FEDERAL COURT OF AUSTRALIA

MZXFQ v Minister for Immigration and Citizenship [2007] FCA 826

MIGRATION – application for protection visa – appeal from Federal Magistrate – whether Tribunal failed to comply with s 424A – whether Tribunal acted unreasonably in failing to make inquiries

Migration Act 1958 (Cth), ss 424, 424A, 427

SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 215 ALR 162 cited
VAF v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 206 ALR 471 referred to
SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 150 FCR 214 referred to
NBKT v Minister for Immigration and Multicultural Affairs [2006] FCAFC 195 cited
M55 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 131 referred to
VUAV v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1271 referred to
SZGGT v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 435 referred to
SZCKD v Minster for Immigration and Multicultural and Indigenous Affairs [2006] FCA 451 referred to
VBWF v Minister for Immigration and Indigenous Affairs (2006) 154 FCR 302 referred to
SZCBQ v Minister for Immigration and Multicultural Affairs [2006] FCA 1538 referred to
NAZY v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 744 referred to
SZCJD v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 609 referred to
SZDPY v Minister for Immigration and Multicultural Affairs [2006] FCA 627 referred to
Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223 referred to
Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155 referred to
Sun v Minister for Immigration and Ethnic Affairs (1997) 81 FCR 71 referred to
Luu v Renevier (1989) 91 ALR 39 referred to
Li v Minister for Immigration and Multicultural Affairs (1997) 144 ALR 179 referred to
Re Minister for Immigration and Multicultural Affairs; ex parte Cassim (2000) 175 ALR 209 referred to

M164/2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 16 referred to
Luu v Minister for Immigration and Multicultural Affairs (2002) 127 FCR 24 referred to

MZXFQ v MINISTER FOR IMMIGRATION AND CITIZENSHIP
VID 1270 OF 2006

KENNY J
30 MAY 2007
MELBOURNE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 1270 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **MZXFQ**
Appellant

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

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **KENNY J**
DATE OF ORDER: **30 MAY 2007**
WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The second and third orders of the Federal Magistrates Court made on 27 October 2006 be set aside, and in lieu thereof, order that:

   (a) there be an order in the nature of certiorari to quash the decision of the Tribunal handed down on 22 November 2005;

   (b) there be an order in the nature of mandamus requiring the Tribunal, differently constituted, to review according to law the decision made by the first respondent's delegate on 28 June 2005; and

   (c) the first respondent pay the costs of the appellant of and incidental to the proceeding in the Federal Magistrates Court.

3. The first respondent pay the appellant's costs of and incidental to the appeal.

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
VICTORIA DISTRICT REGISTRY **VID 1270 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGE:	**KENNY J**
DATE:	**30 MAY 2007**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

BACKGROUND

1 This is an appeal from a judgment of the Federal Magistrates Court given on 27 October 2006 dismissing the appellant's application for an order that the respondents show cause as to why, amongst other things, a decision of the Refugee Review Tribunal ("the Tribunal") should not be quashed. The Tribunal affirmed a decision of the first respondent's delegate not to grant the appellant a protection visa.

2 The Tribunal found that the appellant was a Sri Lankan national. He arrived in Australia on 15 April 2005. On 22 April 2005, he applied for a protection visa with the first respondent's Department. A document entitled "Statement of claims in respect of my application for protection (class XA) visa" ("initial statement") accompanied his application. In his initial statement the appellant set out his claims to be a refugee.

3 The appellant claimed that he would be harmed or killed by his political opponents on account of his former political activities and opinions, if he returned to Sri Lanka. He also claimed that the Sri Lankan authorities would not afford him effective state protection.

Relevantly for what follows, he said:

> *…I was heavily involved with the activities carried out by 'Youngest Welfare Association' in my village. Due to my services to the above organization, in 2003 I was elected as the president of the above organization.*

4 On 28 June 2005, a delegate of the first respondent refused the appellant a protection visa. On 19 July 2005, the appellant applied to the Tribunal for review of the delegate's decision.

5 Independently of his application for Tribunal review, on 10 August 2005, the Australian Red Cross, on behalf on the appellant, faxed to the first respondent's Department an application for a benefit pursuant to the Asylum Seeker Assistance Scheme. Asylum Seeker Assistance provides a monetary benefit that may be paid in certain circumstances pending the determination of an application for review by the Tribunal.

6 The appellant applied for Asylum Seeker Assistance on the basis that he was:

> *A person who is unable to work as a result of effects of torture and trauma and who has supporting documentary evidence, that specifically states this, from a medical officer or other appropriately qualified professional person.*

His application was supported by a letter dated 9 August 2005 from the Australian Red Cross, which stated that:

> *The Australian Red Cross referred* [the appellant] *to the Victorian Foundation for the Survivors of Torture and Trauma due to concerns around his psychological health. He saw a counsellor named Therese Meehan, who found him to be experiencing a range of psychological symptoms, that render him not currently capable of work.*

Attached to this letter was a letter dated 28 July 2005 under the hand of Therese Meehan, "Counsellor Advocate". Ms Meehan wrote:

> *The above Sri Lankan man was referred to the Victorian Foundation for Survivors of Torture by Red Cross Victoria, for a psychological assessment. I interviewed him on 27/7/05 with a Tamil interpreter. He is experiencing a range of psychological symptoms that are having a significant effect on his daily life. He is suffering from chronic sleep disturbance; he is unable to get to sleep easily, he wakes very early, and the few hours of sleep he does get are broken by sudden, unexplained periods of wakefulness. He also suffers from nightmares at least 2 or 3 times a week. He reports that the dreams are about*

> *the traumatic events he experienced in Sri Lanka, and they cause him to wake and feel extremely anxious. He finds it impossible to go back to sleep after one of these nightmares. His previous housemates reported that he frequently shouted in his sleep.*
>
> *His daytime state is a little better provided he can keep occupied, as he finds that when he spends time alone, his mind returns involuntarily to distressing thoughts and memories from the past. He finds that this increases his anxiety and sense of hopelessness, which in turn contributes to a poor night's sleep. He also experiences poor concentration and bouts of tearfulness.*
>
> *In my opinion,* [the appellant] *is not capable of finding or maintaining a job at present. His chronic tiredness, poor concentration, and general stress would contribute to a lack of safety both for himself and others.*

The appellant also filed a statutory declaration in support of his Asylum Seeker Assistance application. Asylum Seeker Assistance was granted on 19 August 2005, for the period from 18 August to 7 December 2005.

7 The Tribunal held a hearing on 25 October 2005, at which the appellant presented evidence with the assistance of a Tamil interpreter. Prior to the hearing the appellant filed a statutory declaration dated 10 October 2005 ("2005 statutory declaration"). The appellant relevantly declared:

> *All the information in my previous statement remains correct and true. I am writing this updated statement to include extra details.*
>
> *Although the main points in this statement are consistent with those in my first statement, I have included more detail in this statement. I wrote my first statement in Tamil, having had no direction as to what was required of me. My previous lawyers had my statement interpreted and included what they thought was appropriate. My second statement was taken verbally. The Asylum Seeker Resource Centre advised me of the kind of details that were necessary and asked me many questions and as a result I gave more details than I had previously.*
>
> …
>
> *I was involved in the Youngest Welfare Association (YWA). I felt this was a good thing to be around the youth of my country and encourage them to follow the UNP. I was elected President of the Association in 2003. This role enabled me to liaise with many wealthy people* [who] *would provide funding for the group. The Youngest Welfare Association was involved in social work. We cleaned the shrine so that people could pray, we collected money for to help buy machines for widows so that they could start a business, we helped children at school sit for scholarship exams and also helped*

> *children take part in sport activities. Eventually the Youngest Welfare Association became a supporter of the UNP. The Youngest Welfare Association would distribute UNP leaflets.*

On 22 November 2005, the Tribunal handed down its decision affirming the delegate's decision.

8 On 22 December 2005, the appellant filed his 'show cause' application in the Federal Magistrates Court seeking review of the Tribunal's decision. The appellant filed an amended application on 5 April 2006. On 27 October 2006, a Federal Magistrate dismissed that application. The appellant appeals from the judgment of the Federal Magistrates Court.

TRIBUNAL DECISION

9 In its reasons for decision, the Tribunal stated that it had access to "the Department's file, which include[d] the protection visa application and the delegate's decision record. The Tribunal also [had] regard to the material referred to in the delegate's decision, and other material available to it from a range of sources." The Department's file included the appellant's application for Asylum Seeker Assistance. The Tribunal specifically referred to this application in its reasons.

10 Under the heading "Findings and Reasons", the Tribunal referred to the law on adverse credibility assessments. It also referred to the appellant's 2005 statutory declaration before stating that it was:

> *…satisfied that by making a clear reference to the Statement provided to DIMIA, the applicant is providing that Statement to the Tribunal for the purposes of the review and consequently it is information which* [he] *has provided for the purpose of the application and as such it falls within one of the exceptions enumerated in Section 424A of the Act, namely S424A(3)(b).*

11 The Tribunal went on to find that, "[l]ooking at the evidence as a whole and having had the opportunity to explore the applicant's claims at a hearing", the applicant was not a credible witness. It commented:

> *The applicant has provided inconsistent information and his knowledge of matters pertaining to the UNP is incongruent with his claim that he had been a member since 2004.*

The Tribunal added:

> *The applicant's level of knowledge contradicts his claims that he had been a member* [of the UNP] *for all those years. In fact, his lack of knowledge is an objective measure raising serious doubts about his claims and reflecting poorly on his credibility.*

The Tribunal noted that he was unable to give any details about the dates of the meetings for the UNP that he claimed to have organized and that this inability "raise[d] serious doubts about this claim and support[ed] the adverse credibility finding".

12 Further, the Tribunal relied on perceived inconsistencies in the appellant's evidence about the position to which he was elected in the Youngest Welfare Association ("YWA") in 2003. The Tribunal said that, in oral evidence, he "gave evidence that he became a member of the YWA in 1994 and that in 2000, he became the treasurer for the following 18 months and in 2003, he was elected Deputy President". The Tribunal concluded that "[t]he claim that he was elected Deputy President in 2003 is inconsistent with what he claimed in writing, namely that he was elected President of the Association". The Tribunal added:

> *When the inconsistency was put to the applicant, he became argumentative and contended that this was what he had told the Tribunal. The Tribunal asked the applicant if he would like to provide an explanation relating to the inconsistency. The applicant now said he was Vice President for three to four months and in July 2003 he became President. There is no mention in the Statement or indeed Statutory Declaration that he was Deputy President. The applicant accepted that he did not mention this and explained that this happened because of the* 'tension I was having…'
>
> …
>
> *The Tribunal is not persuaded by the applicant's explanations. Looking at the evidence as a whole, the Tribunal is satisfied that the inconsistencies between the applicant's oral testimony and written claims reflect poorly on his credibility.*

13 The Tribunal also found that the appellant's stated reasons for not seeking protection as a refugee in Nauru unconvincing and concluded that he had "provided contradictory information in relation to this issue". The Tribunal went on to note that the appellant's evidence at the hearing concerning his alleged visits to the Australian Embassy in Nauru was not reflected in his 2005 statutory declaration, "indicating that he was fabricating claims in the course of the hearing, supporting the adverse credibility finding". Furthermore, so the

Tribunal said in its reasons, "the fact that the applicant did not seek protection in Nauru raises serious doubts about his claims".

14 The Tribunal concluded that these were "legitimate and relevant factors to take into account in reaching the adverse credibility finding" and that it was not satisfied that the appellant was involved in any capacity in the YWA, or was a member of, or involved in, the UNP. It followed, so the Tribunal said, that it "was not satisfied that supporters and or members of the Sri Lankan Freedom Party ever assaulted [him] or caused him any of the claimed harm, or that the police did not help [him], or that many people have asked about [him] since he left Sri Lanka, or that he would be killed if he were to return to Sri Lanka". Further, the Tribunal stated that it was "not satisfied that [he] has suffered any of the claimed harm consequential to his alleged involvement in the Youngest Welfare Association or the UNP, as the Tribunal has not been satisfied that [he] has had any involvement with those organizations".

FEDERAL MAGISTRATES COURT

15 In the Federal Magistrates Court, the appellant contended that the Tribunal had contravened s 424A of the *Migration Act 1958* (Cth) ("the Act") in its treatment of Ms Meehan's letter of 28 July 2005. The Federal Magistrate rejected this contention and dismissed the appellant's application. The Federal Magistrate found that the Tribunal rejected the appellant's claims as a result of its finding that he had no involvement with the UNP or the YWA. The Federal Magistrate accepted that Ms Meehan's letter was not information that the Tribunal considered was a part of the reason for decision. The Federal Magistrate also held that the Tribunal's subjective assessment of the relevance of that evidence did not attract the operation of s 424A.

16 The Federal Magistrate held that the Tribunal relied on inconsistencies between the evidence given by the appellant orally at the Tribunal hearing and that given in writing to the Department and to the Tribunal, particularly concerning his office in the YWA in 2003. The Federal Magistrate concluded that the Tribunal "did consider that this information was a part of the reason for its adverse credibility finding", adding that s 424A(3):

> …*operate*[d] *in respect of the information contained in* [his] *initial statement about his election to the position of president in the YWA in 2003 and that*

accordingly s 424A did not apply to that information.

The Federal Magistrate held that s 424A(3) operated to exclude s 424A because of the adoption in the Tribunal of the information previously provided to the Department.

APPEAL TO THIS COURT

17 The appellant's amended notice of appeal against the judgment of the Federal Magistrate read as follows:

> *1. Hartnett FM erred in failing to find that the Tribunal's decision was affected by jurisdictional error because the Tribunal failed to comply with section 424A of the* Migration Act 1958.
>
> ***Particulars***
>
> *In reaching its decision, the Tribunal referred to and relied upon the following information:*
>
> *(a) The Counsellor/Advocate's letter dated 28 July 2005 and the failure by the Counsellor/Advocate to outline her qualifications;*
>
> *(b) The appellant's statement made in support of his protection visa application that he was elected president of the Youngest Welfare Association and/or his failure to state that he had been elected deputy president,*
>
> *(together, 'the information').*
>
> *The information was information that the Tribunal considered to be a part of the reason for affirming the delegate's decision.*
>
> *The information was not information that the appellant gave for the purpose of the application to the Tribunal.*
>
> *The information was required to have been disclosed to the applicant in accordance with section 424A(2) and was not so disclosed.*
>
> *2. The Tribunal committed a jurisdictional error by acting unreasonably in not enquiring (as it was entitled to do under s.424(1) and (2) and s.427(1)(d) of the Act) about and ascertaining the qualifications of the Counsellor Advocate Ms Therese Meehan to express the opinions set out in her Report dated 28 July 2005.*

SOME RELEVANT LEGISLATION

18 The appeal raises questions about the operation of s 424A of the Act. Section 424A

of the Act 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 reasonably practicable, that the applicant understands why it is relevant to the review; and*
> *(c) invite the applicant to comment on it.*
>
> *(2) The information and invitation must be given to the applicant:*
> *(a) except where paragraph (b) applies - by one of the methods specified in section 441A; or*
> *(b) if the applicant is in immigration detention – by a method prescribed for the purposes of giving documents to such a person.*
>
> *(3) This section does not apply to information:*
> *(a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or*
> *(b) that the applicant gave for the purposes of the application; or*
> *(c) that is non-disclosable information.*

All methods stipulated in s 441A contemplate that the particulars and invitation to which s 424A refers be given to the applicant in writing.

19 A failure to comply with s 424A amounts to jurisdictional error: see *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162 at 183 per McHugh J, at 203 per Kirby J and at 211 per Hayne J.

CONSIDERATION

20 As set out in the amended notice of appeal, the appellant relied on two grounds. The first ground arose under s 424A and had two limbs – (1) Ms Meehan's letter; and (2) the appellant's initial statement regarding his office in the YWA. The second ground related to the Tribunal's failure to make inquiries about Ms Meehan's qualifications.

Ms Meehan's letter

21 The appellant submitted that the fact that Ms Meehan failed to specify her

qualifications constituted a part of the reason for the Tribunal's decision for affirming the delegate's decision and, thus, s 424A(1) of the Act applied. This submission gives rise to the question, first, whether the Tribunal's knowledge of the fact that Ms Meehan's letter did not contain a statement of her qualifications amounted to "information" for the purposes of s 424A(1). If it did, there is a further question as to whether this was information that the Tribunal considered "would be the reason, or a part of the reason" for affirming the decision under review.

22 Before going any further, I would reformulate the first question to identify the real item of information in question. I would not regard the omission of Ms Meehan's qualifications as the "information" that might attract a s 424A(1) obligation. Rather, the information was the letter in the form it took in the circumstances known to the Tribunal ("the letter").

23 This Court has discussed what is intended by the term "information" in s 424A on a number of occasions. As Finn and Stone JJ said in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 at 476-477:

> [T]*here 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 429-30 [104]; 64 ALD 289 at 318. 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; BC200301782;*
>
> *(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 218 [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 217-218 [19]-[22]; and*
>
> *(iii) the word does not encompass the Tribunal's subjective appraisals, thought processes or determinations:* Tin *at [54];* Paul *at FCR 428 [95];* Singh v Minister for Immigration and Multicultural Affairs

> *[2001] FCA 1679; 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]*.

The Court substantially accepted this approach in *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 ("*SZEEU*"): compare *SZEEU* at 226-228 per Moore J, at 252 and 254 per Weinberg J and at 259-260 per Allsop J.

24 Accordingly, I accept that, for present purposes, "information" does not encompass the Tribunal's appraisals or thought processes, although the Tribunal's appraisals and thought processes may show the relevance of the information in question and indicate what is required for compliance with s 424A(1). It follows that information is not constituted by what the Tribunal considers to be defects in evidence or a lack of evidentiary specificity. Secondly, information may have relevance for any number of reasons: compare *SZEEU* at 263 per Allsop J.

25 I accept that the Tribunal's knowledge of the letter was "information" for the purposes of s 424A(1). The contents of the letter included statements about the appellant and about the letter-writer. The information was, relevantly, the knowledge that the letter communicated to the Tribunal.

26 The Tribunal gave no weight to the statements in the letter about the appellant's psychological condition because the letter did not communicate enough about the letter-writer's qualifications. According to its reasons, the Tribunal's determination about the importance of the letter to its review was the product of its evaluation of the significance of this deficiency. As already noted, whilst the Tribunal's thought processes (including appraisals and evaluations) are not "information", they show why the information that they concern (here, the letter) was relevant for s 424A(1) purposes.

27 The appellant submitted that the letter was relevant to his protection visa application in two ways. First, if the Tribunal had accepted he suffered from the psychological symptoms to which Ms Meehan referred, then these symptoms would be corroborative of his claims to have been "the victim of violence, harassment and persecution in the past"; and,

secondly, the Tribunal "may have been more willing to accept that any contradictions or differences in his story given at various stages of the review process were explicable because of his psychological difficulties".

28 The first respondent submitted that this was to approach the matter the wrong way. For the reasons stated below, I would agree.

29 The first respondent argued that the letter was not information that the Tribunal considered was the reason, or a part of the reason, for its decision. While the Tribunal referred to the letter in its reasons, the Tribunal did not, so the first respondent contended, rely on it. The first respondent argued that it was necessary to "unbundle" the Tribunal's reasons. The ultimate reason for the Tribunal's decision was its lack of satisfaction about the existence of any relevant protection obligation. The first respondent argued that the Tribunal's lack of satisfaction flowed from its rejection of the appellant's claims about his past persecution in Sri Lanka, which, in turn, flowed from its finding that the appellant had had no involvement with either the YWA or the UNP. This latter finding was the product of the Tribunal's adverse credibility finding that resulted from inconsistencies in the appellant's evidence. On a fair reading of the Tribunal's reasons as a whole, so the first respondent submitted, this adverse credibility finding did not, in any way, arise out of Ms Meehan's letter. The first respondent submitted that the Tribunal was not bound to regard any depression that the appellant might suffer as indicative of his having experienced persecution in the past in Sri Lanka for a Convention reason. The first respondent further submitted that it was clear that the Tribunal made a positive assessment of the appellant's ability to give evidence and rejected the possibility that any depression suffered by him adversely affected his ability to give evidence.

30 For the reasons I am about to state, I would not accept the first respondent's analysis either.

31 I first note that, in its reasons, the Tribunal referred to the letter three times. First, it mentioned the letter in its summary of "Claims and Evidence". Secondly, under the heading "Hearing", it recorded:

The Tribunal discussed with the applicant the letter dated 28 July 2005 from

> *Counsellor/Advocate…provided in support of his application for* Asylum Seeker Assistance Scheme *(ASAS). The Tribunal put to the applicant that the Counsellor/Advocate does not outline her skills or qualifications and as such the Tribunal is not satisfied that she is qualified to provide the clinical opinions she had expressed in that letter. The Tribunal indicated that the Tribunal is satisfied that the applicant was capable of putting his case in full before the Tribunal. The applicant said he suffers from depression.* ***The Tribunal indicated that on the basis of the available information, the Tribunal does not accept that he suffers from any clinical conditions which the Tribunal should take into account.*** (Emphasis added)

Finally, under the heading "Findings and Reasons", the Tribunal concluded:

> *In reaching the adverse credibility finding, the Tribunal has given regard to the letter dated 28 July 2005 from Counsellor/Advocate…provided in support of the application for* Asylum Seeker Assistance Scheme *(ASAS). As put to the applicant at the hearing, given the fact that the Counsellor/Advocate does not outline her skills and or qualifications, the Tribunal is not satisfied that she is qualified to provide the clinical opinions she had expressed in that letter. Accordingly, the Tribunal does not give that letter any weight. The applicant claimed that he was depressed but provided no clinical evidence in support. The Tribunal accepts as being plausible that the applicant gets depressed, however, the Tribunal is satisfied that the applicant was capable of putting his case in full before the Tribunal. In essence, the Tribunal is satisfied that any depression suffered by the applicant did not adversely affect his ability to present his case in full before the Tribunal.*

32 I would conclude that, on a fair reading of the Tribunal's reasons, its knowledge of the letter, particularly in the form it took, was information that the Tribunal considered was a part of the reason for affirming the decision under review. The fact is that the Tribunal in this case regarded the letter as sufficiently important to mention it specifically on three separate occasions; to state why it was that it had determined to give it no weight; and to state that, in the absence of clinical evidence of depression (which the letter, if written by a clinician, might have provided) the Tribunal was satisfied that the appellant was capable of putting his case. The fact that the Tribunal merely put the letter out of account and, in that way, bolstered a conclusion about the appellant's credibility arrived at by reference to other matters does not mean that the letter did not play **a** part in its reasons for affirming the delegate's decision.

33 Obligations arise under s 424A(1) in respect of information that the Tribunal considers would be **a** part of the reason for affirming the decision under review. In the

present case, for the reasons already noted, the letter played **a** part in the Tribunal's reasons for its decision, even if only a subsidiary part. Notwithstanding that a piece of information constitutes only a minor or subsidiary part of the Tribunal's reasons, s 424A is attracted: see *SZEEU* at 252 per Weinberg J and at 262 per Allsop J; and *NBKT v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 195 ("*NBKT*") at [31] per Young J, with whom Gyles and Stone JJ agreed. The Tribunal considered the letter in the form it took, and put the statements about the appellant's psychological condition, which it contained, out of reckoning because the letter did not state the letter-writer's clinical qualifications. The adverse credibility finding, made after the Tribunal had put this letter out of account, was central to the Tribunal's decision. The fact that the Tribunal's reasoning did not proceed in a straight-line way is immaterial. Weinberg J explained in *SZEEU* at 253 that:

> *The actual process by which a decision is reached is, of course, a complex matter. It is not always as neat as the reasons themselves may suggest. The reasoning may not proceed in a linear fashion, and the Tribunal's reasons must, of course, be read as a whole.*

34 The Tribunal's knowledge of the letter was information which was a part of the Tribunal's reasons for affirming the delegate's decision (and therefore presumably information that the Tribunal considered would be a part of its reasons). The Tribunal was required to comply with s 424A(1) in relation to Ms Meehan's letter, and it failed to do so. The letter did not fall within an exception in s 424A(3) of the Act.

35 The failure to comply with s 424A(1) of the Act constituted jurisdictional error. Further, this is not a case where the Tribunal's decision is supportable on some independent basis. It will be recalled that the Tribunal relied on evidentiary inconsistencies, as well as lack of relevant knowledge, to support its adverse credibility findings. The Tribunal's reasons record that the appellant attributed some of these inconsistencies to the "tension [he] was having". Having found that the appellant's capacity to present evidence was not adversely affected by his psychological condition, the Tribunal had no reason to have regard to any explanation for evidentiary deficiencies that relied on the appellant's psychological condition. It is apparent that the Tribunal's findings on the appellant's capacity were intertwined with its assessment of evidentiary inconsistencies and deficiencies and, ultimately, the appellant's credibility.

36 I would allow the appeal on the first ground argued by the appellant.

YWA

37 Strictly speaking, it is unnecessary to consider the second limb of the first ground. I do so as briefly as I can. I have already noted that, in making its adverse credibility finding, the Tribunal relied on perceived inconsistencies in the appellant's evidence about the position to which he was elected in the YWA in 2003. The Tribunal concluded that his claim at the hearing that, in 2003, he was elected Deputy President and then elevated to President was inconsistent with his claim in his initial statement that he was elected President in that year.

38 It was common ground that the reference in his initial statement to his role in the YWA (see [3] above) was information within s 424A(1)(a) and that the Tribunal did not comply with s 424A(1)(b) or (c) in respect of it. The first respondent submitted that there was no requirement for the Tribunal to do so, because the information fell within the exception in s 424A(3)(b) of the Act.

39 The first respondent submitted, and the appellant denied, that the appellant had "adopted" or "invited reference to" the contents of his initial statement for the purpose of the Tribunal's review by: (1) giving oral evidence at the Tribunal hearing confirming the accuracy of his previous written statements; and (2) by referring to his initial statement in his subsequent 2005 statutory declaration, which was lodged with the Tribunal. The first respondent submitted that the appellant's conduct enlivened s 424A(3)(b). The first respondent further submitted that a fair reading of the Tribunal's reasons demonstrated that it relied on the appellant's adoption in his 2005 statutory declaration of the information previously provided to the Department in his initial statement.

40 The appellant contended that the information in his initial statement was provided to the Department and not to the Tribunal. He argued that, whilst he had referred to his initial statement in his 2005 statutory declaration, which was submitted to the Tribunal, he had not "adopted" his initial statement for the purpose of the Tribunal's review. He argued that "adoption" in this context meant "conscious and meaningful, substantive adoption, rather than just a rote formula of words in a document prepared by somebody else". Accordingly, the appellant contended that his reference to the initial statement during the review process was not sufficient to bring that document within the exception in s 424A(3)(b).

41 The issue is whether the appellant has given the information, which was in his initial statement, to the Tribunal for the purposes of his review application, with the consequence that s 424A(3)(b) applies to the information he gave about holding office in the YWA.

42 The parties referred to numerous decisions in which an issue of this kind arose. In some of these cases, the applicant expressly advanced information that had been initially given to the Department as part of the case on review to the Tribunal: see *M55 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 131 at [25] per Gray J; *VUAV v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1271 at [11] per Merkel J; *SZGGT v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 435 ("*SZGGT*") at [24] and [50] per Rares J; *SZCKD v Minster for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 451 at [37] per Graham J; *VBWF v Minister for Immigration and Indigenous Affairs* (2006) 154 FCR 302 at 312 per Heerey J; and *SZCBQ v Minister for Immigration and Multicultural Affairs* [2006] FCA 1538 at [12] per Bennett J. In these cases, s 424A(3)(b) was held to apply.

43 In other cases, the Tribunal has asked the applicant about such information, which it has generally found in the Department's file in the Tribunal's possession. In cases of this kind, the Court has adopted no fixed view about the application of the exception. On some occasions, it has found that s 424A(3)(b) does not apply, because the applicant was not to be taken as having given the information to the Tribunal for the purposes of the review application: see, for example, *NAZY v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 744 at [39]-[42] per Jacobson J. In *SZBMI*, which appeal is reported with *SZEEU*, the applicant confirmed with the Tribunal that an earlier statement as to flight information was true and correct. This led the respondent to argue that the appellant in that case had adopted the flight information and given it to the Tribunal for the purposes of its review. Moore J, at 225, specifically rejected this submission, commenting:

> *I do not accept that, by adopting the statement at the hearing before the Tribunal, that information was transformed into information provided by the appellant in his application for review. In my opinion, the approach of Jacobson J in* NAZY v Minister for Immigration and Multicultural and Indigenous Affairs *was correct. If the Tribunal comes to know of what was said by an applicant at a point before any application for review was made, and views what was said at that time as material to its assessment of what was later said by an applicant, then the mere adoption of the earlier statement*

> *during the review process would not result in the knowledge (and relevantly information in the present appeal) being comprehended by s 424A(3)(b). Different considerations could arise if it was clear the Tribunal treated only the adoption of the earlier statement as the fact relevant to its consideration of the application in the review. In those circumstances the fact of adoption would almost certainly constitute information provided by the applicant in the application on which the exclusion would operate.*

44 Weinberg J agreed with Moore J that the adoption of the earlier statement by the appellant during the hearing before the Tribunal did not render it information provided by him in his application for review: see *SZEEU* at 252. Allsop J did not consider the operation of the exception in s 424A(3)(b) in this context.

45 As Young J noted in *NBKT* at [55], the Full Court's approach in *SZEEU* to issues of this kind must also take into account its treatment of a similar question in the appeal in *SZDXA*, also reported with *SZEEU*. The relevant information in *SZDXA* was the fact that the appellant had a temporary business visa to Australia. Moore J concluded that, although the Tribunal had acquired this information from sources other than the appellant, the Tribunal had discussed the fact with the appellant at the hearing and the appellant had affirmed that he had entered Australia on a business visa. In this circumstance, Moore J concluded, at 242, that the information fell within 424A(3)(b) and Weinberg J agreed, at 254, observing, at 255, that the adoption of an earlier statement at the hearing can bring that statement within the exception. Allsop J agreed, at 268, with Moore J in relation to *SZDXA*. The Full Court in *NBKT* reached a similar conclusion in relation to the information in question in that case: see *NBKT* at [60]-[63] per Young J. See also *SZCJD v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 609 at [43] per Heerey J; and *SZDPY v Minister for Immigration and Multicultural Affairs* [2006] FCA 627 at [35] per Kenny J.

46 The question whether an applicant gave an item of information for the purposes of his or her review application must be answered by reference to the particular facts of the case. As Rares J said in *SZGGT* at [36] and [50], these facts must be considered objectively. The nature of the information is also relevant to this inquiry: see *NBKT* at [59] per Young J. For example, if the Tribunal puts a specific piece of factual information to the applicant in the course of the hearing and the applicant affirms that it is true, then the conclusion may readily be reached that the applicant has given this information to the Tribunal for the purposes of the

review.

47 Having regard to the facts of the present case, as well as the information in question, is this in substance what the applicant has done? Viewed objectively, I would answer in the negative. This case is closer to *SZBMI* than many of the other cases to which I have referred. The Tribunal purported to rely on information in the initial statement in assessing the appellant's credibility, although the appellant did not invite reference to his initial statement in the course of the Tribunal hearing. I would reject the contention that the appellant "gave" the whole of his initial statement to the Tribunal when, in answer to the Tribunal's question, he confirmed with the Tribunal that he did not wish to amend it or his 2005 statutory declaration. As the appellant's counsel noted, the reference in the fax cover sheet accompanying the 2005 statutory declaration to "**Further** Statement" (emphasis added) is equivocal. I would not attach any significance to it. I would also reject the contention that, because of the terms of his 2005 statutory declaration, he "gave" the information in his initial statement to the Tribunal for the purposes of its review. His affirmation that, whilst his initial statement was "correct and true", he sought to provide the Tribunal with "extra details" in the 2005 statutory declaration did two things. It affirmed that his claims had not altered over time and that there were more particulars he could give in relation to them. In and of itself this did not republish the initial statement to the Tribunal. There is, moreover, nothing else in the 2005 statutory declaration or in the circumstances of the case that would give rise to the implication that the initial statement had been republished to the Tribunal. On the contrary, the terms of the 2005 statutory declaration indicate that it was intended to take the place of the initial statement as a fuller embodiment of the applicant's claims than the initial statement. Despite reference to the initial statement, the statutory declaration plainly stood by itself. It did not require the reader to refer to the earlier document in order to understand its contents.

48 Objectively speaking, in all the circumstances, the references to his initial statement in the 2005 statutory declaration served only to deny any suspicion of "recent invention" that might have arisen upon the filing of the later document. It was insufficient to transform the initial statement into information given for the purposes of the review application. The exception in s 424A(3)(b) was therefore inapplicable. It was, of course, open to the Tribunal to examine the appellant's initial statement (for example, to consider whether the appellant's

assertions about it and the 2005 statutory declaration were correct). If, however, the Tribunal considered that it might rely on information in the initial statement (for example, as showing that there were inconsistencies between his accounts in it and the 2005 statutory declaration, as it did) then the Tribunal was bound to comply with s 424A(1). This meant that it was bound to provide the requisite particulars and invitation in relation to the information in his initial statement about his office in the YWA. The Tribunal's failure to comply with s 424A(1) constituted another instance of jurisdictional error.

Failure to inquire

49 At the hearing of the appeal, the appellant amended his notice of appeal in order to support an argument that there was a third instance of jurisdictional error in that the Tribunal acted unreasonably, in the sense mentioned in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, when it failed to enquire (as it might have done under ss 424 and 427) about Ms Meehan's qualifications to express an opinion about the appellant's psychological state. In this connection, the appellant referred to *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 170 per Wilcox J; *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 119 per Wilcox J; *Luu v Renevier* (1989) 91 ALR 39 at 50 per Davies, Wilcox and Pincus JJ; *Li v Minister for Immigration and Multicultural Affairs* (1997) 144 ALR 179 at 192 per Foster J; *Re Minister for Immigration and Multicultural Affairs; ex parte Cassim* (2000) 175 ALR 209; *M164/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 16; and *Luu v Minister for Immigration and Multicultural Affairs* (2002) 127 FCR 24 at 40-43 per Gray, North and Mansfield JJ. An affidavit sworn on 13 February 2007 by Kelly Louise Hughes, a solicitor in the employ of Mallesons Stephen Jaques, pro bono solicitors for the appellant, indicated that the Tribunal would have had little difficulty in ascertaining Ms Meehan's qualifications had it made a straightforward inquiry. Having regard, however, to the conclusions reached above with respect to the appellant's primary grounds of appeal, it is unnecessary to consider this ground and I do not do so. The argument was not advanced before the learned Federal Magistrate.

DISPOSITION

50 For the reasons stated, I would allow the appeal and make orders accordingly.

51 I note that the appellant has been represented by solicitors and counsel, all of whom have acted pro bono on his behalf. The Court acknowledges the considerable service rendered to the Court and to litigants in person by members of the profession who agree to act without fee as solicitor or counsel in the preparation and presentation of cases such as this.

I certify that the preceding fifty-one (51) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kenny.

Associate:

Dated: 30 May 2007

Pro bono counsel for the Appellant:	Mr Charles Gunst QC and Mr Anthony Lewis
Pro bono solicitors for the Appellant	Mallesons Stephen Jaques
Counsel for the Respondent:	Mr Richard Knowles
Solicitors for the Respondent:	DLA Phillips Fox
Date of Hearing:	14 February 2007
Date of Judgment:	30 May 2007