. These were identified as (i) the alleged failure of the first respondent to inform Mr Cheah of his association with the Local Church in China, where he had lived and worked in China, and whether he had experienced any problems there; (ii) the alleged fact that the first respondent was a newcomer to the Local Church and not a "longer-term Christian"[34]; and (iii) that Mr Cheah's account of his relationship

---

**33** Section 420(1).

**34** Letter from the RRT to the first respondent of 11 April 2007: see [14] above.

with the first respondent suggested that the first respondent's religious activity in Australia was done only for the purpose of strengthening his claim to be a refugee. The Minister's written submissions responded that the issues were not new. The RRT had specifically put in issue the first respondent's claim to be a committed Christian, to be a leader or organiser, and to have a fear of persecution by reason of religious activities. In oral submissions, counsel for the first respondent offered a different characterisation of the new issue, identifying it as being the first respondent's account to Mr Cheah and Mr Cheah's knowledge of the first respondent's past activities in China.

50 During the hearing, the RRT had questioned important aspects of the first respondent's evidence and raised as an issue the truth of his claim of an association with the Local Church in China. For example, the RRT queried the first respondent's membership of a church about whose members and history he knew so little and raised country information inconsistent with the first respondent's evidence. The RRT also queried whether church meetings could be secret as claimed by the first respondent. The RRT drew attention to inconsistencies in the first respondent's claims, asked the first respondent to compare his practice of religion in China with his practice of religion in Australia and informed him that his evidence regarding his religious practice had been "vague and lacking detail". Finally, the RRT asked the first respondent whether he had told Mr Cheah about his review application.

51 Whether an issue must be raised with an applicant for the purposes of a further hearing under s 425(1) will depend on the circumstances of each case. Matters may arise requiring an invitation to a further hearing. However, that is not the case in the present matter. Here, Mr Cheah's evidence was additional evidence about an extant issue; it did not constitute the raising of a new or additional issue such as to trigger the obligation to give another hearing. This distinguishes the facts here from those considered in *SZBEL*. The extant issue was whether the first respondent had been an active Christian in China. Mr Cheah's knowledge of the first respondent's past activities in China deriving from any account given to him by the first respondent was directly related to that issue. Further, s 422B of the Act suggests that there is no residual procedural fairness requirement to give another hearing extraneous to Div 4 of Pt 7. If there were any extraneous right to procedural fairness, as suggested by the first respondent, there was no breach of the obligation here. Importantly, the first respondent had an opportunity to deal with Mr Cheah's information by responding (as he did) to the letter from the RRT conforming with s 424A.

Conclusions

52 The Full Court erred in applying the principle in *Anthony Hordern* and construing s 424(2) of the Act as limiting the generality of s 424(1). The RRT can lawfully obtain information by telephone without following the formal procedures set out in ss 424(3) and 424B. The first respondent also fails in respect of his Notice of Contention. The RRT was not obliged in the circumstances to issue a invitation to the first respondent to again appear before it.

53 For the reasons given, no jurisdictional errors arose as a result of not following the procedures laid down in ss 424(3) and 424B or because the RRT did not give the first respondent an additional hearing under s 425.

Order

54 The appeal should be allowed. In accordance with an undertaking given on behalf of the Minister, the Minister is to pay the first respondent's costs and the orders for costs given below in favour of the first respondent will not be disturbed.