FEDERAL COURT OF AUSTRALIA

SZHKA v Minister for Immigration and Citizenship [2008] FCAFC 138

MIGRATION – visa – protection visa – second review of decision by delegate of Minister to refuse visa – earlier decision of Tribunal set aside by court – Tribunal constituted by different member on second review – whether Tribunal required to invite applicant to second hearing

Held: (by majority) – invitation to second hearing required in every case – (by whole Court) in any event, invitation to second hearing required in particular circumstances

Acts Interpretation Act 1901 (Cth) s 33(2A)
Administrative Appeals Tribunal Act 1975 (Cth) s 44
Migration Act 1958 (Cth) ss 65, 422, 422A, 422B, 424, 424A, 424C, 425, 428, Pt 7

Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 221 CLR 1 referred to
Babaniaris v Lutony Fashions Pty Ltd (1987) 163 CLR 1 referred to
John v Commissioner of Taxation (Cth) (1989) 166 CLR 417 referred to
Liu v Minister for Immigration and Multicultural Affairs [2001] FCA 1362 (2001) 113 FCR 541 discussed
Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597 referred to
Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004 [2006] HCA 53 (2006) 231 CLR 1 cited
Minister for Immigration & Multicultural & Indigenous Affairs v SCAR [2003] FCAFC 126 (2003) 128 FCR 553 cited
Minister for Immigration and Ethnic Affairs v Singh (1997) 72 FCR 288 referred to
Minister for Immigration and Ethnic Affairs v Singh (1997) 74 FCR 553 referred to
Minister for Immigration and Multicultural Affairs v Thiyagarajah (2000) 199 CLR 343 referred to
Minister for Immigration and Multicultural Affairs v Wang [2003] HCA 11 (2003) 215 CLR 518 discussed
NAIS v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 470 referred to
NBGM v Minister for Immigration and Multicultural Affairs [2006] HCA 54 (2006) 231 CLR 52 cited
NBKM v Minister for Immigration and Citizenship [2007] FCA 1413 overruled
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294 referred to
SBRF v Minister for Immigration and Citizenship (2008) 101 ALD 559 referred to
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63 (2006) 228 CLR 152 discussed
SZBYR v Minister for Immigration and Citizenship (2007) 81 ALJR 1190; 235 ALR 609 referred to
SZEEU v Minister for Immigration and Multicultural Affairs (2006) 150 FCR 214 referred to
SZEPZ v Minister for Immigration and Multicultural Affairs (2006) 159 FCR 291 referred to

SZHLM v Minister for Immigration and Citizenship (2007) 98 ALD 567; [2008] FCA 712 referred to
SZILQ v Minister for Immigration and Citizenship (2007) 163 FCR 304 referred to
Wang v Minister for Immigration & Multicultural Affairs [2000] FCA 1599 (2000) 105 FCR 548 discussed
Wang v Minister for Immigration & Multicultural Affairs [2001] FCA 448 (2001) 108 FCR 167 discussed

SZHKA v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL
NSD 625 OF 2007

SZGOD v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL
NSD 1937 OF 2007

GRAY, GYLES AND BESANKO JJ
5 AUGUST 2008
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 625 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZHKA** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**GRAY, GYLES AND BESANKO JJ**
DATE OF ORDER:	**5 AUGUST 2008**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The Refugee Review Tribunal be joined as a party to the appeal.

2. The appeal be allowed.

3. The orders made by the Federal Magistrates Court on 27 March 2007 be set aside and in lieu of those orders there be orders that:

   (a) a writ of certiorari issue quashing the decision of the Refugee Review Tribunal handed down on 31 October 2006 (RRT Case Number 060739076); and

   (b) a writ of mandamus issue directed to the Refugee Review Tribunal requiring it to hear and determine the appellant's application for review according to law.

4. The first respondent pay the costs of the appellant of the appeal and of the application before the Federal Magistrates Court.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1937 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGES:	**GRAY, GYLES AND BESANKO JJ**
DATE OF ORDER:	**5 AUGUST 2008**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by the Federal Magistrates Court on 10 September 2007 (other than the order amending the name of the first respondent) be set aside and in lieu of those orders there be orders that:

   (a) a writ of certiorari issue quashing the decision of the Refugee Review Tribunal handed down on 19 October 2006 (RRT Case Number 060599267); and

   (b) a writ of mandamus issue directed to the Refugee Review Tribunal requiring it to hear and determine the appellant's application for review according to law.

3. The first respondent pay the costs of the appellant of the appeal and of the application before the Federal Magistrates Court (if any).

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 625 OF 2007**
NSD 1937 OF 2007

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZHKA** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
BETWEEN:	**SZGOD** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**GRAY, GYLES AND BESANKO JJ**
DATE:	**5 AUGUST 2008**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

GRAY J:

1 The essential question raised by these two appeals is whether, in each case, s 425(1) of the *Migration Act 1958* (Cth) ("the Migration Act") required the particular member of the Refugee Review Tribunal ("the Tribunal") who made the Tribunal's decision, affirming a decision to refuse to grant the relevant appellant a protection visa, to invite that appellant to attend a hearing. In each case, another member of the Tribunal had previously made a decision, affirming the decision to refuse the appellant a protection visa, after giving an invitation to the appellant pursuant to s 425(1) and conducting a hearing. In each case, the Tribunal's first decision had been set aside by court order, and the matter had been remitted

to the Tribunal. In each case, the member who made the second decision relied on the record of the earlier Tribunal hearing, without issuing a fresh invitation pursuant to s 425(1) and constituting a fresh hearing.

2 The detailed facts and circumstances of each case are set out in the reasons for judgment of Besanko J, which I have read in draft form. It is unnecessary for me to repeat them. I agree that the orders Besanko J proposes should be made in each case. If the appeals fall to be determined on the question whether, in the absence of a general entitlement to a further hearing, the circumstances of each case nonetheless required that there be a second hearing, I agree with his Honour's reasons for concluding that in each case a second hearing was required. On the question whether there is a general requirement that the Tribunal member who actually makes the decision should do so only after an invitation has been given to an applicant to participate in a further hearing by that member, I have reached a view different from that of Besanko J. Accordingly, it is necessary for me to set out my reasons for reaching that view.

3 Section 425 of the Migration Act provides:

> *(1) 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.*
>
> *(2) Subsection (1) does not apply if:*
>
> *(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or*
>
> *(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or*
>
> *(c) subsection 424C(1) or (2) applies to the applicant.*
>
> *(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.*

4 Section 424C(1) permits the Tribunal to make a decision on a review without taking further action to obtain additional information, if an applicant has been invited under s 424 to give additional information and has not given the information before the time for giving it has passed. Section 424C(2) permits the Tribunal to make a decision on a review without taking

further action to obtain an applicant's views on information it has, if it has invited the applicant under s 424A to comment on information and the applicant has not given comments before the time for giving them has passed. It is important to note that, in the terms of s 425, the only exceptions to the right to be invited to attend a hearing involve the Tribunal reaching a decision favourable to the applicant without a hearing, the applicant consenting to a decision without a hearing, or the applicant failing to respond to a written request from the Tribunal for further information, or to an opportunity to comment in writing on information. In other words, apart from a decision in which the applicant is successful, the invitation required by s 425(1) must go to the applicant unless the applicant has signified, expressly or impliedly, a lack of interest in participating further in the review process.

5 Section 425, like other provisions found in Div 4 of Pt VII, represents Parliament's expression, in terms appropriate for the task of reviewing decisions refusing to grant protection visas, of an aspect of the requirements of procedural fairness. If this proposition were ever doubted, it is now confirmed by the presence of s 422B, enacted subsequently to most of the other provisions in Div 4. Like the rules of procedural fairness in other contexts, the rights given to an applicant by Div 4 are rights relating to the process by which decisions are made, rather than to the substantive content of those decisions. To say this, however, is not to diminish the importance of those rights. It has long been recognised that a statutory power, the exercise of which may affect adversely a person's interests, is impliedly subject to a requirement that the decision-maker afford procedural fairness to that person. The fact that, in the context of the Tribunal's task of reviewing decisions to refuse protection visas, Parliament has chosen to make the exercise of the Tribunal's substantive powers depend expressly upon the process rights contained in Div 4, and to spell out for that purpose what constitutes procedural fairness, does not diminish the importance of those process rights. Thus, it is recognised that the requirement of an invitation to a hearing, found in s 425(1), will not be met if what is actually afforded to the applicant is not a hearing at which the applicant is able to give evidence and present arguments relating to the issues arising in relation to the decision under review. See, for instance, *Minister for Immigration & Multicultural & Indigenous Affairs v SCAR* [2003] FCAFC 126 (2003) 128 FCR 553 at [37].

6 Section 425(1) has two particular features that are important in the determination of the larger issue in the present cases. The first is that the hearing to which an applicant must

be invited is for two purposes, for him or her to give evidence and for him or her to present arguments. Although the word "evidence" in relation to the material placed before an administrative decision-maker may not be entirely appropriate, the obvious intent of s 425(1) is that the applicant should have an opportunity to provide information particularly within his or her personal knowledge to the person who will make the decision. This is an important right. No less important is the opportunity to present arguments. It is this opportunity that gives an applicant the chance to persuade the decision-maker to accept the accuracy of the information provided by the applicant, to reach the conclusion that that information should be regarded as more reliable, or as having more weight, than conflicting information that the Tribunal may have, or that apparent conflict between information supplied by the applicant and that gathered by the Tribunal is not real or substantial. It is clear from the express inclusion of the right to present arguments that Parliament regarded the right to attend a hearing for this purpose, as well as for the purpose of providing information, as of great importance to an applicant.

7 The second important aspect of s 425(1) is that the evidence and arguments are to relate to "the issues arising in relation to the decision under review." The focus on this element of the subsection was the basis for what the High Court of Australia decided in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63 (2006) 228 CLR 152. For present purposes, it is not necessary to quote the whole of what the High Court said in [33]-[40], but certain points emerge clearly from that passage. First, the issues arising are not limited to the question whether the applicant is entitled to a protection visa, but are more particular than that. Second, initially the issues will be defined by the reasons given by the person who made the decision under review, but the issues may, and often will, undergo change in the course of the Tribunal's conduct of the review of that decision. Third, because the Tribunal starts from the position of being unpersuaded by the material already before it, the hearing will inevitably explore the reasons why the Tribunal might not be persuaded by that material; the Tribunal will not perform its function adequately if it does not provide the applicant with the opportunity to satisfy the Tribunal's specific reservations about the applicant's case. Thus, to some extent at least, the issues arising in relation to the decision under review will depend upon the view that the ultimate decision-maker takes about the material before the Tribunal, and will therefore be shaped by that person's thought processes. This is not to say that the Tribunal member must expose all of

his or her thought processes to scrutiny by the applicant, as part of the hearing. The High Court recognised this in *SZBEL* at [38]-[39]. The line between exposing every aspect of the reasoning process and making known to the applicant the issues that the Tribunal member sees as arising may not be easy to recognise in all circumstances, but it does exist.

8 If these propositions are accepted, it becomes difficult to see how a Tribunal member who takes up a review after an earlier Tribunal decision has been quashed can avoid the need to conduct a hearing. Simply to regard the rights given by s 425(1) as an item on a procedural check list, that the member can regard as having already been ticked off, would be for the Tribunal to abdicate its responsibility to conduct a review. Similarly, for the member to regard his or her task as being no more than to repeat the views and conclusions of the member responsible for the earlier Tribunal decision, without the jurisdictional error identified in the proceeding in which that decision was quashed, would be a failure to perform the function of reviewing the primary decision to refuse a protection visa. Once the member embarks on the process of considering the material before the Tribunal, including both the material provided originally by the applicant and the material emerging from the earlier hearing, the Tribunal member's mind will begin to focus on reasons why he or she is not persuaded by the case that the applicant put. If this were not so, and the member was persuaded as to the applicant's case, then a visa would be granted and no further hearing would be required. The process of focussing on reasons for being unpersuaded will give rise to issues of the kind that the High Court identified in *SZBEL* as being issues arising in relation to the decision under review. It is these issues on which the applicant is entitled by s 425(1) to be invited to provide information by giving evidence and to persuade by presenting arguments.

9 The view that the issues to be decided are those perceived to be issues at the time of the making of the ultimate Tribunal decision is also consistent with what the High Court has said in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53 (2006) 231 CLR 1 and *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54 (2006) 231 CLR 52, in relation to those applicants who come before the Tribunal seeking permanent protection visas after earlier having been granted temporary protection visas, which have expired.

10 There is a further reason why it is difficult to see that a member in the situation of each of the members in the present case can take the view that no further hearing is necessary. That is that it is impossible to guarantee that the issues of the kinds to which the High Court referred in *SZBEL* will not have changed in the time that has elapsed since the Tribunal's earlier hearing and its first decision. In *Wang v Minister for Immigration & Multicultural Affairs* [2000] FCA 1599 (2000) 105 FCR 548, the Full Court determined that the Tribunal had made an error of law, by asking itself the wrong question. The Full Court took the view that the case should be returned to Ms Boland, the same Tribunal member who had made the decision that was set aside. If the case were to be heard again by another Tribunal member, the result might have been that the applicant would have been deprived of findings of fact made by the original member, favourable to the applicant's case. Wilcox J at [11]-[12] and Merkel J at [112] both expressed the view that the same member ought to deal with the case on its return, but each declined to make an order at that stage, because of the possibility that there might be reasons why Ms Boland could not, or should not, deal with the case. At [23]-[28], I expressed the view that an order should be made having the effect that, when the case was dealt with again by the Tribunal, the Tribunal should be constituted by the member who had made the earlier decision.

11 Subsequently, further application was made to the Full Court, when it became apparent that Ms Boland was available to sit, but the case had been assigned to another Tribunal member. In *Wang v Minister for Immigration & Multicultural Affairs* [2001] FCA 448, reported as *Wang v Minister for Immigration and Multicultural Affairs (No. 2)* (2001) 108 FCR 167, the Full Court made an order that the matter be remitted to the Tribunal as originally constituted. It is clear from the Court's reasons, especially [23] in the reasons for judgment of Merkel J, that the preservation of the findings of fact favourable to the applicant was the principal reason for taking this course.

12 The statutory power under which the Full Court made that order was subsequently repealed. Despite this, the High Court heard an appeal from the Full Court's judgment and allowed that appeal: *Minister for Immigration and Multicultural Affairs v Wang* [2003] HCA 11 (2003) 215 CLR 518. One of the reasons for the High Court concluding that the Full Court lacked the power to do what it did was that the issues before the Tribunal could not be frozen at any particular point in time. At [15]-[16], Gleeson CJ said:

It is clear that the reason for the order finally made by the Full Court was a view that the interests of justice required that the respondent should be protected as far as possible from the contingency that, on the hearing of the remitted matter, the Tribunal might take a view of the facts less favourable to the respondent than had been taken by Ms Boland.

The content of the interests of justice, in the events that occurred, is to be determined in the light of the provisions of the Act, pursuant to which the respondent made his application for a protection visa, and pursuant to which the delegate of the Minister, the Tribunal, and the Federal Court were acting. Under the statutory scheme, and in consequence of the other orders made by the Full Court, the Tribunal is now obliged to undertake a further review of the delegate's decision. The Tribunal's decision upon that review is to be made on the basis of the facts as they appear in the course of that review. To what extent the information before the Tribunal will differ from the information that was originally before Ms Boland is not known. The findings made by Ms Boland will have no legal status in that further review. Neither Ms Boland, if she undertakes the further review, nor any other member of the Tribunal, if the Tribunal is differently constituted, will be bound by them. The most that can be said is that, as a practical matter, if Ms Boland undertakes the review, then, unless there is a significant change in the information before the Tribunal, she is unlikely to alter the view of the facts she took previously, whereas a fresh decision-maker might see the matter differently even if the information remains substantially the same.

13 At [38], McHugh J said:

ordinarily a direction by the Federal Court that the Tribunal must act on facts found at a previous hearing imposes a duty that the Act itself does not impose upon the Tribunal when hearing the matter. Such a direction is also likely to conflict with the Tribunal's duty to decide the applicant's claim for protection at the time that the Tribunal makes its decision. In many cases, such a direction is likely to embarrass the Tribunal by hampering its ability to determine the case as at the date of its decision.

14 At [68], Gummow and Hayne JJ said:

Whether any findings from the first review would be preserved would entirely depend upon the view formed by the Tribunal in conducting the second review. On that second review the respondent, as applicant for a visa, could be expected to appear to give evidence and present arguments (s 425), and, so far as the Court's orders were concerned, it was a review to be conducted in the ordinary way.

15 At [73]-[74], Gummow and Hayne JJ said:

> *Necessarily, the findings that are recorded in the Tribunal's written statement of its decision and reasons will reflect the matters that the applicant for review will have sought to agitate. No less importantly, the findings that are recorded will reflect what the Tribunal considered to be material to the decision which it made on the review. And what was material to that decision will depend upon the view that the Tribunal formed about the relevant legal questions that the review presented.*
>
> *It follows, therefore, that to attempt to divorce the Tribunal's statement of its findings on what it considered to be a material question of fact, from the decision it made and, in particular, from its reasons, may be dangerous in cases like the present where it is accepted that the Tribunal made an error of law. There are several reasons why it may be a dangerous process. First, there is the notorious difficulty of disentangling findings of fact from conclusions about applicable legal principle. Secondly, assuming that those difficulties can be surmounted, the findings of fact which the Tribunal makes after hearing and assessing the body of material and submissions will necessarily reflect the Tribunal's conclusions about applicable legal principle and will be directed to the questions that those principles present. If, in that review, the Tribunal makes an error of law and a subsequent review is ordered, what is the Tribunal then to do if further findings are to be made about subjects with which the first Tribunal dealt? For it to take, as its starting point, findings that were made on that earlier review under a misapprehension of applicable legal principles may, indeed often would, skew the second factual inquiry by the Tribunal.*

16 At [77], Gummow and Hayne JJ also said:

> *When the Tribunal reviews a decision to refuse a protection visa it must decide whether the applicant is,* at the time of the Tribunal's decision, *a person to whom Australia owes protection obligations. So much follows from the fact that the Tribunal exercises afresh the powers of the original decision-maker. Seeking to "preserve" some findings of fact made at an earlier review assumes that no circumstance relevant to those facts has changed in the intervening time. It assumes, for example, that conditions in the country of origin have not changed and, in a case like the present, that the beliefs and intentions of the person who has sought protection have not changed in any material way.*

17 Kirby J dissented.

18 *Wang* therefore points up the difficulty of this Court attempting to constrain the Tribunal as to what the issues in a particular review are by treating those issues as fixed at a particular time. If the Court cannot constrain the Tribunal in that way, then it is clear that the Tribunal cannot constrain itself in that way. The Tribunal must determine a review by

dealing with the issues as they present themselves at the time of its determination, according to the facts as the Tribunal finds them to be at that time. For all sorts of reasons, the facts as they appear to the Tribunal member making the second decision may differ significantly from the facts as they appeared to the Tribunal member who made the earlier decision. Without conducting a further hearing, at which the applicant has the right to give evidence, the Tribunal cannot be confident in making findings of fact on which to base a decision on a review.

19 In the light of this practical problem, and the part that the reasoning processes of the Tribunal play in the ascertainment of what the issues are, there is a necessary fluidity of those issues until the particular Tribunal member is in the process of grappling with the case. In those circumstances, the Tribunal member cannot regard himself or herself as limited to dealing only with the facts and issues that were perceived by an earlier Tribunal member who has made a decision that has been set aside. The role of the Tribunal's reasoning processes also means that the problem cannot be solved simply by asking the applicant whether there are any new issues, or whether he or she wishes to provide any new information. The possibility that the Tribunal member will himself or herself perceive issues that have not been thought of previously cannot be disregarded. Accordingly, it is difficult to see how a Tribunal member could dispense with the step of inviting the applicant to a hearing, simply because another Tribunal member has taken that step at an earlier time.

20 From time to time, suggestions have been made that various other provisions of Div 4 of Pt VII of the Migration Act show an intention on the part of Parliament that a hearing by the member who actually makes the decision is unnecessary, so long as a member of the Tribunal has conducted a hearing pursuant to an invitation complying with s 425(1). The foundation for these suggestions is in the judgment of the Full Court in *Liu v Minister for Immigration and Multicultural Affairs* [2001] FCA 1362 (2001) 113 FCR 541. The issue arose in that case because a Tribunal member who had conducted hearings of the cases of two applicants then resigned before giving decisions. The decisions were given by another Tribunal member, without affording either of the applicants another opportunity to attend a hearing. At [47]-[50], the Full Court made reference to s 428, which confers on the Tribunal power to authorise another person to take evidence on oath or affirmation for the purpose of a review. Subsection (5) provides:

> *If the Tribunal receives, under subsection (4), a record of evidence given by the applicant, the Tribunal, for the purposes of section 425, is taken to have given the applicant an opportunity to appear before it to give evidence.*

21 The Full Court in *Liu* took the view that s 428(5) amounted to an express recognition by Parliament that the Tribunal's decision-making function may be exercised in the absence of a hearing before the Tribunal. The Full Court took the view that this was an indication that the same view should be taken in relation to the exercise of the Tribunal's function in circumstances other than those in which the evidence is taken under s 428. The exception in s 428(5) is a very specific one. It is part of a scheme designed to enable the Tribunal to take evidence by another person in circumstances in which it is difficult for the Tribunal member dealing with the review to obtain evidence directly from the applicant. Even more importantly, the exception in s 428(5) is not expressed in terms that absolve the Tribunal altogether from compliance with s 425(1), if evidence is taken by an authorised person. The only exception is in relation to the invitation to a hearing to give evidence. There is no reference to an invitation to the applicant to present arguments about the issues arising in the case. Even if the Tribunal were to receive an applicant's evidence through an authorised person, it could not make a decision without inviting the applicant to a hearing, at which the applicant would have the opportunity to persuade the decision-maker, by presenting arguments, as required by s 425(1).

22 The same may be said of any reliance on ss 422 and 422A, which are found in Div 3 of Pt VII of the Migration Act. Both deal with the reconstitution of the Tribunal, ie the substitution of one member for another, in different circumstances. By s 422(2) and s 422A(3) the member who comes to constitute the Tribunal after its reconstitution may have regard to any record of the proceedings of the review made by the Tribunal as previously constituted. The first thing to note about these provisions is that they confer on the Tribunal member concerned a discretion. In modern Commonwealth enactments, s 33(2A) of the *Acts Interpretation Act 1901* (Cth) makes it clear that the word "may" signifies the conferring of a discretion. The member who comes to deal with the case may choose to rely on the record, but is not compelled to do so. The second thing is that neither s 422 nor s 422A says anything about the exclusion of the Tribunal's obligation under s 425(1). Having regard to the record of what a previous Tribunal member has done is a sensible step, and may assist in eliminating repetition of a number of steps. In no sense could it be said to be a substitute for

the opportunity given to an applicant pursuant to s 425(1) to give evidence and present arguments about the issues.

23 What I have said leads to the conclusion that it is difficult to imagine a case in which a Tribunal member could be satisfied that the facts remained as they had been when another member made a purported decision, and that the issues were such that no further oral evidence or argument on the part of the applicant could possibly have any effect in relation to them. It follows that, when a Tribunal member is called upon to exercise the Tribunal's decision-making function, that member can only do so following an invitation to the relevant applicant to a hearing that complies with s 425(1) before that member, unless the case falls within one of the exceptions in s 425 itself.

24 Since preparing the first draft of these reasons for judgment, I have read the draft reasons for judgment of Gyles J. I agree with what his Honour has said in his reasons for judgment.

25 For all of these reasons, I agree that each of the appeals presently before the Court must be allowed and the orders made by the Federal Magistrates Court that are the subject of each appeal must be set aside. In lieu of those orders, the orders proposed by Besanko J at the conclusion of his reasons for judgment should be made.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gray.

Associate:

Dated: 1 August 2008

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 625 OF 2007**
NSD 1937 OF 2007

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZHKA**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

BETWEEN: **SZGOD**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **GRAY, GYLES AND BESANKO JJ**
DATE: **5 AUGUST 2008**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

GYLES J:

26 I have had the advantage of reading the reasons of Gray J and of Besanko J in draft. I agree that the appeals ought to be allowed. I generally agree with the reasons of Gray J. I add some observations because of the importance of the issue involved and because of some divergence in the authorities.

27 In my opinion, the obligation to invite an applicant to appear before the Refugee Review Tribunal (the Tribunal) to give evidence and present arguments relating to the issues

concerning the decision to refuse a visa is fundamental to the review of protection visa decisions provided for by Pt 7 of the *Migration Act 1958* (Cth) (the Act). By that stage the applicant will have been refused a visa by the Minister (or the delegate of the Minister) with written reasons provided (s 66(2)(c)) and the Tribunal does not consider that it should decide the review in the applicant's favour on the basis of the material before it (s 425(2)(a)). In other words, the Tribunal will require persuasion.

28 An applicant's case will inevitably involve subjective elements – starting with a genuinely held fear of persecution. The grounds for that fear will usually involve accepting the applicant's word for events for which there may be no objective corroboration. The applicant may have to persuade the Tribunal that some apparently credible external source of information is incorrect, incomplete or out of date. It will often involve the applicant in persuading the Tribunal that the applicant is, in truth, the person the applicant claims to be from the place the applicant alleges. Usually, failure by an applicant to succeed will be because the truth of what the applicant has said has not been accepted by the Tribunal in some critical respect. It is, no doubt, for this reason that the Parliament has provided for a compulsory opportunity for an applicant to persuade the Tribunal face to face. That opportunity is only of real value if the face to face meeting is with the person making the decision. The face to face meeting is not just an opportunity for the applicant to put his or her best foot forward. It is the opportunity for the Tribunal member to explore issues that concern that member with the applicant. The importance of that process is underlined by the decision of the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, particularly at [33]–[40]. In my opinion, the opportunity to be provided by virtue of s 425 is not provided by an appearance before another Tribunal member on an earlier occasion in the course of an aborted review.

29 It is submitted for the Minister that this result would be inconsistent with the decision of the Full Court in *Liu v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 541. That case is not directly in point as it related to the situation covered by s 422. Thus, there is no occasion to consider the correctness of it. To the extent to which the reasoning of that Court may be thought to be inconsistent with my opinion as to the construction of the legislation, I respectfully decline to apply it to the current circumstances.

> *The fundamental responsibility of a court when it interprets a statute is to give effect to the legislative intention as it is expressed in the statute.*

(per Mason J (as he then was) in *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 13, referred to with approval by Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ in *John v Commissioner of Taxation (Cth)* (1989) 166 CLR 417 at 439). Furthermore, in my opinion, the decisions of the High Court subsequent to *Liu* 113 FCR 541 – *SZBEL* 228 CLR 152; *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 to which Gray J, in particular, referred; and *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 per McHugh, Gummow, Callinan and Heydon JJ at [27] – require reconsideration of some of the reasoning in that decision. The fact that the review procedure might be described as "predominantly documentary" (cf Hayne J in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at [192]) does not point in the other direction – indeed, it emphasises the importance of a hearing where the documentary process has been unsuccessful so far as the applicant is concerned.

30 In my opinion, s 428 does not assist in resolving the present issue. The evident purpose of that section is to provide for a situation in which it is impractical for a member of the Tribunal to hear the evidence and, no doubt, would only be used in cases of necessity. It has no operation in circumstances like the present, whether or not it is strictly limited to the taking of evidence as found by Gray J. The tail should not wag the dog. Neither can the issue be resolved on the basis that Div 4 of Pt 7 (including s 425) refers to the Tribunal (in its "corporate" capacity) rather than to the member constituting the Tribunal. The fact that different persons have constituted the Tribunal in relation to these appellants for different reviews cannot be ignored.

31 It was submitted for the Minister that the appellants' contention would be inconsistent with the reasoning of the Full Court in *SZEPZ v Minister for Immigration and Multicultural Affairs* (2006) 159 FCR 291, a decision that was referred to in each of the judgments in the Federal Magistrates Court as negating the need for a fresh hearing. It has been cited for the same proposition in other cases in both the Tribunal and the Federal Magistrates Court. It is not an easy judgment to analyse and, in my opinion, it has been misconstrued.

32 That case is similar to the present cases in that a Tribunal's decision was set aside by consent orders which included an order that "the matter be remitted to the Refugee Review Tribunal differently constituted for reconsideration according to law". There was debate as to whether the Federal Magistrates Court was empowered to make such an order concerning constitution of the Tribunal. In any event, the Tribunal was differently constituted and once again affirmed the decision of the delegate not to grant a protection visa to the appellant. It is not clear whether the appellant was afforded a hearing pursuant to s 425 before that Tribunal member. During the course of the review by the first Tribunal member, the Tribunal, by letter signed on behalf of the District Registrar of the Tribunal, provided certain information to the appellant pursuant to s 424A and invited his comments. The appellant responded by his migration agent. In its reasons for the second decision, the Tribunal, differently constituted, referred to that information and it formed part of the reasons of the Tribunal for again affirming the delegate's decision. However, no further written steps were taken prior to the making of that decision to give the appellant, once more, particulars of the information or to invite comment upon it. The appellant argued that the setting aside of the first decision meant that the second review should be conducted de novo. The Minister contended that the Tribunal had been reconstituted pursuant to s 422 such that the matter could thus proceed pursuant to s 422(2) entitling the second member to have regard to any record of the proceedings of the review made by the Tribunal as previously constituted. The primary judge in the Federal Magistrates Court inferred that a direction under s 422 had been given and also considered that the language of s 424A was such that it did not require that the actual person who gave the particulars be the person constituting the Tribunal at the particular time.

33 The Full Court decided the case on the second of the reasons of the primary judge. The reasoning of the Court was as follows (*SZEPZ* 159 FCR 291 at [40]–[42]):

> *Ultimately, the question raised on the appeal turns on the proper construction of s 424A(1)(a). That section requires the Tribunal to give information to an applicant, to ensure that the applicant understands why the information is relevant to the review and to invite the applicant to comment on the information. However, that requirement is limited to information "that the Tribunal considers would be the reason or part of the reason for affirming the decision that is under review". **In so far as that provision refers to a state of mind or mental process, it must be taken to refer to the state of mind or mental process of the particular member constituting the Tribunal for the purposes of the review.***
> …

> *However, the information and invitation must be given by the Tribunal by one of the methods described in s 441A. All of these methods contemplate that the information and invitation can be given by the Registrar or by an officer of the Tribunal or by a person authorised in writing by the Registrar, in addition to a member of the Tribunal. Further, there is nothing in the scheme of Pt 7 of the Act to suggest that the steps required by s 424A(1), as explained by s 424A(2), must be taken at any particular time. So long as an applicant has been given information that the* ***member of the Tribunal who is to make the decision*** *considers would be the reason, or part of the reason, for affirming the decision under review and so long as the applicant understands why that information is relevant and has been invited to comment on the information, s 424A will be satisfied.*
> (Emphasis added.)

34 In my opinion, the Court's references to the state of mind or mental processes of a particular member constituting the Tribunal are consistent with the view I have formed as to the operation of s 425 rather than the contrary. This is confirmed by the following passage from the judgment (*SZEPZ* 159 FCR 291 at [35]):

> *Under the former regime, when a decision of the Tribunal was quashed or set aside, the Tribunal was obliged to undertake a further review of the delegate's decision. The Tribunal's decision, upon that review, was to be made on the basis of the facts as they appeared in the course of that further review (see* Wang *215 CLR 518 at [16]). Whether any findings from the first review would be preserved would entirely depend upon the view formed by the Tribunal in conducting the second review.* ***On that second review, the visa applicant could be expected to appear to give evidence and present arguments as contemplated by the provisions of Pt 7 (see*** **Wang** ***215 CLR 518 at [68])****.*
> (Emphasis added.)

The reference to "the former regime" related to the orders that might be made under s 481 as it previously stood including an express power to give directions as to the further consideration of the matter where a decision was set aside. It is clear that what the Full Court said as to a fresh hearing would be applicable where there is in fact reconstitution of the Tribunal. It is also clear from the reasons that the "corporate" nature of the "Tribunal" was only relevant in circumstances which did not depend upon the identity of the particular Tribunal member. To the extent that that differs from some of the reasoning in *Liu* 113 FCR 541, it is to be preferred.

35 It was submitted for the Minister that the appellants' argument gives an ambulatory operation to s 425 that may lead to an "anomalous temporal operation" not dissimilar to that which the High Court sought to avoid giving to s 424A in *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 and that it should be given a "once only" construction, to avoid responding to new issues in a circular fashion. That question does not arise in these cases. No invitation to a s 425 hearing was issued after commencement of the further reviews.

36 I agree with Gray J that it would be quite unsatisfactory if the decision whether or not to invoke s 425 in the case of a reconstituted Tribunal following the setting aside of an earlier decision were left to the new Tribunal member in the light of the issues that he or she then perceives them to be, ultimately also subject to any contrary view of the Federal Magistrates Court. Apart from the question as to how those issues might be identified prior to the hearing, it assumes that the new Tribunal member has a closed mind that could not be persuaded.

37 The Full Court in *SZEPZ* 159 FCR 291 did not decide the issue as to whether the second review was de novo. The same course may be taken in these cases. The fatal flaw was in not complying with s 425, and the decisions must be set aside. These appeals are not the vehicle to decide how the new reviews are to take place. However, as presently advised, it is difficult to see an escape from the proposition that once an administrative decision is set aside for jurisdictional error, the whole of the relevant decision making process must take place again (*Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597). There is no analogy between that situation and a rehearing ordered on an appeal in judicial proceedings or pursuant to statutory provisions such as s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) or the former s 481 of the Act. Mandatory statutory obligations must be carried out again. The suggested dichotomy between an administrative decision and what precedes it is unconvincing in this context. Such a conclusion would not mean that what has taken place in the previous review cannot be taken into account in the second review if considered relevant. The proceedings are administrative, not judicial, and the Tribunal can have regard to all relevant material, including a transcript of what took place at the previous hearing, subject to compliance with the statutory regime.

38 It follows from the foregoing that *NBKM v Minister for Immigration and Citizenship* [2007] FCA 1413 was wrongly decided.

I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gyles.

Associate:

Dated: 1 August 2008

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 625 OF 2007**
NSD 1937 OF 2007

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZHKA**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

BETWEEN: **SZGOD**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **GRAY, GYLES AND BESANKO JJ**
DATE: **5 AUGUST 2008**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

BESANKO J:

39 There are two appeals before the Court and they were heard together. They have been referred to the Full Court because they are said to raise important points of principle. Both appeals are appeals from orders made by the Federal Magistrates Court dismissing applications for judicial review. In each case, the appellant made an application for a Protection (Class XA) visa under s 65 of the *Migration Act 1958* (Cth) ("Act") but a delegate refused the application. In each case, an application for review by the Refugee Review Tribunal ("Tribunal") was made and the Tribunal gave the appellant an invitation to appear

before it under s 425 of the Act. In each case, the appellant accepted the invitation and appeared at a hearing of the Tribunal. In each case, the Tribunal affirmed the decision of the delegate. In each case, the appellant made an application for judicial review, which was successful. In each case, the Tribunal, on reconsidering the application for review, did not give the appellant a second invitation to appear before it under s 425 of the Act. In each case, the second Tribunal affirmed again the decision of the delegate and an application for judicial review was unsuccessful.

40 In each case, the appellant submitted that, by reason of the provisions of s 425 of the Act, on the reconsideration of the application for review the Tribunal was required to give him an invitation to appear before it. In each case, an alternative submission was put to the effect that in the particular circumstances of each case a second invitation to appear under s 425 should have been, but was not, given by the Tribunal.

41 In the appeal involving SZGOD a third submission was put to the effect that the delay between the hearing conducted by the Tribunal and the decision of the Tribunal after the remitter to it was such as to give rise to a breach of the rules of procedural fairness.

42 In each case it is of course the Tribunal which gave the invitation to appear, made the first decision (which was quashed) and made the decision which was the subject of the application for judicial review which, in turn, is the subject of the appeal to this Court. The Tribunal was reconstituted after the remitter of the application for review to it. I will refer to the member who conducted the hearing and who made the first decision and delivered reasons for that decision as the first member, and the member who made the second decision as the second member. I will refer from time to time to acts of the first member and the acts of the second member. That is done to assist in explaining the course of events but the point made at the beginning of this paragraph should not be overlooked. The other point is that the Court does not have the transcript of the hearing of the Tribunal in either appeal. In order to ascertain what occurred at the hearing before the first member it is necessary to refer to that member’s reasons.

43 It is convenient to begin by outlining the facts in each appeal. Although later in time, the issues emerge most clearly in the appeal involving SZGOD and I will deal with that appeal first.

SZGOD

44 The appellant is a citizen of India. He arrived in Australia on 9 August 2004, and on 16 August 2004 he lodged an application for a Protection (Class XA) visa with the then Department of Immigration and Multicultural and Indigenous Affairs. His application included a statement which comprised ten pages and which set out the circumstances he advanced in support of his application.

45 On 16 September 2004 a delegate of the Minister wrote to the appellant through his authorised recipient advising him that his application for a protection visa had been refused.

46 On 11 October 2004 the appellant made an application for review by the Tribunal. On 14 January 2005 he was invited to appear before the Tribunal. He accepted that invitation and gave oral evidence at a Tribunal hearing on 10 February 2005.

47 A brief summary of the appellant's claims is as follows. The appellant was born in Kollam, Kerala State in India on 20 February 1971. His parents settled in Orissa and he went to school there. He was attracted to communism and he became a member of the party and an executive member of the youth wing. He subsequently became secretary.

48 After leaving school, the appellant commenced employment with a transport company. He continued his involvement with the Communist Party. At some point there was a transport strike and that led to a scarcity of goods. BJP and Congress black marketeers opened warehouses in order to profit from the scarcity of goods. Members of the Communist Party, including the appellant, burned down the warehouse of a BJP supporter and were arrested. They were beaten and tortured and forced to sign a piece of paper alleging a false case against them. The representatives of the Communist Party, including the appellant, were sentenced to three months' imprisonment on 10 June 2003. The appellant continued his activities, and eventually he lost his job. On 10 November 2003 the appellant moved to Kerala Kollam, and he found new employment in the transport industry. The appellant continued his activities in the Communist Party. The appellant incurred the displeasure of a local union leader and he was beaten and tortured to force him to confess to a murder and to the destruction of certain vehicles. He moved to Madras where he lived for approximately

two months. There were people looking for him who had instructions to kill him. He said that he was imprisoned and his home was destroyed in June 2004.

49 After the hearing before the first member the Tribunal received the appellant's original visitor visa application from the Australian High Commission in India. In that application, the appellant described himself as a film director and, to use the words of the first member in his reasons, "submitted a number of persuasive documents in support of his application, including photos of him clearly involved in the production of films, a CV and various references and offers of contract work".

50 The receipt of that information caused the Tribunal to send a letter to the appellant on 11 March 2005. The letter read, in part, as follows:

> *The Tribunal now has before it your original application for a visa to visit Australia. This shows you to be a film director. Attached to the application are several documents supporting that claim, including photographs of you directing films and statements of support from professional colleagues.*
>
> *This information* [is relevant because it] *may lead the Tribunal to conclude that your claims before the Tribunal are not true.*

51 The appellant responded to that letter by letter dated 4 April 2005. He said that he was persuaded to play the part of a film director by the travel agent who organised his travel to Australia and that he affirmed the statements made in his written statements to the Department and to the Tribunal.

52 On 26 May 2005 the first member handed down the Tribunal's decision affirming the decision of the delegate. The first member noted that there was a conflict of evidence and that the appellant had submitted no supporting evidence at all for his claims to have been involved in industrial action in the transport sector. The Tribunal member said:

> *The Tribunal has made its own researches and has been unable to confirm that there was a transport strike in Kollam when claimed by the applicant. The person the applicant called the Chairman of the Kerala Transport Association is in fact the Transport Commissioner, a Government post. Rajendran, who he claims destroyed his house and tried to have him arrested, is the local member of Parliament and a member of the Communist Party, the applicant's party.*

> *None of this definitively proves that the applicant's evidence is to be disbelieved. However, together with the inconsistencies to which I drew the applicant's attention at hearing between his primary statement of claims and further evidence he submitted, including at hearing, it makes it the more [sic] difficult to accept his claims.*

53 The first member referred to the documents which had been obtained from the Australian High Commission, being the appellant's claim for a visitor visa and he said that he found those documents "much more persuasive".

54 The first member concluded by saying that he did not accept that the appellant had been involved in trade union activity in Kerala "such as to bring him into conflict with transport interests". The first member did not accept that the appellant had been threatened, detained by police or beaten or that his house had been destroyed. The first member did not accept that the appellant had suffered harm amounting to persecution in the past or that there was a real chance of the appellant so suffering in the future if he should return to India in the foreseeable future. The first member concluded that the appellant did not have a well-founded fear of persecution in India for the reason of his political opinion or for any other Convention reason should he return there in the foreseeable future.

55 The appellant made an application for judicial review in the Federal Magistrates Court. On 3 July 2006 a Federal Magistrate made orders, by consent, as follows:

> *1. An order in the nature of certiorari be issued, quashing the decision of the second respondent made on 6 May 2005 and handed down on 26 May 2005, refusing the applicant a protection visa.*
>
> *2. An order in the nature of mandamus be issued to the second respondent to hear and determine the applicant's application according to law.*
>
> *3. There be no order as to costs.*

56 Before making those orders, the Federal Magistrate asked the first respondent to the proceedings to give details of his reasons for consenting to the orders. He received a response from the solicitors for the first respondent on 3 July 2006. They referred to the decision in *SZEEU v Minister for Immigration and Multicultural Affairs* (2006) 150 FCR 214 and said:

The Minister considers that there is an arguable jurisdictional error affecting the Tribunal's decision because the Tribunal failed to put information gained from its own researches about Mr Somaraj and Mr Rajendran to the applicant in a s 424A letter. Our client considers that arguably this information formed a part of the Tribunal's reasons and concerned "another person".

57 On the remitter the Tribunal wrote to the appellant on 15 July 2006 referring to the fact that his case had been remitted to it and inviting him to provide any documents or written arguments he wished to provide.

58 On 7 August 2006 the Tribunal wrote to the appellant. The following is my summary of the points made in the Tribunal's letter:

1. The Tribunal had before it information that it considered could be the reason or a part of the reason for affirming the decision not to grant a protection visa to the appellant. The matters identified by the Tribunal in the letter were the following:

   (a) The apparent inconsistency between the appellant's statement in some of the documents that he had never been convicted of any crime or offence, and his assertion in other documents that he had been sentenced to three months' imprisonment in June 2003.

   (b) The appellant's assertion that he had removed items from a 'godown' operated by a BJP leader and burnt it down might lead the Tribunal to conclude that any charges laid as a result of the incident were to do with criminal action on the appellant's part and not for political reasons.

   (c) The Tribunal had information that the man the appellant described as chairman of the Kerala Transport Association, Mr K P Somaraj, was in fact the Transport Commissioner. If that were accepted, then that might cause the Tribunal to reject the appellant's claim that he was adversely regarded by Mr Somaraj because he threatened his business and destroyed two of his lorries.

   (d) The Tribunal member had information that Mr P Rajendran was a member of the Communist Party. The appellant had claimed that Mr Rajendran had destroyed his house and tried to have him arrested because of his political activities. If the Tribunal accepted that Mr Rajendran was a member of the

Communist Party it might find it difficult to accept that Mr Rajendran would seek to harm the appellant because of his political activities.

(e) The Tribunal referred to the appellant's application for a visitor visa. It referred to the fact that a curriculum vitae included in that application was dated 22 April 2004 and said that if it concluded that the appellant was preparing to travel to Australia as early as April or May 2004 it could reject his claim that it was not until July 2004 that he was offered assistance to leave India. The letter states that such a conclusion would further undermine the credibility of the appellant's claims.

2. The Tribunal member considering the appellant's case would listen to the tape recording of the Tribunal hearing on 10 February 2005.

59 The appellant replied to this letter on 29 August 2006. On 19 October 2006 the second member handed down the Tribunal decision and again the Tribunal affirmed the decision of the delegate.

60 The second member noted the material before him, including the material resulting from the appellant's appearance at the hearing before the first member on 10 February 2005. He referred to the decision of the first member. He referred to the fact that he had listened to the tape recording of the hearing and he referred to the two s 424A letters sent by the Tribunal.

61 The *issues arising in relation to the decision under review* within s 425(1) are to be identified by examining the second member's reasons. Whether they would have been apparent to the applicant for review will, ordinarily at least, be determined by examining the delegate's reasons, any correspondence between the applicant and the Tribunal before the hearing and the events at the hearing. It is convenient at this point to consider how the second member dealt with the six matters, which the appellant submitted were issues within s 425(1). Those matters are listed in [64] below. As to the first matter, the second member found that the appellant was not involved in political and trade union activity in India. As to the second matter, the second member did rely on differences between the appellant's written and oral claims in rejecting his claims. As to the third matter, the second member did rely on the fact that the appellant could not explain why Mr Rajendran would want to kill him in rejecting his

claims. As to the fourth and fifth matters, the second member did rely on both the timing and content of the visitor visa application in rejecting the appellant's claims. As to the sixth matter, the second member did reject the appellant's claim that he was attacked on the ground of religion in December 2003 although it is unclear if the lateness of the claim contributed to that finding.

62 The appellant appeared in person before the Federal Magistrate on the second application for judicial review. A number of the arguments that he raised before the Federal Magistrate need not be mentioned. There was reference to the question whether the Tribunal was required to give a second invitation to appear. The Federal Magistrate referred to a number of decisions including *SZEPZ v Minister for Immigration and Multicultural Affairs* (2006) 159 FCR 291 and concluded the Tribunal had not erred in not inviting the appellant to attend a second hearing.

63 At the hearing of the appeal before this Court, the appellant was granted leave to rely on amended grounds of appeal. Three grounds of appeal are raised. First, it is contended that in every case after orders are made on an application for judicial review quashing the decision of the Tribunal and ordering the Tribunal to determine the application for review according to law, the Tribunal is required to issue an invitation to appear pursuant to s 425(1) of the Act.

64 Secondly, and in the alternative, it is contended that the hearing held by the Tribunal did not satisfy the requirements of s 425(1) of the Act because the appellant was not given the opportunity to give evidence and make submissions with respect to the following issues:

1. Whether the appellant was in fact involved in political or trade union activities in India;
2. Whether any differences between the appellant's written claims and his oral evidence might lead to the rejection of his oral evidence or claims;
3. Because Mr Rajendran was a communist he would not want to kill the appellant;
4. The appellant's claims about his activities in June and July 2004 were false in light of the information contained in his application for a visa to enter and remain in Australia made in India;

5. The information in that application (made in India) was more persuasive than the claims made in his protection visa application; and

6. The appellant was not attacked on religious grounds in December 2003 because the claim was raised late.

65 Thirdly, the appellant contended that he was denied procedural fairness in that the hearing before the Tribunal took place on 10 February 2005 and yet the decision by the second member was signed on 26 September 2006 and handed down on 19 October 2006. As I understand the argument, it is that in those circumstances the delay meant that the Tribunal could proceed properly only by giving a second invitation to appear.

SZHKA

66 The appellant is a citizen of the People's Republic of China. He arrived in Australia on 11 December 2004 and on 15 December 2004 he lodged an application for a Protection (Class XA) visa with the then Department of Immigration and Multicultural and Indigenous Affairs. In a statement which formed part of his application, the appellant claimed that he was born on 3 June 1971 and that he had spent some time in the United States of America. In that country, he came across some Falun Gong members and became interested in their activities. He started to participate in those activities and he practised Falun Gong in his "spare time". On returning to China, he was threatened with being involved in Falun Gong and he could not practise Falun Gong in public. He claimed that towards the end of 2003 he was arrested for practising Falun Gong. He claimed that "by special ways" he was finally released. He claimed that he was beaten and tormented emotionally. He claimed that in mid-2004 the police started to investigate him again. He paid "more money" to get a passport and visa to come to Australia for protection. In the application form itself he stated that he "paid more than the usual amount" to obtain his passport.

67 On 24 March 2005 a delegate of the Minister wrote to the appellant advising him that his application for a protection visa had been refused.

68 On 29 April 2005 the appellant made an application for review by the Tribunal. In a short statement attached to that application, he claimed that he was born on 3 June 1971. He claimed that he had been to the USA and that he first became a Falun Gong member there.

He claimed to have participated in activities, presumably Falun Gong activities, in the USA, China and Australia. He claimed that he suffered in China and that he would face persecution in China because of his involvement in Falun Gong.

69 On 13 July 2005 the appellant was given an invitation to appear under s 425(1) of the Act. He accepted that invitation and appeared at a hearing of the Tribunal on 10 August 2005. He gave oral evidence at the hearing. By decision handed down on 15 September 2005, the first member affirmed the decision of the delegate. In his reasons the first member set out the appellant's claims and discussed his evidence. A brief chronology as revealed in the first member's reasons is that the appellant is a 33-year-old citizen of China who was born and lived in Beijing until 1999. He lived in the United States from 2000 to March 2003 and in March 2003 he returned to Beijing where he remained until November 2004. The appellant was married in Beijing in 2003. The appellant left China and travelled to Australia in November or December 2004. He had a passport which had been issued in Beijing in October 2004 and he entered Australia on a temporary business visa issued in Beijing in December 2004. The appellant presented a PRC travel document which had been issued by PRC officials in Australia in December 2004 in order to replace the passport issued to the appellant in October 2004. The passport had been retained by the tour guide in Sydney. The first member asked the appellant about his activities while he was in the USA and his contact with the authorities in China on his return to that country in March 2003. The appellant told the first member that he had been able to secure his release after the police had arrested him in December 2003 by bribing the police. He also bribed the PSB office in order to secure the return of his passport in April 2004. The first member asked the appellant about his practice of Falun Gong in China and how it was he had been able to finance his trip from China to Australia. The reasons of the first member contain the following passage:

> *The Applicant said that his wife, who works as an accountant in an electronics company, paid some money, and he withdrew funds from his own account. He said that the PSB had prevented him from withdrawing more than RMB1000 (approximately $A160) at a time. The Tribunal asked how it was, then, that he had managed to pay large bribes to them. The Applicant responded that they had written letters to the bank to authorise these larger withdrawals.*

70 The first member asked the appellant why he had not left China earlier and about his practice of Falun Gong in Australia. He was asked about the Falun Gong exercises. I will not

set out all the findings of the first member. It is sufficient to say he was not satisfied that the appellant had left China to escape persecution. In fact, he said that the appellant's departure appears to have been both orderly and planned. The first member said that he was not satisfied that the appellant was a genuine Falun Gong practitioner. The first member said that he was not satisfied that the appellant was of adverse interest to the authorities in China or that he had a subjective fear of the authorities for any reason. The first member said that he was not satisfied that the appellant was a reliable witness, nor that he was a Falun Gong adherent.

71 The appellant lodged an application for review with the Federal Magistrates Court. On 8 August 2006 a Federal Magistrate made orders, by consent, as follows (relevantly):

> *2. A writ of certiorari issue to quash the decision of the second respondent handed down on 15 September 2005.*
> *3. A writ of mandamus issue to compel the second respondent to reconsider and determine the application according to law.*

72 This Court has no information as to the grounds upon which these orders were made or the basis upon which the first respondent consented to them being made. It was not suggested that the grounds themselves necessitated a second invitation to appear.

73 On the remitter the Tribunal wrote to the appellant on 15 September 2006 giving him details of information which was relevant because it may lead the Tribunal to conclude that the appellant's claims were not credible. Six matters were identified and, generally speaking, they were matters which were inconsistencies or perceived inconsistencies in the appellant's claims and evidence, and matters which went to the issue of whether he was a genuine Falun Gong practitioner. The sixth matter was in the following terms:

> *6. You were asked at your hearing before the previous Tribunal how you financed your travel to Australia and the large bribes you claimed to have paid. You said that your wife had paid some money and you withdrew funds from your bank account. You did not explain how you accumulated these large sums if you were not working and you [sic] wife had resigned from her job to give birth to your child.*

74 The appellant responded to the letter on 10 October 2006. As to the sixth matter, he said:

> *6. When I was in China I could afford to raise my wife, daughter, when I was not working, and I could pay money to secure my release, because I made US$70000 in USA, that was my savings. But I still needed to leave, because US$70000 would not be enough for the corrupted government in China.*

75 On 31 October 2006 the second member handed down the Tribunal's decision. The second member said that the appellant's accounts of his involvement in Falun Gong whilst in the USA had varied substantially over time. He made the following comments:

> *While, in his primary application, he stated that he became a Falun Gong member in the United Sates [sic] and practiced [sic] in his spare time, his recent letter states that he did not 'really practice' [sic]. It seems that he now does not consider that, in the United States, he was a 'member' of Falun Gong. (I note that his terminology departs from normal Falun Gong usage. Falun Gong is not an organisation with members. It is described as a cultivation system with practitioners.)*

76 The second member referred to the fact that the appellant's account of his experiences upon his return to China and of his knowledge of Falun Gong practice on his return to China and prior to his alleged detention in December 2003 had been the subject of different accounts. The second member said that he would have been "somewhat less concerned" about these discrepancies and implausibilities if the appellant had shown greater knowledge of Falun Gong beliefs and practice at the hearing. He did not do so.

77 As to the appellant's evidence as to the source of the funds he used in order to pay the bribes, the second member said the following:

> *The Tribunal's letter asked the applicant how he had financed the bribes he claimed to have paid. At hearing, he stated that he had authorised payment by his bank. In his recent letter, he claimed to have saved $US70,000 while in the United States – a claim not mentioned at hearing when asked by the presiding Member how he had financed his bribes. I find the recent explanation implausible and I do not accept it.*

78 The second member said that he was not satisfied that the appellant was a genuine Falun Gong practitioner, and he was not satisfied that the appellant had a well-founded fear of persecution in China by reason of his religion, his membership of a particular social group, or for any other Convention reason.

79 On his application for judicial review, the appellant relied on one ground, namely, the failure of the Tribunal to issue a second invitation to appear after the matter had been remitted to it. The Federal Magistrate rejected that ground. He referred to the decision in *SZEPZ* 159 FCR 291 and concluded that because the appellant's application for review was one review, albeit that the Tribunal at different times was constituted by different Tribunal members, there had been no breach of s 425(1).

80 The appellant prepared his own notice of appeal. On the hearing of the appeal, his counsel developed his challenges by putting the two submissions that were also put by the appellant's counsel in the appeal involving SZGOD (see [63] and [64] above). As far as the alternative submission is concerned, the appellant submitted that he was not given the opportunity to give evidence and make submissions with respect to the following issues:

1. The question of how the appellant obtained the moneys in his account.

2. The appellant's use of the term "member" of Falun Gong.

Issues on the appeals

81 It seems that the Tribunal may not have been joined as a party to the appeal involving SZHKA. It must be a party and I would make an order joining it as a party to that appeal.

82 It was not suggested in either appeal that the form of the orders made as a result of the successful applications for judicial review were relevant to the resolution of the issues on the appeal.

83 The first submission and the alternative submission were put on the assumption that s 425(1) contained the obligation on the Tribunal at a hearing conducted after the acceptance of an invitation to appear. That assumption appears to have been made either because s 422B precluded the operation of the common law rules of procedural fairness, or because if those rules continue to operate, they do not add anything to the obligation in s 425(1). That assumption appears to be correct.

84 Section 425 of the Act is in the following terms:

> ***425 Tribunal must invite applicant to appear***
>
> *(1) 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.*
>
> *(2) Subsection (1) does not apply if:*
> *(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or*
> *(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or*
> *(c) subsection 424C(1) or (2) applies to the applicant.*
>
> *(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.*

85 None of the exceptions in s 425(2) are relevant in either appeal and they may be put to one side. I will refer simply to the obligation in s 425(1).

86 The obligation on the Tribunal in s 425(1) is to give the applicant for review an invitation to appear before it. Clearly, it is envisaged by s 425(1) and the sections which immediately follow it that an oral hearing will be held if the applicant accepts the Tribunal's invitation.

87 As I have said, in the case of each of the appeals the Tribunal was constituted by a different member on the application for review being remitted to it by order of the Federal Magistrates Court. That was done presumably by the Principal Member of the Tribunal exercising his power in s 421 of the Act to give a written direction about the constitution of the Tribunal. The appeals were conducted on the basis that in the ordinary case on a remitter a different member from the member who first considered the application for review will be nominated.

88 No party submitted that there was a general principle that on a remitter the Tribunal was required to, in effect, start again and, for example, give the Secretary written notice of the making of the application for review: s 418. There is no such principle. Counsel for the appellant SZHKA sought to support his arguments by reference to certain statements by the High Court in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 as to the status of a Tribunal decision infected with jurisdictional error. However, to do so is to confuse a Tribunal decision with an invitation to appear under s 425(1) and a subsequent Tribunal hearing. At the same time it is self-evident that if the basis of a

successful application for judicial review and subsequent remitter to the Tribunal is a failure by the Tribunal to comply with s 425(1) then a second invitation to appear may need to be given.

89 As I have said, the appellant's submission in each appeal was that in every case of a remitter following a successful application for judicial review the Tribunal is required to give a second invitation to appear under s 425(1). The alternative submission in each appeal was that, in the particular circumstances of each case, the provisions of s 425(1) were re-engaged such that a second invitation had to be given. Some matters were put at a general level in relation to the first submission and then, in relation to the alternative submission, were said to arise on the particular facts of the case. For example, it was submitted that in many cases *the issues arising in relation to the decision under review*, as that phrase is used in s 425(1), will have changed between the time of the first invitation to appear and the time at which the Tribunal comes to consider the application for review on a remitter. That point was advanced in support of the appellants' first submission. Then, on the alternative submission, the appellants submitted that in fact the issues had changed between the two points in time and it was necessary to give a second invitation to appear in order to comply with s 425(1).

90 The appellants' first submission raises an issue of the proper construction of s 425(1) in the scheme of procedural fairness provided for in the Act. Leaving aside whether the section is engaged by the particular facts of a case (that is, the alternative submission), there is nothing in the terms of s 425(1) which states or even suggests that on a remitter a second invitation to appear must be given. In fact, the section places the obligation to give an invitation to appear on *the Tribunal* not on any particular member of the Tribunal. Nevertheless, the appellants contend that there are a number of features of the scheme of procedural fairness in the Act, and the way in which the Tribunal operates, which support the conclusion that it was the intention of Parliament that on a remitter a second invitation to appear must be given.

91 First, the appellants emphasised the undoubted importance of the invitation to appear to an applicant for review and an appearance before the Tribunal to the scheme of procedural fairness provided in the Act.

92 Secondly, the appellants submitted that it would be procedurally unfair for an applicant for review not to be given a second invitation to appear in circumstances in which there is a different Tribunal member making the decision and the fact that questions of credibility, sometimes influenced by demeanour, often play a crucial role in the outcome of an application for review. There is considerable force in this point. The appellants' point is partly answered by the fact that the Act does contemplate situations in which a Tribunal member who did not hear or see the applicant give evidence makes the decision on the application for review. Section 422 provides that that *may* occur if a member who started the review becomes unavailable and s 422A provides that it *may* occur if a member who started the review is removed in the interests of achieving the efficient conduct of the review in accordance with the objective set out in subs 420(1). It may also occur if the Tribunal appoints a person within s 428(1)(a) or (b) to take evidence on oath or affirmation for the purpose of a review. Subsections (4) and (5) of s 428 provide as follows:

> *(4) If a person (other than the Tribunal as constituted for the purpose of the review) exercises the power of the Tribunal to take evidence on oath or affirmation for the purpose of a review, the person must cause a written record of the evidence taken to be made and sent to the Tribunal.*
>
> *(5) If the Tribunal receives, under subsection (4), a record of evidence given by the applicant, the Tribunal, for the purposes of section 425, is taken to have given the applicant an opportunity to appear before it to give evidence.*

93 These provisions were discussed by the Full Court of this Court in *Liu v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 541. *Liu* concerned a Tribunal member who resigned after a hearing but before giving a decision on an application for review and another Tribunal member, without giving the applicant a second invitation to appear under s 425(1), deciding the application on the ground that the applicant was not a credible witness.

94 The Court said that the right given to an applicant by s 425(1) was an important substantive right, but not an absolute right. The Court said that s 422 did not by its express terms grant a right to a second invitation to appear (at 552 [43]) and that such a right did not emerge from "the context of the merits review system provided for by the Parliament in

relation to protection visa decisions because the important substantive right" is qualified by the discretion given to the Tribunal under s 428 …" (at 553 [47]).

95 Thirdly, the appellants submitted that as the Tribunal must make its decision having regard to the circumstances as they exist at the time of decision that is indicative of, or supports, a conclusion that Parliament intended that s 425(1) operate on a remitter by reason of a successful application for judicial review. It was said that circumstances may have changed between the first invitation to appear and the decision on the remitter. The fact that a Tribunal decision must be made having regard to the circumstances existing at the time of decision is well-established by authorities in this Court: *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288; *Minister for Immigration and Ethnic Affairs v Singh* (1997) 74 FCR 553. The proposition is also clearly established by authorities in the High Court: *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 at 354-355 [28] per Gleeson CJ, McHugh, Gummow and Hayne JJ and was stated specifically in the context of a remitter back to the Tribunal after a successful application for judicial review in *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at 526 [18] per Gleeson CJ; at 530-532 [36]-[42] per McHugh J; at 542 [77] per Gummow and Hayne JJ. There is considerable force in this point: after all, the invitation referred to in s 425(1) is one to appear before the Tribunal to give evidence and present arguments relating to *the issues arising in relation to the decision under review* and it is no doubt true that the issues may have changed, between the first invitation to appear and the decision on the remitter because the facts have changed, making the right to give evidence important, or because the issues may have been recast or reformulated as a result of the successful application for judicial review, making the right to present arguments important. At the same time none of these things may have happened.

96 Fourthly, the appellants referred to the fact that there will often be considerable delay between the first invitation to appear (and a hearing following the invitation) and the decision on the remitter. The appellants submitted that excessive delay without a rehearing can give rise to a breach of the rules of procedural fairness: *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470. That might mean that in a particular case the Tribunal, in order to overcome the problem caused by the delay, is required to give a second invitation to appear under s 425(1), but I do not think that it can

lead to the conclusion that it was the intention of Parliament that in every case of a remitter a second invitation must be given.

97 The appellants' arguments have considerable force and the point is not free from difficulty. However, I do not think that the arguments are of sufficient force to lead to the conclusion that, despite the absence of express words in the Act, Parliament must have intended that in every case of a remitter on a successful application for judicial review a second invitation to appear under s 425(1) must be given. It all depends on the circumstances. As I said earlier, one class of case in which a second invitation to appear must be given is where a failure to comply with s 425(1) forms the basis of the successful application for judicial review.

98 Before leaving the first submission, reference should be made to the decision of the Full Court of this Court in *SZEPZ* 159 FCR 291. This case is not directly on point, although the Court did consider a related issue. The issue was whether the Tribunal had complied with s 424A of the Act in circumstances in which the Tribunal had sent a letter under s 424A, its decision was subsequently set aside by consent on an application for judicial review and after the remitter the Tribunal made its decision without sending a second or further letter under s 424A to similar effect as the first letter. The Full Court said that there had been no failure to comply with s 424A and emphasised the fact that s 424A and other sections referred to *the Tribunal*. The decision provides some support for the conclusion I have reached.

99 I turn now to consider the alternative submission made by each of the appellants.

100 In response to the submission, the first respondent submitted that even if there was an *issue* within s 425(1) and that was not identified as such by the delegate in his or her decision, nor by the Tribunal prior, to or at, a hearing of the Tribunal, that circumstance did not re-engage s 425(1) if, at the time of the hearing of the Tribunal, s 425(1) had been complied with. In other words, s 425(1) did not have what he called an *ambulatory operation*. He submitted that the decision of the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 did not deal with such a situation because in that case the failure to comply with s 425(1) occurred at or prior to the hearing of the Tribunal. He submitted that s 425(1) had a "once and for all" operation, and the obligation

was not reactivated upon a new *issue* being identified after the hearing. In support of that submission the first respondent advanced the following matters:

1. The overall structure of Div 4 of Pt 7 of the Act reflected a sequential procedure in which a hearing normally followed the refinement of the issues. He submitted that in enacting Div 4, Parliament envisaged a "predominantly documentary process" of review, in which an oral hearing was "no more than one step" (*SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 350 [192] per Hayne J).

2. The decision in *SAAP* 228 CLR 294 means that the obligation to comply with s 424A continues to apply at, or after, a hearing. He submitted that the existence of a mandatory written process (that is, the process envisaged by s 424A) supported the conclusion that a further oral hearing was not required.

3. If an invitation to appear must be given each time a new issue emerges it may be very difficult to complete the process, particularly if an applicant for review wishes to delay the determination of his application for review. An analogy was drawn with the interpretation of s 424A rejected by the High Court in *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 and described by the Court as leading to a *circulus inextricabilis* (at 1196 [19]-[20]).

101 In my opinion these arguments must yield to the clear words of s 425(1) and the interpretation of the section by the High Court in *SZBEL* 228 CLR 152. An invitation to appear must be given to an applicant and, if accepted, he or she must be given the opportunity to give evidence and present arguments *relating to the issues arising in relation to the decision under review*.

102 In *SZBEL* 228 CLR 152 the Court was concerned with the common law rules of procedural fairness and their operation in a particular statutory context including s 425. Nevertheless, the Court placed considerable emphasis on the words "*issues arising in relation to the decision under review*" in s 425(1) and, in giving an example in support of its conclusions, said there would be both a failure to accord procedural fairness and non-compliance with s 425(1). The Court said (at 163-164 [36]-[37]):

> … *But unless the Tribunal tells the applicant something different, the applicant would be entitled to assume that the reasons given by the delegate for refusing to grant the application will identify the issues that arise in relation to that decision.*
>
> *That this is the consequence of the statutory scheme can be illustrated by taking a simple example. Suppose (as was the case here) the delegate concludes that the applicant for a protection visa is a national of a particular country (here, Iran). Absent any warning to the contrary from the Tribunal, there would be no issue in the Tribunal about nationality that could be described as an issue arising in relation to the decision under review. If the Tribunal invited the applicant to appear, said nothing about any possible doubt about the applicant's nationality, and then decided the review on the basis that the applicant was not a national of the country claimed, there would not have been compliance with s 425(1); the applicant would not have been accorded procedural fairness.*

103 An invitation to appear to give evidence and present arguments relating to the issues arising in relation to the decision under review is an essential part of the review conducted by the Tribunal and if an issue in relation to the decision under review emerges after the hearing conducted by the Tribunal then, in my opinion, a second invitation to appear must be given. I would add the following observations on the third argument advanced by the first respondent. The argument assumes that a broad meaning is to be given to the word *issues* in s 425(1) and that there is a far-reaching obligation on the Tribunal to advise the applicant for review of the issues. Those assumptions require examination. In order to succeed in showing that s 425(1) has not been complied with, an applicant for review must show that there is a matter which is an issue arising in relation to the decision under review and that he was not given the opportunity to appear before the Tribunal to give evidence and present arguments relating to that issue because it was not apparent to him that it was an issue and he was not warned by the Tribunal that it was or may be an issue. That is the nature of the obligation, although it must be accepted that questions of fact and degree will often be involved. Furthermore, there is a distinction between evidence relating to an issue and the issue itself and it seems to me that not every matter which might engage the obligation in s 424A involves a new issue or a further issue or a previously unidentified issue. In addition to these considerations, it must be remembered, as the High Court pointed out in *SZBEL* 228 CLR 152, that there may be many ways in which it will become apparent to an applicant for review that a particular matter is an issue. In *SZBEL* 228 CLR at 165-166 [47] the Court said (at 165 [47]):

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

104 The conclusions I have reached in relation to the first submission and the alternative submission are consistent with the views expressed by single Judges of this Court in *SZILQ v Minister for Immigration and Citizenship* (2007) 163 FCR 304 and *SBRF v Minister for Immigration and Citizenship* (2008) 101 ALD 559; [2008] FCA 712. Insofar as Cowdroy J was expressing a contrary conclusion in *SZHLM v Minister for Immigration and Citizenship* (2007) 98 ALD 567 at 574 [34]); [2007] FCA 1100, I would respectfully disagree with it.

105 I turn now to apply these principles to the facts in each appeal.

SZGOD

106 The first respondent accepts that there was an issue within s 425(1), which, on the material, was not apparent to the appellant prior to, or at the hearing of the Tribunal and which was important to the decision of the Tribunal on the remitter. It was not in fact one of the matters said by the appellant to be an issue (see [64]) although it is a related matter. The issue was whether the appellant was involved in the transport industry at all. The Tribunal on the remitter found that the appellant was not involved in the transport industry. That issue was a fundamental one in the sense that his claims of political and trade union activity were based on it.

107 The delegate's reasons for refusal contain nothing to indicate that he rejected the appellant's claim that he was involved in the transport industry. In fact they suggest that he accepted that claim. At the hearing of the Tribunal, although the first member challenged a

number of the appellant's claims he did not challenge the appellant's claim that he was involved in the transport industry.

108 It seems the finding of the first member was based, or largely based, on information in the appellant's visitor visa application which the Tribunal obtained shortly after the hearing. That information suggested that the appellant was a film director and not involved in the transport industry and although that was put to the appellant in a s 424A letter sent by the Tribunal after the hearing, a second invitation to appear was never given. In the circumstances, the first respondent was correct to concede that if his submission that s 425(1) had a once-and-for-all operation was not accepted, then there had been a failure to comply with s 425(1).

109 The appellant submitted there were other matters which support a conclusion that there was a failure to comply with s 425(1). I should address those matters. The matter I have just addressed deals with the information in the appellant's visitor visa application and therefore particulars (4) and (5) (see [64] above). For the purposes of the first matter I will treat the appellant's involvement in the transport industry as separate from his involvement in political and trade union activities. The extent of the appellant's involvement in political and trade union activities in India (particular (1)) and the significant differences and discrepancies in the appellant's accounts (particular (2)) were matters being considered by the Tribunal at the time of the hearing and it is plain from the first member's description of that hearing that that would have been apparent to the appellant. In addition, it seems that the fact that the first matter (particular (1)) was an issue would have been apparent from the delegate's reasons. Neither matter identified in particular (1) or (2) called for a second invitation to appear. Nor, in my opinion, did the matter in particular (3). At the hearing, the appellant told the first member that Mr Rajendran was a member of the Communist Party who had stood for election to a legislative body. The first member questioned the appellant about whether Mr Rajendran had wanted to kill the appellant. The Tribunal's conclusion on the remitter that the appellant's failure to explain why, in the circumstances, Mr Rajendran would want to kill him undermined his credibility is not an issue within s 425(1). Nor did the matter in particular (6) call for a second invitation to appear. The claim was made at the hearing. The appellant was asked about it. Ultimately, the particular claim was rejected. Those events do not give rise to a failure to comply with s 425(1).

110 In view of the fact that the appellant has succeeded in relation to the second ground of appeal, it is not necessary to deal with the third ground of appeal.

SZHKA

111 The appellant submits that there were two matters which required the Tribunal to issue a second invitation to appear under s 425(1) of the Act.

112 The first matter identified by the appellant is how the appellant obtained the funds he used to pay the bribes he claimed he had paid. In his response to the Tribunal's s 424A letter the appellant said that he had saved $US70,000 while in the United States. The second member said that he found his explanation implausible and that he did not accept it. If there is an issue within s 425(1) here it is not whether the appellant's explanation should be accepted but, rather, how the appellant financed the payment of the bribes he claimed he had paid. As the second member noted, at the hearing the first member asked the appellant how he had financed the payment of the bribes. The issue was raised with the appellant at the hearing and there was no obligation on the Tribunal to give a second invitation by reason of this matter. The fact that by reason of a letter sent under s 424A of the Act the appellant was given an opportunity to provide an explanation as to the source of the funds, a topic raised with him at the hearing of the Tribunal, does not mean that his explanation then became an issue within s 425(1).

113 The second matter identified by the appellant is the second member's reference to the appellant's use of Falun Gong *member* as opposed to Falun Gong *practitioner*. It is true that the appellant was not afforded an opportunity to give evidence and present arguments relating to this matter. If the matter constitutes an *issue arising in relation to the decision under review*, within the meaning of s 425(1) of the Act, then the Tribunal would have failed to comply with its obligations under that subsection. Whether a matter such as this constitutes an *issue* depends upon two requirements.

114 The first is that the matter play a part in the Tribunal member's decision on the application for review. Matters not playing any part cannot, in my view, be said to arise *in relation to the decision*.

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

116 Returning to the present facts, the first requirement is made out. In one sense, the second member's reference to it was no more than a reference in passing. However, it is in his reasons and I have reached the conclusion that I should proceed on the basis that it did play a part in his decision on the application for review. The second requirement is also made out because the Tribunal, in placing significance on the use by the appellant of Falun Gong *member* as distinct from Falun Gong *practitioner* raised a question which would not, on the material before the Court, have been apparent as an issue to the appellant. The nature of the matter and the decision of the High Court in *SZBEL* on the facts lead me to the conclusion that it was an issue arising in relation to the decision under review and that, therefore, there was a failure to comply with s 425 of the Act.

Conclusions

SZGOD

117 For the reasons I have given, the appeal must be allowed and the orders made by the Federal Magistrates Court on 10 September 2007 (other than that amending the name of the first respondent) set aside. In lieu of those orders there should be orders as follows:

1. A writ of certiorari issue quashing the decision of the Refugee Review Tribunal handed down on 19 October 2006 (RRT Case Number 060599267).

2. A writ of mandamus issue directed to the Refugee Review Tribunal requiring it to hear and determine the appellant's application for review according to law.

The first respondent must pay the costs of the appellant of the appeal and of the application before the Federal Magistrates Court (if any).

SZHKA

118 The Refugee Review Tribunal should be joined as a party to the appeal.

For the reasons I have given, the appeal must be allowed and the orders made by the Federal Magistrates Court on 27 March 2007 set aside. In lieu of those orders there should be orders as follows:

1. A writ of certiorari issue quashing the decision of the Refugee Review Tribunal handed down on 31 October 2006 (RRT Case Number 060739076); and

2. A writ of mandamus issue directed to the Refugee Review Tribunal requiring it to hear and determine the appellant's application for review according to law.

The first respondent must pay the costs of the appellant of the appeal and of the application before the Federal Magistrates Court.

I certify that the preceding eighty (80) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko.

Associate:

Dated: 1 August 2008

Appellant SZHKA

Counsel for the Appellant:	Mr R Nair
Counsel for the First Respondent:	Mr G Kennett
Solicitor for the First Respondent:	DLA Phillips Fox

Appellant SZGOD:

Counsel for the Appellant:	Mr J D Smith with Ms S Callan
Counsel for the First Respondent:	Mr G Kennett
Solicitor for the First Respondent	Australian Government Solicitor
Date of Hearing:	6 March 2008
Date of Judgment:	5 August 2008