FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZNAV & ORS v MINISTER FOR IMMIGRATION & ANOR *[2009] FMCA 693*

MIGRATION – Review of RRT decision – where transcript of hearing showed omissions of interpretation and translations of words that were not actually spoken – whether standard of interpretation so inadequate as to amount to a breach of s.425 – whether Tribunal failed to take into account relevant evidence.

"Acknowledgement of Application" letter – where letter contained an invitation to provide information "immediately" without specifying the prescribed period for response – whether that letter contained an invitation to provide additional information written pursuant to s.424(2) – whether failure to indicate the prescribed period in breach of s.424B constitutes a jurisdictional error.

Migration Act 1958 (Cth), ss.359A, 359B, 359C, 414, 424, 424A, 424B, 424C, 425
Migration Regulations 1994

Perera v Minister for Immigration [1999] FCA 507
Minister for Immigration v Wu Shan Liang (1996) 185 CLR 259
SZCOQ v Minister for Immigration [2007] FCAFC 9
Minister for Immigration v Al Shamry [2001] FCA 919
SAAP v Minister for Immigration [2005] HCA 24
NAAF of 2002 v Minister for Immigration (2004) 211 ALR 660
SZLPO v Minister for Immigration [2009] FCAFC 51
Minister for Immigration v Sun [2009] FCAFC 201
SZLTR v Minister for Immigration [2008] FCA 1889
MZXRE v Minister for Immigration [2009] FCAFC 82
SZKCQ v Minister for Immigration [2008] FCAFC 119
SZKTI v Minister for Immigration [2008] FCAFC 83
SZEXZ v Minister for Immigration [2006] FCA 449
M v Minister for Immigration [2006] FCA 1247
SZLWQ v Minister for Immigration [2008] FCA 1406
SZIZO & Ors v Minister for Immigration [2008] 172 FCR 152

First Applicant: SZNAV

Second Applicant: SZNAW

Third Applicant:	SZNAX
Fourth Applicant:	SZNAY
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 3232 of 2008
Judgment of:	Raphael FM
Hearing date:	6 July 2009
Date of Last Submission:	6 July 2009
Delivered at:	Sydney
Delivered on:	23 July 2009

REPRESENTATION

Counsel for the Applicant:	Ms A Arunothayam
Counsel for the Respondents:	Ms V McWilliam
Solicitors for the Respondents:	Clayton Utz

ORDERS

(1) A writ of certiorari issue directed to the Refugee Review Tribunal removing into this Court to be quashed the decision of the Tribunal made on 22 October 2008.

(2) A writ of mandamus be directed to the Second Respondent directing it to reconsider and determine the matter according to law.

(3) The First Respondent to pay the Applicant's cost assessed in the sum of $5,500.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3232 of 2008

SZNAV
First Applicant

SZNAW
Second Applicant

SZNAX
Third Applicant

SZNAY
Fourth Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The applicants are citizens of Bangladesh who arrived together in Australia on 24 March 2008. On 6 May 2008 they applied to the Department of Immigration & Citizenship for protection (Class XA) visas. On 20 June 2008 a delegate of the Minister refused to grant protection visas and on 16 July 2008 the applicants applied for review of the delegate's decision from the Refugee Review Tribunal. The Tribunal held a hearing which the principal applicant attended. He will hereafter be referred to as "*the applicant*" as he was the only person who completed Part C of the PVA form. Although his wife could be

said to have had her own claims she completed Part D indicating she did not. The Tribunal provided the applicant with additional time in which to make further submissions following the conclusion of the hearing. These submissions were made in detail by his migration agent. On 22 October 2008 the Tribunal determined to affirm the decision under review and handed it down on 11 November 2008.

2. The principal cause of the persecution which the applicant claimed he had a reasonable fear of was his marriage in 1992 as a Hindu to a Muslim woman from a neighbouring village. The applicant told that his wife had become a genuine believer in the Hindu religion. He stated that he had been intimidated by a group of Muslims immediately prior to his marriage and that after the notorious Babri Mosque incident in Ayodhyain in India in 1992 there was a serious backlash against Hindus in Bangladesh. He said that his marriage caused him to be estranged from his parents. The applicant claimed that he was not living with his parents at the time but Muslims from the local village came to his parents' house asking after him. The heated discussions between the Muslim vigilantes and his father, in which it was suggested that his father had told the vigilantes that they could kill his son, was the subject of much probing by the Tribunal. The applicant told that following this incident he left Bangladesh in 1994 for India with his family. He remained in India until 2007 when he heard that his mother was ill with uterine cancer and wished to see her grandchildren before she died. He returned to Bangladesh to his village. Where he stayed during that time was also the subject of debate. He told that after about fifteen days some Muslims from his wife's former village got together in the Mosque and determined to attack him and his wife. He learned about these threats and immediately left and returned to India. Upon his return to India the fact of his wife's Muslim origins became known through careless talk at his children's school. There was uproar in his village. He was assaulted and stripped to see if he had been circumcised and was therefore a Muslim. He was accused of being a terrorist. He fled the village with his family. The applicant produced a newspaper report of the alleged incident. He claimed that he could not return to India.

3. The Tribunal questioned the applicant about his claims in some detail. The applicant puts in issue the capability of the assigned interpreter.

The Tribunal, in its "*Findings and Reasons*", concluded that whilst there were clearly difficulties between Hindus and Muslims in Bangladesh it did not accept that Hindus face a real chance of persecution in Bangladesh just for identifying as Hindus. The Tribunal felt that this was particularly the case with the applicant given that he had lived in a village very close to a Muslim village and that outside of the incidents related to the Tribunal there was no evidence of violence between the two communities. The Tribunal noted that the applicant had returned to Bangladesh in 2007 and did not report any serious harm or threats befalling him or his family immediately upon their return and he did not suggest that any of the Hindus in the village to which he returned were facing persecution just for being Hindus [CB 381] at [149].

4. The Tribunal then considered the applicant's specific claims which can be reduced to three. Firstly, that he and his wife were forced to abandon their homes and move to India in 1994, second that he was the victim of family ostracism, Muslim vigilante activity, raids and a fatwa upon his return to Bangladesh in 2007 and third when he returned to India in 2007 he was the subject of Hindu persecution. The Tribunal had difficulty in accepting the applicant's evidence. It did not accept that the applicant's move to India in 1994 was an act of flight from persecution [CB 384] at [163], particularly given the lengthy period of time between the alleged confrontation between the Muslim vigilantes and his father, which it considered was invented in any event, and the date of his departure. The Tribunal had difficulty in accepting the applicant's story about how he came to know of the alleged meeting in the Mosque [CB 384] at [166-170]. It did not accept the veracity of the written corroborative evidence the applicant had brought including the newspaper report of the alleged occurrences in the village he returned to in India [CB 386] at [180-181]. The Tribunal did not consider it necessary to make findings in relation to the applicant's protection prospects in India because it accepted that Bangladesh was his country of nationality even though all the applicants had entered Australia on Indian passports.

5. The applicant's ground for alleging that the Tribunal fell into jurisdictional error in the manner in which it reached its decision are

contained in a Further Amended Application filed in Court on 6 July 2009. There are three grounds and I shall deal with each in turn:

1. The Interpretation Ground

6. "1. The Second Respondent **("Tribunal")** breached s.425 of the Migration Act 1958 (Cth) (**"Act"**).

Particulars

(a) The transcript and tape recording of the Tribunal hearing disclosed such inadequacy or incompetence in the interpretation that the applicant could be said to have been prevented essentially from giving his evidence."

7. The applicant provided the Court with a transcript of the evidence before the Tribunal together with an affidavit from another interpreter, Mr Arafeen, in which he had marked up errors that he had heard on the transcript. These errors constituted omissions of interpretation, translation of words that were not actually spoken or other misinterpretations. For example, on page 1 of the affidavit at line 19 the Tribunal actually said *"They can make one decision only"* but the words *"one decision only"* were not interpreted. At line 35 the Tribunal said *"Ok now I would have to be satisfied"* and the interpreter inserted the word *"understand"*. At line 36 it is claimed that the interpreter misinterpreted the word *"remote"* as *"less"*.

8. The applicant pointed to four instances where he argued the interpretation particularly fell short so that the applicant had been unable to give an effective account of the facts vital to his case and that the departures from the standard of interpreting related to matters of significance for his claim or the Tribunal's decision; *Perera v Minister for Immigration* [1999] FCA 507 at [45]. The first example is found at page 6 of the version of the transcript contained in Mr Arafeen's affidavit. The applicant commences to describe the incident after Babri Mosque in 1992. He was asked which village the vigilantes came to:

"I: Batika Danga, and destroyed our house. And they have burned, they have arsoned and they have assaulted my parents and my brothers and sister (Omission) assaulted [CUNLEAR 20:59], injured, assaulted us.

T: Which house? Where was the house?

I: My house.

T: Where?

I: Kalkoli Para.

T: Where were you?

I: I was hiding at my aunt's place at Gopal Pur.

T: Hmm. Well they didn't burn it until that event happened, did they? Like they took some – Maybe it was a case of them taking it out on a Hindu that they didn't like on that occasion. (Omission) but they didn't burn your house when you married her or they didn't burn your house just for being a Hindu, before feeling provoked by that riot in India."

9. The Tribunal refers to this piece of evidence from the applicant at [CB 383] at [160-161].

> *"[160] The Applicant clearly indicated that his marriage to a wife who converted to his religion was not the factor, on its own, that pressed them to leave Bangladesh. He said that he and his wife became local scapegoats of Muslim anger in the wake of the December 2002* [1992] *Babri Mosque episode in India, and that this development was the thing that ultimately pressed them into fleeing.*
>
> *[161] The Tribunal gives this claim no weight for the following reasons. The Applicant only suggested that local Muslim anger in response to the Babri Mosque incident was directed at him and his wife, whereas one would reasonably expect such a mass backlash to be more broadly directed at the Hindu community. Also, whilst in his protection visa application he loosely described the backlash to the Babri Mosque incident as the factor that precipitated his escape to India, he provided a little more detail to the Tribunal about when he travelled, and it was not until some time in 2004* [1994], *more than a year after the Babri Mosque incident. This was accordingly more than a year after the Applicant and his wife were married. This means they stayed in Bangladesh for more than a year after they were married."*

10. The applicant says that he could not respond to the Tribunal's conclusion that he had only suggested local Muslim anger in respect of the Babri Mosque incident was directed at him and his wife because the suggestion that the locals were "*taking it out on a Hindu that they didn't particularly like on that occasion*" had not been interpreted to him. I am of the view that even if that phrase had been translated it would not have provoked a response that there was a general antipathy

towards Hindus following the Babri Mosque incident of which this was just an example. That is the response the Tribunal appears to have wanted in order to accept the story. I also take the view that this omission did not relate to a matter of significance for the applicant's claim or the Tribunal's decision. The more telling reason why the Tribunal did not accept that the applicant had a well founded fear of persecution arising out of this incident was that it was not until some time in 1994, more than a year after the incident, that the applicant and his wife moved from Bangladesh. The Tribunal's views about the applicant's evidence that he had remained in Bangladesh "*on the run*" were that this evidence was inconsistent and unconvincing [CB 383] at [162].

11. The next complaint that the applicant had about the interpretation related to concerns that the Tribunal expressed about the use of the word *"probably"* by the applicant. The Tribunal had expressed its concern about the use of the word *"probably"* to the applicant during the course of the hearing. There are insertions of the word *"probably"* found at T7 of Mr Arafeen's affidavit - line 15, line 26, line 28, T10 line 45. The Tribunal referred to that matter at T11 line 25:

> "T: Yeah, well can I tell you, I'm a bit sceptical about this story about, about the plot in the mosque and people just happening to hear it coming back to your father; I'm a little bit sceptical about this story. I'm very sceptical about it because it also relies on the word 'probably'. I hear the word probably in both this story and the other one about when they came to your parents' house and your parents probably told them to kill you. I'm sceptical about, I'm sceptical about your parents ostracising (Omission) you because your mother wants you to come back and see her with the children. Okay, it sounds to me like a Muslim doesn't mind – No, we sometimes hear that Muslims don't mind if, if their child marries a non-Muslim as long the non-Muslim becomes a Muslim, okay? Sounds like – Your family sounds consistent with a Hindu family that's happy enough that the Muslim daughter-in-law has become a Hindu. Okay? So you can address that first. Your family's let you come back to the village with the Hindu wife and your children were Hindu. This doesn't sound like a family that's ostracised you or sold you off to the Muslims by saying "Kill him, spare us."

The Tribunal took the matter up in its "*Findings and Reasons*" [CB 379] at [133 – 135] where it refers to the comments made by the applicant's advisor:

> *"[133] The Applicant's adviser said that on listening to the recording of the RRT hearing he had noticed that the word "probably" had not been used during the hearing by the Applicant himself as often as the interpreter had indicated in his consecutive interpreting. The adviser suggested that some use of the word "probably" had merely been the result of interpolation by the interpreter, and suggested that the frequency of the appearance of the word probably should not be relied upon in discrediting the Applicant.*
>
> *[134] The Tribunal considered this position. However, the Applicant did not support this position in any way, and he certainly was not specific about where the word "probably" might have been erroneously interpolated rather than correctly translated.*
>
> *[135] The Tribunal recalls that perhaps the most critical moment where the Applicant appeared to use the word "probably" was when he put words in the mouths of one or both of his parents in an instance to which he could not have been a witness, and then suggested that they "probably" said this after the Tribunal asked him how he could possibly know for sure what they said on the alleged occasion. The Applicant went on to change his version of what his parents might have said, and it was this change in his evidence that became the issue of concern to the Tribunal."*

12. The Tribunal's most serious concern is the use of the word "*probably*" and that words were put into the mouth of the applicant's parents he could not have himself have heard. This is found at T7 in the Arafeen affidavit at line 12:

> "I: For their safety of their life (Omission) They do – well I was not present but I heard, but probably for the safety of their life and the security of their life they (probably – insertion) have said that. They said that "If you find them, do but you don't please harm us."

Whilst there is an insertion of one "*probably*" the first "*probably*" is not inserted, it was always said. Given this fact it would seem to me that the criticisms being made by the applicant are being made with a "*mind attuned to error*" rather than being read in the context of the whole decision. In any event the Tribunal's major concern was the change in the version of what his parents might have said rather than the use of the word "*probably*". I am not satisfied that the applicant has established that these complaints amount to a failure of interpretation of the type considered in *Perera* and I note in any event that the applicant had an opportunity to clear up the Tribunal's concern when the Tribunal expressed it to him. What the Tribunal was concerned about was that the applicant was intending to give evidence

of conversations held with his parents at a time when he was not there. The conversations were allegedly being held with his father from whom the application was estranged.

13. At [CB 384] at [163] the Tribunal expressed its concern that when being questioned on the matters of what was said to his father the applicant changed his evidence. The applicant submits that he did not change his evidence but I do not think that is correct. At T7 of line 5 of the Arafeen affidavit, already extracted, there does seem to me to be a change of evidence from the suggestion that the parents had said to the vigilantes *"just kill him"* to *"do not harm us"*. It is for the Tribunal to opine upon the significance of that change; for the Court to do so would be to indulge in impermissible merits review.

14. The applicant also complains that the interpreter did not include the word "*ostracised*" when he/she was translating to the applicant. This is the extract from the transcript found at T11 extracted at [11] of these reasons. It is fair to say that the answer to that series of questions from the Tribunal was unresponsive but the matter is dealt with by the applicant's migration agent at [CB 223]. In the "*Findings and Reasons*" there is no criticism of the applicant's failure to respond to the Tribunal's scepticism about this matter and I am of the view that in any event the essence of the Tribunal's concern was adequately conveyed to the applicant.

15. Finally, there is a general complaint about the quality of the translation because of the unresponsiveness of many of the applicant's answers. Unresponsiveness was certainly a matter of concern in *Perera*, see for example [41]. At [42] the general concern is more specifically defined:

> "Whilst it is possible to divine the general thrust of the applicant's case from the transcript as a whole, his evidence, as given through the interpreter and transcribed, was, as we have seen, repeatedly unresponsive to the questions asked by the Tribunal. It was at times incoherent and inexplicably inconsistent with other evidence given. There are a number of exchanges between the interpreter and the Tribunal which evidence confusion on the interpreter's part as to the subject and direction of the Tribunal's inquiry; and it would seem that from time to time difficulties in communication actually led the Tribunal to abandon avenues of relevant inquiry. Speaking more generally, it is difficult to believe that the interpretation given is adequately expressive of Mr *Perera*'s unchallenged account of himself as an attorney-at-law in Colombo. His evidence, as interpreted and transcribed, lacks the responsiveness and coherence of the well-educated person that he apparently is. It

> may be that Mr *Perera*'s unresponsiveness and lack of coherence are indicative of a lack of candour on his part. It is, however, difficult to fathom what the applicant, an educated person, could hope to gain from an unresponsive approach, particularly having regard to the nature of his application for refugee status."

16. I am of the view that the concerns of inconsistency and unresponsiveness were very much conditioned by the facts in *Perera*'s case, namely his intelligence and high qualifications. No-one has suggested that this applicant had those same advantages. I am unable to say why the applicant was unresponsive but looking at the transcript as a whole I am not satisfied that the volume of alleged errors was such as to suggest that they were a significant reason. I am also influenced by the fact that the applicant's migration agent did not make any reference to the quality of translation in his letter of 17 September 2008. The migration agent informed the Tribunal that it had reheard the tapes of the record of interview and, whilst it commented upon the excessive use of the word *"probably"* [CB 223] and made another reference to interpretation under the heading *"Did the applicant stay at his father's house"*, there was no general complaint made of the quality of interpretation. If the interpretation problems had been so significant that they hindered the applicant in providing the Tribunal with a coherent story then one would have expected his migration agent to have said so.

17. It should also be pointed out that during the course of the Tribunal hearing the interpreter did on occasion not hear or not understand questions put by the Tribunal. On each occasion, see for example T2 line 26 and T3 line 43, the interpreter requested the Tribunal either to repeat or to explain the question. This would indicate that there was no confusion on the interpreter's part and that he was acting diligently, that he did not make up questions and thus it is more likely that unresponsiveness and confusion lay in the mind of the applicant. See also T8 at line 1, all references being to the Arafeen affidavit.

2. The Failure to Consider Relevant Evidence

Particulars

18. (a) The Tribunal found that the Applicant gave

inconsistent evidence of his capacity to hear or learn about a Muslim plan to attack and kill the Applicant in 2007. The Tribunal found that the Applicant never provided any details that helped make the story more convincing. In finding so, the Tribunal must have failed to take into account the Applicant's explanation of the perceived inconsistency."

19. The Tribunal's questioning of the applicant in relation to the plan to attack and kill him in 2007 is found at T12 of the Arafeen affidavit [L11 - 50]:

"I: My father is still like, you know, very rigid now but still so far he hasn't seen us and we just – there is this Hindu society is there and if we have like social program in our house and these Hindu people, the do not want to attend that.

T: You were staying in your father's house?

I: No, I did not stay at my father's house.

T: Well you say that the conspirators in the mosque were talking about your father's house and because – and because the people came to your father and talked about his house, you all inferred from that that it was about you. So in your own account of this you've created a link between your visit home and your father's house.

I: Your father's house and what?

T: Your visit back home and your father's house.

I: The link?

T: Yeah, you've created a link. 'Cause you were talking about the conspirators targeting you and your father's house and the family's assumption being that they were talking about the father's house then they must be talking about you.

I: My father did not accept us. Okay, well when there was a discussion of this conspiracy that was going on, my father came to -

C SEN: (Foreign language)

I: Let me finish. Please repeat that, you were interrupting. When my father landed, the discussion was about our house. Then my father realised, understood that the issue is with us, that these people of Muslim Para, they did not know where, which house we had been living. And then my father realised that, I mean this matter is of grave importance and then – **Okay, my father, he sent the intimation to us, through our cousin, that if you are to live, you know, for the safety of your life you leave the place.** Then we fled the place and then in the evening, like after dusk, they came in group and they

circled our house and they were asking, like the people who have come here." (emphasis added)

The Tribunal's comment upon this evidence is contained at [CB 385] at [170]:

> *"The reference to people hearing what the Muslims in the mosque were discussing is similar to the disparate claims about what the Applicant's parents supposedly said to the alleged vigilantes. More significantly, the Applicant gave divergent versions of what then happened: he said that when these people reported what they heard to his father, he and (presumably) his wife (the "us" to whom he referred at the hearing) realised the Muslims must have been discussing him and her. However, he gave evidence at the same hearing to the effect that he had no contact with his father and that he and his wife were hiding from him in another house. In that version of events, he could not have been a witness to the report that he interpreted as having implicated him and his wife. As with the disparate accounts of what his parents supposedly said to the alleged vigilantes, the Applicant gave inconsistent evidence of his capacity to be able to hear or learn what these supposed Hindus said to his father,* ***and he never provided the Tribunal with any details that helped make the story sound more convincing."***. [emphasis added]

In his submissions, the applicant focussed on the section of the sentence which is highlighted above. Taken in isolation, this comment of the Tribunal would appear to be inconsistent with the evidence at line 45 of the extract where the applicant says that his father sent intimation to him and his wife through their cousin. The impression may be that the Tribunal overlooked this piece of evidence. However, when the sentence is read as a whole, I am unable to exclude the possibility that what the Tribunal was really saying was that it was unconvinced by the explanation provided. This reading of the Tribunal's decision is consistent with the cautionary observations of the High Court in *Minister for Immigration v Wu Shan Liang* (1996) 185 CLR 259 at [271-272] that the administrative decision maker's reasons are not to be construed minutely and with an eye keenly attuned to error; *SZCOQ v Minister for Immigration* [2007] FCAFC 9 per Moore J at [14].

3. The failure to comply with s.424B(2)

20. "1. The Tribunal failed to comply with s.424B(2) of the Migration Act 1958 (Cth) (**"Act"**).

Particulars

(a) The Tribunal sent the applicant an invitation to give it additional information on 17 July 2008 pursuant to s.424(2) of the Act. The invitation did not specify that the information had to be provided within the prescribed period."

The letter of 17 July 2008 will be familiar to anyone involved in migration matters. It is the first letter sent to an applicant following the receipt of an application to the Refugee Review Tribunal. The letter in this case is in the following form:

"Mr Tushar Kanti Das
Migration Plus
24 Toomevara Street
KOGARAH NSW 2217

By Post

This correspondence is addressed to you as the authorised recipient of the review applicant(s).

Dear (applicant)

ACKNOWLEDGEMENT OF APPLICATION

We received your application on 16 July 2008.

This letter explains what we will do next and what we expect you to do. Please read it carefully.

What will the Tribunal do now?

We have asked the Department of Immigration and Citizenship (the Department) to send us its file so that the Tribunal can review your application for a protection visa.

When we get your file, we will decide if we can consider your review application. If we can consider it, a Member of the Tribunal will look at the information you and the Department have given us and information about your country.

Will I be invited to a hearing of the Tribunal?

After looking at this information the Member may either:

- *Make a decision in your favour; or*
- *Invite you to attend a hearing of the Tribunal*

The Member may also:

- *Write to you for more information*
- *Ask you to comment on information that the Tribunal has*

What is a hearing and why is it important?

A hearing is your opportunity to give the Tribunal evidence to support your application. Evidence can include:

- *What you tell the Member at the hearing*
- *Information or documents you give the Tribunal*
- *Information or documents you ask others to give the Tribunal*

When and where will the hearing take place?

We will tell you the date and time of the hearing and where the hearing will be held. Hearings can take place in person at the Tribunal's offices in Sydney or Melbourne, but in some circumstances hearings may be conducted by video or telephone links.

What does the Tribunal expect me to do?

You should:

- *Tell us immediately if you change your contact details (such as your home address, your mailing address, your telephone number, your fax number or your email address) or if there is any change in the contact details of your authorised recipient. If you do not, you might not receive an invitation to a hearing or other important information and your case may be decided without further notice. We have enclosed forms to use when advising us of changes to your contact details. (You should also inform the Department of any change in these details)*
- *Use your RRT file number when you contact us. Your file number is: 0804482*
- *Immediately send us any documents, information or other evidence you want the Tribunal to consider. Any documents not in English should be translated by a qualified translator.*

You should inform:

(Applicant's son)
(Applicant's wife)
(Applicant's daughter)

about this letter, and any reply will be regarded as a joint response unless we are advised otherwise.

Do I have to pay a fee for the review by the Tribunal?

A fee of $1400 is payable if the Tribunal decides you are not entitled to a protection visa.

Where can I get more information?

If you have any questions you can call me on the number below. You can also call our information line on 1300 361 969 (local call charges apply from anywhere within Australia, except when calling from mobile telephones). For assistance in your language, please contact the Translating and Interpreting Service (TIS) on 131 450. You can also obtain general information from our website at www.rrt.gov.au.

Yours sincerely

Deidre Olliver
TRIBUNAL OFFICER
Telephone: 02 9276 5392

Attachments:
RRT brochure "Appointment of Authorised Recipient" form
"Change of contact Details" form
Multilingual advice"

21. The gravamen of the applicant's argument is that as this letter seeks additional information it enlivens s.424(2) of the Act. If s.424(2) is enlivened s.424B(2), which has to be read with s.424B(1), applies. Those sections are in the following form:

> 424B **"Requirements for written invitation etc**.
>
> (1) If a person is:
>
> (a) invited in writing under section 424 to give information; or
>
> (b) invited under section 424A to comment on or respond to information;
>
> the invitation is to specify the way in which the information, or the comments or the response, may be given, being the way the Tribunal considers is appropriate in the circumstances.
>
> (2) If the invitation is to give information, or comments or a response, otherwise than at an interview, the information, or the comments or the response, are to be given within a period specified in the invitation, being a prescribed period or, if no period is prescribed, a reasonable period."
>
> …

22. The applicant submits that Regulation 4.35 of the *Migration Regulations 1994* (Cth) (the "*Regulations*")prescribes a fourteen day period where the information is to be provided from Australia and twenty-eight days where the information is to be provided from a place outside Australia. He says that the invitation letter does not specify that the information must be provided by the applicant within the prescribed period, instead it states that the information must be provided "*immediately*". The failure to prescribe the period in accordance with the Regulations is a breach of s.424B and that constitutes a jurisdictional error. The respondent argues that s.424 is not enlivened because s.424(1) utilises the words "*conducting the review*". The Minister argues that the letter acknowledging receipt and requiring information is not written "*conducting the review*" with a view to the Tribunal getting any information that it considers relevant. He argues that this submission is supported by the fact that under the heading *"What will the Tribunal do now"* the letter states *"When we get your file, we will decide if we can consider your review application. If we can consider it, a Member of the Tribunal will look at the information you and the Department have given us and information about your country."* This, the Minister says indicates that the Tribunal had not yet begun either to conduct a review or turn its mind to information it considers to be relevant. Accordingly, s.424 has no application.

23. This is an attractive argument. No-one has previously considered that the acknowledgment letter falls within s.424 and if it is found to have done so then a very large number of review decisions that have been made and that are awaiting judicial review may have to be remitted. However, this is not something that the Courts have shied away from previously; *Minister for Immigration & Multicultural Affairs v Al Shamry* [2001] FCA 919; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24.

24. The Minister's submissions do not deal with the problems posed by the existence of s.414(1) of the Act:

Refugee Review Tribunal must review decisions

> (1) Subject to subsection (2), if a valid application is made under section 412 for review of an RRT-reviewable decision, the Tribunal must review the decision.

and the views expressed by McHugh J in *NAAF of 2002 v Minister for Immigration* (2004) 211 ALR 660 at [22] and [23].

> "**The nature of the proceedings before the Tribunal**
>
> [22] The provisions governing the Tribunal's review of the decision by the Minister's delegate were in Pt 7 Divs 2-7A of the Act. The legislation provided for an inquisitorial, merits-based review by an independent tribunal. As might be expected in view of the importance of the proceedings, particularly for persons in the position of the appellant, the legislation was detailed, and it provided for procedures of some solemnity.
>
> [23] Once an applicant had made a valid application for review of a delegate's decision, the Act imposed on the Tribunal a duty to review that decision: s 414(1). It provided that the Tribunal might exercise all the powers and discretions conferred by the Act on the delegate: s 415(1). It obliged the Tribunal to "*pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick*": s 420(1). The Secretary of the Department was obliged to give the Tribunal a statement about the decision under review setting out the findings of fact made by the delegate, referring to the evidence on which the findings were based, and giving the reasons for the decision: s 418(2). The Secretary was also obliged to give the Tribunal all other documentary material in the Secretary's possession or control, which the Secretary considered to be relevant to the review: s 418(3). There were provisions by which the applicant for review might supply, and the Tribunal might seek, information: ss 423 and 424. The Act also imposed duties on the Tribunal to supply the applicant with certain information for comment: ss 424A-424C. Section 425(1) compelled the Tribunal to invite the applicant to appear before it and detailed provision was made about the terms of that invitation: ss 425A and 426."

25. It seems to me to be clear that once an application is filed with the Tribunal the Tribunal is seized of it and any thing that it does in relation to the application is done in "*conducting the review"*. The letter is significant. It invites the applicant to provide additional information (the original information which the applicant has provided being the information contained in the application to the Tribunal) and the information is required for a particular purpose. That purpose is for the Tribunal to consider whether or not it is prepared to make a decision in the applicant's favour without the necessity of inviting him to a hearing. This must be "*conducting the review*". The additional

information provided pursuant to the request thus has a particular importance. It could be more convincing than the applicant himself. The Tribunal might be prepared, on the basis of that information, to grant a visa which it might have declined having heard the applicant. I am unable to accept the Minister's submissions on this point.

26. Section 424 is also the only source of power in the Act by which the Tribunal can obtain additional information by invitation from a person. A "*person*" means a natural person; *SZLPO v Minister for Immigration* [2008] FCAFC 51 at [103-108]. However, it is necessary to consider the facts and *dicta* in two Full Bench cases. In *Minister for Immigration v Sun* [2009] FCAFC 201, a case dealing with the Migration Review Tribunal sections of the Act, the Tribunal sent letters under ss.359 and 359A in one document. The applicant did not respond in time. The Tribunal invoked s.359C. The applicant's agent acknowledged he was out of time but requested permission to lodge information by a date in less than 28 days, the prescribed period. The Tribunal agreed and the applicant provided the information. He argued before the Federal Magistrate that he had been given an effective extension of time under s.359A and should have been given a hearing. The Federal Magistrate decided the case on the basis of the s.359A letter. His Honour was not satisfied that the original invitation to provide additional information under s.359 was an effective invitation as it did not specify the prescribed period within which the first respondent was to provide the additional information as required by s.359B. Therefore, s.359C(1)(b) did not apply to the applicant except in relation to the s.359A letter.

27. On appeal the Full Bench held that the Tribunal was empowered to conduct a review in a manner consistent with its obligations. At [47] the Court said:

> "Division 5 of Pt 5 of the Act imposes certain procedural obligations upon the Tribunal, and correspondingly creates certain procedural rights upon the visa applicants to which it applies. But it does not disempower the Tribunal from conducting a review in a manner not inconsistent with those procedural obligations."

Although *Sun* accepted that a letter seeking information which did not give a date for its provision was not "*a letter under s.359*", I am not

clear that it said in terms that additional information could be obtained in that way.

28. In *SZLTR v Minister for Immigration* [2008] FCA 1889 Siopsis J referred to *Sun*, although the case was not decided on that basis:

> "[34] Further, it appears that neither of the Full Courts in SZKTI and SZKCQ were referred to the case of Minister for Immigration & Multicultural & Indigenous Affairs v Sun [2005] FCAFC 20; (2005) 146 FCR 498 (Sun). In that case the Full Court dealt with the equivalent provisions in the Act which apply to reviews by the Migration Review Tribunal. In Sun, the Full Court construed those sections as not precluding the Tribunal from obtaining additional information from an applicant by a means other than the formal invocation of s 359 of the Act. The Full Court held that the consequence of the Tribunal invoking the formal process was that the provisions of s 359C were enlivened.
>
> [35] However, in light of my findings below, it is unnecessary for me to determine this issue."

If all his Honour was saying there was that a Tribunal could use information obtained from an applicant in a manner that did not invoke ss.359 or 424 or the Act, I would respectfully agree. But I do not think this *obiter dicta* is authority for the proposition that a request for additional information can be made other than in compliance with ss.359 or 424.

29. The second case is *MZXRE v Minister for Immigration* [2009] FCAFC 82. The Full Court in that case, North, Graham and Rares JJ, accepted submissions that a letter which sought additional information but did not specify the prescribed period for response was not an invitation within the meaning of s.424(2) of the Act:

> "It is common ground that this letter did not amount to an invitation to the appellant to give additional information within the meaning of s 424(2) of the Act. This was because it had not specified a date, in accordance with s 424C(1)(b), before which any information had to be provided."

The letter which is referred to in these comments was sent to an applicant whose case had been remitted to the Tribunal for reconsideration. I have seen the letter referred to in *MZXRE*. Among other things, it stated:

> "You are invited to provide any documents or written arguments you wish the Tribunal to consider which you have not already provided to the Tribunal. Any documents should be provided as soon as possible."

There is a fundamental matter which differentiates this letter from the letter currently under consideration. It is that the letter in *MZXRE* invites the applicant to provide "*documents*" and "*written arguments*" but does not make a request for "*information*" as such. A document is not considered "*information*" and therefore not "*additional information*" under s.424(2); *SZLPO* at [110].

30. I should also express my concern about the apparent denomination of some letters as "*not amounting to an invitation under s.424*". What exactly is the status of such letters? Clearly, if such a letter is written before a hearing and is not responded to the Tribunal would be exceeding its authority to proceed without providing a hearing under s.424C(1). But what is the situation with regard to letters of acknowledgement such as the one written in the instant case? In those circumstances the letter would not be an invitation under s.424, what then is it? I can see that there are attractions in designating it a non-invitation. If it is, none of the requirements of s.424B are invoked but the Tribunal would still have to have regard to any information provided because of s.424(1). Whilst this might secure the result wished for by the drafter of the letter, it does appear to fly in the face of the intention of this section of the Act, namely, to ensure a modicum of procedural fairness in relation to the gathering of information. Avoiding those responsibilities by deliberately designing a letter that effectively infringes a requirement (s.424B(2)) would, to my mind, be a most unsatisfactory way of securing the intended outcome.

31. There are two ways in which the outcome could be legitimately obtained. The first is by a robust application of the purposive doctrine of statutory interpretation. A Court could hold that it was the intention of the legislature to restrict s.424 to "*particular*" information identified by the Tribunal and not a request for "*general*" information of the type contained in the letter. Buchanan J examined the intent of the legislature in bringing in these amendments in *SZKCQ v Minister for Immigration* [2008] FCAFC 119 and concluded that he was little assisted by either the second reading speech or the explanatory memorandum. It could be suggested that the differentiation in the

regulation 4.35 between information from within Australia and information from overseas might indicate such particularity but it does not behove this Court to posit such an interpretation given the very clear wording of s.424 and the interpretation placed upon additional information in the authorities. The second method would be by legislative amendment.

32. It follows from the above that I am of the view that the appropriate description of the acknowledgement letter is that it is a letter written pursuant to s.424 to which the provisions of s.424B(2) apply and that by requiring the information "*immediately*" the writer did not require it to be given within the prescribed period. This caused a breach of s.424B(2). The question I must now consider is whether such a breach constituted a jurisdictional error.

33. In *SZLPO* supra the Full Bench Lindgren, Stone and Bennett JJ approved of the dicta of another Full Bench Tamberlin, Goldberg and Rares JJ in *SZKTI v Minister for Immigration* [2008] FCAFC 83 whereat [43] the Court stated:

> "[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).

and continued at [53]

> "[53] In our opinion, if the tribunal requires additional information to be provided by a person it must follow the procedures that the Parliament has laid down to obtain that information."

34. *SZLPO* is also authority for the elements that must be present for the engagement of s.424(2). Approving Buchanan J in *SZKCQ* at [41], their Honours said that there were four elements that were required:

> "Namely, an invitation; to a person; to give information; which is additional information."

I have already indicated I am satisfied that all four of these elements exist in the letter of 17 July 2008. I have also indicated that I am satisfied that with the use of the word *"immediately"* instead of *"fourteen"* or *"twenty eight days"* the Tribunal breached s.424B(2) and Regulation 4.35. *SZLPO* also confirmed that information is only additional information where it is additional to information previously given by the invitee [88].

35. There are a number of cases bearing upon whether a breach of s.424B constitutes a jurisdictional error. The matter was first considered by Jacobsen J in *SZEXZ v Minister for Immigration* [2006] FCA 449 where an invitation was given to an applicant under s.424B(2) of the Act and an answer requested beyond the 14 day prescribed period fixed by regulation 4.35(3) of the Regulations. The Minister conceded that the invitation was in breach of the section but said that it did not involve jurisdictional error. His Honour contrasted the imperative requirements contained in s.424A before saying at [37]:

> "Although it is not one of the centrepieces of the statutory scheme, s 424B(2) plays an important part in carrying out the statutory requirement of procedural fairness. It applies to invitations under both s 424 and s 424A. Its object, or at least one of them, is apparently to ensure that after the invitation is issued, the applicant has a reasonable, albeit relatively short, period of time in which to provide the information or comments to the RRT."

He continued at [45] – [49]:

> "[45] It might be thought therefore that the time limits fixed by the Act and the Regulations must be adhered to strictly. Further support for this view is to be found in the observation of Sackville J in *NAWR v Minister for Immigration and Multicultural & Indigenous Affairs* [2003] FCA 1520 at [33] and [35], that no period other than the period of 14 days for the initial prescribed period or 28 days for the further prescribed period can be specified.
>
> [46] Against this, s 424B(2) and s 424B(3)(b) each provide that where no period is prescribed, the information or comments are to be given within a reasonable

period. Mr Potts drew attention to the power of the RRT to extend the period to respond to an invitation contained in s 424B(4). It may well be that this power can be exercised after the initial prescribed period has expired; see *Minister for Immigration and Multicultural & Indigenous Affairs v Sun* [2005] FCAFC 201 at [51].

[47] A difficult question of construction and reconciliation of the provisions of Div 4 of Part 7 with the privative clause in s 474 of the Act would arise if the RRT were to specify in its s 424 or 424A invitation a period of 13 days to respond, and, in the absence of a response within that period, the RRT proceeded to make a decision on the review without further action, as apparently authorised by s 424C and s 425(2)(c).

[48] However, I am relieved from answering that question because of the circumstances in which the apparent breach of s 424B(2) occurred in the present case. What I have to determine is whether the breach complained of gave rise to jurisdictional error. That cannot be answered by simply posing the question of breach or no breach; it is necessary to consider whether in the particular circumstances the breach had that result.

[49] I do not see how, having regard to the language of s 424B(2) or the scope of Div 4, a breach which consisted of giving an applicant more time than he or she was entitled to, could be thought to render invalid a decision given after the breach. This must be especially so where the information was provided and a hearing took place in accordance with s 425."

36. The matter was then considered by Tracey J in respect of the mirror provision in relation to the Migration Review Tribunal s.359B in *M v Minister for Immigration* [2006] FCA 1247. In this case, as with others, it was argued that the failure to comply with the provisions of 359B(2) meant that there was no lawful invitation to provide additional information and therefore the applicant was not a person to whom (in this case s.359C(2)), in refugee cases s.424C(1) applied and the applicant remained entitled to the oral hearing mandated by the Act. Tracey J noted at [28]:

"[28] The applicant relied on three cases to support his argument that strict compliance with the terms of s 359B(2) of the Act was required. They were *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; (2005) 215 ALR 162, *VEAN of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 311; (2003) 133 FCR 570 and *Chan Ta Srey v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1292; (2003) 134 FCR 308. None of these cases dealt with the construction of s 359B(2) of the Act."

His Honour then considered the cases cited above before saying at [32]:

> "[32] The applicant's submission, correctly, did not suggest that all breaches of the procedural requirements imposed by the Act would give rise to jurisdictional error. Rather, it was submitted, that assistance could be found in the cases relied on when the task of construing s 359(2) of the Act was undertaken."

He then compared ss.359A and 359B finding that the obligation in 359A as that in 424A was imposed in imperative terms. In regard to s.359B his views were:

> "[35] Section 359B of the Act is, on its face, a more flexible provision. It is designed to avoid extended delays in the decision making process in circumstances where the Tribunal chooses or is required to seek additional information or comment from an applicant. If there is a prescribed period that period is to be specified in the invitation. Otherwise a reasonable period limitation is imposed. By s 359B(4) of the Act the Tribunal may extend a prescribed period for a prescribed further period. The burden of any temporal requirement falls on an applicant. There is no requirement that an applicant respond to an invitation. No imperative obligation is, in terms, imposed on the Tribunal by s 359B of the Act."

His Honour then considered 359B(2) further at [36] concluding:

> "[36] [t]he obligation to so stipulate is not imposed on the Tribunal in mandatory terms. Furthermore the type of provision considered in SAAP will, if not complied with, deprive an applicant of a significant procedural safeguard. The same is not necessarily true of a failure accurately to state the period within which an applicant should respond to an invitation, issued under s 359 of the Act. If the period stipulated is shorter or longer than that prescribed this could but will not necessarily lead to an applicant losing an entitlement to be invited to attend an oral hearing. For these reasons I am not persuaded that a legislative intention can be discerned that a misstatement of the prescribed period in the letter of invitation should lead to invalidity of the Tribunal's ultimate decision at least in circumstances where, as here, the time stated was more generous than that prescribed, the applicant did not respond within the time stated, the applicant subsequently provided information sought and that information was taken into account by the Tribunal when it made its decision."

At [37] Tracey J acknowledged the conclusion reached by Jacobsen J in *SZEXZ*.

37. The matter was considered again by Buchanan J in *SZLWQ v Minister for Immigration* [2008] FCA 1406. At [52] his Honour said:

"[52] Section 424B(2) on its face directs that 'information or comments are to be given within a period specified in the invitation'. It does not, in terms, impose a direct obligation on the RRT about the terms of the invitation (cf. s 424B(1) – 'the invitation is to specify ...'). The consequence of any failure to specify a period is that the facility in s 424C of proceeding to a decision in the absence of the information might not be available but I do not see s 424B(2) as establishing the kind of obligation on the RRT which could lead to either statutory breach or jurisdictional error. A circumstance of this kind (failure to specify a period and consequent inability to rely on s 424C) does not fall within any of the reasoning in *SZKTI*, *SZKCQ* or *SZIZO*. As it happens the information was given. It was brought to the attention of the appellant. She had an opportunity to deal with it. It cannot be said that the information was not given before the time for it had passed (s 424C(1)(b)). In my view no 'breach' of s 424B(2) occurred and, in any event, any failure to comply with its strict terms did not, in the circumstances of this case at least, amount to jurisdictional error on the part of the RRT. The Minister's latest written submissions drew attention to judgments of this Court to similar effect (*SZEXZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 449 and *M v Minister for Immigration and Multicultural Affairs* [2006] FCA 1247; (2006) 155 FCR 333 at [34]- [37])."

38. It is noteworthy that his Honour specifically excluded the reasoning in *SZKTI, SZKCQ and SZIZO*. His Honour gave the principal judgment in *SZKCQ* where he again discussed the imperative nature of s.424A in contrast with that of s.424 saying at [53] and [54]:

"[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)"

His Honour continued with an extract from the views of McHugh J in *SAAP* at [77] and of Kirby J at [173] in the same case before indicating that at [58]:

> "[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."

39. Buchanan J concluded by considering the decision in *SZKTI* and supported the views expressed by the Full Court in that case at [43] and extracted at [26] of these reasons.

40. *SZLPO* is the generic heading for three cases, *SZLPO, SZLQH* and *SZLPP* which were all considered by a Full Bench of Lindgren, Stone and Bennett JJ. The applicant relies heavily on *SZLPO* saying at [49] of his submissions:

> "The Full Court applied the Full Court's decision in *SZKCQ v Minister for Immigration and Citizenship* (2008) 170 FCR 236 (at [52]-[58]), noting:
>
> > For reasons that his Honour gave (at [52]-[58]) but which we need not discuss, Buchanan J thought that a failure by the Tribunal to comply with ss 424(2), (3)

> **and 424B**, like a failure by it to comply with s 424A (cf *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294*, ***constituted jurisdictional error***."
>
> (Emphasis added)

but he acknowledges that in fact the Full Court in *SZKCQ* stops short of expressly stating that any breach of s.424B constituted jurisdictional error.

41. The most relevant case, however, would appear to be *SZLQH*, which was considered by the Full Bench in *SZLPO* (*SZLQH v Minister for Immigration & Anor* NSD 970 of 2008). In that case there was a specific reference to non-compliance with the time limit in s.424B. The Full Court found that the Regulations only prescribed a time limit of seven days when in fact the Tribunal had given the applicant 28 days. The vice in the Tribunal's decision was that it had been made after 21 days, in other words before the time limited by the Tribunal for the provision of the information. It concluded that a jurisdictional error had been made:

> "[137] The Tribunal in fact assured *SZLQH* that he would have twenty eight days. We think that, having allowed this period, the Tribunal was bound by considerations of procedural fairness to allow *SZLQH* the full twenty eight day period. He was denied procedural fairness because the Tribunal signed its decision only twenty one days later. This is so even though there is no evidence that *SZLQH* would have given the Tribunal additional information or evidence if we had been allowed the full twenty eight days."

42. The applicant then referred the Court to the decision in *SZIZO & Ors v Minister for Immigration* [2008] 172 FCR 152 but this case was decided before *SZLPO* and *SZLQH* although I acknowledge the comments made at [87], [97]:

> "… the provision of s 422B in the Act, which make the content of Division 4 and Division 7A, together with ss 416, 437 and 438 a complete code for the discharge of the Tribunal's obligations in relation to the natural justice hearing rule, suggests that Parliament intended that there be strict adherence to each of the procedural steps leading up to the hearing. Each of the procedural steps is imperative and must be complied with in the manner described in the Act.
>
> …

> It should be only in exceptional circumstances that a Court should refuse to issue the constitutional writs once the Court has determined that the Tribunal had failed to comply with its imperative statutory obligations to an applicant seeking the review of a decision of the delegate refusing the applicant a protection visa. If it were otherwise, and the Court were required to inquire into the extent to which the failure by the Tribunal to comply with its statutory obligations to accord an applicant a fair hearing prejudiced the applicant, the imperative obligation imposed on the Tribunal might well be blunted."

43. What I take from these cases is that the Federal Court has been reluctant to make the sweeping assertion that any breach of the time provisions contained in s.424B and the Regulations constitutes a jurisdictional error. It is most reluctant to find that a jurisdictional error has been made when an applicant is given more time to provide the information than that contained in the Regulations. However, where the breach of the Regulation constitutes unfairness to an applicant the Court would hold that a jurisdictional error has occurred (*SZLQH*). Even then the Court will look at the particular circumstances of the case and exercise its discretion not to grant relief where an applicant suffered no injustice by reason of misstatement of the prescribed period; *M* supra at [38]. *SZLQH* at [144 – 146].

44. In the instant case the applicant was told to provide the information *"immediately"* when he should have been told to provide it within fourteen or twenty-eight days. Importantly the Tribunal determined that it could not make a decision on the information alone on 25 July, 8 days after the 17 July letter and therefore **before** the regulated time period would have expired. The applicant has not deposed to any disadvantage arising out of that error. He was given a hearing. I believe that this is a situation which should be looked at objectively. I have at [25] already referred to one possible disadvantage that the applicant suffered by the Tribunal determining, before the statutory period had expired, that it could not make a decision upon the information provided alone and requiring a hearing. It could also be said that an applicant who was told that he had to provide information "*immediately*" would not take any steps to provide information that he could not obtain in that short space of time and thus lose an opportunity of putting forward important evidence to the Tribunal. Given the difficulties that many applicants are encumbered with; lack of education, lack of English, lack of understanding of the Tribunal

process, lack of assistance, this is not a far fetched possibility. The Court does not have to be exhaustive in the provision of examples. The two cited would seem to me to be sufficient to indicate that this failure by the Tribunal constitutes the type of unfairness that was found to be a jurisdictional error in *SZLQH*.

45. The Minister relied on his submission that the Tribunal had not entered upon the review. He made no submissions upon discretion. It is not for this Court to undertake that task for him. In the circumstances I would not be prepared to exercise any residual discretion to refuse the relief sought. I will grant the applicant the constitutional writs requested and order that the first respondent pay the costs of the applicant which I assess in the sum of $5,500.00.

I certify that the preceding forty-five (45) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate:

Date: 23 July 2009