FEDERAL MAGISTRATES COURT OF AUSTRALIA

MZYMP v MINISTER FOR IMMIGRATION & ANOR [2011] FMCA 884

MIGRATION – Review of decision of the Refugee Review Tribunal – interpretation of s.424A of the *Migration Act 1958* – interpretation of Regulation 4.35 of the *Migration Regulations 1994.*

Migration Act 1958, ss.424A, 424(1)(c), 424B, 424B(2), 424B(4), 424C
Migration Regulations 1994; r.4.35

Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 75 ALD 630; [2003] FCAFC 184.
Applicant S1607 of 2003 v Minister for Immigration and Citizenship [2007] FMCA 1740.
Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 73 ALD 321; (2003) 197 ALR 389; [2003] HCA 26.
Htun v Minister for Immigration and Citizenship (2001) 194 ALR 244; [2001] FCA 1802.
M v Minister for Immigration and Multicultural Affairs [2006] FCA 1247.
MZXQS v Minister for Immigration and Citizenship (2009) 107 ALD 33; [2009] FCA 97.
NABE v Minister for Immigration and Multicultural Affairs [2002] FCA 281.
NAIY v Minister for Immigration and Multicultural Affairs and Indigenous Affairs [2005] HCATrans 91.
Pojani v Minister for Immigration and Multicultural Affairs [2002] FCA 1283.
S1925 of 2003 v Minister for Immigration and Citizenship [2008] FCA 246.
SZEXZ v Minister for Immigration, Multicultural and Indigenous Affairs [2006] FCA 449.
SZFIV v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FMCA 1811.
SZKCQ v Minister for Immigration and Citizenship (2008) 170 FCR 236; [2008] FCAFC 119.
SZKJV v Minister for Immigration [2008] FMCA 26.
SZLWQ v Minister for Immigration and Citizenship [2008] FCA 1406.
SZOAM V Minister For Immigration and Citizenship [2010] FCA 864.
SZOEC v Minister for Immigration and Citizenship [2010] FMCA 489.
SZOFE v Minister for Immigration and Citizenship (2010) 185 FCR 129; [2010] FCAFC 79.
VAAD v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 17.

Applicant:	MZYMP
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	MLC 653 of 2011
Judgment of:	Whelan FM
Hearing date:	12 August 2011
Date of Last Submission:	12 August 2011
Delivered at:	Melbourne
Delivered on:	16 November 2011

REPRESENTATION

Counsel for the Applicant:	Mr P. Gray with Mr S. Castan (assisting)
Solicitors for the Applicant:	Asylum Seeker Resource Centre
Counsel for the First Respondent:	Mr C. Horan
Solicitors for the First Respondent:	Sparke Helmore

ORDERS

(1) The application filed 10 May 2011 be dismissed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLC 653 of 2011

MZYMP
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application made on 10 May 2011 in which the Applicant seeks a review of a decision of the Refugee Review Tribunal ("the Tribunal") dated 1 April 2011, which affirmed the decision of a delegate of the Minister for Immigration & Citizenship ("the First Respondent") not to grant a protection visa to the Applicant.

2. The Applicant seeks:[1]

    a) A declaration that the decision is unlawful, void and of no force and effect;

    b) Certiorari quashing or setting aside the decision;

[1] Applicant's Further Amended Application filed 6 August 2010.

c) Prohibition directed to the First Respondent prohibiting the Minister from acting upon or giving effect to or proceeding further upon the decision;

d) Mandamus or an injunction compelling the First Respondent to cause the Tribunal to consider and determine according to law the Applicant's application for a protection visa lodged on 11 January 2010; and

e) To the extent necessary, an extension of time for the filing of this further amended application.

Background

3. The Applicant is a citizen of Bangladesh who arrived in Australia on 14 December 2009 as the holder of a Class UC subclass 456 Business (Short Stay) visa.

4. On 11 January 2010, the Applicant made an application for a protection visa.[2] The Applicant claimed to fear persecution from government authorities in Bangladesh because of his involvement with and support of the Bangladesh National Party ("BNP") and because of his membership of the Kadiani Organisation.[3]

5. The Applicant attended a Departmental interview on 15 March 2010 and provided further documents in support of his application on 6 April 2010.[4]

6. On 9 April 2010, a delegate of the Minister refused to grant a protection visa to the Applicant.[5]

7. On 4 May 2010, the Applicant applied to the Tribunal for review of the delegate's decision.[6] A hearing was scheduled for 20 July 2010.[7] On 19 July 2010, the Applicant requested that the hearing be postponed for medical reasons, and to enable him to obtain relevant documents from

[2] Court Book at pages 11 – 25.
[3] Court Book at pages 17 – 20.
[4] Court Book at pages 38 – 44.
[5] Court Book at pages 46 – 57.
[6] Court Book at pages 59 – 62.
[7] Court Book at pages 64 – 65.

Bangladesh.[8] After receiving a medical certificate, the Tribunal agreed to reschedule the hearing for 11 August 2010.[9] Between 4 and 11 August 2010, the Applicant again requested that the hearing be postponed for medical reasons.[10] The Tribunal again agreed to reschedule the hearing,[11] which took place on 27 August 2010.

8. On 22 September 2010, the Applicant provided further documents in support of his application.[12] The Tribunal subsequently initiated inquiries through the Department of Foreign Affairs and Trade ("DFAT") into the authenticity of the documents.[13]

9. On 4 March 2011, the Tribunal wrote to the Applicant under s.424A of the *Migration Act 1958* ("the Act").[14] In addition to various inconsistencies arising from the Applicant's evidence at the hearing, the letter invited the Applicant to comment on or respond to the DFAT report about the authenticity of the documents submitted by the Applicant following the hearing, as well as country information about the level of fraudulent documents and corruption in Bangladesh. The letter required these comments or response to be provided by 18 March 2011, but noted that the Applicant could request an extension of time before that date.

10. Late on 18 March 2011, the Applicant's agent requested an extension of time to provide a response to the s.424A letter on the ground that the Applicant was waiting for documents from Bangladesh "which may take another 35 days".[15] The agent also indicated that he would be travelling overseas from 12 April 2011 and would respond after 5 May 2011.[16]

11. On 22 March 2011, the Tribunal refused to grant an extension of time, but told the Applicant's representative that the Tribunal would consider any further information received before its decision was made.[17] The

[8] Court Book at pages 68 – 69.
[9] Court Book at pages 75 – 76.
[10] Court Book at pages 77 – 86.
[11] Court Book at pages 87 – 88.
[12] Court Book at pages 144 – 151.
[13] Court Book at pages 152 – 153.
[14] Court Book at pages 156 – 160.
[15] Court Book at pages 161 – 162.
[16] Court Book at page 162.
[17] Court Book at pages 163 and 182.

Tribunal stated in its reasons for decision, that the request for an extension of time was refused

> *on the basis of the lateness of the request and the lack of any information as to the relevance of the documentation which the applicant was allegedly obtaining from Bangladesh in order to respond to the particular information put to the applicant for comment.*[18]

12. On 30 March 2011, the Applicant's agent contacted the Tribunal by phone and indicated that further documentation would be submitted by 31 March 2011. No further material was submitted by that date and the Tribunal affirmed the delegate's decision on 4 April 2011.

Grounds of Claim

13. On 10 May 2011, the Applicant made his initial application to this Court for a review of the Tribunal's decision.

14. On 15 July 2011, amended grounds were lodged. These are as follows:

1. The Tribunal's decision is affected by jurisdictional error in that:

*(a) the Tribunal's invitation in writing to the applicant to comment on or respond to information dated 4 March 2011 (**invitation**) included information of a character such that the information or comment to which the invitation related was to be provided from a place that is not in Australia;*

(b) the invitation specified a period of 14 days for the applicant's comments or response;

(c) the "prescribed period" referred to in section 424B(2) in relation to the information referred to in subparagraph (a) above was 28 days and not 14 days, pursuant to regulation 4.35 of the Migration Regulations 1994;

(d) in the circumstances referred to in the preceding three subparagraphs, the Tribunal:

[18] Court Book at page 182.

(i) breached section 424B(2) of the Migration Act 1958 (Cth); and/or

(ii) the Tribunal breached a requirement to be implied in section 424A(1)(c) by reason of the provisions of section 424B, that is, that where the Tribunal is required to applicant to comment on or respond to information under section 424A(1)(c), the invitation must be consistent with the requirements of section 424B including those of section 424B(2).

(e) The Tribunal relied upon the information referred to in subparagraph (a) above in making its decision on the review.

2. Further or in the alternative to ground 1, the Tribunal's decision is affected by jurisdictional error in that:

(a) the applicant through his authorised representative by letter dated 18 March 2011 requested an extension of the time in which to respond to the invitation inter alia on grounds to the effect that information to which the invitation related was to be provided from a place that is not in Australia;

(b) the Tribunal decided not to extend the time within which the applicant could respond to the invitation, and that decision was notified to the applicant through his authorised representative by telephone on 22 March 2011;

(c) the Tribunal possessed discretion under section 424B(4) to extend the time within which the applicant could respond to the invitation;

(d) the relevant considerations, or relevant matters, which the Tribunal was required to take into account in making a decision on the applicant's request for an extension of time whether or not to exercise of discretion under section 424B(4) included:

(i) the fact that information the subject of the invitation was of a character such that the information or comment to

which the invitation related was to be provided from a place that is not in Australia;

(ii) the applicant's representative by his letter dated 18 March 2011 stated that information to which the invitation related was to be provided from a place that is not in Australia; and

(iii) the fact that the invitation had not specified the prescribed period of 28 days provided for in regulation 4.35 in the case of invitations in relation to information that is to be provided from a place that is not n Australia, but had specified the incorrect period of 14 days;

(e) the Tribunal failed to take the relevant consideration or relevant matters specified in subparagraph (d) above into account;

(f) by reason of the Tribunal's failure to take relevant considerations or relevant matters specified in subparagraph (d) above into account, the Tribunal's decision whether or not to exercise discretion pursuant to section 424B(4) miscarried;

(g) if the Tribunal had not failed to extend the time within which applicant could respond to the invitation, the prescribed period by which the time to respond would have been extended would have been a further 70 days, pursuant to regulation 4.35B of the Migration Regulations 1994.

15. Ground 3, which was added by leave of the Court, was contained in a further amended application dated 4 August 2011.

3. Further or in the alternative to grounds 1 and 2, the Tribunal's decision is affected by jurisdictional error in that:

(a) the Tribunal:

(i) asked itself the wrong question; and/or

(ii) failed to address in full each aspect of the applicant's claim; and/or

(iii) failed to address the issue whether the applicant had a well-founded fear of persecution by reason of imputed political opinion or membership of a particular social group

*(b) the Tribunal considered whether the applicant was a high-level member of the Bangladesh Nationalist Party (**BNP**), and concluded that the applicant had a low-level profile as an ordinary member of the BNP and may have made financial contributions to the BNP;*

(c) the Tribunal did not consider whether the applicant, with a low-level profile as an ordinary member of the BNP who may have made financial contributions to the BNP, would have a well-founded fear of persecution for that reason.

16. On 31 May 2011, Registrar Allaway issued orders requiring the Applicant to file and serve an amended application giving proper particulars of the ground of the application by 6 July 2011.

17. On 11 July 2011, those orders were varied by the Court, as constituted, to allow for the amended application to be filed and served by 15 July 2011. As previously referred to, an amended application was filed on that date. On 5 August 2011, a further amended application was lodged and, on the date of the hearing, the Applicant sought to lodge a third amended application.

18. The First Respondent did not oppose leave being granted to allow the further amended application to be lodged on 5 August 2011, although objection was made to much of the affidavit in support. The First Respondent did however oppose leave being granted to file the third amended application on the date of the hearing. That amended application sought to add an additional ground for review, being that the Tribunal's decision was affected by jurisdictional error because:

a) The Tribunal did not refer to a newspaper submitted to it but only to an English translation of the relevant article;

b) The Tribunal rejected the authenticity of the article without considering the newspaper itself and without having referred the newspaper itself to the post;

c) The newspaper itself, as distinct from an English translation of the article, was probative material; and

d) The Tribunal thereby ignored relevant material.

19. The Applicant relied on paragraph 16 of his affidavit of 4 August 2011 in which he states:

> *At the RRT hearing I gave the Member a full copy of the newspaper, 'The Daily Agnishikha' dated 17 July 2010 which contained the article titled 'Panic of arrest by police makes [name of applicant] take concealment'. The Member did not return the copy to me. In my RRT decision the Member found that the newspaper article is not genuine, however, she did not have the whole newspaper examined and only relied on the country information saying that newspaper articles are sometime fraudulent.*

The First Respondent's opposition to leave being granted

20. The First Respondent opposed the granting of leave on the basis of the following. The Tribunal did not actually make a finding that the newspaper was counterfeit. It made adverse findings in relation to other documents (which dealt with the content of the newspaper article, being the alleged 'false cases' being brought against the Applicant)[19] and in the light of those findings placed no weight on the newspaper article. Such findings were within the Tribunal's province of assessing the evidence on the merits. To complain that certain inquiries were not made in relation to the provenance of the article and the genuineness of the whole newspaper is really just revisiting the merits of the Tribunal's considerations.

21. Whether or not there was a hard copy of the newspaper given to the Tribunal is something which would require further investigation. It is not in the Court Book. This would raise evidentiary difficulties at a late stage of the proceedings and may require the Court to adjourn the hearing. The threshold question is: does this ground have sufficient merit to warrant opening the doors to those consequences? The case of *Applicant WAEE v Minister for Immigration and Multicultural and*

[19] Court Book at page 194, paragraph 98.

Indigenous Affairs (2003) 75 ALD 630; [2003] FCAFC 184 held that the Tribunal is not required to refer to every piece of evidence before it.

22. The Tribunal inquired into whether or not the article was published. The post went to the registered offices of the paper but was unable to locate the paper. The upshot of that was that when writing the s.424A letter, the Tribunal did not include information given by the post about the paper. A clear inference therefore arises that the Tribunal did not consider that information to be part of its reasons. When making its findings the Tribunal relied on information that no such 'false cases' were lodged. Whatever the content of the article and whatever its authenticity, it was essentially given no weight because the information which was directly put to the Applicant was that these cases did not exist. The weight to be given to the newspaper article is a matter for the Tribunal.

23. There is nothing to suggest that the Tribunal did not take the newspaper article into account. The Tribunal made inquiries into the newspaper and its existence. There is no clear basis to draw an inference that it did not take into account the material that was in evidence before it. Unless that inference can be drawn, the further ground sought to be relied on by the Applicant does not get to first base.

The Applicant's argument for leave being granted

24. The Applicant referred to the s.424A letter sent to the Applicant and the reference in that letter to the Tribunal's significant doubt about the genuineness of documents submitted by the Applicant in support of his claims that he had been charged with a false case. The Tribunal went on to refer to the newspaper article and to the prevalence of fraudulent documents and corruption in Bangladesh including references to "[m]any 'documented' claims of outstanding arrest warrants"[20] being proven to be fraudulent and that "altered or counterfeit newspaper articles were another less frequent but notable example of document fraud".[21]

25. The Tribunal then went on to state:

[20] Court Book at page 181.
[21] Ibid.

> *This information is relevant because the country information cited above, and the fact that you appear to have submitted other fraudulent documentation, raises significant doubt about the genuineness of the newspaper article you submitted and subject to your comments, this could lead the Tribunal to find that you were not charged with any false case as reported.*[22]

26. The Applicant submitted that the issue of 'genuineness' raised by the Tribunal should be read in the context of the previous reference to counterfeit newspaper articles. The authenticity of the newspaper was therefore raised by the Tribunal.

27. The Applicant's case is that the Tribunal failed to consider the newspaper as a whole. It therefore failed to consider documentation before it[23] and the Court should not dismiss the possibility that if consideration had been given to the document in question, it could have affected the outcome.

28. The Applicant stated to the Tribunal that there were cases against him put by the government which are false and they were reported in the local newspaper. At paragraph [98] of its decision, the Tribunal refers to the false cases and the report and goes on to say:

> *The applicant presented the Tribunal with an article purportedly from The Daily Agnishika. Following the hearing the Tribunal received a First Information Report (FIR), memo to the officer in charge, and a court document, as evidence of the false case the applicant claimed was registered against him. The Tribunal does not accept that these particular documents are genuine.*[24]

29. The Tribunal goes on at paragraph [102][25] of its decision to say that it places no weight on these particular documents or the newspaper article which reports on this alleged case against the Applicant.

30. The Applicant submits that the Tribunal does not say in either paragraph that it is making a finding about the newspaper; it says it is making findings about the article. The limitations on the inquiry made by the Tribunal are set out at pages 152 and 153 of the Court Book. The scope of the inquiry was limited to the article and not to the

[22] Court Book at pages 181 – 182.
[23] *VAAD v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 17.
[24] Court Book at page 194, paragraph 98.
[25] Court Book at page 195.

newspaper itself. This is an indication that consideration of the newspaper as a whole was ignored by the Tribunal.

Ruling

31. The Applicant claimed that the government had brought false cases against him and that he had been sentenced to seventeen years imprisonment in relation to an arms case.[26] He produced certain documents in support of that claim including a newspaper article. He says that the original newspaper was given to the Tribunal although it is not referred to by the Tribunal in its reasons for decision or reproduced in the Court Book.

32. The First Respondent makes no admission in relation to the newspaper, saying that it would be necessary to make further inquiries to ascertain if the newspaper itself was before the Tribunal. In any event, the authenticity or otherwise of the newspaper is not an issue. On the basis of its findings about other documents, the Tribunal was satisfied that the Applicant concocted the claim that the government had brought false cases against him and therefore gave no weight to a newspaper article about those cases.

33. The country information referred to in the Tribunal's letter included the information that no case with the number given had ever been registered at the Court, there had never been a Judge of the name given at that Court and the GR number as given in the First Information Report was for a drug abuse case unrelated to the Applicant.

34. I am unable to see how in coming to its conclusions the issue of whether the newspaper itself, as opposed to the content of the article, was genuine could have any bearing on the outcome of the case. The Tribunal considered the article and gave it no weight. It made no finding one way or the other on the authenticity of the newspaper itself. In reaching its conclusions, it was not necessary to do so. For those reasons, I do not grant leave to further amend the grounds as proposed in the third amended application.

[26] Court Book at page 177, paragraph 50.

The Tribunal's decision of 1 April 2011

35. The Tribunal found that there was no real chance that the Applicant would face persecution if he were to return to Bangladesh for reasons of his political opinion, religion or any other Convention reason.[27]

36. The Tribunal accepted that the Applicant was an ordinary or low-level member of the BNP and that he financially supported the BNP.[28] However, the Tribunal did not accept that the Applicant was politically active or that he held an official position within the BNP.[29]

37. Accordingly, the Tribunal did not accept the Applicant's claims in relation to harassment and threats from the opposition party both before and after it came to power in 2008.[30] Similarly, the Tribunal rejected claims that the people had come to the Applicant's office to kill him on two occasions in 2009; that the Applicant had been visited by supporters of the government in June 2009; and that the Applicant was arrested, detained and mistreated by the police in July 2009.[31] As a consequence, the Tribunal did not accept the Applicant's claims that he had gone into hiding.

38. The Tribunal did not accept that the Applicant had been subjected to attacks and abuse from the government or that either the authorities or opposition members or supporters were responsible for the closure of the Applicant's business.[32]

39. The Tribunal did not accept that the documents submitted by the Applicant in support of his claim that false cases had been registered against him were genuine,[33] based on the results of the DFAT inquiries and country information about the high prevalence of fraudulent documents and corruption in Bangladesh.[34] The Tribunal therefore placed no weight on the documents.[35]

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[27] Court Book at page 196, paragraph 107.
[28] Court Book at pages 191, paragraph 85; 192, paragraph 87.
[29] Court Book at pages 191 – 192.
[30] Court Book at pages 192 – 193.
[31] Court Book at page 193.
[32] Court Book at page 194.
[33] Court Book at pages 194 – 195.
[34] Ibid at paragraphs [98] – [102].
[35] Court Book at page 195, paragraph 102.

40. The Tribunal did not accept that the death of the Applicant's parents or his cousins was due to their political opinions, or that the death of his cousin 17 or 18 years ago had any relevance to the Applicant's current situation.[36]

41. The Tribunal found that any threats received by the Applicant from his ex-wife's family were for personal reasons rather than for reasons of his political opinion.[37]

42. Further, the Tribunal did not accept that the Applicant had joined the Qadiani organisation in January 2009, or that he had been tortured for this reason.[38]

The submissions

Ground 1

43. On 4 March 2011, the Tribunal wrote to the Applicant raising credibility concerns in relation to claims made by the Applicant and documents provided by the Applicant in support of those claims. The Tribunal also put to the Applicant information received from the post concerning the authenticity of certain documents produced by the Applicant. The content of the letter is set out in paragraphs [58] and [59] of the Tribunal's statement of decision and reasons.[39]

44. The Tribunal sought a response to the matters raised in the letter by 18 March 2011, which was 14 days after the date of invitation. In a letter dated 18 March 2011 (and received by the Tribunal at 6.52pm)[40], the Applicant's representative sought an extension of time in which to lodge a response to the Tribunal's letter.

45. The letter to the Applicant was written in accordance with s.424A of the Act.

46. The Applicant submits that s.424A with s.424B and 424C establish a statutory regime intended to be an exhaustive statement of the natural

[36] Court Book at page 195, paragraph 104.
[37] Court Book at pages 195 – 196, paragraph 105.
[38] Court Book at page 196, paragraph 106.
[39] Court Book at pages 179 – 182.
[40] Court Book at page 182, paragraph 60.

justice hearing rule. Where the Tribunal does not address adverse information and provide an opportunity to an Applicant to comment and respond to it during a hearing,[41] invitations under s.424A are critical. Section 424B makes express provision as to the period within which an Applicant is to respond. Those periods are prescribed by Regulation 4.35 of the *Migration Regulations 1994* ("the Regulations"), which provides:

> *(1) This regulation applies, for subsection 424B (2) of the Act, if a person is invited to give additional information, or to comment on information, other than at an interview.*
>
> *(2) If:*
>
> *(a) the invitation relates to an application for review of a decision that applies to a detainee; and*
>
> *(b) the information or comment to which the invitation relates is to be provided from a place in Australia;*
>
> *the prescribed period for giving the information or comments starts when the person receives the invitation and ends at the end of 7 days after the day on which the invitation is received.*
>
> *(3) If:*
>
> *(a) the invitation relates to an application for review of a decision that does not apply to a detainee; and*
>
> *(b) the information or comment to which the invitation relates is to be provided from a place in Australia;*
>
> *the prescribed period for giving the information or comments starts when the person receives the invitation and ends at the end of 14 days after the day on which the invitation is received.*
>
> *(4) If:*
>
> *(a) the invitation relates to an application for review of a decision that applies to a detainee; and*
>
> *(b) the information or comment to which the invitation relates is to be provided from a place that is not in Australia;*

[41] Section 424AA.

the prescribed period for giving the information or comments starts when the person receives the invitation and ends at the end of 28 days after the day on which the invitation is received.

(5) If:

(a) the invitation relates to an application for review of a decision that applies to a person who is not a detainee; and

(b) the information or comment to which the invitation relates is to be provided from a place that is not in Australia;

the prescribed period for giving the information or comments starts when the person receives the invitation and ends at the end of 28 days after the day on which the invitation is received.

(6) A response to the invitation is taken to be given to the Tribunal when a registry of the Tribunal receives the response.

Note 1 If the Tribunal gives a person a document by a method specified in section 441A of the Act, the person is taken to have received the document at the time specified in section 441C of the Act in respect of the method.

Note 2 A document given to a person in immigration detention is given in the manner specified in regulation 5.02.

47. The Regulation provides for a response to be provided within a period which ends at the "end of 14 days after the day on which the invitation is received"[42] if the information or comment is to be provided from a place in Australia or "28 days" if the information or comment is to be provided from a place that is not in Australia.[43]

48. The Applicant submits that the general intention evidenced by reg.4.35 is that a longer period should be allowed for responses to s.424A invitations where information is to be provided from overseas. Section 424A invitations are necessarily directed to a person present in Australia because in order to be an application for a protection visa, the Applicant must be present in the migration zone.

49. The interpretation of reg.4.35 must therefore depend on the character of the subject matter of the invitation, not the location of the person to

[42] Regulation 4.35(3).
[43] Regulation 4.35(4).

whom the invitation is extended. While the Tribunal cannot know with certainty in advance whether the information or comment is to be provided from a place inside or outside Australia, the Tribunal is required to make a reasonable judgment as to the likely source of any responding information by reference to the nature of the subject-matter on which it invites comment or response. It is arguable that each of the matters on which the Tribunal in this case invited a response potentially could be seen as calling for information to be obtained from Bangladesh.

50. The Applicant refers to the comments of Cameron FM *in SZKJV v Minister for Immigration* [2008] FMCA 26 ("*SZKJV*") where his Honour said at paragraph [30]:

> *It is not to the point that at the time of sending the s 424A(1) notice the Tribunal did not know that the applicant might or might not have sought to respond to the notice by obtaining information from overseas. This is because the notice did not, in its terms, contemplate any comment to require information to be obtained from overseas. Had the applicant responded to the Tribunal saying the comment sought required information to be sourced from overseas then it might be that reg 4.35(4) would then have applied to the notice in place of reg 4.35(2). But the applicant did not make any such indication to the Tribunal. Indeed, the response made by her solicitor, reproduced at CB 179ff, provides comments and also provides documents which clearly were already in Australia because of the promptness with which the response was made.*

51. The Applicant also refers to the comments of Buchanan J in *SZKCQ v Minister for Immigration and Citizenship* (2008) 170 FCR 236; [2008] FCAFC 119 ("*SZKCQ*"); where his Honour appears to leave open the possibility that the nature of the request for comments may impart a necessity to obtain information from somewhere outside Australia.

52. The Applicant contends that if the First Respondent's interpretation of reg.4.35 was correct there would be no need to have provision for a specified time where the invitation relates to information or comment from outside Australia as a detainee (or an Applicant for a protection visa) would always be in Australia.

53. The Applicant sought to distinguish the decision in *Applicant S1607 of 2003 v Minister for Immigration and Citizenship* [2007] FMCA 1740 ("*S1607 of 2003*") on the basis that the reasoning was really just conclusionary and that conclusion was upheld on appeal.

54. The Applicant further submits that a breach of s.424B(2) of the Act and reg.4.35 of the Regulations constitutes jurisdictional error. The Applicant refers to the decision of Jacobson J in *SZEXZ v Minister for Immigration, Multicultural and Indigenous Affairs* [2006] FCA 449 ("*SZEXZ*") where his Honour held that a breach of s.424B which resulted in the Applicant being given more time than that specified could not "render invalid a decision given after the breach".[44] His Honour left open however the question of whether affording an Applicant less than the prescribed period to respond would be enough to demonstrate jurisdictional error.

55. The Applicant also referred to the judgment of Buchanan J in *SZLWQ v Minister for Immigration and Citizenship* [2008] FCA 1406, where his Honour expressed the view that he did not see s.424B(2) as "establishing the kind of obligation on the RRT which could lead to either statutory breach or jurisdictional error".[45] In reaching that conclusion, his Honour referred to *SZEXZ*, already discussed, and *M v Minister for Immigration and Multicultural Affairs* [2006] FCA 1247 ("*M v MIMA*"), which concerned a mistake as to the prescribed period in an invitation issued by the Migration Review Tribunal under a provision analogous to s.424B(2).

56. The Applicant refers to paragraph [33] of the judgment of Tracey J in *M v MIMA:*

> *The question of whether or not a failure to comply with procedural requirements renders the relevant decision invalid will be determined having regard to the considerations identified by the High Court in Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at 390–91. Attention will be directed to the language of the particular statutory provision and the scope and object of the Act in which the provision appears. The reviewing court will also seek to discern whether the legislature should be understood as intending that a failure of an*

[44] *SZEXZ v Minister for Immigration, Multicultural and Indigenous Affairs* [2006] FCA 449 at paragraph [49].
[45] Ibid at paragraph [52].

administrative authority to comply with the procedural requirement should lead to the invalidity of any consequential decision.

57. The Applicant submits that, in this case, the breach of s.424(B)(2) is a breach of the minimum requirements applicable in order for an invitation purportedly made under s.424A(1) to be made and the legislation should have been taken to have intended that the resulting decision would be invalid. Unlike the other cases referred to, the error was not made in the Applicant's favour. The cases cited are therefore distinguishable.

58. The First Respondent submits in relation to Ground 1 that the 14 day period prescribed by reg.4.35(3) was applicable and so there was no failure to comply with s.424B(2) and in any event failure to correctly specify the prescribed period for the purpose of s.424B(2) would not give rise to jurisdictional error affecting the Tribunal's decision.

59. The First Respondent submits that s.424B sets out the requirements for invitations under both ss.424 and 424A. Section 424B(1) states that:

(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.

60. Section 424B(2) states:

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.

61. When s.424B(2) refers to "the information, or the comments or the response, are to be given within a period specified in the invitation", it reflects the distinction drawn in s.424B(1)(a) and (b) between an

invitation under s.424 to give information and an invitation under s.424A to comment on or respond to information.

62. The periods referred to in s.424B(2) are prescribed by reg.4.35, which distinguishes between the application for a review of a decision that applies to a detainee (sub-regs.(2) and (4)) and an application for a review of a decision that does not apply to a detainee (sub-regs.(3) and (5)). In each case, it also distinguishes between cases in which the information or comment to which the invitation relates is to be provided from a place that is in Australia (sub-regs.(2) and (3)) from a place that is not in Australia (sub-regs.(4) and (5)). Regulation 4.35(1) makes it clear that the periods prescribed relate to invitations under both s.424 and s.424A.

63. The First Respondent submits that the proper construction of reg.4.35(3)(b) and (5)(b) is to give the words a distributive operation. That is, in the case of an invitation to give additional information under s.424, the *information* to which the invitation relates is to be provided from a place that is or is not in Australia, while in the case of an invitation to comment on information under s.424A, the *comment* to which the invitation relates is to be provided from a place in Australia.

64. The First Respondent submits that such a construction is consistent with regs.4.35A and 4.35C, which respectively prescribe the periods for the purposes of s.424B(3)(b) and s.424B(5)(b) in relation to an invitation to give information or comment or a response, at an interview.

65. The First Respondent cites the cases of *SZKCQ* and *S1607 of 2003*, a decision of Turner FM which was upheld on appeal by Flick J in *S1925 of 2003 v Minister for Immigration and Citizenship* [2008] FCA 246 ("*S1925 of 2003*"). The First Respondent submitted that the point had been determined and the Court was bound by those decisions. To the extent that Cameron FM in *SZKJV* suggests otherwise, that reg.4.35(4) or (5) *might* apply to a s.424A letter in circumstances where the Tribunal is aware that the Applicant seeks to obtain information from overseas, this suggestion is incorrect and ought not be followed.

66. The contrary interpretation of regs.4.35(3) and (5) would be productive of uncertainty. Only the Applicant would ever be in a position to know

if he or she wants to obtain further information in order to provide a comment or response to a s.424A letter. Even if the subject matter of the s.424A letter involves matters outside Australia, the Applicant can provide his or her comment or response without necessarily having to get rebutting information from overseas. Any judgment by the Tribunal as to what time period might apply would be purely speculative.

67. In any event, the First Respondent submits that even if the prescribed period under s.424B(2) was 28 days, the specification of 14 days in the s.424A letter did not lead to jurisdictional error.

68. Section 424B(2) does not impose an imperative duty on the Tribunal or would not attract a discretion to grant relief. The First Respondent referred to the decision of Buchanan J in *SZLWQ v Minister for Immigration and Citizenship* [2008] FCA 1406 and Jacobson J in *SZEXZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 449 ("*SZEXZ*") on the place of s.424B in the statutory scheme. The First Respondent also relies on the decision of Tracey J in *M v MIMA.* The difficulty which was referred to by Jacobson J in *SZEXZ* does not arise in this case because the Tribunal did not proceed to make a decision in the absence of a response within the 14 day period. The Tribunal did not make a decision until 4 August 2011, which was more than 28 days after the day on which the s.424A letter was received by the Applicant. In such circumstances, any failure to specify the correct period in the s.424A letter did not adversely affect any entitlement of the Applicant, nor did it otherwise cause any unfairness or injustice to the Applicant.

Ground 2

69. The Applicant argues that even if it was not obvious to the Tribunal as at 4 March 2011, the Applicant's letter of 18 March 2011 made it clear that certain matters in the letter of 4 March 2011 would be answered by providing information from places outside of Australia. There was scope under s.424B(4) for the Tribunal to redress the deficiency in the original letter by exercising its discretion to extend time.

70. The Applicant submits that in refusing to extend time, the Tribunal's discretion miscarried because it failed to take into account a relevant

consideration being that the Regulations set up a presumption that a longer period should be allowed when information was required to be obtained from outside Australia. The decision to refuse the extension, although it was procedural had the potential to affect the outcome. The Applicant referred to paragraphs 5 and 10 of the affidavit of 4 August 2011 in support of this submission.

71. In response to the second ground, the First Respondent submits that the Tribunal expressly referred in its reasons for decision to the reasons given by the Applicant for seeking an adjournment:

> *The decision to refuse the adviser's request for an extension was made on the basis of the lateness of the request and the lack of any information as to the relevance of the documentation which the Applicant was obtaining from Bangladesh in order to respond to the particular information put to the Applicant for his comment.*[46]

72. In order to establish jurisdictional error in exercising its discretion, the Applicant has to show that the Tribunal failed to have regard to something it was bound to have regard to. The argument largely stands or falls on the construction point itself. If the prescribed period was 14 days, then the Tribunal was not bound to take into account the period prescribed by reg.4.35(5). The Tribunal clearly had regard to the content of the letter of 18 March 2011 and there is nothing to suggest that it did not take it into account in exercising its discretion.

Ground 3

73. The Applicant submits that the Tribunal failed to consider whether the Applicant had a well founded fear of persecution due to his political beliefs as a member of the BNP and as a member of a particular social group being "businessmen providing financial support to the BNP".[47]

74. The Applicant submits that the Tribunal found that the Applicant was not an active member of the BNP and was not of interest to authorities

[46] Court Book at page 182, paragraph 61.
[47] Court Book at page 19.

in the past and would therefore not be harmed by authorities if he returned to Bangladesh.[48]

75. While the Tribunal found that "as a low-level member of the BNP who was not politically active, the applicant would not face a real chance of persecution",[49] it did not refer to any additional evidence or give independent consideration to justify its conclusion about the risks of persecution suffered by ordinary members of the BNP.

76. The Applicant took the Court to extracts from the Court Book at paragraph [23] of the Tribunal's statement of decision and reasons and paragraph [31] in relation to the Applicant's claim of persecution as a member of the BNP.[50]

77. The Applicant also took the Court to parts of the Tribunal's statement of decision and reasons which refer to country information including paragraphs [69], [71] and [74].[51] The Applicant drew the Court's attention to aspects of those paragraphs which refer to attacks on the houses and shops of BNP supporters and to the death and injury of BNP supporters.

78. The Applicant submitted that the statement of the Tribunal at paragraph [103] of the Tribunal's statement of decision and reasons[52] to the effect that a person would be safe from persecution because they only have a low profile is an assumption, not a finding. Because of that assumption, the Tribunal failed to make a finding on an integer on a matter about which there was an imperative duty to make a finding. The Tribunal's findings and reasons start from paragraph [82].[53] It is clearly accepted that the Applicant was a BNP member. The uncontested country information shows that there were ordinary BNP supporters - about whom there is no suggestion they had an active role – that were also killed and injured. The Applicant contends that the Tribunal did not consider this critical issue.

[48] Court Book at page 195.
[49] Court Book at page 192, paragraph 90.
[50] Court Book at pages 171 – 172.
[51] Court Book at pages 184, 185 & 187.
[52] Court Book at page 195.
[53] Court Book at page 190.

79. The Applicant refers to *Htun v Minister for Immigration and Citizenship* (2001) 194 ALR 244; [2001] FCA 1802, *SZOFE v Minister for Immigration and Citizenship* (2010) 185 FCR 129; [2010] FCAFC 79, *NABE v Minister for Immigration and Multicultural Affairs* [2002] FCA 281 ("*NABE*"), and *NAIY v Minister for Immigration and Multicultural Affairs and Indigenous Affairs* [2005] HCATrans 91 in support of this submission.

80. Further, the Tribunal is required to address all claims that can be said to clearly arise from the case presented and not only those claims expressly articulated by the Applicant (*SZOAM V Minister For Immigration and Citizenship* [2010] FCA 864*; NABE*).

81. The circumstances presented in this case suggest that BNP members generally were at risk and called for a determination of whether or not a person might be at risk by reason of ordinary BNP membership and financial support. The Tribunal is required to give independent and discrete consideration to each aspect of the Applicant's claims.[54]

82. The Applicant sought to distinguish the case of *SZOEC v Minister for Immigration and Citizenship* [2010] FMCA 489 ("*SZOEC*") on the basis that the argument in that case was that the Tribunal had introduced an impermissible dichotomy not available in the material before it between the class of low level supporters of the BNP in respect of when there is no risk and active members in respect of whom there is risk. The case the Applicant puts in this matter is different, it is that there was an extra question which needed to be decided which was whether and to what extent low level members faced a well founded fear of persecution, and whether businesses who supported the BNP faced such a well founded risk.

83. The First Respondent referred the Court to the findings of the Tribunal at paragraph [103] of its statement of decision and reasons[55] and submitted that it was clear that the Tribunal did address the chance of persecution of the Applicant as an ordinary member of the BNP. This

[54] *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 73 ALD 321; (2003) 197 ALR 389; [2003] HCA 26; *SZOFE v Minister for Immigration and Citizenship* (2010) 185 FCR 129; [2010] FCAFC 79; *MZXQS v Minister for Immigration and Citizenship* (2009) 107 ALD 33; [2009] FCA 97, *Pojani v Minister for Immigration and Multicultural Affairs* [2002] FCA 1283 and *SZFIV v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FMCA 1811
[55] Court Book at page 195.

does not fall within the category of cases in which an integer of a claim is overlooked by the Tribunal. What is criticised by the Applicant is that the Tribunal has not made discrete findings about the risk of persecution of a member of the BNP who was not politically active. The Tribunal is not obliged to make findings on all material questions of fact and, provided it deals with the claim with all possible bases of persecution, then that is sufficient to deal with and address the claim for protection.

84. Most of the country information referred to deals with post-election violence which occurred between both sides. It does not give rise to a suggestion that anybody who supports or belongs to the BNP, who has no other profile, is therefore facing a real chance of persecution. It is a large political party.

85. The First Respondent relies on *SZOEC* because while the ground raised was differently expressed, it arises from a similar scenario where the Tribunal had country information, some of the very same country information that was before the Tribunal in this case. Raphael FM dealt with the argument at paragraph [14]

> *I am not satisfied that the applicant is correct when he says that the Tribunal created an impermissible dichotomy. My reading of the Tribunal's decision record, with its many references to the applicant's claim to be an active and committed member of the BNP is that it used these claims to test the credibility of the applicant's story. The applicant accepts that he claimed to be an active and committed member. The letters which he produced in support of his case argued that he was such. The Tribunal questioned the applicant upon these activities and came to the conclusion that they did not support such a description. That was the exercise by the Tribunal of its primary obligation to consider an applicant's claims on their merits and to make a decision as to whether it was satisfied that he was a person to whom Australia owed protection obligations. The Tribunal concluded that this applicant had exaggerated those claims, indeed, that the evidence he put forward to support his level of activity was fabricated. This is a matter for the Tribunal par excellence. The Tribunal was not measuring the applicant's level of activity against a particular standard. It concluded that, because the true level of activity was low, he was not likely to face the dangers that he had adumbrated. It is not correct to say that the Tribunal had not considered the applicant's claim to have a well-founded fear of*

> *persecution merely by being a member of the BNP. The extracted paragraph [104] at [10] of these reasons seems to me to do exactly that. To seek review of that paragraph is to seek merits review of the Tribunal's decision. The Tribunal did consider and accept the general independent country information but its duty was to measure the applicant's claims against that information. The information could well be used to indicate that any member of the BNP in Bangladesh had fears similar to those of the applicant and was thus entitled to asylum in any Convention country but equally another decision maker could take the opposite view. Provided that the view was taken within jurisdiction, it is not a matter for review. I am satisfied that this decision was so made.*

86. Having rejected the primary basis for the claim and found that he was an ordinary member, the Tribunal did not ignore the need to make a finding which addressed the risk of persecution as an ordinary member. To the extent, if any, that there was a separate claim available of a particular social group, it was really no different a group than members and supporters of the BNP. There was no claim put and nor did one arise from the material that businessmen supporting the BNP formed a particular social group that was at an additional risk of persecution.

Conclusion

Ground 1

87. The Applicant invites the Court to interpret reg.4.35 as requiring the Tribunal to give an Applicant, who has been invited to comment or respond to information that the Tribunal considers would be the reason or part of the reason for affirming a decision under review, a period ending 28 days after receipt of the invitation where the Tribunal ought to assume that such comment or response will require the obtaining of material from overseas.

88. The difficulty with the Applicant's proposition is two-fold. First, this Court, and on appeal the Federal Court, has already accepted the interpretation contended for by the First Respondent. In *Applicant S1607 of 2003*, Turner FM found as follows:

> *28. It is claimed that the Tribunal had to give the applicant 28 days to respond to the s.424A letter. The s.424A letter was sent on*

> *2 January 2007 (CB 296) and gave until 25 January to respond (CB 309). Regulation 4.35(5) provides that if the information or comment to which the invitation relates is to be provided from a place that is not in Australia, the prescribed period for giving the information is 28 days after the day on which the invitation is received.*
>
> *29. The Court accepts the submission for the first respondent that the invitation under s.424A was to provide comment on the information in the letter. That comment was to be provided by the applicant who was in Australia, and therefore the time limit under reg 4.35(3) is 14 days after the day on which the invitation is received, which, by s.441C(4) is taken to be 7 days after the date of the letter. The letter was dated 2 January 2007, which means receipt by 9 January 2007; 25 January 2007 gave 14 days to respond. No breach occurred.*

89. On appeal in *S1925 of 2003*, Flick J supported that interpretation of the Regulation:

> *Also rejected is a submission made orally during the course of the hearing of the appeal that inadequate time had been permitted to comment upon specific information. The submission was that Regulation 4.35(5) of the* Migration Regulations 1994 *(Cth) applied and that 28 days should have been permitted as opposed to 14 days. Regulation 4.35(3) provides a period of 14 days where "the information or comment to which the invitation relates is to be provided from a place in Australia"; reg. 4.35(5) provides for a period of 28 days where "the information or comment to which the invitation relates is to be provided from a place that is not in Australia." No Ground of Appeal in this Court seeks to raise this issue. The ground was, however, raised before the Federal Magistrate and was rejected. The decision of the Magistrate was correct as the information or comment was sought from the Appellant, being a person present in Australia, and time allowed was in accordance with the Regulations.*[56]

90. While the Applicant refers to the judgment of Cameron FM in *SZKJV* and Buchanan J in *SZKCQ* as perhaps leaving open the possibility that if the nature of the request, or the response by the Applicant imparted a necessity to obtain information from somewhere outside Australia that reg. 4.35(5) *might* apply, those comments are obiter.

[56] *S1925 of 2003 v Minister for Immigration and Citizenship* [2008] FCA 246 at paragraph [6].

91. The second difficulty is that to accept the Applicant's proposition would require the Tribunal to make a judgment in each case that material may be required from outside Australia in order for a person who is present in Australia to provide comment on or respond to information. The mere fact that the information on which comment is sought relates to events which occurred outside Australia, as *SZKJV* shows, does not necessarily impute a requirement to seek documents from outside Australia.

92. The Court should follow an interpretation which provides clarity and certainty. The position of the First Respondent, as accepted in *S1607 of 2003* and *S1925 of 2003* bases the distinction on where the person from whom the comment or response is to come is located, not where potential sources of information which may be needed to frame a comment or response might be located. Where this provides difficulty for an applicant in any particular case, the Act makes provision for them to seek and for the Tribunal to grant an extension of time.

93. Having formed the view that reg.4.35(3) was appropriately invoked by the Tribunal and the period of 14 days was the prescribed period, it is not necessary for me to consider if a breach of s.424B(2) would constitute jurisdictional error.

Ground 2

94. As the First Respondent submitted, the second ground largely stands or falls on the basis of the interpretation to be given to reg.4.35. If, as I have accepted, reg.4.35(3) applies to situations where a s.424A letter is sent to a person who is to provide comment or response from a place in Australia, there is no presumption that a longer period should apply and the Tribunal is not bound to have regard to the provisions of reg.4.35(5).

95. In this case, the Tribunal had regard to the reasons given by the Applicant in support of the application to extend time and rejected the application. That was a matter within the discretion of the Tribunal.

Ground 3

96. Ground 3 raises the issue of whether the Tribunal failed to consider an integer of the Applicant's claim being:

    a) That he had a well founded fear of persecution by virtue of his membership of the BNP; and

    b) That he had a well founded fear of persecution as a businessman providing financial support to the BNP.

97. I have been unable to discern from the Applicant's claims or the Tribunal's discussion any claim by the Applicant, express or implied, that he suffered or had a well-founded fear of persecution as a member of a 'particular social group' being 'businessmen who provide financial support to the BNP'. I am not satisfied that a 'particular social group' of 'businessmen who provide financial support to the BNP' can be discerned from any of the relevant material. To the extent that the Applicant can be identified as a financial supporter of the BNP, I cannot discern any particular distinction between 'financial supporters' and other 'supporters' of the BNP in the material.

98. I am therefore not satisfied that the Tribunal was requested to consider if the Applicant had a well founded fear of persecution as a 'businessman who financially supported the BNP'.

99. On the issue of whether the Tribunal considered whether the Applicant might have a well founded fear of persecution as a BNP member, the Applicant took the Court to various passages in the country material which refers to BNP 'supporters' as opposed to 'leaders' 'workers' or 'activists'. The submission, in essence, was that the Tribunal in reaching its conclusion at paragraph [103] that

> *based on the applicant's low-level profile as an ordinary member of the BNP who was not politically active, the applicant would not face a real chance of persecution for reason of his BNP political opinion, now or in the reasonably foreseeable future, if he returns to Bangladesh*[57]

[57] Court Book at page 195, paragraph 103.

failed to properly consider his claim for protection as an ordinary member and the material that suggested that BNP members generally were at risk.

100. While the Tribunal did spend a great deal of its time dealing with the Applicant's claims, which related to his profile and specific attacks, threats and incidents he claims to have occurred, it referred appropriately to the political situation in Bangladesh. Substantially, the same information was referred to by the Tribunal in *SZOEC.* Commenting on that, Raphael FM said:

> *The Tribunal did consider and accept the general independent country information but its duty was to measure the applicant's claims against that information. The information could well be used to indicate that any member of the BNP in Bangladesh had fears similar to those of the applicant and was thus entitled to asylum in any Convention country but equally another decision maker could take the opposite view. Provided that the view was taken within jurisdiction, it is not a matter for review.*[58]

101. The Tribunal did consider and make findings on the Applicant's claim that he faced a well founded fear of persecution as a member or supporter of the BNP and rejected that claim. In doing so it made no jurisdictional error.

102. For these reasons, the application is dismissed.

I certify that the preceding one hundred and two (102) paragraphs are a true copy of the reasons for judgment of Whelan FM

Date: 16 November 2011.

[58] *SZOEC v Minister for Immigration and Citizenship* [2010] FMCA 489 at paragraph [14].