HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

SZBYR & ANOR APPELLANTS

AND

MINISTER FOR IMMIGRATION
AND CITIZENSHIP & ANOR RESPONDENTS

SZBYR v Minister for Immigration and Citizenship
[2007] HCA 26
13 June 2007
S3/2007

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

G O'L Reynolds SC with C D Jackson and M A Izzo for the appellants (instructed by Kazi & Associates)

R J Beech-Jones SC with J A C Potts for the first respondent (instructed by Clayton Utz Lawyers)

Submitting appearance for the second respondent

CATCHWORDS

SZBYR v Minister for Immigration and Citizenship

Immigration – Refugees – The appellants were refused a visa under s 36(2) of the *Migration Act* 1958 (Cth) ("the Act") – The appellants gave a statutory declaration to the Refugee Review Tribunal ("the Tribunal") – The Tribunal affirmed the decision not to grant a visa partly on the basis of discrepancies between the statutory declaration and the appellants' oral evidence – Whether relief was available to the appellants.

Immigration – Refugees – s 424A of the Act, read with s 441A, requires that an applicant be given written notice of particulars of any information that would be a reason or a part of the reason for affirming a decision – Whether s 424A applied to the appellants' statutory declaration – Temporal scope of s 424A – Whether the Tribunal breached s 424A – Whether the Tribunal committed jurisdictional error – Meaning of "information" – Whether "information" included discrepancies or inadequacies in previously submitted evidence – Meaning of "reason, or a part of the reason".

Administrative law – Constitutional writs – Certiorari and mandamus – Impact of discretionary considerations governing availability of relief – Whether relief should be denied on discretionary grounds for lack of a Convention nexus.

Words and Phrases – "information", "reason, or a part of the reason".

Migration Act 1958 (Cth), ss 36(1), 422B, 424A, 441A.

1 GLEESON CJ, GUMMOW, CALLINAN, HEYDON AND CRENNAN JJ. The appellants are Indian citizens who arrived in Australia on 2 October 2002. They are husband and wife, although the facts surrounding their claim to refugee status largely concern the husband's previous marriage to a woman named Salima. After the appellants' arrival in Australia, they applied for a Protection (Class XA) Visa, which was refused by the respondent Minister's delegate on 21 November 2002[1]. The Refugee Review Tribunal ("the Tribunal") refused the appellants' application for review of the delegate's decision. The Federal Magistrates Court rejected an application for judicial review of the Tribunal's refusal, and an appeal by the appellants to the Federal Court of Australia was dismissed.

2 The resolution of the appeal to this Court depends on two matters: first, whether the Tribunal fell into jurisdictional error; and secondly, if it did, whether relief should follow. The resolution of these issues therefore turns on the proper construction of s 424A of the *Migration Act* 1958 (Cth) ("the Act") and the application of the correct principles regarding the discretionary grant of relief. No party sought leave to re-open the question of the construction given to s 424A by the majority of this Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*[2]. However, this does not obviate the need to pay careful attention to the application of s 424A to the present facts. Likewise, notwithstanding some resistance on their behalf, the appellants' case cannot escape scrutiny in the light of the discretionary considerations identified in *Re Refugee Review Tribunal; Ex parte Aala*[3] governing the grant of certiorari and mandamus.

The appellants' claims

3 The appellants' entitlement to a protection visa under s 36(2) of the Act depends on their being persons to whom Australia owes protection obligations, namely those who have a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" within the meaning of Art 1A(2) of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating

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1 At the hearing of the appeal in this Court, the title of the proceeding was amended to reflect the first respondent's current portfolio.

2 (2005) 79 ALJR 1009; 215 ALR 162.

3 (2000) 204 CLR 82.

to the Status of Refugees done at New York on 31 January 1967 ("the Convention"). The appellants contend that they fear persecution in India because of their religion. The female appellant's claim is largely dependent on the male appellant's claim, pursuant to s 36(2)(b) of the Act. In the decisions below, the appellants also referred to their membership of a particular social group, although the basis of this claim was never clearly expressed, and the appellants did not pursue it in this Court.

4 The appellants are Ismaili Muslims and followers of the Aga Khan. Around 1992 or 1993, the male appellant was living in Hyderabad and met a woman named Salima whose familiy were Muslims of a different sect and a higher social status. Salima's family was said to be very influential in Hyderabad. Notwithstanding her family's disapproval, Salima married the male appellant in May 1997. Thereafter, the male appellant claims to have been falsely arrested, charged by the police and imprisoned on a number of occasions between early 1997 and December 2001, each time at the corrupt instigation of Salima's family. The male appellant also claimed to have suffered other forms of harassment at the hands of Salima's family, including an assault in 1997, and he feared the future repetition of such acts. The timing and circumstances of these episodes were not entirely clear, and there were significant discrepancies between the oral evidence which the appellants gave before the Tribunal and the content of their statutory declaration made on 25 October 2002 in support of their application for a protection visa.

5 Some time around early 1999, Salima's father asked that the male appellant divorce Salima. The male appellant did so in March 1999 and thereafter in October 2000 married his present wife, the female appellant. The appellants were living in Hyderabad when they heard that Salima had committed suicide, at which point they moved to Mumbai (Bombay) in the apparent fear that the male appellant would be blamed for Salima's death. In Mumbai, the appellants claim that they were arrested for the death of Salima, gaoled for 15 days, and then released on unconditional bail. The appellants said that they were charged with murder, although the precise offence in question was not clear. The appellants claimed that the hostility of Salima's family towards them was motivated by a desire for revenge over Salima's death.

6 After their release from prison, the appellants returned to Hyderabad and lived there and in a number of other places. Then in Mumbai they obtained a visa to travel to Australia. They left India using their own passports, apparently without any difficulty despite the outstanding charges relating to Salima's death. The appellants fear that, if they are returned to India, they will be imprisoned as a result of the outstanding charge relating to Salima's death, and that they will

suffer continued animus from Salima's family. While in their statutory declaration the appellants claimed to fear hostility from "Muslim people" generally, there was no subsequent suggestion other than that they feared hostility from Salima's family, and from police acting at the instigation of Salima's family.

The proceedings below

7 The Minister's delegate was not satisfied that the appellants were persons to whom Australia owed protection obligations because such persecution as they feared was not for a Convention reason. The delegate concluded that the appellants' difficulties arose out of the male appellant's personal relationship with Salima and her family, which was "a private matter which falls outside the scope of the Convention", and while religious differences may have been involved, the male appellant's fear arose out of a "personal and longstanding conflict between [him] and his ex-wife's family over their relationship".

8 Dissatisfied with this result, the appellants applied to the Tribunal for review of the delegate's decision. The application for review was filed on 2 December 2002, and the Tribunal wrote on 10 July 2003 to invite the appellants to attend a hearing which was held on 27 August 2003. That invitation was given pursuant to s 425 of the Act. Before the hearing, the Tribunal had received various documents including the appellants' statutory declaration of 25 October 2002 in support of their application for a protection visa. At the hearing, the appellants gave oral evidence and were questioned by the Tribunal. In particular, the Tribunal explicitly drew the male appellant's attention to discrepancies between his oral evidence and his written claims in the statutory declaration, and invited him to comment. The male appellant offered no comment or explanation other than to say that his memory was poor.

9 Like the Minister's delegate, the Tribunal did not accept the appellants' claims and, in a decision dated 14 October 2003, dismissed their application for review. Fundamentally, the Tribunal was not satisfied that the appellants suffered persecution for a Convention reason. The Tribunal concluded that:

> "Taking into account all the evidence before me, I am satisfied that the [appellants] are involved, or have been involved, in a personal dispute and there is no Convention nexus. The [appellants] are not being targeted for reason of their religion, even though the claimed protagonist the father of [Salima] is not a follower of the Aga Khan. Nor are the [appellants] being targeted for reason of membership of a particular social group constituted by social status."

The Tribunal did not consider the male appellant to be a reliable witness, and the "modifications and refinements between his written claims and his oral evidence", within his oral evidence, and between his and his wife's evidence led the Tribunal to conclude that he was not "entirely frank", especially as regards the circumstances of his alleged arrest in 2001. Other factors leading towards the rejection of the appellants' claims included the lack of documentary evidence, and the implausibility of the appellants' being able to leave India on passports in their own names, given the alleged existence of outstanding murder charges.

10 In the Federal Magistrates Court, Raphael FM rejected the appellants' application for review of the Tribunal's decision[4], and an appeal to the Federal Court (constituted by Madgwick J) was likewise dismissed[5]. The appellants were unrepresented, and in neither Court was substantial attention given to the operation of s 424A. The Federal Magistrate reasoned that neither the text of s 424A nor the decision in *SAAP* were of assistance to the appellants because "the essential reason for the decision of the Tribunal was that the [appellants'] claims were claims which had no Convention nexus" and that "whatever might be said in support of other technical breaches of the Tribunal's duty not to fall into jurisdictional error, it would not outweigh that one important point"[6]. In the Federal Court, Madgwick J said that "[r]ead charitably" the Federal Magistrate's reasoning was that "any criticism of the Tribunal arising from s 424A of [the Act] is not a valid ground for review in this case for the central reason that the Tribunal Member's decision was unaffected by any information to which s 424A might have applied", and so understood it did not disclose error[7].

The operation of s 424A

11 Section 424A was inserted into the Act by the *Migration Legislation Amendment Act (No 1)* 1998 (Cth)[8]. It forms part of Div 4 of Pt 7 of the Act.

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4 [2005] FMCA 1137. The source of the Federal Magistrate's jurisdiction was s 483A of the Act, which was repealed by the *Migration Litigation Reform Act* 2005 (Cth) Sched 1 cl 28. The source of jurisdiction is now to be found in s 476 of the Act.

5 [2005] FCA 1761.

6 [2005] FMCA 1137 at [5], [9].

7 [2005] FCA 1761 at [5].

8 Sched 3 cl 3.

That Division begins with s 422B which provides that the 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". It should be noted that the decision in *SAAP* concerned the Act as it stood before the insertion of s 422B[9].

12 Section 424A provides as follows:

"(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 information and invitation must be given to the applicant:

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

(b) if the applicant is in immigration detention – by a method prescribed for the purposes of giving documents to such a person.

(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."

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9 (2005) 79 ALJR 1009 at 1035 [138]; 215 ALR 162 at 196. Section 422B was inserted by the *Migration Legislation Amendment (Procedural Fairness) Act* 2002 (Cth) Sched 1 cl 6.

If sub-s (1) is engaged, sub-s (2)(a) relevantly directs attention to the methods of communication specified in s 441A of the Act. Each of the methods there specified requires transmission of a written document. Oral communication is not sufficient.

13 A majority of this Court in *SAAP* determined two points about the operation of s 424A: first, that its effect was mandatory, in that a breach of the section constituted jurisdictional error[10]; second, that its temporal effect was not limited to the pre-hearing stage[11]. However, these propositions do not determine the outcome of this case, and attention must be given to the particular terms of par (a) of s 424A(1) and its operation upon the present facts.

14 Had the second point in *SAAP* been decided differently, the present case would have been simpler to resolve: the scope for the operation of s 424A would have been exhausted once the appellants were invited to appear before the Tribunal pursuant to s 425 of the Act. Certainly, there was nothing in the conduct of that hearing which was of itself procedurally unfair and, given the presence of s 422B, it might be surprising if s 424A were interpreted to have an operation that went well beyond the requirements of the hearing rule at common law. Unlike *SAAP*, where the relevant "information" was testimony of the appellants' daughter which had been given in their absence, the "information" in this case consisted of the appellants' own prior statutory declaration, to which the Tribunal explicitly drew their attention during the course of the hearing. If the common law rules of procedural fairness applied, one would certainly not criticise the Tribunal's approach in this regard. However, it follows from *SAAP* that the Parliament has determined that, if s 424A is engaged, only written notice will suffice.

15 This then requires close attention to the circumstances in which s 424A is engaged. Section 424A does not require notice to be given of every matter the Tribunal might think relevant to the decision under review. Rather, the Tribunal's obligation is limited to the written provision of "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". What, then, was the

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10 (2005) 79 ALJR 1009 at 1026 [78], 1040 [173], 1046 [208]; 215 ALR 162 at 183, 203, 211.

11 (2005) 79 ALJR 1009 at 1024 [71], 1037 [154], 1045 [202]; 215 ALR 162 at 181, 199, 210.

"information" that the appellants say the Tribunal should have provided? In their written submissions, the appellants appeared to focus on the requisite "information" as being the "inconsistencies" between their statutory declaration and oral evidence. However, in oral argument they focused on the provision of the relevant passages in the statutory declaration itself, from which the inconsistencies were later said to arise.

16 Four points must be noted about this submission. First, while questions might remain about the scope of par (b) of s 424A(3), it was accepted by both sides that information "that the applicant gave for the purpose of the application" did not refer back to the application for the protection visa itself, and thus did not encompass the appellants' statutory declaration. In this regard, the parties were content to assume the correctness of the Full Federal Court decisions in *Minister for Immigration and Multicultural Affairs v Al Shamry*[12] and *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs*[13]. Accordingly, no occasion now arises for this Court to determine whether that assumption was correct.

17 Secondly, the appellants assumed, but did not demonstrate, that the statutory declaration "would be the reason, or a part of the reason, for affirming the decision that is under review". The statutory criterion does not, for example, turn on "the reasoning process of the Tribunal", or "the Tribunal's published reasons". The reason for affirming the decision that is under review is a matter that depends upon the criteria for the making of that decision in the first place. The Tribunal does not operate in a statutory vacuum, and its role is dependent upon the making of administrative decisions upon criteria to be found elsewhere in the Act. The use of the future conditional tense ("would be") rather than the indicative strongly suggests that the operation of s 424A(1)(a) is to be determined in advance – and independently – of the Tribunal's particular reasoning on the facts of the case. Here, the appropriate criterion was to be found in s 36(1) of the Act, being the provision under which the appellants sought their protection visa. The "reason, or a part of the reason, for affirming the decision that is under review" was therefore that the appellants were not persons to whom Australia owed protection obligations under the Convention. When viewed in that light, it is difficult to see why the relevant passages in the appellants' statutory declaration would itself be "information that the Tribunal

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12 (2001) 110 FCR 27.

13 (2006) 150 FCR 214.

considers would be the reason, or a part of the reason, for affirming the decision that is under review". Those portions of the statutory declaration did not contain in their terms a rejection, denial or undermining of the appellants' claims to be persons to whom Australia owed protection obligations. Indeed, if their contents were believed, they would, one might have thought, have been a relevant step towards rejecting, not affirming, the decision under review.

18 Thirdly and conversely, if the reason why the Tribunal affirmed the decision under review was the Tribunal's disbelief of the appellants' evidence arising from inconsistencies therein, it is difficult to see how such disbelief could be characterised as constituting "information" within the meaning of par (a) of s 424A(1). Again, if the Tribunal affirmed the decision because even the best view of the appellants' evidence failed to disclose a Convention nexus, it is hard to see how such a failure can constitute "information". Finn and Stone JJ correctly observed in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* that the word "information"[14].

> "does not encompass the tribunal's subjective appraisals, thought processes or determinations … nor does it extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the tribunal in weighing up the evidence by reference to those gaps, etc".

If the contrary were true, s 424A would in effect oblige the Tribunal to give advance written notice not merely of its reasons but of each step in its prospective reasoning process. However broadly "information" be defined, its meaning in this context is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence. The appellants were thus correct to concede that the relevant "information" was not to be found in inconsistencies or disbelief, as opposed to the text of the statutory declaration itself.

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14 (2004) 206 ALR 471 at 476-477, citing *Tin v Minister for Immigration and Multicultural Affairs* [2000] FCA 1109 at [54]; *Paul v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 396 at 428; *Singh v Minister for Immigration and Multicultural Affairs* [2001] FCA 1679 at [25]; *WAGP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 124 FCR 276 at 282-284.

19 Fourthly, and regardless of the matters discussed above, the appellants' argument suggested that s 424A was engaged by *any* material that contained or tended to reveal inconsistencies in an applicant's evidence. Such an argument gives s 424A an anomalous temporal operation. While the Act provides for procedures to be followed regarding the issue of a notice pursuant to s 424A *before* a hearing[15], no such procedure exists for the invocation of that section *after* a hearing. However, if the appellants be correct, it was only after the hearing that the Tribunal could have provided any written notice of the relevant passages in the statutory declaration from which the inconsistencies were said to arise, as those inconsistencies could not have arisen unless and until the appellants gave oral evidence. If the purpose of s 424A was to secure a fair hearing of the appellants' case, it seems odd that its effect would be to preclude the Tribunal from dealing with such matters during the hearing itself.

20 Moreover, supposing the appellants had responded to a written notice provided by the Tribunal after the hearing, if inconsistencies remained in their evidence, would s 424A then oblige the Tribunal to issue a fresh invitation to the appellants to comment on the inconsistencies revealed by – or remaining despite – the original response to the invitation to comment? If so, was the Tribunal obliged to issue new notices for so long as the appellants' testimony lacked credibility? If the appellants' desired construction of s 424A leads to such a *circulus inextricabilis*, it is a likely indication that such a construction is in error.

21 The short answer to all these points is that, on the facts of this case, s 424A was not engaged at all: the relevant parts of the appellants' statutory declaration were not "information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review". Section 424A has a more limited operation than the appellants assumed: its effect is not to create a back-door route to a merits review in the federal courts of credibility findings made by the Tribunal. That being so, this case does not require this Court to address the differences in opinion in the Federal Court concerning the "unbundling" of Tribunal reasoning[16].

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15 Notably, in the sequential interaction of ss 424A, 424B, 424C(2) and 425(2) of the Act.

16 Compare *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 with *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214.

22 Once the limited scope of s 424A is appreciated, and once the proper meaning of the word "reason" in s 424A(1)(a) is discerned, the apparent need for "unbundling" is correspondingly reduced. The respondent Minister's concern about "minor" or "unimportant" matters engaging s 424A is largely to be resolved by the proper application of s 424A itself, not by any extra-statutory process of "unbundling".

"Primary" and "residual" claims

23 In this Court, the appellants placed great emphasis on the supposed disjuncture in the Tribunal's reasoning between the appellants' "primary claim", namely the laying of the false charge of murder in 2001, and the "residual claim", namely the fear that false charges would be laid in the future at the behest of Salima's family. This disjuncture was said to arise out of the Tribunal's use of the phrase "residual claim" in one passage in its reasoning when discussing the feared future actions of Salima's family. The consequence of this disjuncture, so the appellants said, was that the Tribunal's reasoning with respect to the lack of "Convention nexus" went only to the residual claim, and not to the primary claim. The primary claim, it was said, failed not for want of a Convention nexus, but solely because the male appellant was disbelieved as a result of the discrepancies between his oral evidence and his earlier statutory declaration.

24 In turn, this alleged disjuncture led the appellants to argue that the Tribunal's alleged breach of s 424A with respect to the primary claim infected its finding about lack of Convention nexus with respect to the residual claim. It was said to be an "absurdity" and a "logical impossibility" to link the finding of lack of Convention nexus with the Tribunal's findings about the appellants' arrest in 2001.

25 In truth, any absurdity arose only from the appellants' artificial construction of the Tribunal's reasons. The following words of Brennan CJ, Toohey, McHugh and Gummow JJ in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* are relevant here[17]:

> "[T]he reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed. In the present context, any court reviewing a

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17 (1996) 185 CLR 259 at 272 (footnotes omitted).

> decision upon refugee status must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision."

26 There was no logical inconsistency between on the one hand determining that, even taken at its highest, the appellants' evidence did not disclose a Convention nexus, and on the other hand finding that the appellants' evidence could not be wholly believed because of its inconsistency and implausibility. When read fairly – and certainly when read in light of the decision of the Minister's delegate – the Tribunal's reasons indicate that its finding about lack of Convention nexus applied to all of the appellants' claims, not just to some of them. The incidental use of the phrase "residual claim" did not require any contrary conclusion. Moreover, the appellants' lack of credibility regarding the acts comprising the so-called "primary claim" could not have affected the finding about lack of Convention nexus, as that latter finding was not credibility-based. Rather, it was inevitable even on the best view of the appellants' case.

Discretion

27 The respondent Minister raised the issue of discretionary relief by way of a Notice of Contention dated 16 February 2007. The Minister argued that, even if the appellants' arguments about s 424A were correct, their claim would be doomed to failure because of the absence of a Convention nexus, and thus the grant of certiorari or mandamus would be futile. This submission was not put to the courts below, and, given the conclusions expressed in these reasons that on the facts of this case s 424A had not been engaged at all, it is not critical for the Minister to rely upon it in this Court. However, it is convenient to say something on the subject.

28 This Court has previously emphasised that the grant of the constitutional writs is a matter of discretion, and the same principles apply to the grant of relief by the Federal Magistrates Court and the Federal Court pursuant to s 39B of the *Judiciary Act* 1903 (Cth). In *Aala*, Gaudron and Gummow JJ noted that[18]:

> "Some guidance, though it cannot be exhaustive, as to the circumstances which may attract an exercise of discretion adverse to an applicant is indicated in the following passage from the judgment of Latham CJ, Rich, Dixon, McTiernan and Webb JJ in a mandamus case,

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18 (2000) 204 CLR 82 at 108 [56].

R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd. Their Honours said[19]:

> 'For example the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. The court's discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld.'"

29 The present is a case in which no useful result could ensue from the grant of the relief desired by the appellants. This is so because, even if the appellants be correct as to the proper operation of s 424A, they cannot overcome the Tribunal's finding that their claims lacked the requisite Convention nexus. The appellants' case, like *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*[20], cited in *Aala*, was one in which "irrespective of any question of procedural fairness or individual merits, the decision-maker was bound by the governing statute to refuse"[21]. In this regard, the references that were made in the course of argument to the "unbundling" of a Tribunal's reasons into "impeachable" and "unimpeachable" parts were more likely to mislead than to assist. While there may well be cases in which a tribunal's breach of s 424A affects its findings about the absence of a Convention nexus, this was not such a case.

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19 (1949) 78 CLR 389 at 400.

20 [1994] 1 SCR 202 at 228.

21 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 109 [58].

Orders

The appeal should be dismissed with costs.

31 KIRBY J. This is an appeal from the Federal Court of Australia[22]. I agree in the order proposed in the reasons of Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ ("the joint reasons")[23]. The appeal must be dismissed.

32 However, I would support the order solely on the ground explained in the concluding part of the joint reasons[24]. In my opinion, the appeal should be rejected, and relief denied, on the basis of the discretionary arguments advanced by the Minister in his Notice of Contention in this Court[25]. I would reserve my opinion on the many issues raised concerning the construction of s 424A of the *Migration Act* 1958 (Cth) ("the Act").

33 This is an area of the law where there is a multitude of decisional authority and a proliferation of dicta. Indeed, upon one view, the problem that arose in the present proceedings derived from comments made by the Refugee Review Tribunal ("the Tribunal"), in its reasons for decision, that were unnecessary to resolve the matter.

34 From first to last, these proceedings were highly fact-specific. There was at all times a consistent, available and legally unimpeachable reason for affirming the decision under review, adverse to the appellants. Any controversy arising out of s 424A was therefore immaterial to the outcome[26]. In this respect, the appeal was distinguishable from the decision in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*[27]. This Court should say so. We should not burden this field of law with more *obiter dicta* unnecessary to the disposition.

The facts

35 The general nature of the applications brought by SZBYR and SZBYS[28] ("the appellants") for protection visas as "refugees" under the Act[29] is set out in

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22 *SZBYR v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1761 (Madgwick J).

23 Those reasons also note the amendment of the title of the Minister so as to correspond with the current designation.

24 Joint reasons at [27]-[29].

25 See joint reasons at [27]; reasons of Hayne J at [91].

26 See also reasons of Hayne J at [92].

27 (2005) 79 ALJR 1009; 215 ALR 162.

28 The names of the appellants were anonymised in accordance with s 91X of the Act.

the joint reasons[30]. Inevitably, the facts were more complex, and detailed, than the summary provided there. But the essence of what happened is sufficiently stated.

36 To be entitled to protection visas, the appellants, who are husband and wife and both nationals of India, were obliged to bring themselves within the requirements accepted by Australia pursuant to the Convention, as given effect by Australian law[31]. This necessitated the appellants proving that[32]:

> "[O]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion [they were] outside the country of [their] nationality and … unable or, owing to such fear … unwilling to avail [themselves] of the protection of that country".

37 The appellants sought to bring themselves within the requirement of "persecution" by proving harassment and unlawful criminal prosecutions for serious crimes, which the family of the male appellant's former wife, Salima, had allegedly instigated[33]. They sought to demonstrate a "well-founded fear" by showing "reasons" of "religion" or "membership of a particular social group". They did this by relying on the religious and social differences between the male appellant and his former wife's family. The female appellant's claim was derivative from that of her husband, the male appellant.

38 The appellants and the family of the male appellant's former wife were all Muslims. However, both of the appellants were followers of the Aga Khan, known as Ismaili Muslims[34]. Country evidence adduced before the Tribunal affirmed that India is a secular State whose Constitution provides for freedom of

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29 Pursuant to the Act, s 36(2).

30 Joint reasons at [3]-[6].

31 Convention relating to the Status of Refugees done at Geneva on 28 July 1951; [1954] ATS 5; 189 UNTS 150. As amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967; [1973] ATS 37; 606 UNTS 267 (together "the Convention").

32 Convention, Art 1A(2). Note also the Act, ss 91R, 91S.

33 See joint reasons at [3]-[5].

34 Adherents of Islam whose members believe that Ismail, son of the sixth Imam, was the true seventh Imam.

religion[35]. Whilst tension between Muslims and Hindus has posed "a challenge to the secular foundations of the State", and problems can arise, at State and local levels, as to the level of respect for religious freedom, the country information contained "no suggestion" that "followers of the Aga Khan are subjected to persecution by the authorities or the community at large."

39 In dealing with the appellants' request for protection visas, the decision-makers below (as is usual) described the provisions of the Convention and various decisions concerning its basic requirements. They also recounted various aspects of the appellants' claims concerning the circumstances of their lives in India before their arrival in Australia in October 2002. There were doubts and contests over particular aspects of this history. Yet, as I shall show, at every level of decision-making, there was a consistent, simple reason which was fatal to the entitlement of the appellants to protection under the Convention. This was the conclusion that they did not have a well-founded fear of persecution for a Convention reason[36]. That is, the "reasons" for *any* "fear of persecution" on the part of the appellants did not include "religion" or "membership of a particular social group", as alleged, but merely concerned a private quarrel animated by hostility that existed between the male appellant and his former wife's family.

The decisional record

40 *The Minister's delegate*: That this was the decisive reason for the decisions at every level of decision-making is clear from a review of the record. It begins with the delegate of the Minister[37] making the primary decision refusing protection visas to the appellants. The delegate concluded that the "fear of persecution on return to India is not for a Convention ground(s)". The delegate said:

> "The [male appellant's] difficulties, which arose as a result of his relationship with a woman from a different Muslim sect, is a private matter which falls outside the scope of the Convention. His decision to continue the relationship, in the face of repeated warnings and threats from the woman's family, is the *essential and significant reason* for the alleged mistreatment he suffered, rather than any Convention reason(s).

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35 Constitution of India, Art 25. See also Arts 15, 16(2), 26-28; Seervai, *Constitutional Law of India*, 4th ed (1993), vol 2 at 1259-1308.

36 See also reasons of Hayne J at [91].

37 Under the Act, s 65.

> The [male appellant's] fear of persecution if he returns is not for a Convention ground(s) but because of a personal and longstanding conflict between the [male appellant] and his ex-wife's family over their relationship." (original emphasis)

41 *Refugee Review Tribunal*: The reason advanced by the delegate unsurprisingly became the focus of the review by the Tribunal, which the appellants promptly initiated.

42 The Tribunal set out, at some length, the male appellant's evidence about harassment, arrest and hostility in India as a result, he claimed, of the antagonism of his former wife's family, both in her lifetime and after her alleged suicide. The Tribunal member acknowledged her obligation to consider whether the appellants had a "well-founded fear of persecution for a Convention reason". She noted their statement that they feared harm "including imprisonment and possibly death arising from the death of the [male appellant's] first wife". The Tribunal member made various critical observations concerning the male appellant's credibility. Amongst other things, she said:

> "[T]here are a number of aspects about the evidence before me which I find troubling.
>
> ... the [male appellant] did not impress me as a reliable witness. I found the modifications and refinement between his written claims and his oral evidence, within his oral evidence and the inconsistency with that of his wife's oral evidence as to when he was actually arrested in 2001 to be unsatisfactory.
>
> ...
>
> ... [There was] a willingness by the [male appellant] to tailor his evidence in a manner which suited his purposes rather than a willingness to be frank.
>
> … the evidence before me as to the precise character of the 2001 charge laid against the [appellants] is vague."

43 However, these statements were then followed by the Tribunal's conclusion that leads to its disposition:

> "The [appellants] contend that the harm they fear is related to their religion. However, apart from a single reference made by Salima's brother to religion as being a factor in why the family disapproved of the relationship there is nothing in the evidence before me as to the [appellants'] actual experiences with Salima's family which provides any support to this contention.

> …
>
> Taking into account all the evidence before me, I am satisfied that the [appellants] are involved, or have been involved, in a personal dispute and there is no Convention nexus …
>
> I do not accept the [appellants'] contention that religion or social status were in any way or at all factors in the harm they fear …
>
> ... I find that the motive for the harm which the [appellants] fear is because they have been ascribed with responsibility for a suicide. I further find that the harm which the [appellants] fear in the future arises out of this personal matter and is not Convention related.
>
> Accordingly I find that the harm the [male appellant] fears is from private individuals settling a private dispute and as such it does not constitute persecution of a kind which can attract protection under the Refugees Convention".

44 *Federal Magistrates Court*: When an application for judicial review was made to the Federal Magistrates Court, Raphael FM, after recounting or extracting passages from the Tribunal's reasons, rejected the application for review on the basis that, essentially, it amounted to an endeavour to relitigate the factual conclusions of the Tribunal[38]. However, he went on to explain why he had refused the appellants an adjournment of the hearing following the late provision of the Minister's submissions. He said[39]:

> "[T]he granting of an adjournment would be of little utility because it seemed to me so clear from the decision of the Tribunal that the reason for refusal of the visa was the failure of the [appellants'] claim to have a Convention nexus, that whatever might be said in support of other technical breaches of the Tribunal's duty not to fall into jurisdictional error, it would not outweigh that one important point which … is *the real matter that a court must consider*."

45 *Federal Court of Australia*: The appellants' appeal to the Federal Court specifically raised a ground complaining that the Tribunal had exceeded its jurisdiction in failing to conform to s 424A and in denying the appellants procedural fairness. The appellants were not legally represented in that Court.

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38 *SZBYR v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FMCA 1137 at [6].

39 [2005] FMCA 1137 at [9] (emphasis added).

46 Part of the Federal Court's reasons was addressed to the failure of the Federal Magistrate to grant the appellants the adjournment which they had sought[40]. This is not a matter pursued in this Court. In dealing with the appellants' complaint that the Tribunal had misunderstood or misapplied the Convention criteria, Madgwick J quoted the passage from the Tribunal's reasons, part of which is set out above, characterising the appellants' conflicts in India as "a personal dispute [with] no Convention nexus"[41]. In default of an explanation of how this involved error or how the Federal Magistrate had failed to discern any such error in that passage, Madgwick J concluded: "the case simply appears to be devoid of legal merit"[42].

47 From the foregoing it follows that the appellants' appeal to this Court is singularly ill-suited to present an examination of the application to the facts of s 424A. To the extent that s 424A was considered, both by the Federal Magistrate and by the Federal Court, attention appears to have been confined to the suggested relevance of s 424A to the discretionary refusal to grant an adjournment, an issue not now in contention.

48 I appreciate that, where parties are unrepresented in the courts below, and special leave is granted to appeal to this Court, formalistic impediments to the argument of legal questions essential to the lawful determination of the matter should not stand in the way of their consideration. On the other hand, where this Court does not have well focused reasons of the intermediate courts on such questions, addressed to the facts of the instant case, there is special reason for caution before launching into an elaboration of new issues of general significance and frequent application where that course is not legally essential.

Discretionary dismissal of the application

49 *Basis of the jurisdiction*: The Act does not provide for a full merits appeal from the Tribunal. Nor is such an appeal afforded by any other law. The appellants' application to the Federal Magistrates Court invoked the jurisdiction of that Court pursuant to s 39B of the Judiciary Act 1903 (Cth) ("the Judiciary Act")[43]. As appears from that section, it is designed to provide a statutory basis, relevantly, for "defining the jurisdiction of any federal court other than the High

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40 [2005] FCA 1761 at [3]-[5].

41 [2005] FCA 1761 at [7].

42 [2005] FCA 1761 at [9].

43 The jurisdiction of the Federal Magistrates Court arises under s 39B(1EA)(a) and s 39B(1EA)(d)(ii).

Court" with respect to "any of the matters mentioned" in s 75 of the Constitution[44].

50 By s 75(v), the Constitution confers on this Court original jurisdiction in all matters "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth"[45]. In the present matter, the appellants sought relief of the defined type directed to the Tribunal. It was the second respondent below, as in this Court. Because the Tribunal ordinarily submits to the orders of the courts, the Minister was named as the contesting respondent.

51 The identity of the relief provided in the Constitution for the original jurisdiction of this Court, and in s 39B of the Judiciary Act in respect of the jurisdiction of the Federal Magistrates Court and the Federal Court, indicates that the character and scope of the relief provided by that Act is, in material respects, the same as the relief provided for in the Constitution[46]. Thus, in determining the jurisdiction and powers of the Federal Magistrates Court (and on appeal, where error is shown, of the Federal Court) it is appropriate to start with an understanding of these remedies in Australian constitutional law.

52 *Constitutional writs are discretionary*: In *Re Refugee Tribunal; Ex parte Aala*[47], this Court settled a number of important points concerning the remedies referred to in s 75(v) of the Constitution (and, hence, in s 39B of the Judiciary Act). Relevantly, for present purposes, the Court concluded that whatever may have been the features of the named remedies in the pre-existing English and colonial "prerogative writs", the remedies were, in the Australian context, uniformly discretionary in nature[48]. Out of recognition of the public and federal character of the remedies, this Court has ceased describing them (as it earlier did)

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44 Constitution, s 77(i). See also s 75(v).

45 Note also *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 81 ALJR 905 at 916 [61]-[64]; 234 ALR 114 at 127.

46 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 181 per Mason CJ. See also the comment of Gummow J in *SAAP* (2005) 79 ALJR 1009 at 1027 [91] fn 68; 215 ALR 162 at 185-186.

47 (2000) 204 CLR 82.

48 *Aala* (2000) 204 CLR 82 at 89 [5], 107 [54], 122 [104], 136 [146], 144 [172], 156 [217].

as "prerogative writs". It has substituted the appellation of "constitutional writs"[49].

53 When this point of distinction, derived from the specific Australian source of these remedies and their purpose is appreciated, it is no longer necessary to treat the remedies provided in s 75(v) (or their statutory derivatives in s 39B of the Judiciary Act) as subject to the same disparate procedural features as had grown up during their long history in England, having no relevance to their essential constitutional and public law functions in Australia. That, I believe, is the reason that lay behind the decision in *Aala* to recognise that all of the remedies so provided are discretionary. They are available to the courts as the justice of the particular case requires.

54 Of course, what is enlivened in each case is a judicial discretion. Many of the considerations taken into account earlier in the case of the prerogative writs remain pertinent. However, the universal discretionary character of the constitutional and statutory remedies is now settled. Where a party establishes *prima facie* grounds for the issue of such remedies, the resisting party may point to any considerations that will nevertheless warrant the ultimate refusal of relief in the particular circumstances of the case.

55 In *Aala*, drawing on the earlier case law, various explanations were afforded by members of this Court as to the circumstances that could warrant refusal of relief, although a party has otherwise established a foundation for it, as a matter of law. Thus, in their joint reasons in *Aala*, Gaudron and Gummow JJ said[50]:

> "It is one thing to refuse relief on the ground of utility because, as Lord Wilberforce put it, '[t]he court does not act in vain'[51]. For example, the application for an administrative determination may be one which, irrespective of any question of procedural fairness or individual merits, the decision-maker was bound by the governing statute to refuse[52]. Or the prosecutor's complaint may be the refusal by the decision-maker of an opportunity to make submissions on a point of law which must clearly

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49 See *Bodruddaza* (2007) 81 ALJR 905 at 911-912 [37]; 234 ALR 114 at 121; *Aala* (2000) 204 CLR 82 at 136 [145].

50 (2000) 204 CLR 82 at 109 [58].

51 *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 at 1595; [1971] 2 All ER 1278 at 1294.

52 *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board* [1994] 1 SCR 202 at 228; Wade and Forsyth, *Administrative Law*, 7th ed (1994) at 528.

have been answered unfavourably to the prosecutor[53]. Again, the decision under review may have no legal effect and no continuing legal consequences may flow from it. In such a situation, the reasoning in *Ainsworth v Criminal Justice Commission*[54], where the remedy refused was certiorari, indicates that prohibition will not lie[55]."

56 In his reasons in *Aala*, McHugh J wrote to similar effect[56]:

> "Not every breach of the rules of natural justice affects the making of a decision. The decision-maker may have entirely upheld the case for the party adversely affected by the breach; or the decision may have turned on an issue different from that which gave rise to the breach of natural justice. Breach of the rules of natural justice, therefore, does not automatically invalidate a decision adverse to the party affected by the breach. This principle was acknowledged by this Court in *Stead v State Government Insurance Commission*[57] when it said that 'not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial'. Nevertheless, once a breach of natural justice is proved, a court should refuse relief only when it is confident that the breach could not have affected the outcome because '[i]t is no easy task for a court … to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome'[58]."

57 In my own reasons in *Aala* I indicated that the "public character of the legal duties" which the remedies were designed to uphold meant that "ordinarily, [relief] will issue where the preconditions are made out"[59]. I went on to acknowledge[60]:

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53 See *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145.

54 (1992) 175 CLR 564 at 580-581.

55 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 553-554 [113].

56 (2000) 204 CLR 82 at 122 [104].

57 (1986) 161 CLR 141 at 145.

58 (1986) 161 CLR 141 at 145.

59 (2000) 204 CLR 82 at 136-137 [148].

60 (2000) 204 CLR 82 at 136-137 [148].

> "But circumstances will occasionally arise where it is appropriate to withhold the writ because a party has been slow to assert its rights, has been shown to have waived those rights, or seeks relief in trivial circumstances or for collateral motives, and where the issue of the writs would involve disproportionate inconvenience and injustice."

58 The decision in *Aala* was thus a clear indication by this Court of the discretionary character of the remedies sought by the appellants in their applications for judicial review. In the result, all members of the Court upheld the existence of the discretion and two (McHugh J[61] and Callinan J[62], in whole or part) refused the remedies claimed.

59 The result of *Aala* is that, whilst establishment of the preconditions for this form of relief will ordinarily entitle a party to the relief, there will always remain a residual discretion to be exercised judicially. Some of the considerations relevant to that decision have been identified. However, in the nature of discretionary remedies, much will depend on the facts and circumstances of the particular case.

60 *Resistance to the contention*: The Minister acknowledged that, neither the Federal Magistrates Court nor the Federal Court had, in terms, rejected the appellants' proceedings on discretionary grounds. Moreover, in neither Court had the Minister urged that course. So far as the appellants had relied on s 424A, the Minister had submitted that there had been no contravention of the section and thus no occasion to consider whether remedies for default should be refused on discretionary grounds.

61 The appellants objected to the Minister's late application to rely on a Notice of Contention raising the discretionary point. There is no merit in that opposition. The issue is not one that could have been met by any evidence below provided by the appellants[63]. The argument is addressed solely to the matters available in the record. Any defects in the presentation of the point below arise from the ill-focused character of the appellants' arguments, because they were not then legally represented. The propounded contention is entirely consistent with the Minister's submissions there. It was clearly foreshadowed during the special leave hearing. The Minister should therefore have leave to file his Notice of Contention and raise this discretionary argument.

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61 (2000) 204 CLR 82 at 128 [122]-[123].

62 (2000) 204 CLR 82 at 156-157 [217]-[219].

63 cf *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *Coulton v Holcombe* (1986) 162 CLR 1 at 7-9.

62 *Arguments against relief*: Assume, for the purpose of argument, that in this appeal the appellants could establish a breach by the Tribunal of the requirements of s 424A. Any such breach would depend upon establishing the preconditions envisaged by s 424A. To this extent only it is necessary to consider what s 424A, read with s 441A of the Act, provides. Section 424A assumes the existence of "information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review". The failure to comply with s 424A is said to be constituted by the failure of the Tribunal to give the appellants copies in writing of the documents allegedly inconsistent with the male appellant's oral evidence, that being the method prescribed for giving such documents to a person[64]. Might any such failure have affected the correct disposal of the appellants' application to the Tribunal? If it might, the matter would not be suitable for dismissal in the exercise of a judicial discretion.

63 The Minister submitted that in this matter such a failure, based on s 424A, even if established, could not have affected the Tribunal's decision. This was because that decision rested on a reason insusceptible to alteration by any response which the appellants might have made to the posited information, had it been given to them as s 424A envisaged. The Tribunal's decision depended upon its conclusion that the character of the dispute which the appellants had described with the male appellant's former wife's family in India was a private dispute about private animosities.

64 Thus, even if those animosities had given rise to "fear", including the fear of being wrongly and corruptly prosecuted and imprisoned for criminal offences, this did not amount to persecution. Still less to "being persecuted *for reasons of* … religion … [or] membership of a particular social group". The words "for reasons of" require the characterisation of what had occurred, as does the necessity of establishing persecution. In short, the characterisation, by the delegate and relevantly by the Tribunal, concluded that the "reasons" were private inter-familial hostility. They lacked the character necessary to bring them within the Convention grounds.

65 Once the Tribunal so decided, the Act required[65] the protection visas sought by the appellants to be refused. The appellants could not satisfy the criteria for the grant of protection visas[66]. The formation of that conclusion

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64 *SAAP* (2005) 79 ALJR 1009 at 1020 [48]-[51], 1040 [175]-[176], 1043-1044 [192]-[196]; 215 ALR 162 at 175, 203-204, 207-208. See also joint reasons at [12], [15].

65 The Act, s 65.

66 The Act, s 36(2)(a).

concerning the character of the "reasons" would be unimpeached by any contravention that the appellants might be able to demonstrate concerning the requirements of s 424A. It stood alone, and sufficient in itself, to sustain the decision of the Tribunal, effectively confirming the decision of the delegate based, ultimately, on the same reason.

66 As the reasons of the Tribunal show, the member did call to the male appellant's attention the suggested disparity between his oral evidence and earlier written "information":

> "I asked the [male appellant] whether he could explain the discrepancies between his written claims and that of his oral evidence as to the dates of his arrests. The [male appellant] responded that his memory was not good. He added that a person did not want to remember bad things. He also asked the tribunal whether there was much difference. He added that he did not believe that it was important when things occurred rather that they had occurred. After his wife gave oral evidence it was put to the [male appellant] that his written statement and his wife had indicated that the last arrest occurred in December 2001. The [male appellant] again explained the discrepancy by stating that his memory was very bad."

67 In the light of this oral identification of the "information" derived from the appellants themselves, any infraction of s 424A is effectively reduced to a complaint of a failure of the Tribunal to provide the "information" concerned to the appellants in written form with an invitation to comment on it[67]. No such requirement or formality would exist as part of the general law of natural justice and procedural fairness. However, allowing for the Parliament's provision for such a requirement[68], the fact remains that any comment by the appellants on these particular matters could not possibly have altered the Tribunal's characterisation of the "reasons" for the appellants' propounded fear of persecution.

68 Any breach of s 424A might be relevant to the general credibility of the male appellant. However, the Tribunal's "reason" for affirming the decision of the delegate was more basic. It was a "conclusion" about the "reasons" for the propounded fear of persecution on the part of the appellants. And that conclusion was that the source of any "fear" was private and for domestic

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67 See joint reasons at [12], [15].

68 The Act, ss 424A, 441A. See *SAAP* (2005) 79 ALJR 1009 at 1040 [175]; 215 ALR 162 at 203.

reasons. It was not for reasons that would enliven the protection obligations imposed on Australia as a State party to the Convention.

69 *Suggested inconsistency with SAAP*: Is this conclusion inconsistent with the reasoning of the majority of this Court in *SAAP*? I was part of that majority and I do not consider that there is an inconsistency.

70 All members of the majority in *SAAP* acknowledged the residual availability of a discretionary decision to decline relief[69]. However, in the circumstances of *SAAP*, all members of the majority concluded that relief should not be denied in the exercise of that residual discretion.

71 The circumstances of *SAAP* and of the present case are very different. In *SAAP*, the applicants before the Tribunal were a mother and young daughter. The mother was illiterate. The mother and daughter were detained in immigration detention at Woomera. The mother had an older daughter, living in Sydney, who gave information to the Tribunal, in the mother's absence, in some ways adverse to her claim[70]. The case was a clear example of the circumstances in which the provision of information in writing was required[71]. It might have affected the outcome because that information was critically addressed to what "would be the reason, or a part of the reason, for affirming the decision that is under review"[72].

72 That is not the present case. Here, in so far as the procedures adopted by the Tribunal are concerned, the substance of the "information" before the Tribunal was drawn to the appellants' notice orally[73]. More fundamentally however, the "information" was not addressed to "the reason, or a part of the reason" for the Tribunal's decision[74]. When properly analysed, that "reason" was the conclusion of the Tribunal about the character of the conflict involving the male appellant and his former wife's family and the "reasons", within the language of the Convention, for any "fear of persecution" which the appellants

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69 (2005) 79 ALJR 1009 at 1026-1027 [79]-[84] per McHugh J; 1046 [210]-[211] per Hayne J and 1040 [174]-[176] of my own reasons; 215 ALR 162 at 183-185, 211-212, 203-204.

70 See *SAAP* (2005) 79 ALJR 1009 at 1016-1018 [31]-[37]; 215 ALR 162 at 170-172.

71 See *SAAP* (2005) 79 ALJR 1009 at 1035-1036 [144], 1040 [175]; 215 ALR 162 at 197, 203.

72 The Act, s 424A(1)(a).

73 cf *SAAP* (2005) 79 ALJR 1009 at 1040 [175]; 215 ALR 162 at 203.

74 cf joint reasons at [15], [17].

had deterring them from availing themselves of the protection of the country of their nationality, India.

73 Whereas in *SAAP*, it was my opinion that "discretionary considerations overwhelmingly [favoured] the provision of relief"[75], in the present appeal, they overwhelmingly favour the refusal of relief. They do so because here any non-compliance with s 424A was immaterial to the "reason" of the Tribunal for its decision adverse to the appellants which I have identified.

74 *Invalidity and discretion*: The appellants submitted that this conclusion was inconsistent with some of the majority reasoning in *SAAP*, which the Minister (despite a few hints from the Bench) declined to challenge and accepted as correctly stating the law on s 424A[76].

75 It is true that in the reasons of McHugh J[77] and of Hayne J[78] in *SAAP*, emphasis was placed on the invalidity of a decision made following a breach of the requirements of s 424A and the relevance of such invalidity to the availability of *certiorari* to quash "what is found to be an invalid decision"[79]. However, neither McHugh J nor Hayne J questioned the principle established by this Court in *Aala*, that relief of the kind described in s 75(v) of the Constitution (and reflected in s 39B of the Judiciary Act) is fundamentally discretionary in nature. Nor, in my reasons, did I. Moreover, McHugh J expressly acknowledged that in some circumstances ("suggestion of delay, waiver, acquiescence or unclean hands"[80]) relief might be withheld on discretionary grounds.

76 It will often (perhaps usually) be the case that the remedies for which s 75(v) of the Constitution (and s 39B of the Judiciary Act) provide are enlivened by instances of established jurisdictional error. Yet to acknowledge the existence of a discretion to withhold relief is to accept that, in some instances, although invalidity is established, the circumstances do not call for the provision of judicial remedies.

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75 (2005) 79 ALJR 1009 at 1040 [176]; 215 ALR 162 at 204.

76 Joint reasons at [2].

77 (2005) 79 ALJR 1009 at 1027 [83]-[84]; 215 ALR 162 at 184-185.

78 (2005) 79 ALJR 1009 at 1046 [211]; 215 ALR 162 at 212.

79 (2005) 79 ALJR 1009 at 1046 [211]; 215 ALR 162 at 212.

80 (2005) 79 ALJR 1009 at 1027 [84]; 215 ALR 162 at 185.

77 In a sense, this conclusion simply acknowledges the great variety of cases and circumstances that come before the courts; the different kinds of infraction that are said to warrant relief; the different positions of the parties; and the need to conserve relief to cases where it is appropriate and required to do practical justice. Sometimes the reasons for denying relief may have their origins in defaults and omissions on the part of the claimant ("because a party has been slow to assert its rights, has been shown to have waived those rights"[81], or otherwise). Sometimes, relief may be denied because the error relied upon is immaterial to the reasoning of the decision-maker. Instances of immateriality of this kind were identified by Gaudron and Gummow JJ in *Aala*[82]. The present appeal affords another, and different, instance.

78 *Reason or part of the reason*: The appellants asked rhetorically, in effect, how it could be said that the alleged disparity between the oral evidence given by the male appellant and the earlier written documentation was not "the reason, or a part of the reason, for affirming the decision that is under review" when the Tribunal had expressly referred to that subject in the reasons for its decision.

79 Not everything that is said in the course of the reasons of a tribunal or a court, when analysed, constitutes "the reason, or a part of the reason" for the resulting dispositive order. To find *that* "reason" requires more than pointing to the discursive reasoning of the decision-maker. It requires analysis, a fact made clear by the use in s 424A of the conditional tense ("would be") – a formulation that necessitates a hypothetical construct[83].

80 In countries of the common law tradition, such as Australia, the reasoning of courts and tribunals is typically (as in this case) detailed and elaborate and includes material that is not strictly necessary to the ultimate decision. This mode of reasoning contrasts with that typical of courts and tribunals in most civil law countries, although the two systems have lately moved somewhat towards each other. Finding what would be "the reason" or "a part of the reason" for a "decision" of a tribunal requires identification of the links in the chain that sustain (if they do) the eventual disposition.

81 Many reasons of courts and tribunals contain discussion of matters that are not part of this process of reasoning[84]. Thus, they may include a more detailed

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81 *Aala* (2000) 204 CLR 82 at 136-137 [148].

82 (2000) 204 CLR 82 at 109 [58].

83 See also joint reasons at [17].

84 *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at 262 [216] per Allsop J, Weinberg J concurring at 242 [94];

(Footnote continues on next page)

account of the facts, as recounted by the witnesses, than is strictly necessary. They may contain a description of the submissions of the parties although ultimately some or most of these may be treated as superfluous, irrelevant or insignificant to the decision. They may refer to legislation and case law that is not, in the end, determinative. They may set out impressions of witnesses, although such impressions do not eventually control, or even influence, the decision.

82 It is pointless to complain about these features of discursive reasoning. They are well entrenched. In part, they derive from tradition; pressures imposed on decision-makers to complete their reasons quickly; the premium normally attached to candour and disclosure of the consideration of evidence and argument in reasoning; and the fact that the process of explaining decisions sometimes clarifies, in the mind of the decision-maker, those elements that are (or would be) "the reason, or a part of the reason" for the decision, thereby distinguishing them from those that are not (or would not be) such.

83 The appellants submitted that the alleged discrepancies between earlier written documents and their oral evidence before the Tribunal had influenced the Tribunal's assessment of their credit. In this sense, they argued, the discrepancy would at least be "a part of the reason" for the Tribunal's ultimate decision.

84 In many cases, including claims to refugee status, this would undoubtedly be so. Thus, if the Tribunal were to disbelieve that a refugee applicant was an apostate convert to Christianity[85] or a homosexual[86] or the victim of domestic violence[87] and this was the basis of the propounded fear of persecution, obviously a reference to evidence relevant to the applicant's credit would be "the reason, or a part of the reason" for the Tribunal's decision. In that event, as in *SAAP*, the requirements of s 424A would necessitate provision of the information in question and in the form specified in the section[88].

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cf *SZDQL v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 144 FCR 356 at 365-367 [55]-[59]; *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 at 478 [33].

85 *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 1142; 216 ALR 1.

86 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

87 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1.

88 See the Act, s 424A(2)(a); *SAAP* (2005) 79 ALJR 1009 at 1027 [83]-[84]; 215 ALR 162 at 184-185.

85 *The correct analysis*: However, that is not this case. Here, after elaborating all of the descriptive material, recounting the ways in which the appellants put their case, describing the country information, recording impressions of witnesses and so forth, the Tribunal, in effect, cut to the chase. Essentially, it said: Be that all as it may, and accepting the claim as stated in full, it still lacks the essential nexus to a Convention ground. It is a private dispute. As such, it does not attract the country obligations imposed by the Convention.

86 Properly analysed, that was "the reason" and the only "reason" in this case for the Tribunal's decision. It was sufficient. And it necessarily required rejection of the appellants' claims. It could not possibly have been affected by anything that might have been said by either of the appellants in response to written copies of documentation addressed only to preliminary, collateral and discursive matters as set forth in the Tribunal's reasons. Whilst I agree that the phrase "the reason, or a part of the reason" should not be narrowly read so as to diminish the obligations of s 424A (*SAAP* stands against such a narrow reading), the search is not simply for a passage in the Tribunal's discussion. It is for the identification of something more substantive. Just as the elucidation of the *ratio decidendi* of a decision for legal purposes requires analysis[89], "the reason, or a part of the reason" referred to in s 424A(1)(a) also requires discernment and correct analysis. In both cases, it is a mistake to treat everything this is, or might be, contained in the discursive reasoning as significant for the more precise legal purpose in hand.

Conclusion and order

87 Once the foregoing conclusion became clear, it was immaterial for the Federal Magistrates Court or the Federal Court to examine the extent of the default of the Tribunal, if any, under s 424A or to elaborate further the meaning of that provision. Any such default could not have affected the decision of the Tribunal for the reason that it accepted. An application for judicial review of that decision was therefore liable to dismissal on discretionary grounds[90]. Discretionary refusal of judicial review must be exercised with care, particularly where the hypothesis of jurisdictional error is a possibility. However, in some such cases (of which this was one) invocation of the discretion is proper, prudent, economical and just.

88 In effect, the discretion allows the reviewing court to say: The case is clear. A sound basis for the challenged decision has been established. Even if a postulated error has occurred in complying with s 424A and could be proved, any

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89 See eg *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 417-418 [56].

90 See also reasons of Hayne J at [91]-[92].

such error is immaterial because it could not undermine the essential legal basis that sustains the decision. In that event, to divert the court's time and resources into examining a supposed technical breach is not a proper use of its energies. Nor is it required by the justice of the case.

89 When such conclusions are reached, the reviewing court is entitled to, and should, reject the application in the exercise of its discretion. It should leave analysis of suggested technical infractions to a case where the result of such analysis might influence the outcome. This was not such a case.

90 Upon this discretionary ground, and not for any view of the compliance or non-compliance with s 424A of the Act, I would dismiss the appeal with costs.

91 HAYNE J. I agree that the appeal should be dismissed with costs. The Refugee Review Tribunal's finding that the appellants' claims lacked the requisite nexus with the Convention[91] was inevitable. That being so, the appellants were not entitled to relief of the kind they sought. The discretion[92] to grant that relief was to be exercised against them.

92 There is, therefore, no occasion to consider the application in this case of s 424A of the *Migration Act* 1958 (Cth) or to consider what was said about that provision in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*[93]. Nor is it necessary to examine what has been said about that provision by the Full Court of the Federal Court of Australia in *Minister for Immigration and Multicultural Affairs v Al Shamry*[94] or *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs*[95].

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91 Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 (1954 ATS 5), as amended by the Protocol Relating to the Status of Refugees done at New York on 31 January 1967 (1973 ATS 37).

92 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

93 (2005) 79 ALJR 1009; 215 ALR 162.

94 (2001) 110 FCR 27.

95 (2006) 150 FCR 214.