FEDERAL COURT OF AUSTRALIA

SZKCQ v Minister for Immigration and Citizenship [2008] FCAFC 119

MIGRATION – whether failure to comply with section 424 gives rise to jurisdictional error – the obligation to give a written invitation to a person to provide additional information is mandatory – jurisdictional error established – whether failure to provide 'information' involved a breach of section 424A – 'information' relevant to the review by the RRT which might be used to decide matters adversely to the appellant – breach of section 424A(1)(b) – jurisdictional error established – appeal upheld.

PRACTICE AND PROCEDURE – judicial comity – an earlier decision of the Full Court on similar issues should be followed unless 'plainly wrong' – decision in *SZKTI v Minister for Immigration and Citizenship* not 'plainly wrong' but correct – decision followed.

Migration Act 1958 (Cth) s 56, s 58, s 59(2), s 422B, s 423, s 424, s 424A, s 424B, s 424C, s 425, s 427, s 430, s 430B(4), s 441A
Migration Legislation Amendment Bill (No 1) 1998
Migration Regulations 1994 reg. 4.35(3)

Bahonko v Sterjov (2007) 163 FCR 318
BHP Billiton Iron Ore Pty Ltd v National Competition Council (2007) 162 FCR 234
Bolton, Re; Ex Parte Beane (1987) 162 CLR 514
Cooper v Commissioner of Taxation (2004) 139 FCR 205
Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah (2001) 206 CLR 57
Minister for Immigration and Multicultural and Indigenous Affairs v SZANS (2005) 141 FCR 586
NBKS v Minister for Immigration and Multicultural Affairs (2006) 156 FCR 205
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294
SZBYR v Minister for Immigration and Citizenship (2007) 81 ALJR 1190
SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 150 FCR 214
SZKTI v Minister for Immigration and Citizenship [2008] FCAFC 83
VAF v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 206 ALR 471
WAGP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 124 FCR 276
Win v Minister for Immigration and Multicultural Affairs (2001) 105 FCR 212
Win v Minister for Immigration and Multicultural Affairs [2000] FCA 1363

SZKCQ v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL
NSD 371 OF 2008

STONE, TRACEY AND BUCHANAN JJ
27 JUNE 2008
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 371 OF 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGES:	**STONE, TRACEY AND BUCHANAN JJ**
DATE OF ORDER:	**27 JUNE 2008**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appellant has leave to file his amended notice of appeal and to rely on all the grounds therein except ground 6b.

2. The appeal from the judgment of the Federal Magistrates Court of Australia in *SZKCQ v Minister for Immigration and Anor* [2008] FMCA 209 is upheld.

3. The orders made by the Federal Magistrates Court of Australia on 6 March 2008 in *SZKCQ v Minister for Immigration and Anor* are set aside and in lieu thereof it is ordered that:

    (a) The decision of the Refugee Review Tribunal handed down on 18 January 2008 is set aside.

    (b) The matter be returned to the Refugee Review Tribunal to be dealt with according to law.

4. The first respondent pay the appellant's costs of the appeal and of the proceedings before the Federal Magistrates Court of Australia, such costs to be taxed if not agreed.

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 371 OF 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZKCQ** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**STONE, TRACEY AND BUCHANAN JJ**
DATE:	**27 JUNE 2008**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

STONE AND TRACEY JJ:

1 We have had the advantage of reading in draft the reasons for judgment of Buchanan J. We gratefully adopt his Honour's account of the appellant's claims and the history of this matter both in the Tribunal and in the Federal Magistrates Court and respectfully agree that the appeal should be allowed. We also agree with his Honour's reasons save that, in relation to s 424A, we do not think it is necessary to consider the meaning of "information" and or the applicability of the observations that Finn and Stone JJ made in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471. Similarly we do not think it is necessary to consider whether the High Court's decision in *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 impliedly overruled the decision of a Full Federal Court in *NBKS v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 156 FCR 205. We do not express any opinion on these points.

2 In our view the breach of s 424A in this case rests in the Refugee Review Tribunal's failure to comply with s 424A(1)(b). The Tribunal is required to "ensure, as far as is

reasonably practicable, that the applicant understands" why the information referred to in s 424A(1)(a) is "relevant to the review". In its letter of 28 November 2006, the Tribunal quoted the Australian High Commission's reply to its enquiry about the letters of support that the appellant had provided to the Tribunal. In inviting the appellant to comment on the information in the High Commission's reply, the letter stated:

> This information is relevant because it may be the reason or part of the reason for the Tribunal not to be satisfied that there is a real chance of you suffering harm amounting to persecution in Pakistan for reason of your political opinion. It may also cause the Tribunal not to be satisfied that the letter from [the senior official of the PPP] is authentic.

3 The significance of the information lay, as the Tribunal itself remarked, in what the two gentlemen contacted did **not** say rather than in what they did say. In the light of the questions that were asked their responses were significantly deficient. So much can be seen from the Tribunal's comments, in particular, the comment that the letter from the former candidate of the PPP did not mention the appellant having been gaoled in the past. The Tribunal added:

> Neither did he [the candidate] mention this in response to the High Commission's question as to how exactly the applicant suffered as a result of work of the party. Neither did he mention any threats subsequent to the 2002 election campaign.

The Tribunal also relied on the responses of the two gentlemen to support its conclusion that "harassment of political opponents is an integral part of the Pakistani political process, but falls short in seriousness of anything that could be characterised as persecution".

4 For the appellant to understand why the information provided in response to the High Commission's enquiry might be relevant to the review he needed to understand the context in which that information was given; in other words he needed to be informed of the questions to which the two gentlemen were responding. There can be no doubt that it was "reasonably practicable" for the Tribunal to give him the questions. Without them the appellant's capacity to comment on the responses was severely compromised; he was not afforded the procedural fairness for which the Act provides. As McHugh J remarked in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at [77], it would be an "anomalous result" if, despite the Tribunal's failure to take the steps that the *Migration Act* laid down so that an applicant would be accorded procedural fairness, its decision were found to be valid.

5 For these reasons we are of the opinion that the Tribunal was in breach of s424A(1)(b) and that this was a jurisdictional error.

6 We agree with Buchanan J that the appellant should be given leave to rely on the grounds set out in the Amended Notice of Appeal other than, for the reasons given by his Honour, ground 6b. We have also considered the parties' supplementary submissions in relation to *SZKTI v Minister for Immigration and Citizenship* [2008] FCAFC 83. We agree with Buchanan J that this Court should only depart from the decision in *SZKTI* if the decision is plainly wrong. It is not plainly wrong and, for the reasons given by Buchanan J, we are of the opinion that the construction of s 424 in *SZKTI* is correct.

7 For the reasons given above we agree with the orders proposed by Buchanan J.

I certify that the preceding seven (7) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Stone and Tracey .

Associate:

Dated: 27 June 2008

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 371 OF 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZKCQ** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**STONE, TRACEY AND BUCHANAN JJ**
DATE:	**27 JUNE 2008**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

BUCHANAN J:

8 The appellant is a citizen of Pakistan. He arrived in Australian on 25 May 2006. Some weeks later, on 20 June 2006, he applied for a Protection (Class XA) visa under the *Migration Act 1958* (Cth) ('the Act'). He claimed to have been a member of the Pakistan People's Party ('the PPP'). He said that after the dismissal of the Benazir government and during the prime ministership of Nawaz Sharif he was arrested and detained for six months during which he was beaten and tortured. He said he was arrested again during the presidency of General Musharaf in March 2000 and put in jail for six months but was released from jail in July 2000. He asserted that as a 'key member of operational policy' for the PPP in Sialkot (where he was born and lived) he was contacted in the first week of April 2006 'by the high command of PPP from London'. He said he was then arrested by military authorities on 6 May 2006 and detained for two days. He received information that he would be killed within two months and was instructed by the high command of PPP in London to leave Pakistan. He obtained a visa on 23 May 2006. He arrived in Australia on 25 May 2006.

9 A delegate of the Minister refused the application for a protection visa on 29 July 2006. The delegate did not accept that the appellant faced a real chance of persecution for the following reasons:

- he had provided few details of his political activities in Pakistan and no evidence to support his claims to be a refugee;
- he had provided no documentation relating to his work for the PPP - he was at most an ordinary member of the PPP with no real political profile;
- there was no reason to believe he is not able to obtain protection in Pakistan with the support of the PPP;
- he was able to leave Pakistan legally;
- he said he has never been convicted of any offence and is not currently under any investigation;
- he could re-locate to another part of the country;
- he chose not to apply for protection until he had been in Australia for about four weeks.

10 The appellant was given 28 days in which to apply for a review by the Refugee Review Tribunal ('the RRT'). He lodged an application for review on the 28th day.

11 A hearing was conducted before the RRT on 3 October 2006. A number of the claims made by the appellant in his oral evidence before the RRT did not appear (as recorded by the RRT) to be entirely consistent with the way he advanced the claims in his written statement accompanying his application for a protection visa. At the hearing before the RRT he said he had forgotten a few details. He said before the RRT that his father had been a founder member of the PPP and had been imprisoned continuously for ten years. He also said that it was his father's political involvement that effectively ruined his family's life, as attempts to withdraw from politics were met with pressure to continue. He said that at the time of the 2002 elections an army officer threatened him with the same treatment as his father had

received. He said he had been detained by the police many times. He said that he currently held no position in the party and that people wanted to harm or harass him because of the influence of his family in their district.

12 These claims seem different from the picture painted by the written statement which accompanied the application for a visa but it was a matter for the RRT, not a court, how they were to be evaluated in the context of all his claims. The RRT decision records that, at the hearing, the RRT 'asked him to obtain from Pakistan confirmation from leading party officials who knew him of his standing and situation and allowed him four weeks to do so'. 28 days later, on 31 October 2006, two documents were faxed to the RRT. One was dated 18 October 2006. It purported to be a letter from Ghulam Abbas, Senior Vice-President of the Punjab PPP. The letter stated that the appellant's father was one of the 'great founder members' of the PPP and that the appellant had done a lot to maintain party discipline amongst other party members, that he had made a lot of sacrifices for the party and that the prime reason why opposing parties might threaten his life was due to loyalty to the party. The letter continued that if he was in Pakistan his life would probably be in danger.

13 The other document was dated 26 October 2006. It was a handwritten document from 'Nazim' Rana Naeem Khalid, a former candidate of the PPP. It said that the appellant was a member of the PPP and in the 2002 elections had played a key in Mr Khalid's election campaign. The letter said that if the appellant wished to stay alive he should stay away from Pakistan.

14 It appears from the RRT decision that the two documents were referred to the Australian High Commission in Islamabad. In later proceedings before the Federal Magistrates Court of Australia ('the FMCA') a solicitor acting for the Minister swore an affidavit which attached the request to the High Commission and the response provided. In the request the following was provided as background:

> '3. The Applicant claims to have suffered mistreatment because of his and his family's work for the Pakistan People's Party (PPP). He has submitted letters from two PPP officials in support of his claims. These letters are supplied in the PDF document which attends this request as <pak30908.a.pdf>.'

15 The following requests were made:

'6. The RRT would appreciate it if post would provide answers to the following:

A. Could post please confirm the authenticity of the letters and establish the identity of the authors.

B. Could post investigate whether the authors have suffered as a result of their work for the party. If so, can post please include details of claims.

C. Could post provide information from the authors as to how exactly the applicant suffered as a result of his work for the party?'

16 The response from the High Commission was in the following terms:

'In response to questions raised in reftel, the post provides the following information:

A. Mr Rana Naeem Khalid is a *nazim* (mayor) in District Sialkot, Punjab. He verified the authenticity of the correspondence signed by him and included with reftel.

Mr Ghulam Abbas was senior vice-president of the Pakistan People's Party (PPP) in Punjab and is now Secretary-General of the PPP in Punjab. He did not have a record of the correspondence attributed to him and therefore could not offer an opinion on its authenticity.

B. Mr Khalid claimed that as a member of the PPP, and while contesting elections for the Provincial Assembly of Punjab in 2002, he was falsely charged with abduction and other crimes (the case was allegedly lodged by the PML-Q party). He does not claim to have suffered physical abuse while in custody. Mr Khalid also claims that a fabricated case was brought against a family member.

Mr Abbas claimed he had been imprisoned on charges of which he was later cleared.

C. Mr Khalid claimed the applicant had been harassed and investigated by police. He also alleged the applicant, during the 2002 election campaign, had been attacked on several occasions by activists of the PML-Q party, with police backing.

Mr Abbas could not recall the individual in question but offered a general statement that many campaigners and activists have had false charges brought against them.'

17 On 28 November 2006 the RRT wrote to the appellant setting out the response made by the High Commission. The relevant terms of the letter are as follows:

> 'The Tribunal has information that would, subject to any comments you make, be the reason, or part of the reason, for deciding that you are not entitled to a protection visa.
>
> The information is as follows:
>
> The letters of support provided to the Tribunal by you were referred to the Australian High Commission for authentication and comment. The following is the High Commission's reply:'

[The response from the High Commission was then set out verbatim.]

> 'This information is relevant because it may be the reason or part of the reason for the Tribunal not to be satisfied that there is a real chance of you suffering harm amounting to persecution in Pakistan for reason of your political opinion. It may also cause the Tribunal not to be satisfied that the letter from Mr. Ghulam Abbas is authentic.'

18 The appellant was given until 21 December 2006 to respond.

19 It will be noted that the appellant was not advised of the terms of the questions which the High Commission was asked to put to Mr Khalid and Mr Abbas. In particular, the appellant was not told that Mr Khalid and Mr Abbas should be asked 'how exactly the applicant suffered as a result of his work for the party'.

20 There are two issues which arise from the letter to the appellant which need to be distinguished for the purpose of later discussion. One related to the advice to the appellant that the letter from Mr Abbas might be found not to be authentic. Doubt about that issue arose, in part at least, from the lack of verification by Mr Abbas of the authenticity of the letter. Another observation might also be made about the purported letter from Mr Abbas and his response to the High Commission. It was the correspondence purporting to be from Mr Abbas that provided the only other support for the appellant's claims relating to his father. It might seem unlikely that Mr Abbas could, if the purported letter from him was authentic, have forgotten the appellant's father or the appellant himself. It is not possible to say what form the High Commission's enquiries to Mr Abbas took, and whether he was shown the document purporting to bear his signature. However there is no issue arising directly from these matters in the present proceedings. The appellant was clearly put on notice that there was doubt about the authenticity of Mr Abbas's letter, as provided by him, and given an opportunity to comment.

21 The other issue arises from the use made of Mr Khalid's responses and, in particular, the context in which those responses were provided, bearing in mind that the questions which the High Commission was asked to pose to him were not adequately summarised by the suggestion to the appellant that the letters were referred 'for authentication and comment', which is all that the appellant was told.

22 The appellant made a response dated 18 December 2006 in the following terms:

> 'My comments are as follows:
>
> I would like to inform the Tribunal that I am the member of the P.P.P and my case is based on the complete truth.
>
> Mr. Naeem khalid [sic] knows me as his party worker and he admits that my life is threatened in Pakistan. Mr Ghulam Abbas is now the Secretary-General of Pakistan People's Party (PPP). He knows me and he can verify the authenticity of my statement, that my life is threatened in Pakistan. I was living a very terrible life which can be imagined worse than living in jail
>
> It's my humble request that you allow me to provide more evidence to solidify my case'

23 In that part of its decision entitled 'Findings and Reasons', where the RRT explained why it had decided to affirm the decision of the delegate not to grant a protection visa, the RRT said the following (which I set out in full):

> 'I accept that the applicant is a citizen of Pakistan.
>
> I accept that the applicant is a member of the PPP and worked for the party in the 2002 election campaign. I accept that the applicant was harassed by supporters of parties opposed to his during that campaign.
>
> However, the bulk of the applicant's claims I do not accept. I give no weight to the letter of Ghulam Abbas, as I am not satisfied that it is authentic. The applicant's reply to the Tribunal's letter does not address the Tribunal's doubts on that point, at least not specifically.
>
> I accept that the letter from Nazim Rana Naeem Khalid is genuine. However, despite containing some detail, it makes no reference to the applicant having been gaoled in the past for his political activities. **Neither did he mention this in response to the High Commission's question as to how exactly the applicant suffered as a result of work for the party**. Neither did he mention any threats subsequent to the 2002 election campaign.

> **My conclusion is that the applicant has exaggerated his role and the harassment he suffered as a result**. I do not accept that he has suffered on-going harassment subsequent to the 2002 elections, as he claims, or that there is a real chance of his suffering any harm amounting to persecution should he return to Pakistan.
>
> Further, on the basis of independent county information and the information provided by Nazeem Rana Naeem Khalid (orally and in writing) and Mr. Ghulam Abbas (orally), I believe that harassment of political opponents is an integral part of the Pakistani political process, but falls short in seriousness of anything that could be characterised as persecution.
>
> I have considered his request to allow him to provide more evidence. However, my concerns about his claims were made very clear to him at hearing. He was given then an opportunity to provide substantiation of his claims. He provided two documents, one of which is of doubtful authenticity. The Tribunal's concerns were put to him in writing and his reply does not adequately respond to those concerns. I believe that he has had every possible opportunity to provide to the Tribunal evidence to support his clams [sic] and I am not therefore willing to delay further a decision already long delayed to permit him to provide additional supporting material.
>
> I find that the applicant does not have a well founded fear of persecution in Pakistan for a Convention reason.'
> (Emphasis added)

24 The RRT decision was handed down on 18 January 2008. That therefore must be regarded as the date of the decision (see s 430B(4) of the Act). However, the decision itself was signed on 20 December 2007, one day before the expiration of the time which the appellant had been allowed to make further comment. That circumstance led to one of the challenges on the appeal.

25 Following the decision of the RRT the appellant applied for judicial review to the Federal Magistrates Court of Australia ('the FMCA'). The application was dismissed on 6 March 2008 (*SZKCQ v Minister for Immigration & Anor* [2008] FMCA 209). The Federal Magistrate records that the appellant was unrepresented but had sought to participate in the scheme that gives unrepresented applicants in refugee matters independent legal advice. He was allocated to a panel member who advised him. He was granted leave to file an amended application. It ought be inferred, in my view, that the amended application was prepared with the assistance of independent advice. However it fell to the appellant to advance arguments in support of it. The two grounds advanced before the FMCA were as follows:

> '1. The Tribunal committed jurisdictional error by its failure to explicitly state in its s424A letter the relevance to the review of the information concerning the applicant's letters of support such that the use the Tribunal could make of the information as particulars was not self-evident.
> 2. The Tribunal committed jurisdictional error by failing to consider an integer of the applicant's claim, namely, that he feared persecution "because of the influence of his family in their district".'

26 The Minister was represented by counsel before the FMCA. It would appear that the Federal Magistrate had little difficulty dismissing the application for judicial review, as it was then advanced. On this appeal we have had the advantage of the assistance of counsel appointed under O 80 of the *Federal Court Rules*. The arguments which have been advanced to us were in large measure additional to those which were put to the FMCA. Counsel for the appellant accepted that it is necessary that leave be granted to rely upon such arguments and has sought it.

27 The appellant seeks to rely on an amended notice of appeal in which the following grounds are stated:

> '1. The Single Judge of the Federal Magistrates Court in his Honours judgement delivered on the 6 March 2008 failed to find error of law, jurisdictional error, and relief under section 39B of the Judiciary Act 1903 in that:
>
> 2. Whilst letter issued by the Tribunal in order to comply with s 424A of the Act provided that his comments were to be provided in English and be received at the Tribunal by 21 December 2006, the Tribunal proceeded to make its decision prior to the expiry of that period, namely 20 December 2006. This involved a failure to comply with the requirements of Regulation 4.35(3) of the Migration Regulations and so s 424A, s424B and 441A and further breached s 420 of the Act
>
> 3. The s424A notice failed to comply with the minimum prescribed response period of 28 days (a time period which was required to be prescribed by reason of Regulation 4.35(5) of the Migration Regulations 1994 ("the Regulations") and so s424A, s242B, and s441A of the Act and further breached s 420 of the Act.
>
> 4. The s424A letter did not comply with s 424A(1)(a) by not providing particulars of information (being the DFAT 563 Report) in that it failed to provide the appellant with the questions asked by it to the High Commission on 3 November 2007.
>
> 5. The s424A letter did not comply with s 424A(1)(b) because it did not

ensure, as far as is reasonably practicable, that the applicant understood why the information which was referred to was relevant to the review, and the consequences of it being relied on in affirming the decision under review.

6. The Tribunal failed to comply with the requirements of s424 together with s424B and s441A of the Act in relation:

   a. the Tribunal's invitation, given orally at the hearing, to the appellant to provide further information being confirmation from leading party officials of his standing and situation in the PPP;

   b. the Tribunal's invitation, given to Nazim Khalib and Ghulam Abbas for further information.

7. The Tribunal failed to determine the appellant's separate claims based on his membership of his family group or imputed political opinion, being the son of a founding member of the PPP who had been imprisoned for 10 years and because of whom the Muslim League continued to persecute him and the family and so constructively failed to determine the appeal.'

28 Apart from ground 6b, I think this is a proper case in which to grant leave to ventilate matters which were not argued before the FMCA. All of the other issues were fully argued, either in writing or orally. No prejudice is claimed. The Minister's sole ground for resisting leave to amend is that the grounds to be added by amendment have no prospect of success. In the circumstances I would grant leave to the appellant to rely upon all the grounds (apart from 6b) which appear in the finally amended notice of appeal. Ground 6b raises a matter which was not discussed during oral argument or dealt with initially in the appellant's initial written submissions. I shall return to it later. It is not necessary that it be dealt with, for reasons which will become clear.

29 In my view the appellant's contentions (so far as I would permit them) may be summarised in the following way:

(a) The Tribunal made its decision earlier than was permitted by the Act because it did not wait until the expiry of the period which it had given to the appellant in accordance with s 424B of the Act.

(b) The RRT was obliged to allow 28 days for the appellant to respond to the letter to him of 28 November 2006, but did not.

(c) The RRT's request to the appellant to provide 'confirmation from leading

party officials who knew him of his standing and situation' was an invitation within the meaning of s 424(2) of the Act and was required to be provided to him in writing.

(d) The letter to the appellant dated 28 November 2006 sent to the appellant in accordance with s 424A of the Act was required to identify the questions to be posed to Mr Khalid and Mr Abbas because in the circumstances of this case, that was part of the 'information' required to be provided to him in accordance with s 424A and was necessary to ensure that the appellant understood why the 'information' was relevant to the review being conducted by the RRT..

(e) The RRT failed to determine specific claims made by the appellant based on his membership of his family group.

30 Each of these errors or failures is said to be jurisdictional in nature and to provide a foundation upon which to set aside the decision of the RRT.

Decision made before 21 December 2006

31 Pursuant to s 430 of the Act, the RRT was required to prepare a written statement. That written statement is represented by the decision handed down on 18 January 2008. Section 430B(4) provides:

'The date of the decision is the date on which the decision is handed down'

32 No separate statutory consequence flows from the date upon which a decision is signed. Although the decision was signed on 20 December 2006 (and perhaps it would have been better had it not been) that does not indicate that the RRT was not prepared to consider further material provided by the appellant within the time which it had allowed. In fact a further period of over four weeks passed before the decision was handed down and thereby brought to the appellant's attention. The appellant did not in that intervening period provide any additional material. There is therefore no factual context in which to test what is really no more than supposition or conjecture to the effect that the RRT had irrevocably committed itself to the course it would take, and the reasons for it, prior to the expiration of the time to which the appellant was entitled pursuant to s 424B of the Act. This line of argument therefore affords no reason to grant relief to the appellant.

28 days was required to be allowed for a response to the letter of 28 November 2006

33 This argument was based upon the provisions of reg 4.35(5) of the regulations made under the Act which requires 28 days to be allowed for the provision of information or comment which is to be provided from a place that is not in Australia, rather than, as in other circumstances, 14 days which is prescribed by reg. 4.35(3). This argument cannot be accepted. The comments which were sought by the letter from the RRT dated 28 November 2006 were sought from the appellant who was in Australia. It should not be concluded that the request to him for his comments imported any necessity to obtain information from somewhere outside Australia. This line of argument also provides no basis upon which the appeal should be upheld.

No written invitation to provide additional information

As the appeal was first argued

34 I propose to deal with this issue first upon the basis of the submissions initially advanced by the parties. Then it will be necessary to refer to a recent authority to which our attention was drawn only after judgment had been reserved.

35 The appellant's contention that the oral request made to him during the hearing before the RRT on 3 October 2006 was required, by s 424 of the Act, to be in writing and the Minister's response to the argument requires attention to the scheme established by Division 4 of Part 7 of the Act for the conduct of reviews before the RRT.

36 Section 423 provides that an applicant for review by the RRT may provide a statutory declaration in relation to any matter of fact that the applicant wishes the RRT to consider and written arguments relating to the issues arising in relation to the decision under review. Neither aspect is directly relevant in the present case. Section 424 then provides as follows:

> '(1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.
>
> (2) Without limiting subsection (1), the Tribunal may invite a person to give additional information.
>
> (3) The invitation must be given to the person:

> (a) except where paragraph (b) applies – by one of the methods specified in section 441A; or
> (b) if the person is in immigration detention – by a method prescribed for the purposes of giving documents to such a person.'

37 The methods specified in s 441A are all ones which relate to the provision of documents. Those methods are by handing a document to the intended recipient, handing it to a person at the last residential or business address of the recipient, dispatching it by prepaid post or other prepaid means or transmitting it by fax, email or other electronic means. In another context (referring to s 424A(2) which is in identical terms) McHugh J observed that the identification of the various methods 'contemplates that the information is in the form of a document' (*SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 ('SAAP') at [65]).

38 The Minister initially had two answers to the contention that the oral request made by the RRT was required to be in writing.

39 The first was that the underlying purpose of an invitation under s 424(2) was to engage the procedures in s 424C which allowed the RRT to make a decision on a review without taking further action to obtain the information if it was not provided as required. It was argued that the RRT had a discretion whether to engage that procedure or not. The Minister argued that the reference in s 424(2) to not limiting subsection (1) meant that the RRT could proceed pursuant to s 424(1), rather than s 424(2), to obtain the information from the appellant and not provide its request or invitation in writing. The only consequence, it was argued, was that s 424C was not engaged.

40 I am not able to accept this construction. The first reason I would reject it arises from the terms of s 424 itself. It seems apparent that s 424(1) is not confined to obtaining information by inviting a person to give it. The RRT may conduct its own researches and make requests for information that it considers relevant. The condition which attaches to such a step is that it 'must have regard to that information in making the decision on the review'. That condition, in my view, continues to apply if the more limited circumstances in s 424(2) are engaged. In *Win v Minister for Immigration and Multicultural Affairs* [2000] FCA 1363 Lindgren J at [71]-[72] expressed a contrary view. His Honour also thought that

the requirement that the information be 'relevant' was not imported into s 424(2). In my respectful view that gives insufficient attention to the opening words of s 424(2) but my disagreement with his Honour's construction of s 424(2) does not affect any ultimate conclusion in the present case.

41 The elements which must be present for the engagement of s 424(2) are: an invitation; to a person; to give information; which is additional information. There is no doubt that these elements were present in the case under consideration. Prima facie, therefore, s 424(2) was engaged and the Tribunal came under an obligation to give the invitation in writing.

42 Another reason why the Minister's argument on this point should not be accepted, arises from consideration of the interaction between s 424 and s 424C. Relevantly (so far as it interacts with s 424), s 424C provides:

> '(1) If a person:
>
> (a) is invited under section 424 to give additional information; and
>
> (b) does not give the information before the time for giving it has passed;
>
> the Tribunal may make a decision on the review without taking any further action to obtain the additional information.'

43 Upon the construction advanced by the Minister, the purpose of s 424(2) and (3) is to permit the RRT to make a decision (in the event that the invited person fails to respond within the time specified) without taking a further step to obtain the information requested. With respect, I am not able to see how this advances the argument that the RRT may rely instead on what is suggested to be a less formal method of requesting the same information from the same person under s 424(1). I see no basis for the contention that use of s 424(2) simply provides access to a speedier form of decision-making. That suggests that use of s 424(1) would involve a less speedy procedure but I cannot see why. On the contrary, it seems to me to be plain that the intention of s 424(2) is to provide some formality when the RRT intends to seek additional information from an identified person, which might include the applicant or members of his family. I see no room for any election by the RRT to extend such an invitation informally under s 424(1).

44 Contrary to the submission for the Minister that also seems to me to be plain from the extrinsic material referred to by the Minister. We were provided, after judgment was reserved, with extracts from the Explanatory Memorandum to the *Migration Legislation Amendment Bill (No 1) 1998* presented to the Senate of the Australian Parliament and also a copy of the Hansard record of the Second Reading Speech made by the Minister, Mr Ruddock, to the House of Representatives on 2 December 1998. The Bill proposed to replace then existing ss 424 and 425 of the Act with new provisions ss 424, 424A, 424B and 424C, as well as a new s 425. In a section of the Explanatory Memorandum headed 'Overview' it was said (at [3]):

> '3. The amendments to the Migration Act 1958 in relation to the system of merits review of immigration decision-making:
>
> …
>
> • prevent MRT and RRT hearings from being unnecessarily delayed where:
>
> - prescribed notice of a personal hearing has been provided and no change has been sought; or
> - an applicant fails to respond to an invitation to give additional information within the prescribed period (or a further prescribed period)
>
> …
>
> • **apply a code of procedure** to the MRT and the RRT in relation to decisions on entry and stay of non-citizens.'
>
> (Emphasis added)

45 Later, in a section devoted to the specific amendments here relevant, it was said (at [116] and [117]):

> '116. This item repeals existing sections 424 and 425 of the Migration Act which provide for the right of a personal appearance by the applicant unless the Tribunal is able to make a decision "on the papers" that is most favourable to the applicant.
>
> 117. It also inserts six new sections into the Migration Act. Of these sections 424, 424A, 424B and 424C **provide a code of procedure which the Tribunal is to follow in conducting its review**:
>
> …

- **new sections 424 and 424A also ensure that invitations** to an applicant to:

  . provide further information; or

  . comment on information which the MRT considers would be reason for affirming the decision under review;

  are sent to the last address for service, or residential address given by the applicant **in a way that provides evidence of the date of dispatch** …

- new section 424C provides that where a person fails to provide additional information under section 424 or an applicant fails to provide comment on information under section 424A, the Tribunal may make a decision without taking any further action. The purpose of the new section is to allow the Tribunal to make a decision without any delay if the applicant fails to respond to a request for further information or comment within the prescribed period.'

(Emphasis added)

46 The fact that the explanation about the proposed '*code of procedure*', and the contemplated '*invitations*' and the methods by which they are to be given, proceeds by reference to both s 424 and s 424A, without distinction, should be noted.

47 The Minister's Second Reading Speech also provides general illumination in the following passage:

> '**The bill also includes certain safeguards for applicants by introducing a code of procedure** for both the Migration Review Tribunal and the Refugee Review Tribunal which is similar to that already applying to decisions made by the department. This code includes such matters as the giving of a prescribed notice of the timing for a hearing, and a requirement that applicants be given access to, and time to comment on, adverse material relevant to them.'
> (Emphasis added)

48 In my view, these somewhat general indications do not support the Minister's argument. In fact they tend against it. They support the view that a new level of formality was to be required if additional information was sought, particularly if it was sought from an applicant. They do not support the view that the RRT was to retain a general discretion whether or not to use the new, more formal, methods of obtaining information from an applicant or other persons.

49 It was submitted that upon the construction which I favour the RRT would be obliged to commit to writing every question which it wished to ask of an applicant (or presumably anybody else) during an oral hearing conducted in connection with a review. The prospect is certainly a troubling one. However, I think there are sufficient reasons to conclude that the obligation does not apply to information which is provided by way of evidence or argument in an oral hearing.

50 Section 425(1) 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.'

51 Section 427 sets out the powers of the RRT. Amongst its powers are a power to take evidence on oath or affirmation, to summon persons to appear before it to give evidence, to require a person appearing to give evidence and to administer an oath or affirmation. In my view the power to take evidence on oath or affirmation and to require evidence to be given on oath or affirmation necessarily carries with it the power to put questions and require answers. That power is not affected, much less limited, by s 424 which clearly operates outside the environment of the oral hearing itself. Outside the oral hearing the scheme of Division 4 of Part 7 of the Act appears to me, in various ways, to establish as a necessary procedure that certain steps must be taken in writing. It does so in the context set by s 422B which provides that the Division 'is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with'. Significance and weight must therefore be attached to the safeguards for applicants which the procedural requirements, particularly those in ss 424, 424A and 424B, represent.

52 The second argument advanced by the Minister at the hearing of the appeal was that any failure to comply with a requirement of s 424 did not result (unlike for example, a failure to comply with s 424A) in jurisdictional error or invalidity.

53 As I earlier indicated, the requirements about the method by which an invitation must be given in s 424(3) are stated in identical terms to the requirements to be found in s 424A(2) about the way in which the RRT must invite an applicant to comment on information which 'would be the reason, or part of the reason, for affirming a decision that is under review'.

The explanation given by the Explanatory Memorandum, to which I referred earlier, for the new 'code of procedure' did not differentiate between s 424 and s 424A. The requirements of s 424A(2) have been found to be strict ones, breach of which will render a decision invalid (see *SAAP*). On the present appeal, however, the Minister invited us to draw a distinction between s 424A, which was described as mandatory, and s 424, which was described as permissive. The distinction is one which was adverted to by Hayne J in *SAAP* where his Honour said (at [206]):

> '206 The language of s 424A is, of course, imperative: "the Tribunal *must*" take the several steps it prescribes. That imperative language stands in sharp contrast with the permissive terms of, for example, s 424 which says that "the Tribunal *may*" take various steps. The evident purpose of the provisions of s 424A (and several other provisions in Div 4 of Pt 7) is to give applicants for review procedural fairness.'
>
> (Emphasis in original text)

54 In my view, however, the argument breaks down at the point at which the RRT chooses to take the step permitted to it of inviting a person to give additional information. At that point the language of s 424 becomes imperative. Such an invitation *'must be given to the person'* in one of the ways then specified. Hayne J went on to say (at [208]):

> '208 Where the Act prescribes steps that the tribunal *must* take in conducting its review and those steps are directed to informing the applicant for review (among other things) of the relevance to the review of the information that is conveyed, both the language of the Act and its scope and objects point inexorably to the conclusion that want of compliance with s 424A renders the decision invalid. Whether those steps would be judged to be necessary or even desirable in the circumstances of a particular case, to give procedural fairness to that applicant, is not to the point. The Act prescribes what is to be done in every case.'
>
> (Emphasis in original text)

55 It is the Act which limits the requirement of the natural justice hearing rule to the procedures specified in Division 4 of Part 7 of the Act, so far as it concerns reviews by the RRT, and the Act which imposes the imperative obligations which must be obeyed in that respect. I can see no basis for making a distinction, in that regard, between s 424(3) and s 424A(2).

56 McHugh J dealt with the issue in the following way in *SAAP* (at [77]):

> '77 However, because the Act compels the Tribunal in the conduct of the review to take certain steps in order to accord procedural fairness to the applicant for review, before recording a decision, it would be an anomalous result if the Tribunal's decision were found to be valid, notwithstanding that the Tribunal has failed to discharge that obligation. It is not to the point that the Tribunal may have given the applicant particulars of the adverse information orally. It is also not to the point that in some cases it might seem unnecessary to give the applicant written particulars of adverse information (for example, if the applicant is present when the Tribunal receives the adverse information as evidence from another person and the Tribunal there and then invites the applicant orally to comment on it). If the requirement to give written particulars is mandatory, then failure to comply means that the Tribunal has not discharged its statutory function. There can be no "partial compliance" with a statutory obligation to accord procedural fairness. Either there has been compliance or there has not. Given the significance of the obligation in the context of the review process (the obligation is mandated in every case), it is difficult to accept the proposition that a decision made despite the lack of strict compliance is a valid decision under the Act. Any suggestion by the Full Federal Court in *NAHV* to the contrary should not be accepted. Parliament has made the provisions of s 424A one of the centrepieces of its regime of statutory procedural fairness. Because that is so, the best view of the section is that failure to comply with it goes to the heart of the decision-making process. Consequently, a decision made after a breach of s 424A is invalid.'

57 Kirby J said (at [173]):

> '173 … Because of the mandatory language of s 424A (must) and the provisions of Pt 7, Div 4, I agree with Hayne J (134) that the breach is sufficient to constitute jurisdictional error, as that opaque expression has been interpreted. An imperative obligation for the conduct of a review by the Tribunal has not been complied with. The will of the parliament must be obeyed. The resulting decision of the Tribunal is not, therefore, one protected by the Act from judicial review in the Federal Court.'

58 Applying those observations in the present case, as I think we should, it follows that the RRT failed to comply with a mandatory obligation which fell upon it when it asked the appellant 'to obtain from Pakistan confirmation from leading party officials who knew him of his standing and situation and allowed him four weeks to do so'. The result is that the decision of the RRT must, for that reason, be set aside.

***The Full Court decision in* SZKTI**

59 Two days before the hearing of the present appeal a Full Court of this Court delivered judgment in *SZKTI v Minister for Immigration and Citizenship* [2008] FCAFC 83 (*'SZKTI'*). In that judgment the Full Court considered and rejected a number of the arguments also advanced to us by counsel for the Minister about the proper construction of s 424 of the Act. Shortly after judgment was reserved in the present appeal, the Minister's legal representatives sought leave to make further submissions about the effect of *SZKTI*. Leave was granted to both parties. The appellant relied on *SZKTI*. The Minister argued it was 'clearly wrong' and should not be followed. Considerations of comity would normally suggest that the present appeal not be decided upon a basis inconsistent with the judgment of another Full Court about relevantly similar legal issues. There are limited exceptions to this general rule. The Minister's submission that *SZKTI* was 'clearly wrong' attempts to invoke such an exception (see *Cooper v Commissioner of Taxation* (2004) 139 FCR 205 at [46]; *Minister for Immigration and Multicultural and Indigenous Affairs v SZANS* (2005) 141 FCR 586 at [38]; *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at [148], *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 162 FCR 234 at [83]-[89] and *Bahonko v Sterjov* (2007) 163 FCR 318 at [8]).

60 The Minister's submissions about *SZKTI* were lengthy. They addressed issues of authority, history, legislative structure, policy and textual arguments. It appeared that the Minister wished to rely on matters which had not been put to the Court in *SZKTI*. The Minister's submissions on the present appeal said:

> '43. The Minister contends that the Full Court in *SZKTI* was not, apparently, given the whole picture on the legislative history and structural role of the provisions that it construed. It was also not directed to all of the relevant authorities, some of which are inconsistent with the approach taken in that Court.'

61 The Minister was a party to the appeal in *SZKTI*. Any deficiency in the argument put to the Full Court in *SZKTI* is clearly the responsibility of the Minister and not an appropriate foundation for a criticism of the Full Court or its judgment. Even if, strictly speaking, no question of issue estoppel arises, any asserted error should normally be addressed by a direct, rather than collateral, challenge to the judgment in question. Moreover, such matters were not advanced to us, in support of the same contentions, when written and oral argument was

initially advanced on the appeal. Publication of the judgment in *SZKTI* did not alter the matters to be addressed or the character of the issues about the construction of s 424 of the Act. If the Minister wished to rely upon the matters which were finally included in the supplementary submissions which we gave leave to file, the time to do so was when the arguments were first presented to us. The fact that arguments of the kind presented to us had already been rejected by another Full Court did not, in my view, provide a suitable opportunity to advance and rely upon matters not advanced either to that Full Court or to us.

62 A short formal submission would have been sufficient to preserve any right to challenge reliance by us on the reasoning in *SZKTI*. Leaving aside such a formal reservation, it requires much more than disinclination to accept the result to provide a satisfactory foundation for unwillingness to accept and acknowledge the authority of the judgment and the clearly expressed conclusions which it contains. In light of the fact that the same party had argued the same points of construction in a case so close in time to the present, it would require a very clear case of manifest error to justify departure by us from the Full Court's conclusions or a refusal to apply them in the present case. The argument presented to us fell well short of meeting that requirement.

63 In fact, in my view none of the matters advanced by the Minister provide a reason to doubt the correctness of the construction of s 424 of the Act determined by the Full Court in *SZKTI*. Far from being wrong, much less clearly wrong, the construction approved by the Full Court in *SZKTI* was correct. In *SZKTI* the Full Court rejected the contention that the RRT could elect to obtain information from a person, as contemplated by s 424(2), without engaging the operation of s 424(2) and (3). That is the view to which I have come independently. Notwithstanding the attack made on it in the Minister's supplementary submissions, I am fortified in my view by the analysis and discussion in *SZKTI*.

64 For the purpose of the present appeal the construction determined by the Full Court appears sufficiently from its findings at [43]-[45]:

> '43 In our opinion in its natural and ordinary meaning s 424(2) provides a means by which a person may be "invited" to give additional information to the tribunal, that is, information which that person has not already provided to the tribunal or which the tribunal has not obtained in another way, such as pursuant to the use of its powers under s 427(3) to summons a person to give evidence. The introductory words to s 424(2), namely "without limiting

subsection (1)", identify one of the means available under s 424(1) which the tribunal may employ to get information, but then s 424(2) prescribes the mode and limitations governing how it may invite a person to give it additional information. The Parliament provided a code in ss 424, 424A, 424B and 424C which made extensive provision for the tribunal to obtain information including by means of an invitation to a person to provide it. Those provisions specified the means by which the information was to be sought, and the consequences for its non-provision. We are of opinion that the Parliament did not authorise the tribunal to get additional information from a person pursuant to its general power under s 424(1) without complying with the code of procedure set out in ss 424(2) and (3).

44 Moreover, s 422B(1) made the intention of the Parliament manifest that the nature and extent of the natural justice hearing rule, where, relevantly, a person was invited to give information, was exhaustively set out in Div 4 of Pt 7 of the Act. There is nothing in the text or structure of Div 4 of Pt 7 which supports a construction permitting the tribunal to invite a person to give it additional information without complying with the requirements of ss 424(3) and 424B. In ASIC v DB Management Pty Limited (2000) 199 CLR 321 at 338 [34]-[35] Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ said:

> "*[34] In* Project Blue Sky Inc v Australian Broadcasting Authority *(1998) 194 CLR 355 at 384, per McHugh, Gummow, Kirby and Hayne JJ), after pointing out that the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have, the majority said:*
>
> > "Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."
>
> *[35] It may be added that, if a party contends that a provision, by reason of such considerations, should not be given its literal meaning, then such a contention may lack force unless accompanied by some plausible formulation of an alternative legal meaning."*

45 In our opinion, the Minister failed to provide any plausible alternative legal meaning to ss 424(1) and (2) which allowed the tribunal to act as it did when inviting Mr Cheah to provide additional information without complying with ss 424(3) and 424B. Here, the tribunal's obligations under s 424(3) were enlivened. Since those obligations were not complied with, the tribunal failed to follow the procedure specified in the Act for the provision by a person invited to give additional information of that information and committed a jurisdictional error.'

65 With respect, I share the same view about the matters argued in the present appeal.

66 Although the submissions about *SZKTI* failed to establish error, much less error to the necessary standard, with the result that considerations of comity dictate that we should not depart from the construction approved by that Full Court, I shall make some brief observations about some aspects of the Minister's further arguments.

67 I have already expressed my view about the interaction between ss 424 and 424C in the Act as presently framed, and about the lack of persuasive force in the contention based on the amendments made in 1998/1999. One further argument advanced by the Minister was based on suggested parallels between ss 424 and 424B (which apply to the RRT) and ss 56 and 58 (which apply to the Minister or his delegate when considering an application for a visa). The submission was:

> '15. … The new ss 424 and 424B are similar to ss 56 and 58, which were clearly not designed to prevent officers of the Department from calling the applicant for additional information: "Section 58 and this section do not mean that the Minister cannot obtain information from an applicant by telephone or in any other way." (s 59(2)).'

68 The submission itself provides one reason why the suggested parallel breaks down. Section 59(2) contains an express permission to obtain information 'by telephone or in any other way'. Also, s 56 (which is the suggested parallel to s 424) provides:

> '(2) Without limiting subsection (1), the Minister may invite, orally or in writing, the applicant for a visa to give additional information in a specified way.'

69 This provision is different to s 424(2). It is confined to seeking information from an applicant. It expressly permits the invitation to be made orally. There is no counterpart to s 424(3). Far from illustrating any parallel or real similarity the differences are, in relevant respects, striking. The comparison is destructive of, rather than supportive of, the Minister's argument.

70 The Minister also argued:

> '32. The Minister and the officers of the Department have no constraints equivalent to s 424(3) when seeking information from third persons.

> There is no policy justification for why delegates should have been able to contact the elder in *SZKTI* with a phone call without advanced notice but not the Tribunal.'

71 This submission disregards the important statutory differences referred to above. No question of *'policy justification'* arises. The Minister and his delegates have express statutory authority to extend an invitation to supply additional information to an applicant orally and to obtain information by telephone. The RRT does not. An appeal to policy considerations which takes no account, or insufficient account, of the statutory language is misplaced. The primary task of the Court is to interpret the statute. Policy considerations may, in appropriate cases, provide an aid to interpretation but they cannot prevail over the text of the statute (*Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; see also *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [132]).

72 The supplementary submissions for the Minister also suggested, as had the earlier submissions, that any breach of s 424 does not raise a case of jurisdictional error. I have dealt with this argument. In my view it does. I share the view of the Full Court in *SZKTI* about that issue.

Ground 6b of the Amended Notice of Appeal

73 The Full Court judgment in *SZKTI* raises another possible question concerning the facts of the present case. The appellant attempted to rely on the issue in ground 6b.

74 In *SZKTI* the RRT sought information from a person known to the applicant. It sought the information by telephone. The Full Court held that was impermissible. In the present case the RRT sought information, not only from the appellant but also, through the High Commission in Islamabad, from Mr Abbas and Mr Khalid. Although the request to the High Commission was in writing there is nothing to suggest that the invitation to provide information which was extended to Mr Abbas and Mr Khalid was in writing. It could only have been an invitation as both gentlemen were beyond the reach of any compulsive power possessed by the RRT. Prima facie, therefore, the provisions of s 424(2) were engaged also with respect to the additional information sought from each of them.

75 In his supplementary submissions about *SZKTI*, and in the amended notice of appeal, counsel for the appellant relied on this additional matter to suggest another example of jurisdictional error in the processes followed by the RRT. The discussion by the Full Court explaining why the RRT was required to act strictly in conformity with s 424 gives support to the submission. However, it is not necessary to pursue the matter in the present case. There was no oral argument addressed to this issue. It only arose after the parties were given leave to make submissions about *SZKTI*. The respondent has not had an adequate opportunity to deal with it. A conclusion about the issue could not alter the outcome but only possibly provide another reason for it. In the circumstances I do not think it necessary to decide this additional argument and I would not give the appellant leave to rely upon it.

Breach of s 424A

76 During the course of hearing the appeal an issue arose about whether the failure of the letter of the RRT of 28 November 2006 to inform the appellant of the questions which were to be posed to the authors of the two documents he had provided involved a breach of s 424A. The issue is now squarely raised by the amended notice of appeal. As I earlier indicated, in my view leave should be granted to rely upon this issue.

77 The Minister's argument accepts that 'it may have been necessary' to invite the appellant's comments on the possibility that no weight might be attached to the letter purportedly from Mr Abbas. That requirement was satisfied by the letter to the appellant dated 28 November 2006 and no issue about that aspect of the letter arises on the appeal. However the Minister argued that none of the other material was required to be supplied at all because it was not adverse to the appellant in the relevant sense or was not 'information'. As I understood the argument it was that, taken at its highest, the RRT relied upon 'omissions' and that 'omissions' are not 'information'. For this proposition the Minister relied upon the judgment of the High Court in *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 ('*SZBYR'*) at [18] and [21]. In my view the passages relied upon, and other passages in the judgment, do not support the contention on the facts of the present case.

78 Although it could not be determinative of the legal position there is no doubt that the information supplied by the High Commission, which summarised the responses from both Mr Khalid and Mr Abbas, was provided to the appellant by the RRT in order that the RRT

could not be said to be in breach of its obligations under s 424A. In light of the use made of the material, that was a correct assessment. It seems to me to be apparent from the findings and reasons of the RRT which I set out earlier that Mr Khalid's failure to make any reference to the appellant having been put in jail or subject to any threats subsequent to the 2002 election campaign can only be seen satisfactorily, fairly and in a legally meaningful way in the context of the third question which the High Commission was asked to put to him. The RRT itself refers to the lack of reference to jail and threats in that very context. The appellant, however, was never advised of the question the High Commission was asked to put to Mr Khalid. He had no way of understanding the significance of Mr Khalid making no reference to those matters. The appellant did not know that Mr Khalid had been asked to say something about 'how exactly' the appellant 'suffered as a result of his work for the party'. The fact that he had been asked to do so was itself information of which the appellant should have been advised. Section 424A(1) provides as follows:

> '(1) Subject to subsection (3), the Tribunal must:
> (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
> (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and
> (c) invite the applicant to comment on it.'
>
> (Subsection (3) is not relevant in the present case.)

79 In my view, the RRT was in breach of both s 424A(1)(a) and (b). The question which was to be posed to Mr Khalid in such a particular way was information, within the meaning of s 424A(1)(a), which should have been provided to the appellant together with Mr Khalid's answer. It was also necessary to do that, in accordance with s 424A(1)(b), so that the appellant might understand why the answer was relevant to the review.

80 Furthermore, I do not think that the issue in the present case, or the use made of Mr Khalid's failure to mention certain things, turns upon any notion of 'omission' of the kind which was relied upon by the Minister in argument.

81 In *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 (*'VAF'*) at [24] Finn and Stone JJ said:

'[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:

…

(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; BC200004607 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]; BC200107472 at [25]; approved [2002] FCAFC 120; BC200203793; 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 282-4 [26] – [29].'

82 In the present case the Minister drew attention to the fact that the observations in (iii) set out above were cited with approval by the High Court in *SZBYR* at [18]. The Minister's submission asked us to regard *SZBYR* as impliedly overruling a judgment of a Full Court of this Court in *NBKS v Minister for Immigration and Multicultural Affairs* (2006) 156 FCR 205 ('*NBKS'*), which also discussed *VAF*. It will therefore be necessary to give some attention to precisely what was said in *NBKS* and in *SZBYR*. First, it is important to point out that in *VAF* Finn and Stone JJ provided a synthesis of established propositions derived from earlier cases. The synthesis, so far as it referred to 'gaps' (the word 'omissions' was not used) was derived from *WAGP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 124 FCR 276 ('*WAGP of 2002'*) at 282-4 [26]-[29].

83 In *WAGP of 2002* the Full Court said (at [26]):

'It is inappropriate to speak of the RRT "getting information" where the substance of that information is merely an observation that the appellant did not refer to a particular matter in his evidence. The fact that the appellant failed to refer to a particular matter constitutes nothing more than an aspect of the RRT's reasoning concerning a deficiency in his evidence.'

and, referring to an earlier judgment of the Full Court in *Win v Minister for Immigration and Multicultural Affairs* (2001) 105 FCR 212 (*'Win')* said that in *Win* at [22]:

> 'The Full Court did not intend to include in its definition of "information" conclusions arrived at by the RRT in weighing up aspects of the evidence of an applicant by reference to gaps or defects in that evidence.'

84 The reference in all these judgments (*Win*, *WAGP of 2002* and *VAF*) to gaps or defects in the evidence of an applicant is not apt, in my view, to be extended to the circumstances of the present case. Here, there was no gap or defect, as such, in the evidence given by the appellant. What told against him was that Mr Khalid was to be asked a specific question (which the appellant did not know about) but he made no reference to things the appellant had spoken about. That 'omission' by Mr Khalid only had significance in a context where it was known that the question was to be asked and on the assumption that it was. The fact that the question was to be posed was part of the 'information' upon which the RRT relied. In my view, therefore, the observations in *VAF* at [24(iii)] do not apply here. Rather, the observations at [24(ii)] apply. Mr Khalid's response was a relevant fact or circumstance which was used by the RRT to decide matters adversely to the appellant. Contrary to the Minister's submission the RRT correctly drew it to the appellant's attention and was obliged to do so. However, the use made of the response by the RRT depended importantly on the context in which the response was given. The nature of the questions to be asked (both of Mr Khalid and Mr Abbas) was equally a relevant fact or circumstance, and therefore 'information', required to be disclosed.

85 Weinberg J was a member of the Full Court in *WAGP of 2002*. In *NBKS* his Honour referred (at 33) to *VAF*. He said:

> '33 In *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471, it was suggested by Finn and Stone JJ (at [24]) that the term "information", in s 424A, did not extend to "identified gaps, defects or lack of detail or specificity in evidence".'

86 His Honour however went on to say at [38]-[39]:

> '38 To the same effect is *SZCNP v Minister for Immigration and Multicultural Affairs* [2006] FCA 1140. There Tamberlin J rejected a

> submission on behalf of the Minister that the term "information" in s 424A did not encompass a failure to mention a matter to the Tribunal. His Honour noted that in the instant case the matters raised in the original application had been used by the Tribunal to suggest recent invention by the appellant. That meant that the Tribunal used the omission in a way that went beyond "mere omissions" in the sequence of facts presented by the appellant. This amounted to a positive use of information, as opposed to an observation made in relation to a failure to give information or make a claim.
>
> 39 It seems to me that each case must depend upon its own particular circumstances. There is no reason in principle why an omission (which the Tribunal views as important, and which is plainly adverse to the applicant's case) should be treated any differently, when it comes to s 424A, than a positive statement. That is particularly so when, as the Tribunal seems to have done here, it treats the omission as though it provides implicit support for a positive assertion that is detrimental to an applicant's case. It makes no difference whether the omission is to be found in a prior statement of an applicant or, as in this case, in a statement provided by a third party.'

87 Allsop J said, in *NBKS* (at [74]):

> 'As I said in *SZEEU v Minister for Immigration and Multicultural affairs and Indigenous Affairs* (2006) 150 FCR 214 at [221]-[225], care needs to be exercised in applying [24(iii)] of *VAF* 206 ALR 471. Here, the absence of something in Dr Nair's report was not merely taken as a gap, but was implicitly probative of Dr Nair's view that there was no such danger. If the form of Dr Nair's report (including what it did not say) did not have this significance for the Tribunal there would have been no point in mentioning it.'

88 The observations of Weinberg J and Allsop J are conceded by the Minister to be against the argument advanced to us in the present case. In my respectful view their Honours' reservations are appropriate ones. I share them. If an 'omission' has evidentiary weight and may be regarded as a fact which is probative it may, depending on the circumstances of the case, be 'information' within the meaning of s 424A. I do not understand Finn and Stone JJ, when they distilled the proposition in *VAF* to which the Minister referred in argument, to have been attempting to lay down any unyielding principle to the contrary, any more than did the earlier cases to which they referred.

89 The Minister's contention is that the approach taken by Weinberg and Allsop JJ in *NBKS* has been impliedly overruled. I do not agree that is so. In *SZBYR* the High Court distilled the issue for its examination in the following way (at [15]):

> '15 … Section 424A does not require notice to be given of every matter the Tribunal might think relevant to the decision under review. Rather, the Tribunal's obligation is limited to the written provision of "particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review". What, then, was the "information" that the appellants say the Tribunal should have provided? In their written submissions, the appellants appeared to focus on the requisite "information" as being the "inconsistencies" between their statutory declaration and oral evidence. However, in oral argument they focused on the provision of the relevant passages in the statutory declaration itself, from which the inconsistencies were later said to arise.'

90 Four points were then noted which may (without unduly removing the context supplied by the accompanying discussion) be extracted as follows from [16], [17], [18] and [19] respectively:

> '16 … First, while questions might remain about the scope of para (b) of s 424A(3), it was accepted by both sides that information "that the applicant gave for the purpose of the application" did not refer back to the application for the protection visa itself and thus did not encompass the appellants' statutory declaration.
> …
>
> 17 Second, the appellants assumed, but did not demonstrate, that the statutory declaration "would be the reason, or a part of the reason, for affirming the decision that is under review".
> …
>
> 18 Third and conversely, if the reason why the Tribunal affirmed the decision under review was the Tribunal's disbelief of the appellants' evidence arising from inconsistencies therein, it is difficult to see how such disbelief could be characterised as constituting "information" within the meaning of para (a) of s 424A(1). Again, if the Tribunal affirmed the decision because even the best view of the appellant's evidence failed to disclose a Convention nexus, it is hard to see how such a failure can constitute "information".
> …
>
> 19 Fourth, and regardless of the matters discussed above, the appellants' argument suggested that s 424A was engaged by any material that contained or tended to reveal inconsistencies in an applicant's evidence. Such an argument gives s 424A an anomalous temporal operation.
> …'

91 All of these points were dealt with at [21] as follows:

> '21 The short answer to all these points is that, on the facts of this case, s 424A was not engaged at all: the relevant parts of the appellants' statutory

> declaration were not "information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review". …'

92 The Court observed at [17] that if the content of the statutory declarations was believed, that would have been a relevant step towards rejecting, not affirming, the decision under review.

93 No part of the analysis involved any rejection of the reasoning in *NBKS* either expressly or impliedly. The high point of the Minister's submission was the endorsement of the passage from *VAF* which I earlier identified. However, that endorsement was given in a context where there is no obligation to point out, before a decision is handed down, that an applicant's evidence has failed to disclose a Convention nexus. The High Court confirmed (again at [18]):

> 'However broadly "information" be defined, its meaning in this context is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence.'

94 In the present case the information constituted by the questions to be posed to Mr Khalid and Mr Abbas, and their responses, is not correctly described as 'the absence of evidence'. The whole exchange with each of them was properly to be seen as 'information'. It was important and necessary that the whole of the exchange be disclosed. Otherwise the appellant was denied part of the information which s 424A guaranteed him.

95 In the circumstances, in my view, the appeal should be upheld for this reason also.

Family group

96 The FMCA concluded that there was no basis to find that the appellant's claim to fear persecution because of the membership of his family group, or a political opinion imputed to him by reason of the activities of his father, had been overlooked and was not addressed in the RRT's rejection of the appellant's claims. It is true that in its findings and reasons the RRT does not specifically refer separately to this aspect of the claim. However, the claims by the appellant were explicitly recorded in the RRT decision itself and the request to the High Commission which I set out earlier also referred to a claim to have suffered mistreatment

because of his family's work for the PPP. There is no reason to think the claim was overlooked or ignored. It was clearly rejected along with other claims. In the circumstances the appellant has not established any error in the approach taken by the FMCA. This line of argument does not afford a reason to uphold the appeal.

Conclusion

97 In my view there are two independent grounds for upholding the appeal – failure to comply with the requirements of s 424(3) and failure to comply with the requirements of s 424A(1). Each requirement is strict. Failure to comply represents jurisdictional error in the processes followed by the RRT. The decision of the RRT should be set aside and the matter remitted to the RRT to be decided in accordance with law.

98 In my view the appellant should have his costs of the appeal and the proceedings in the FMCA.

99 I would make the following orders:

1. The appellant has leave to file his amended notice of appeal and to rely on all the grounds therein except ground 6b.
2. The appeal from the judgment of the Federal Magistrates Court of Australia in *SZKCQ v Minister for Immigration and Anor* [2008] FMCA 209 is upheld.
3. The orders made by the Federal Magistrates Court of Australia on 6 March 2008 in *SZKCQ v Minister for Immigration and Anor* are set aside and in lieu thereof it is ordered that:
    (b) The decision of the Refugee Review Tribunal handed down on 18 January 2008 is set aside.
    (b) The matter be returned to the Refugee Review Tribunal to be dealt with according to law.

4. The first respondent pay the appellant's costs of the appeal and of the proceedings before the Federal Magistrates Court of Australia, such costs to be taxed if not agreed.

I certify that the preceding ninety-two (92) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan.

Associate:

Dated: 27 June 2008

Counsel for the Appellant:	Mr S Prince
Counsel for the Respondents:	Mr S Lloyd
Solicitor for the Respondents:	Australian Government Solicitor
Date of Hearing:	30 May 2008
Date of Judgment:	27 June 2008