FEDERAL COURT OF AUSTRALIA

VAF v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 123

MIGRATION – application for protection visa refused – Tribunal's understanding of the word 'persecution' – s 424A of *Migration Act 1958* – whether information was 'the reason or part of the reason' for affirming the decision under review – meaning of 'information' – identification of the 'reason' for decision – an interpretative task – discretionary ground to refuse relief

Migration Act 1958 (Cth), s 424A

Bax v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 75 ALD 34 cited
Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 379 cited
Minister for Immigration & Multicultural & Indigenous Affairs v Awan (2003) 75 ALD 386 cited
Minister for Immigration and Multicultural Affairs v Al Shamry (2001) 110 FCR 27 cited
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 cited
Paul v Minister for Immigration and Multicultural Affairs (2001) 113 FCR 396 applied
Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82 cited
Stead v State Government Insurance Commission (1986) 161 CLR 141 cited
Tin v Minister for Immigration and Multicultural Affairs [2000] FCA 1109 cited
VAAC v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 74 cited
Win v Minister for Immigration and Multicultural Affairs (2001) 105 FCR 212 cited
SAAY v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 393 cited
Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 cited
John v Rees at [1970] 1 Ch 345 – cited
Plaintiff S157/2002 v The Commonwealth of Australia (2003) 211 CLR 476 applied
NAHV of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 102 cited
NANF v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 292 cited
VEAJ v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 678 cited
Beaton-Wells, "Disclosure of Adverse Information to Applicants under the Migration Act" (2004) 11 AJ Admin L 61

VAF v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
V132 OF 2003

FINN, MERKEL & STONE JJ
12 MAY 2004
MELBOURNE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **V132 OF 2003**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT

BETWEEN:	**VAF** **APPELLANT**
AND:	**THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**FINN, MERKEL AND STONE JJ**
DATE OF ORDER:	**12 MAY 2004**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

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

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DATE:	**12 MAY 2004**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

FINN and STONE JJ:

1 The appellant, an unsuccessful applicant for a protection visa under the *Migration Act 1958* (Cth), challenges the primary judge's decision upholding that of the Refugee Review Tribunal on two grounds, both of which are alleged to demonstrate jurisdictional error on the Tribunal's part. The one is that the Tribunal erroneously interpreted the term "persecution" for the purposes of the 1951 Convention relating to the Status of Refugees. The other is that the Tribunal acted in breach of its obligations under s 424A of the *Migration Act*.

2 This matter has twice been before the Court as presently constituted. Prior to the first occasion the appellant notified the Court that he would not be appearing at the hearing and he had not filed any submissions in support of the appeal. His migration agent/solicitor had very recently filed a notice of ceasing to act. Rather than simply dismiss the appeal because of the appellant's absence, we proceeded with the hearing of the matter: cf O 52 r 38A(1)(d) of the Federal Court Rules.

3 To the extent that the appeal raised an issue in relation to s 424A of the *Migration Act*, we indicated to counsel for the respondent Minister that we were concerned with whether the primary judge had correctly applied the interpretation given to that provision by the Full Court in *Minister for Immigration and Multicultural Affairs v Al Shamry* (2001) 110 FCR 27.

Counsel for the Minister very fairly accepted that the possible operation of s 424A in circumstances such as the present was such that, absent an opponent, he could not properly oppose adjourning the matter so that legal representation for the appellant might be obtained. We have appreciated his assistance and candour in this matter.

4 At the resumed hearing Mr Gunst QC and Mr Krohn appeared for the appellant on a *pro bono* basis. We in turn express our appreciation for their preparedness so to participate in the matter. Written submissions were put on in support of the appeal though limited to the same two grounds originally raised and that are noted above.

5 By way of general background to the appeal we would note the following. The appellant is from Pakistan and claimed to have been active in the political affairs of that country. It is unnecessary for present purposes to outline the various circumstances and the events in which he claimed to have been involved which gave rise to his asserted well founded fear of persecution. As the primary judge noted:

> *"The tribunal rejected almost all of the applicant's assertions substantially because it was of the opinion "that the applicant has progressively embellished, enhanced and altered his claims over time to meet the circumstances as they have arisen".."*

Additionally the Tribunal did not accept the genuineness of an alleged police document (an "FIR") that the appellant claimed had been issued against him, that document, apparently, being a preliminary step before charges are laid.

The First Ground of Appeal

6 The passage in the Tribunal's reasons to which objection is taken on the basis that the Tribunal misunderstood the word "persecution" followed on (i) the Tribunal's rejection of the appellant's allegation that he had been arrested or detained and ill treated by the police or that he had gone on hunger strikes; and (ii) its finding that, by the time of his departure from Pakistan on his own passport, he was not of interest to the authorities. The impugned passage was in these terms:

> *"Even if the Tribunal were to accept that the applicant was detained for short periods on earlier occasions, as he had previously claimed, the Tribunal finds that this would not constitute a well-founded fear of persecution for a Convention reason for any alleged past periods of detention now or in the foreseeable future, as he was never charged with any offence and was able to leave Pakistan legally."*

7 The primary judge dealt with this passage as follows:

> *"If read in isolation this so called* 'cryptic observation' *might support the applicant's assertion that the tribunal misunderstood the meaning of persecution. The applicant argues that the tribunal is contending that, because the applicant had not been charged with an offence and had been allowed to leave Pakistan legally, the mistreatment to which he had otherwise been subjected could not establish a well founded fear of persecution for a Convention reason. Of course if that were the tribunal's view of the matter it would be untenable, being inconsistent both with the text of the Convention and with many authorities. However, when read in context the tribunal's* 'cryptic observation' *is really nothing more than an inelegant passing comment which is not intended to reflect the tribunal's understanding of the meaning of* 'refugee'. *In the first place the tribunal's explanation of that term shows that it properly understood what the applicant needed to establish to succeed on the review. In the second place the tribunal's reasons indicate that it regarded the applicant as a person with a* 'very modest political profile' *and for that reason there was no real chance that he would attract adverse attention on the basis of any actual or imputed political opinion. The tribunal said:*
>
> > 'It is 4 and a half years since the applicant left Pakistan. He has not been a union member for that period and he has been expelled from the PLF. The applicant gave evidence that the various union bodies of which he is a former member are still in existence, continue to hold elections of office bearers, and to attract and enrol members. For the above reasons the Tribunal finds that there is not a real chance that the applicant would attract the attention of the authorities on the basis of his past union membership.'
>
> *In this context one can see the tribunal's comment should not be taken as a statement of what it meant by the word* 'refugee'. *Finally, and this is really dispositive of the criticism, the tribunal's observation is not a matter which was taken into account in deciding the case against the applicant. In reality the tribunal is simply saying, I suppose by way of emphasis, that the applicant's case is so hopeless that even if all his claims were accepted he would not satisfy the relevant criterion."*

8 The appellant has sought again to argue that this passage was not merely an "inelegant passing comment". It demonstrated an erroneous understanding of the term "persecution": repeated detention and release without charge can give rise to a well-founded fear of persecution: *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 379 at 429 – 431. And its inclusion in the Tribunal's reasons leads to the proper inference, contrary to the primary judge's conclusion, that it was taken into account by the Tribunal in making its decision.

9 We do not consider that the Tribunal has erred. We agree with the primary judge's

treatment of the passage in question. Given the context of that passage, the more appropriate characterisation of the comment made was that it related to the question of whether the appellant had a well-founded fear at the times referred to and not with whether he had experienced persecution.

10 Likewise, we do not consider that his Honour erred in the view that the Tribunal's comment was not a matter which was taken into account in deciding the case against the appellant. Having previously found that it was not satisfied that the appellant had been arrested, etc, the Tribunal was engaging in a counterfactual inquiry which was unnecessary to its decision. The fact that the comment found its way into the reasons does not of itself lead necessarily to the inference that account was taken of that matter when the Tribunal arrived at its decision. As we have indicated, the structure of the reasons indicates to the contrary. While the provisions of s 430 of the Act (relating to the content of a Tribunal's record of its decision) may entitle "a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material": *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [69]; the contrary inference does not necessarily arise if a matter is mentioned in the s 430 statement. Mr Gunst conceded as much.

The s 424A ground

11 By way of background it needs to be noted that when the appellant left Pakistan and came to Australia it was for the purpose of attending a trade union conference in Melbourne.

12 The ground relied upon is that the Tribunal breached a statutory obligation when it took into account as one of the factors which undermined the appellant's claim of apprehended persecution, the facts that the appellant had not asked for help from "contacts" in Melbourne and that he had delayed making an application for a protection visa.

13 Section 424A of the *Migration Act* (insofar as presently relevant) provides:

> *"(1) Subject to subsection (3), the Tribunal must:*
>
> *(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and*
>
> *(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and*

(c) invite the applicant to comment on it.

…

(3) This section does not apply to information:

…

(b) that the applicant gave for the purpose of the application."

14 The relevant passage of the Tribunal's reasons is as follows:

> *"The applicant's attendance at the conference, and his meeting with the Trades and Labour Council provided him with contacts who could have been of assistance to him if he were fleeing Pakistan to escape persecution or death as claimed. He did not seek such assistance. The applicant arrived in Australia on a valid passport issued in his own name. Despite his claim to have fled Pakistan, he did not apply for a protection visa upon arrival in Australia, but did so only after he had attended the conference for which timely arrangements had been made, and only after his temporary business visa had expired. The Tribunal finds his behaviour of significance as it is not the behaviour of a person who fears persecution in his country of citizenship."*

15 The questions raised before his Honour, and again raised in this appeal are (i) whether the Tribunal breached s 424A(1) in not inviting the appellant to comment on the facts (ie "the information") referred to in the above quotation; and (ii) whether those facts fell within the exemption of s 424A(3)(b).

16 The primary judge held, as he felt obliged to in light of Full Court decisions of this Court, that:

(i) the facts in question were information for the purposes of s 424A of the Act: *Win v Minister for Immigration and Multicultural Affairs* (2002) 105 FCR 212 at 217; and

(ii) those facts were part of the information that had been provided to the Tribunal by the applicant: *Minister for Immigration and Multicultural Affairs v Al Shamry* (2001) 110 FCR 27.

17 As to the second of these matters, his Honour said in relation to the views expressed in *Al Shamry*:

> *"Uninstructed by the views of these judges I might have reached the opposite conclusion to avoid the anomalies which Merkel J identified. But I feel obliged to follow the considered views of the judges in* Al Shamry *notwithstanding some doubt as to their correctness: see* Bristol-Myers

Squibb Co v F H Fauldings & Co Ltd *(2000) 97 FCR 524, 570-574."*

18 In *Al Shamry*, Ryan, Merkel and Conti JJ expressed the considered view (though strictly dicta) that the term "application" in s 424A(3)(b) in its setting signifies the application for review to the *Tribunal* and not the application for a *protection visa*. The significance of this distinction is indicated in the following observations of Merkel J (at [40]):

> *"An applicant for a protection visa will have provided information relevant to the outcome of the application prior to applying for the review of a delegate's decision. Such information may, in some cases, have been provided prior to the application for a visa. The prescribed application form requires that the basis for the application be stated. Further, the information given may be supplemented by information provided subsequently to the Department or to the delegate of the Minister. An applicant may have no record of the information provided but, more importantly, may not be aware of its significance to the review ultimately to be conducted by the RRT. It is therefore understandable that the legislature would require that, in fairness, any adverse information provided prior to review, the significance of which the applicant may be unaware, be disclosed to the applicant to enable him or her to respond to it. That approach has particular importance in the context of the inquisitional and non-adversarial nature of proceedings before the RRT: see* Paramananthan v Minister for Immigration and Multicultural Affairs *(1998) 94 FCR 28 at 62-63.*
>
> *For the above reasons the construction the primary judge and I regard as correct gives effect to the beneficial purpose of s 424A of affording an applicant with the opportunity to respond to the gravamen or substance of any adverse information upon which the RRT proposes to act, the significance of which the applicant may be unaware. It is consistent with that purpose to take a narrow, rather than a broad, view of the exceptions in s 424A(3)."*

19 The distinction so emphasised by Merkel J seems not to have been adhered to in substance by the primary judge. It is not clear from the Tribunal's reasons at what stage (or stages) in the antecedent processes leading to the Tribunal's hearing and decision that the totality of the facts in question were supplied to the Minister or alternatively, to the Tribunal. This is not a matter to which the primary judge referred. He dealt with the s 424A(3)(b) question in the following way:

> *"The next matter is whether the "facts" were provided to the tribunal for the purposes of the application to review. I take the view that the application made to the tribunal is an application to review the decision of the delegate to refuse to grant the applicant a protection visa. It is an invitation to the tribunal to consider afresh (so called merits review) the visa application, including all the information set out in the application, any documents attached to the application and, in my view, further information provided to the Minister (being information which the delegate was required to consider pursuant to s 54) plus any additional material which the applicant places before the tribunal. On this view the exemption would only apply to*

> *information provided by an applicant in limited circumstance, such as occurred in* Al Shamry *where the information was given at a time when the applicant had not made, and perhaps was not even contemplating making, an application for a visa. If this be correct then the "facts" upon which the tribunal relied were part of the information that had been provided to it by the applicant. It therefore falls within the exemption in s 424A(3)(b).*

20 This, with respect, is a misapplication of *Al Shamry*. Whatever else may be said of all the information supplied by an applicant *prior to* an application for review by the Tribunal, it cannot be said that that applicant gave that information "for *the purpose of* the application" to the Tribunal.

21 If the views of s 424A(3)(b) adopted in *Al Shamry* are correct then it must be concluded that his Honour did not address correctly the question raised by the appellant. That was: "was the information referred to by the Tribunal supplied by the applicant for the purpose of the application to the Tribunal?"

22 For present purposes and for the reasons given below, it is unnecessary for us to consider whether the views expressed in *Al Shamry* are correct.

23 Section 424A(1)(a) has two presently relevant requirements. First the Tribunal must possess "information". Secondly, the Tribunal must consider that that information "would be the reason, or part of the reason" for affirming the decision under review.

24 As to the first of these, there is now a considerable body of case law concerned with the compass of the term "information" in its s 424A(1) setting. The following propositions emerge from it:

(i) the purpose of s 424A is to provide in part a statutory procedural analogue to the common law of procedural fairness: *Paul v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 396 at [104]. However the obligation imposed is not coextensive with that which might be imposed by the common law to avoid practical injustice: *VAAC v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 74;

(ii) the word "information" in s 424A(1) has the same meaning as in s 424: *Win v Minister for Immigration and Multicultural Affairs* (2001) 105 FCR 212 at [20]; and in this setting it refers to knowledge of relevant facts or circumstances communicated

to or received by the Tribunal: *Tin v Minister for Immigration and Multicultural Affairs* [2000] FCA 1109 at [3]; irrespective of whether it is reliable or has a sound factual basis: *Win*, at [19] – [22]; and

(iii) the word does not encompass the Tribunal's subjective appraisals, thought processes or determinations: *Tin* at [54]; *Paul* at [95]; *Singh v Minister for Immigration and Multicultural Affairs* [2001] FCA 1679 at [25]; appr [2002] FCAFC 120; nor does it extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the Tribunal in weighing up the evidence by reference to those gaps, etc: *WAGP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 124 FCR 276 at [26] – [29].

25 In the present matter, the Tribunal made reference to two factual matters each of which involved an omission on the part of the appellant to take a particular course of action. Those matters were that (i) he did not seek assistance from contacts either at the conference he attended or at his meeting with the Trades and Labour Council; and (ii) he did not apply for a protection visa until after he had attended the conference and only when his temporary business visa had expired. The Tribunal found "this behaviour of significance", its significance being that it was "not the behaviour of a person who fears persecution in his country of citizenship".

26 The matters seem obviously to have been referred to because of their perceived relevance to the ultimate question before the Tribunal, hence the significance it attributed to the appellant's "behaviour". In our view, the knowledge of that behaviour which the Tribunal derived from what had been provided to it, or done (in the case of the visa application) by, the appellant was properly characterised as information. It was knowledge acquired about circumstances having a particular factual character (i.e. they were circumstances involving inaction on the appellant's part).

27 In *Paul's* case Allsop J observed (Heerey J agreeing) that (at [95]):

> *"… I agree with the distinction drawn by Sackville J in* Tin v Minister for Immigration and Multicultural Affairs … *that the information of which particulars must be provided is information or knowledge that has come to or been gained by the Tribunal and is not the subjective appraisal or thought process of the Tribunal … However, the distinction can become very fine. If the subjective thought processes of the Tribunal are as they are because of the perceived importance of some piece of knowledge, those thought processes may merely reveal the relevance (for the purposes of s 424A(1)(b)) of*

information (for s 424A(1)(a)), requiring the Tribunal to give particulars of that information and to explain its relevance."

28 In the present case the Tribunal's subjective thought processes explain both why it isolated and referred to the evidence concerning the appellant's behaviour and why it attributed to that evidence the significance it did. It was perceived to be relevant to the decision it had to make. Those thought processes, though, did not rob the Tribunal's knowledge of the appellant's behaviour of its character as "information". Rather, as Allsop J suggested in the above passage, those processes indicated why the information was considered relevant.

29 This conclusion brings into focus the second of the s 424A(1) requirements: "Was the information **the reason** *or* **a part of the reason** for its decision?" We cast the matter in this fashion because we agree with the majority view in *Paul's* case that, though the subsection addresses the matter prospectively (i.e. "the Tribunal considers would be the reason etc"), the question of compliance with s 424A(1)(a) is to be judged retrospectively in light of the Tribunal's actual decision: see *Paul* at [94]; and cf Beaton-Wells, "Disclosure of Adverse Information to Applicants under the Migration Act 1958" (2004) 11(2) AJ Admin L 61 at 64 – 65.

30 The information concerning the appellant's behaviour clearly was not "the reason" for the Tribunal's decision. But was it "a part of the reason"? As we have indicated, the Tribunal considered it to have some relevance to the determination to be made. And the Tribunal's treatment of that information (i.e. the "significance" attributed to it) equally had a place in its reasoning process. However, it is not necessarily the case that for either or both of these reasons, the circumstances attract the obligation of s 424A(1)(a). The subsection itself requires identification of **the reason** for affirming the decision under review.

31 The ultimate "reason" was that the Tribunal was not satisfied that the appellant was a person to whom Australia has protection obligations. However, as Allsop J indicated in *Paul* (at [99]), there needs to be "some unbundling" of that reason for s 424A purposes and that (at [100]):

"[i]n any given circumstance it may not be straightforward to identify from an expressed reasoning process whether information was the reason or a part of the reason for affirmation."

32 There were divided views in *Paul's* case as to whether the "reason" for s 424A(1) purposes was to be determined by reference to the requirements of s 430 of the Act which stipulates what is to be contained in a Tribunal's written reasons. The majority rejected that the two sections were so tied, while acknowledging that assistance in s 424A cases may be derived from s 430. As we are not satisfied that this view is clearly wrong we intend to follow it.

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

34 In this matter the Tribunal's "Findings and Reasons" extended over 22 pages and dealt in detail with a complex of matters and events relied upon by the appellant. Its reasoning can be distilled to the following propositions (which for the most part were conclusions reached after detailed consideration of the relevant evidence):

(i) the appellant progressively embellished, enhanced and altered his claims over time to meet the circumstances as they had arisen;

(ii) his evidence contained contradictions and inconsistencies;

(iii) the Tribunal was not satisfied that he was ever arrested or detained for brief periods, ill-treated by the police, or that he was ever on hunger strikes;

(iv) he gave inconsistent evidence as to why and when he applied to go to the union conference in Australia, these inconsistencies creating further inconsistencies with some of his claims.

To interpolate, it was at this point in the Tribunal's reasoning process that it made the reference to the appellant's conduct in Australia which is the subject of the present ground of appeal.

(v) He was of no interest to the authorities when he obtained his passport and left the country;

(vi) it was not accepted that an FIR (a police document that was preliminary to the laying of charges) had been issued against him or that the FIR documents he produced were genuine;

(vii) the written evidence of a witness he put forward was contrived and tailored to suit the appellant's case and that person's evidence otherwise contained numerous inconsistencies;

(viii) it was not accepted that he made arrangements to come to Australia as a result of political difficulties or a threat to his life;

(ix) he had a very modest political profile;

(x) he was dismissed from the public service because he failed to return to his employment, and not because of his political opinion or trade union membership; and

(xi) there was no evidence that he would face a real chance of persecution on the basis of political opinion actual or imputed if he were to return to Pakistan now or into the future.

35 By way of recapitulation the Tribunal concluded:

> *"**Given the implausibility of much of the applicant's evidence, the inconsistencies, and the preparedness of the applicant to vary his evidence to suit the circumstances as they arose, the Tribunal finds for these and all the above reasons that the applicant is not credible**. The Tribunal was unable to find that the applicant had a political profile as PML member as claimed by him and thus had attracted the amount of adverse attention as claimed to have been associated with that alleged profile. The Tribunal also finds that the applicant does not have an imputed political profile such as would attract adverse attention from the authorities or political opponents.*
>
> *The Tribunal refers to its earlier findings. The Tribunal does not accept that the FIR was issued as a result of a demonstration, it does not accept that the FIR is genuine, it does not accept that the applicant was targeted as a result of exposing corruption, it does not accept that he was dismissed because of his political beliefs or membership of a particular social group, and it accepts that the applicant had only a very minor political involvement in the PML.*

> *In view of the aforementioned information and the particular circumstances of this case, the Tribunal finds there is no prospect of the applicant being persecuted due to his support of the PML and his former union membership activities.*
>
> *The Tribunal is not satisfied on the basis of the evidence before it, that the applicant would face a real chance of persecution for a Convention reason now or in reasonably foreseeable future if he were to return to Pakistan."* Emphasis added.

36 The emphasised statement in the above quotation – and in particular the comment "for these reasons and all the above reasons" – might seem to suggest that it was for cumulative and interrelated reasons of undifferentiated importance that the appellant was found not to be credible so that, accordingly, the impugned passage is to be taken for s 424A purposes to be an integral part of the reason for affirming the decision under review. However, when one looks to the language and structure of the Tribunal's reasons, such a conclusion does not so easily commend itself.

37 The Tribunal has adopted a particular linguistic contrivance throughout its reasons when making findings adverse to the appellant – a contrivance the intent of which on occasion is clear while on others it borders on the mysterious. On no less than eleven occasions the formula "for all the above reasons" is so deployed (Reasons pp 30, 31 (three times), 33, 34, 35 (twice), 39 (twice), 42); the formula "for the above reasons" is used four times (Reasons pp 36, 39 (twice), 40); and "for these reasons" and "for all the same reasons" are each used once (Reasons pp 27 and 31). Simply by way of illustration we refer to the following passage at p 31 of the Reasons:

> *"The Tribunal finds that the applicant has varied his claims over time regarding the alleged incidents of 8 February 1996. There is no evidence before the Tribunal (apart from documents which the Tribunal has found to be fraudulent) on which it can rely and on which it can be satisfied that the demonstration in early February 1996 as claimed took place and Tribunal so finds. The Tribunal finds also that it follows* ***for all the above reasons*** *that the applicant has not been declared to be an absconder, and that he does not fear persecution as alleged by him from the police or his alleged political opponents on the basis that he has been declared an absconder. Further,* ***for all the above reasons****, the Tribunal does not accept the applicant's claim that he was targeted by important former political figures of the PPP in relation to the lodgement of the alleged FIR.* ***The Tribunal finds that the applicant is not credible for all the above reasons****. In summary, the Tribunal finds that the applicant does not have a well-founded fear of persecution on the above bases.*

38 While the "for all the above reasons" formula might suggest that all the preceding findings and reasoning are being incorporated progressively into the various conclusions reached – as for example, in the last two sentence of the paragraph quoted above – the word "all" as used does not seem to have such an ambulatory quality. In our view the reasons are segmented with related subject matter dealt with in segments of greater or lesser length. The "all" in the quoted paragraph, for example, is confined in our view to a sequence of matters (beginning at p 25 of the Reasons) relating to the FIR which it was claimed was issued against the appellant as a result of an alleged demonstration on 8 February 1996. That "all" does not reach back to even earlier findings including that relating to his conduct in Australia.

39 The Tribunal's reasons are replete with individual and segment grouped adverse credibility findings – findings either expressly so made (as in the paragraph quoted above) or else implicit in the rejection of a particular claim or group of claims made by the appellant. Given the individual adverse credibility findings, each having its own context and explanation, we are unable to regard the statement in the concluding paragraph of the reasons referred to earlier as being anything other than a compendious reiterative description of the various individual findings already made. We do not consider it to be **the** credibility finding of the Tribunal based on all of the matters that preceded it. Equally we do not consider that the Tribunal's reasons, fairly read, demonstrate a process of cumulative and interdependent reasoning leading to an ultimate adverse conclusion. The mantra-like reiteration of the "for all the above reasons" or of one of its variants neither requires or justifies such a conclusion.

40 Because we take this view it becomes necessary to determine whether the impugned passage was part of the reason for the Tribunal's decision.

41 Considered in the context of the Tribunal's reasoning process and having regard to the aggregate of findings made that rejected both that the appellant had been persecuted for a Convention reason and that his situation was such as to give rise to a well founded fear of persecution, reference to the information as to his behaviour in Australia can only be categorised as being relatively minor and unimportant in the scheme of things. It was not so integral to the reasoning process rejecting the appellant's claim as to require as a matter of fairness that the appellant be told that information (cf s 424A(1)(a)) and why it was relevant to the review (cf s 424A(1)(b)).

42 The Tribunal explicitly recognised it had s 424A obligations, giving in its reasons an

instance where information was in consequence provided to the appellant. Given this, and given the care with which it put important issues to the appellant (for example in relation to the FIR), we consider that the Tribunal itself has given some indication of the relative importance of the information relating to his behaviour. It did not reach the s 424A(1)(a) threshold.

43 The reason the appellant's application was rejected related to the Tribunal's non-acceptance of what the appellant alleged occurred in Pakistan. It did not relate to his conduct in Australia. The significance of the Australian behaviour such as it was was that it was consistent in its own way with, and thus confirmatory of, a conclusion taken for other reasons. It was not, for s 424A purposes, a part of the reason for that conclusion.

44 If we are incorrect in this conclusion, if there has in fact been a non-compliance with s 424A(1) and one moreover which gave rise to jurisdictional error: *Minister for Immigration & Multicultural & Indigenous Affairs v Awan* (2003) 75 ALD 386 at [101]; we would nonetheless refuse relief on discretionary grounds.

45 We acknowledge that (i) it is only where an affirmative conclusion is reached that compliance with s 424A(1) "could make no difference to the result already reached": *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145; that relief will be withheld: *Bax v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 75 ALD 34 at [18]; and (ii) it will be a rare case in which a court will be convinced to adopt such a course: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [13].

46 The present we consider to be such a case. In our view, whatever explanations the appellant may have been able to advance to explain his omission to act as the Tribunal indicated it would have been expected, those explanations about his conduct in Australia could not possibly have had any bearing on the Tribunal's evaluation of the evolution of his evidence (ie "embellished", "enhanced" and "altered") or of the particular claims he made concerning his activities and the events and conditions in Pakistan. These latter, as we have indicated, were the subjects of detailed consideration and of discrete findings. Explanation of his perceived omissions in Australia could not possibly have made a difference. This particular non-compliance with s 424A(1) was not the thread that could remotely have caused the particular result reached to unravel.

Conclusion

47 We would dismiss the appeal with costs.

I certify that the preceding forty-seven (47) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Finn and Stone.

Associate:

Dated: 10 May 2004

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **V 132 OF 2003**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT

BETWEEN:	**VAF** **APPELLANT**
AND:	**THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**FINN, MERKEL AND STONE JJ**
DATE:	**12 MAY 2004**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

MERKEL J:

48 I have had the opportunity of reading the reasons for judgment of Finn and Stone JJ and gratefully adopt their Honours' outline of the facts and issues raised by the present appeal. I agree, for the reasons their Honours have given, that the first ground of appeal must be rejected. I also agree, for the reasons their Honours have given, that the "behaviour" of the appellant after his arrival in Australia, which is outlined in [25] of their Honours' reasons, is to be characterised as "information" for the purposes of s 424A(1)(a) of the *Migration Act 1958* (Cth) ("the Act") and that the primary judge misapplied the views expressed in *Minister for Immigration and Multicultural Affairs v Al Shamry* (2001) 110 FCR 27 ("*Al Shamry*") concerning the operation of s 424A(3) of the Act.

49 The view expressed in *Al Shamry* at 34 ([17]-[18]) that the word "applicant" in s 424A means "applicant for review by the Tribunal of a Ministerial decision" and that the word "application" means "the proceeding before the Tribunal" has been cited with approval (see for example *SAAY v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 393 at [33]). As I am not satisfied that that view is clearly wrong, I propose to apply it in the present appeal. I have, however, arrived at a different conclusion to that reached by their Honours as to the operation of s 424A(1) and I will endeavour to briefly

state my reasons for the conclusion at which I have arrived.

50 The critical issue on the appeal is whether the information concerning the appellant's behaviour after his arrival in Australia was considered by the Refugee Review Tribunal ("the Tribunal") to be a "part of the reason" for its decision to affirm the delegate's decision to refuse to grant the appellant a protection visa. As has been pointed out by Finn and Stone JJ at [29] of their Honours' reasons, although the issue, which is to be viewed prospectively, is whether the Tribunal considered that the information in question would be the reason or a part of the reason for its decision, the question of compliance is to be judged retrospectively in light of the Tribunal's actual decision. Plainly, the determination of that issue requires careful consideration of the Tribunal's statement of its reasons for the decision it made.

51 The immediate or ultimate reason for the Tribunal's decision was that it was not satisfied that the appellant was a person to whom Australia owes protection obligations or, put another way, it was not satisfied that the appellant had a well-founded fear of persecution for a Convention reason: see *Paul v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 396 ("*Paul*") at 428 [97]-[98] per Allsop J (with whom Heerey J agreed). However, the reason for that conclusion was, in turn, based on particular reasons. As Allsop J stated at 429 [99]:

> *"Section 424A is intended to be directed to information being the reason or a part of the reason for that conclusion."*

52 His Honour observed (at 428-429, [99]-[100]) that, in order to ascertain the reason or part of the reason for the decision, "some unbundling of the immediate reason for the affirmation is required" and that "[i]n any given circumstance it may not be straightforward to identify from an expressed reasoning process whether information was the reason or a part of the reason for affirmation". Allsop J (at 429 [104]) construed s 424A in the light of its purpose of "ensuring that the claimant is fairly informed of information adverse to his or her case (in the manner described by the section) so that investigation may be made, and steps may be taken, somehow, if possible, to meet it."

53 In *Al Shamry* it was accepted that information that was one of the reasons for rejecting an applicant's credibility can be part of the reason for the decision to affirm the delegate's decision. In *Paul* Allsop J also accepted that the reasons underlying a credibility finding may

constitute part of the reason for such a decision. His Honour stated (at 431 [114]) that:

> *"…one needs to see from the decision what was the reason or a part of the reason for affirmation and, in the light of the reasoning process which in fact drew the Tribunal to that conclusion, assess what, in fairness, the claimant… needed to be appraised of in order that he or she could deal with issues that were of a relevance to the review as determined by the phrase 'would be the reason or a part of the reason'."* [Emphasis in the original]

and at 432 [116]:

> *"The question as to whether information would be the reason or a part of the reason for affirmation is ultimately decided, in my view, by whether it can be characterised as sufficiently important to the reasoning process in the rejection of the appellant's claims, for fairness to warrant that the applicant be told if it so that he or she can understand and be able to meet the integers or elements that make up the Tribunal's reasons or conclusion thus far reached (hence 'would') for finding adversely to the applicant."*

54 His Honour, by taking the approach set out above, eschewed a narrow view of what would constitute the reason or part of the reason for a decision to affirm the decision of the delegate. His Honour's observations may provide guidance for assessing whether particular information was part of the reason for the Tribunal's decision where, as was the case in *Paul*, it may not be straightforward to identify from the reasons themselves whether the information in question was part of the reason for the Tribunal's decision.

55 However, his Honour should not be regarded as having intended to lay down an exhaustive test for the circumstances in which s 424A is to apply. If his Honour's observations at 432 ([116]) were said to lay down such a test, that test would become a substitute for the words the legislature has used in the section itself. Thus in a case, of which *Al Shamry* is an example, where it is clear on the face of the reasons expressed by the Tribunal that the information in question was a part of the reason for the decision, Allsop J's observations cannot be employed to arrive at a different conclusion because to do so would be to impermissibly import into s 424A an additional criterion of "sufficient importance". On the same basis it would be impermissible to impose an additional criterion that the information must be an "integral" or "essential" reason for the decision in order for s 424A to apply.

56 As explained above, the ultimate question for the Tribunal in the present matter was whether it was satisfied that Australia owes protection obligations to the appellant. That question required consideration of whether the appellant has a fear of persecution for a

Convention reason *and* whether that fear is well-founded. As was pointed out by Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 575, the determination of the latter question usually requires speculation about what would happen to the applicant in the future, based largely on what has happened in the past:

> *"Determining whether there is a real chance that something will occur requires an estimation of the likelihood that one or more events will give rise to the occurrence of that thing. In many, if not most cases, determining what is likely to occur in the future will require findings as to what has occurred in the past because what has occurred in the past is likely to be the most reliable guide as to what will happen in the future. It is therefore ordinarily an integral part of the process of making a determination concerning the chance of something occurring in the future that conclusions are formed concerning past events."*

57 Whether the Tribunal accepted the appellant's version of the past events on which his fear of persecution is based was critical to the outcome of his claim. In the present case the appellant's account of past events was not believed, and as a consequence the Tribunal concluded that the appellant does not have a well-founded fear of persecution. The adverse finding on credibility was the primary reason for the Tribunal's affirmation of the delegate's decision.

58 It must follow that the question arising on the present appeal is whether the information concerning the appellant's behaviour after his arrival in Australia was stated by the Tribunal to be *a* reason for the adverse general finding it made against him in relation to his credit. If the Tribunal did make such a statement it would follow that that information was considered by the Tribunal to be part of the reason for its decision. In such circumstances there would be no role for questioning whether the information was:

- a more, or a less, significant part of the reason for its decision;
- an integral or essential part of the reason for the decision; or
- "sufficiently important" to the reasoning process to warrant that s 424A apply.

59 As I later explain, those questions might be relevant to the exercise of the Court's discretion to decline to grant relief if a breach of s 424A has occurred.

60 There is an additional difficulty with the Court, in ascertaining whether information is a part of the reason for a decision, engaging in an evaluation of the relative importance of the information to the reasoning process. Information that has been stated to be part of the reason for the decision might appear to be only a minor part of the reasoning, but had it been put to the applicant that information might have elicited a response which may have had an impact on the Tribunal's decision. Thus, there is an inherent problem in assessing the importance of the information in question without having the response the applicant would have given to it had he or she been apprised of the information and of its significance. As was observed by Megarry J in *John v Rees* at [1970] 1 Ch 345 at 402 "the path of the law is strewn with examples … of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

61 The approach set out above gives effect to the purpose of s 424A, which was stated in *Al Shamry* at 40 [39] to reflect a fundamental common law principle of natural justice (albeit in a restricted form) namely, "that a person whose interests are likely to be affected by an exercise of power be given an opportunity to deal with relevant matters adverse to his or her interests that the repository of the power proposes to take into account in deciding upon its exercise."

62 As has been pointed out by Finn and Stone JJ at [34] the Tribunal's "Findings and Reasons" extend over 22 pages and deal in detail with the numerous matters and events relied upon by the appellant. Early in its "Findings and Reasons" the Tribunal referred to the appellant's conduct in not asking for help from "contacts" in Melbourne and in delaying making an application for a protection visa. The Tribunal considered that this was not the behaviour of a person who fears persecution in his country of nationality. In that regard it stated:

> *"The [appellant's] attendance at the conference, and his meeting with the Trades and Labour Council provided him with contacts who could have been of assistance to him if he were fleeing Pakistan to escape persecution or death as claimed. He did not seek such assistance. The [appellant] arrived in Australia on a valid passport issued in his own name. Despite his claim to have fled Pakistan, he did not apply for a protection visa upon arrival in Australia, but did so only after he had attended the conference for which timely arrangements had been made, and only after his temporary business visa had expired. The Tribunal finds this behaviour of significance as it is not the behaviour of a person who fears persecution in his country of citizenship."*

63 The Tribunal identified the factors and information that led it to reject the appellant's account of events. It made it clear that its credit finding against the appellant was arrived at on the basis of *all* of the matters stated to have been relied upon by it in reaching that finding. For example, the Tribunal stated:

> *"The Tribunal finds that the [appellant] is not credible for all the above reasons. In summary, the Tribunal finds that the does not have a well-founded fear of persecution on the above bases."* (p 31)
>
> *"For all the above reasons the Tribunal does not accept that the [appellant] made arrangements to come to Australia as a result of political difficulties or a threat to his life."* (p 35)
>
> *"Given the implausibility of much of the [appellant's] evidence, the inconsistencies, and the preparedness of the [appellant] to vary his evidence to suit the circumstances as they arose, the Tribunal finds for these and all the above reasons that the [appellant] is not credible."* (p 42)
>
> *"Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol"* (p 42)

64 In each of the above passages, one of the "reasons" referred to was the appellant's behaviour after entering Australia, which it stated was "significant". Plainly, that behaviour bore directly upon the subjective aspect of whether the appellant had a well-founded fear of persecution. Further, the behaviour, together with all of the other factors and information relied upon by the Tribunal, led it to reject the appellant's credit and hence his claim to have a well-founded fear of persecution.

65 The above passages from the Tribunal's decision, when coupled with the statement by the Tribunal that it found the appellant's post-arrival behaviour "of significance as it is not the behaviour of a person who fears persecution in his country of citizenship", has led me to conclude that the Tribunal considered that that behaviour was part of the reason for its decision. That is not a surprising outcome as the credit findings identified in the above passages are general findings as to credit and it appears that, in making those findings, the Tribunal intended to rely cumulatively upon *all* of the particular credit findings it made that were adverse to the appellant's credit. Accordingly, the appellant's post-arrival behaviour was a part of the reason for the Tribunal's decision and was information that was required to be disclosed, but was not disclosed, to the appellant in accordance with s 424A(1).

66 It then falls to be determined whether the breach of s 424A(1) gave rise to a jurisdictional error. If so, the Tribunal's decision will not be a privative clause decision and review of it is not prevented by s 474 of the Act: *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476. The cases demonstrate that not every breach of s 424A will result in a jurisdictional error and therefore invalidity of the decision such that s 474 does not apply to it. For example, in cases where the substance of the information was put to an applicant by the Tribunal, but not in the form mandated by s 424A(2), it has been held that no jurisdictional error occurred: see *NAHV of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 102; *NANF v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 292. However, in the present case, the breach of s 424A does not relate to the form in which the information in question was put to the appellant. Rather, the breach occurred because the information was not put to the appellant at all.

67 In *Minister for Immigration and Multicultural and Indigenous Affairs v Awan* ("*Awan*") (2003) 75 ALD 386 I considered the consequences of a failure by the Migration Review Tribunal to comply with s 359A(1) of the Act, which imposes requirements equivalent to those imposed on the Tribunal under s 424A. At 409 ([101]) I stated:

> *"As explained above, s359A(1) enacts an important aspect of the rules of natural justice, albeit in a somewhat more restricted form. For example, the rules of natural justice require disclosure of adverse information that* could, *rather than* would, *be prejudicial: see* Kanda v Government of the Federation of Malaya *[1962] AC 322 at 337 and* Kioa v West *(1985) 159 CLR 550 at 603, 629, 634; 62 ALR 321 at 361, 380 and 384. The observations to which I have referred in* Aala, Miah *and* Plaintiff S157/2002*; the more restricted form of s 359A(1); its mandatory nature and its central importance in ensuring a* fair *review by the tribunal; afford strong reasons for not construing s 474 as manifesting a legislative intent that a decision made in contravention of the requirements of s359A(1) is validated by s 474. The above matters have led me to conclude that s 474 does not manifest a legislative intent that a decision made without compliance with s359A(1), irrespective of how unfair that may have been, is nonetheless a valid decision."* [Emphasis in the original]

68 Marshall J (at 399 ([61])) agreed with the above reasoning. See also *VEAJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 678 at [46] – [47].

69 For the above reasons the Tribunal's failure to comply with s 424A(1) in the present case constituted a jurisdictional error resulting in the invalidity of the decision with the consequence that it is not a privative clause decision and may be reviewed by the Court.

70 There remains only the question of whether the Court should, as a matter of discretion, refuse relief. In *Awan* (at 410 [106]) I discussed the principles which govern the exercise of the discretion:

> *"Generally, relief for a failure to comply with a requirement of procedural fairness is withheld only where the court concludes that compliance with the requirement 'could have made no difference': see* Stead v State Government Insurance Commission *(1986) 161 CLR 141 at 145; 67 ALR 21 at 23-4. As was noted in* Bax v Minister for Immigration and Multicultural and Indigenous Affairs *[2003] FCAFC 55; BC200301216 at [18] such an outcome will be a rarity and it is no easy task to convince a court to adopt it. While the above observations were made in relation to refusal of relief where there has been a failure to comply with the common law requirements in respect of procedural fairness I see no reason for not applying them to the failure to comply with s 359A(1) that has occurred in the present case."*

71 As explained above, there were many factors which, cumulatively, led the Tribunal to make an adverse finding in relation to the appellant's credit. Although the information in question may be viewed as one of the less significant of those factors the Tribunal did not itself state which factors were more or less significant in persuading it to reject the appellant's credibility. Thus, as in *Awan* and *Al Shamry*, it cannot be said that, had the information in question been provided to the appellant and had the appellant thereby been afforded an opportunity to provide a response to it, it "could have made no difference" to the outcome of the case before the Tribunal.

72 Accordingly, the appeal should be allowed with costs, the decision of the Tribunal should be set aside and the matter remitted to a differently constituted Tribunal.

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

Associate:

Dated: 10 May 2004

Counsel for the Appellant: C Gunst QC with
A Krohn

Counsel for the Respondent:	C Horan
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	11 March 2004
Date of Judgment:	12 May 2004