FEDERAL CIRCUIT COURT OF AUSTRALIA

CZBB & CZBC v MINISTER FOR IMMIGRATION & ANOR *[2013] FCCA 310*

Catchwords:
MIGRATION – Meaning of "to consider" – use of "Tribunal emphasised" country information not disclosed to Applicants – considerations regarding jurisdictional error – "illogicality" and "unreasonableness" as opposed to evidence on which reasonable minds may differ.

Legislation:
Migration Act 1958, ss.420, 424(1), (2A), (3)(a), 424AA, 477(1) & (2)
Migration Amendment (Complementary Protection) Act 2011

Cases cited:
Appellant S395/2002 v Minister for Immigration & Multicultural Affairs; Appellant S396/2002 v Minister for Immigration & Multicultural Affairs (2003) 216 CLR 473
Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88
Attorney-General (NSW) v Quin (1990) 170 CLR 1
Kirk v Industrial Relations Commission (2010) 239 CLR 531
Minister for Aboriginal Affairs v Peko-Wallsend (1986) 162 CLR 24
Minister for Immigration and Citizenship v Khadgi (2010) 190 FCR 248
Minister for Immigration and Citizenship v MZYYL [2012] FCAFC 147
Minister for Immigration & Citizenship v SZHXF (2008) 166 FCR 298
Minister for Immigration and Citizenship v SZJSS (2010) 243 CLR 164
Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323
Minister for Immigration & Multicultural & Indigenous Affairs v NAMW (2004) 140 FCR 572
Minister for State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273
Muin v Refugee Review Tribunal (2002) 190 ALR 601
NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 216 ALR 1
Plaintiff M13/2011 v Minister for Immigration and Citizenship (2011) 121 ALD 466; (2011) 277 ALR 667
Randhawa v Minister for Immigration, Local Government and Ethnic Affairs

(1994) 52 FCR 437
Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1
Re Refugee Review Tribunal; Ex Parte Aala (2000) 204 CLR 82
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294
SCMCD v Minister for Immigration and Citizenship (2009) 174 FCR 415
Shi v Migration Agents Registration Authority (2008) 235 CLR 286
SZATV v Minister for Immigration and Citizenship (2007) 233 CLR 18
SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609
SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 150 FCR 214
SZMCD v Minister for Immigration & Citizenship (2009) 174 FCR 415
SZOQQ v Minister for Immigration and Citizenship (2013) 296 ALR 409; [2013] HCA 12
Tickner v Chapman (1995) 57 FCR 451

M. Aronson, B. Dyer, M. Groves, *Judicial Review of Administrative Action* (Fourth Edition) (Sydney: Lawbook Co., 2009)
M. Crock & L. Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia*, (Sydney: The Federation Press, 2011)
P. Keane, "Judicial Power and the Limits of Judicial Control," in *Centenary Essays for the High Court of Australia* (ed. P. Cane) (Sydney: LexisNexis Butterworths, 2004) 295-313

Applicants:	CZBB & CZBC
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	CAG 72 of 2011
Judgment of:	Judge Neville
Hearing date:	27 August 2012
Date of Last Submission:	27 August 2012 (supplementary submission received 4 March 2013)
Delivered at:	Canberra
Delivered on:	24 May 2013

REPRESENTATION

Solicitor/Advocate for the Applicant:	Mr J Davey
Solicitors for the Applicant:	Herm Legal & Migration Services, Canberra
Counsel for the Respondents:	Ms R Francois
Solicitors for the Respondents:	Clayton Utz, Canberra

ORDERS

(1) Pursuant to s.477(2) of the *Migration Act 1958* (Cth), an extension of time is granted to the Applicants in relation to the Application filed on 29 December 2011.

(2) A writ of certiorari issue to remove into this Court the record of the Refugee Review Tribunal for the purpose of its decision dated 16 November 2011 being quashed.

(3) A writ of mandamus issue to require the Tribunal to determine the matter according to law.

(4) The First Respondent pay the Applicants' costs in accordance with the Schedule to the Rules of this Court in the sum of $6646.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT CANBERRA

CAG 72 of 2011

CZBB & CZBC
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. Respectfully, to borrow the words of Keane J from a recent migration appeal (with which all other members of the High Court agreed), this is another such appeal which may similarly (or ultimately) be characterised (other than by the lawyers) as an "arid exercise."[1]

2. Pursuant to an Application filed on 29th December 2011 (with an Amended Application filed on 11th May 2012), the Applicants seek judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") delivered on 16th November 2011.

3. Leaving aside a contention by the First Respondent that the Application is out of time (which is disputed by the Applicants), formally there are six (6) grounds of review:

[1] *SZOQQ v Minister for Immigration and Citizenship* (2013) 296 ALR 409; [2013] HCA 12 at [37].

(i) The Tribunal failed to take into account a relevant consideration, being the *Migration Amendment (Complementary Protection) Act 2011*;

(ii) In accordance with principles set out in the High Court decision in *Minister for State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, the Tribunal failed to take into account the 'legitimate expectations' of the Applicants being the Tribunal's consideration of Australia's complementary protection obligations;

(iii) The Tribunal failed to take into account Australia's international obligations regarding the non-refoulement principle;

(iv) The Tribunal gave "inappropriate weight" or placed too much "reliance" on the 'country information', which led to it reaching an "unreasonable conclusion" in relation to the locality of inter-caste marriages;

(v) The Tribunal's finding that relocation within India was 'illogical and unreasonable';

(vi) The Tribunal erred in failing to apply ss.6 and 10 of the *Racial Discrimination Act* 1975 in relation to its determination of relocation.[2]

4. In their Outline of Argument, the Applicants reasonably contended, by way of overview, that (a) grounds 1-3 relate "collectively to the ground herein described as the Complementary Protection issues", (b) ground 4 relates to "the weight placed by the Tribunal on Country Information", and (c) ground 5 to "the unreasonableness of the conclusions reached."

5. Before dealing with the substantive grounds of the Application, a number of preliminary comments are apposite.

6. First, in relation to the extension of time application, the solicitor for the Applicants filed an affidavit in which he deposed that his instructions were that, although the date of the Tribunal's decision is 16th November 2011, his clients did not receive a copy of it until 18th

[2] In the result, this last ground of review concerning the *Racial Discrimination Act* 1975 was not pressed.

December 2011. Accordingly, he submitted that the Application, which was filed on 29th December 2011, was filed within the 35 day period prescribed by s.477 of the *Migration Act* 1958 ("the Act").

7. Apart from the written submission that 'the Tribunal sent by post its decision affirming the decision of the delegate', learned Counsel for the Minister made no other submissions regarding the out of time application.

8. In all of the circumstances (not least being the explanation given by the Applicants' solicitor, and the relatively short time involved), in my view, pursuant to s.477(2) of the Act, should there need to be any formal order that an extension of time is necessary, such an order shall be taken to have been made and that the Application filed on 29th December 2011 shall be taken to have been filed within time.

9. Secondly, in the Minister's written submissions, it is contended that some of the grounds of review are "unorthodox and plainly misconceived." In many respects, I must agree. Some of the grounds are novel – to say the least.

10. For example, the Applicants' ground of review in relation to the '*Teoh* principles', does not take into account, or even refer to, later High Court decisions which cast very significant doubt on them. For example, in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* ("Lam"), four members of the High Court stated quite directly their doubts about the utility and applicability of the principles in *Teoh*.[3] As I have noted, the Applicants made no reference to *Lam*.

11. Similarly troublesome is the fact that the Applicants make a general claim regarding the relevance and application of the *Teoh* principles, but do not distinguish, as the High Court itself did in *Teoh*, that the principle of 'legitimate expectation(s)' is a matter of procedure. The Applicants refer, in very general terms, to the connection between *Teoh*

[3] See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 (McHugh & Gummow JJ) at [61] – [102]; (Hayne J) at [116] – [122]; (Callinan J) at [139] – [148]. Gleeson CJ, at [35], posed questions in the light of *Teoh* as to what was the nature of the unfairness alleged, and what was the applicant reasonably entitled to expect? See also the helpful discussion in M. Crock & L. Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia*, (Sydney: The Federation Press, 2011) at [4.15] *ff* under the pregnantly critical heading "The Teoh experiment."

and Australia's complementary protection responsibilities under international and domestic common law. Unfortunately, such a level of generality as a ground of review is of no assistance to the Court for the purposes of the current Application. It would require the Court to undertake its own inquiry as to what, in particular, the Applicants understood as being the legitimate expectation of the complementary protection obligations. The Court should not, and will not, undertake such a task. Nor is there any relevant evidence of what the Applicants' specific expectations were or are in this regard.

12. A third area of concern relates to the first ground of review, namely reliance upon the *Migration Amendment (Complementary Protection) Act 2011*.[4] As the First Respondent's submissions properly highlight, this legislation did not come in to force until some four months after the Tribunal's decision was given.[5] How and why this Court can, or should, apply legislation in this matter when it was not in force at the relevant time (being the time of the Tribunal's decision) is not readily apparent.

13. For the reasons just given, in my view, it is not appropriate for the Court to consider further grounds (i) and (ii) of the Application.

14. In relation to ground (iii), it too is framed in so wide and general a manner as to require the Court 'to fill in the gaps', so to speak, to give substance to it. In such circumstances, I do not propose addressing this ground. In any event, it may be that it is otherwise an exercise in supererogation because of grounds (iv) and (v).

Overview

15. The Applicants are Husband and Wife who arrived from India in March 2008 on student visas. The Husband's evidence, which was accepted

[4] For a recent helpful discussion of the application of the provisions of this Act, see the Full Court decision in *Minister for Immigration and Citizenship v MZYYL* [2012] FCAFC 147.

[5] At [6] of the Tribunal's decision, there is reference to the relevant criteria for the grant of a protection visa, being criteria "in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant." In argument, the Applicants suggested that this could embrace the complementary protection legislation. However, as the First Respondent submitted, I take this to be nothing more than the Tribunal's oblique acknowledgment of the High Court's discussion in *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 of relevant criteria at the time of the Tribunal's decision.

by the Tribunal, is that he belongs to the Jatt Sikh ethnic group and that his religion is that of a Sikh.

16. The Wife's evidence – also accepted by the Tribunal – is that she belongs to the Gujjar ethnic group and that she is a Hindu. The Wife's evidence is that she is a member of a 'backward caste.'

17. Both parties read, speak and write Punjabi, Hindi and English. Both parties are formally qualified as teachers.

18. The parties married secretly in India in August 2007. Both parties are from the Punjab region in northern India.

19. The parties contended before the Tribunal that they did not live together as spouses in India initially but instead lived in student hostels while they studied for their exams. The Tribunal noted that they did not disclose their marriage to their families because they feared they would both be murdered for bringing dishonour to their families by entering into a mixed marriage.[6] The Husband Applicant had previously advised his parents of the relationship and that he wished to marry his now Wife. The Husband advised the Tribunal that "his parents became upset and refused to accept the relationship."

20. The Husband further contended that his relatives were very influential, and that those relatives had ties to politicians and the police, which influence extended beyond the area of the Punjab. The Husband also claimed that, through this 'network', his family would obtain information regarding the parties' whereabouts elsewhere in India and, ultimately, have them murdered.

21. In the alternative, the parties (and the Wife in particular) feared that her relatives would force her to divorce her Husband and marry a man from her own caste.

22. Although not completely clear as to the timing of events, the delegate also recorded that the Husband said that (a) the parties decided to leave India and travel to Australia, and (b) upon learning of the marriage, the Husband's Father told him to divorce his Wife and marry a girl of his

[6] See Court Book ("CB") at [33] and [36].

Father's choosing. Upon refusing to do so, the Father told him to cease contact with his family; his Father threatened to kill him.

23. In the light of these matters, the Applicants claimed that they would be killed for entering into a mixed marriage against the wishes of their respective families.

24. On 7th July 2011, although the Delegate accepted that the Applicants subjectively held a genuine fear of harm, he was not satisfied that there was a real chance of persecution occurring in India as a whole. Accordingly, the Delegate refused the application for a protection visa.

25. On 8th August, the Applicants applied to the Tribunal for review of the delegate's decision.

The Tribunal's Decision

26. Early in the Tribunal's reasons, at [36], the reason for the Applicants' claim to have a well-founded fear of persecution is identified, thus: "… the Applicants claimed that they would be killed for entering into a mixed marriage against the wishes of their respective families. … Therefore, the Applicants claimed that they faced a real risk of being the victims of honour killings in India."

27. The reasons of the Tribunal, in turn, (a) summarised the Delegate's decision of 7th July 2011, and (b) outlined the details of and evidence considered for the 'review application' to the Tribunal. Of particular significance is the Tribunal's treatment of "Independent Country Information" (which includes consideration of information in relation to "inter-religious/caste (mixed) marriages", at [46] – [51], and the issue of "internal relocation."

28. Beginning at [57], the Tribunal outlined the oral evidence of the Applicants. The Tribunal considered the Husband's evidence specifically in relation to relocation at [82] – [84], and in relation to the Wife on the same issue, at [102] – [105].

29. Following the hearing, the Applicants were invited (pursuant to s.424AA of the Act) to comment on certain other matters, which are detailed at [106] – [112]. The matters in relation to which further

comment was sought were: information that was included with the Applicants' 2008 visa application, inconsistencies in the Applicants' evidence, and the country information that was set out at [50] – [55] of the Tribunal's reasons. Of some significance is that the Tribunal stated, at [111]: "… the Tribunal noted there was little in the country information to indicate that Punjabi families perpetrated honour crimes outside the Punjab."

30. At [112], the Tribunal confirmed to the Applicants the relevance of this country information (set out at [50] – [55]) because "it might lead to a finding that they could relocate within India." It might follow, the Tribunal said, that in such circumstances the Applicants would not be owed any protection obligations by Australia.

31. The Applicants' responses to the additional matters are set out at [113] – [124].

32. Summarily, the Tribunal made the following findings.[7]

33. By way of overview, the Tribunal discussed in its reasons at [143], [144], and [166] and following, the official languages in India. At [172] the Tribunal considered inter-caste marriages. At [173] and [179] it discussed corruption and state protection in India; finally, at [173] and [177] it discussed "country information".

34. More particularly, I note the following from the Tribunal's reasons.

35. First, the Tribunal accepted, at [142] – [144], the Applicants' evidence in relation to their educational qualifications and their command of English, Punjabi and Hindi. Likewise the Tribunal accepted the Applicants' evidence in relation to the history given concerning employment in India.

36. The Tribunal also accepted, at [146], the "family circumstances" of the each of the Applicants.

37. The Tribunal then noted, at [147] – [148], the very specific ground upon which the Applicants fear persecution and seek protection. In terms, the Tribunal referred to the fact that "apart from their mixed

[7] The 'findings and reasons' of the Tribunal are located at [133] – [195] of its reasons, at CB pp.262-270.

marriage, there was no other Convention-related basis for their respective fear of persecution in India. …The Applicants' claims to be refugees centre on the fact that they have entered into a mixed marriage, which their families oppose on religious and caste grounds."

38. Accordingly, as the Tribunal noted, it addressed the specific claim(s) of the Applicants "as well as those that might potentially arise from the fact that the first-named Applicant is a Jatt Sikh and the second-named Applicant is a Gujjar Hindi, as well as the possibility that they might respectively be the members of a particular social group."

39. I have already recorded that the Tribunal accepted the Applicants' evidence regarding their education, and their ability to speak, read and write Punjabi, Hindi and English.

40. At [149] the Tribunal confirmed the Applicants' "claim to fear persecution in India from non-state actors, namely members of their respective families" because they are from different castes and because they married without family consent or approval.

41. At [151], after noting some inconsistencies in the Applicants' evidence, the Tribunal also noted "the overall consistency in the oral evidence presented by the Applicants regarding their marriage, personal and family circumstances, and claims to be refugees." I pause here to note that on a number of occasions throughout the Tribunal's reasons, the consistency, plausibility and acceptance of the Applicants' evidence is recorded. For example, at [155], the Tribunal said that it found it plausible, and that it accepted that "the Applicants' respective families voiced their disapproval and objections to even the suggestion that the parties might enter into a mixed marriage, prior to them actually doing so in August 2007."

42. Then at [156] the Tribunal said that it found it both plausible and that it accepted that the Applicants received verbal remonstrations "culminating in possible threats from their respective relatives if they proceeded to enter into a mixed marriage. The Tribunal accepts that it is likely that this including [sic] threats regarding the possible consequences for each of the Applicants, if they were to enter into such a marriage [in] India and subsequently refused to divorce." In the same place the Tribunal found that "the Convention grounds of religion, or

membership of a particular social group, are the significant and essential reason for the harm feared as a result of these purported threats."

43. I do not need to recount the Tribunal's concern about the initial action taken by the Applicants to live separately in India, and therefore to conceal their marriage.

44. In relation to the circumstances of the Applicants' respective families in India, the Tribunal noted, at [162], that the country information before it confirmed that "the Gujjars and Jats [sic] in Punjab tend to be relatively wealthy landowners…" The same country information also confirmed, according to the Tribunal, that "many of the Gujjars in Punjab are politically powerful and enjoy positions of influence."

45. In answer to the question posed by the Tribunal, namely "is there a real chance of serious harm?", at [165] the Tribunal confirmed:

> *... on balance, having regard to all the evidence before it, the Tribunal accepts that the Applicants face a real chance of serious harm from non-stage agents, being members of their respective families, in the Punjab on the basis of their mixed marriage. The Tribunal also accepts that the essential and significant reason for the harm the Applicants fear is based upon the fact that members of their respective families would target them specifically because they belonged to a different religion from their would-be persecutors, or their membership of a particular social group. In addition, the Tribunal is satisfied that the basis for the Applicants' fear is Convention-related.*

The Tribunal and Internal Relocation

46. At the outset of the Tribunal's consideration of internal relocation, otherwise dealt with at [166] – [191] of its reasons, and after considering briefly the judgment of Black CJ in *Randhawa*, the Tribunal referred to comments by the High Court in *SZATV*.[8] In this regard the Tribunal said, at [168], that "whether relocation is reasonable is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political

[8] *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437; *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18.

and socio-economic rights. The Convention is concerned with persecution in the defined sense, and not with living conditions in a broader sense."

47. Next, at [169], the Tribunal referred to Hayne J's judgment in *Plaintiff M13/2011*.[9] The Tribunal rejected the submission by the Applicants that *Plaintiff M13* applied directly to the circumstances of the current case and said "the Tribunal accepts the findings of Hayne J as set out at paragraph 19 of this decision, in terms of the relevant legal test for relocation and the legal error the decision maker committed in this case." The Tribunal went on to reject any direct comparison between the facts and circumstances between *Plaintiff M13* and the current matter involving the Applicants.

48. At [172] the Tribunal confirmed that the Applicants' claims were "highly localised to the Punjab where there has been a history of honour killings where individuals have entered into mixed inter-caste or inter-religious marriages without family approval." I observe that the Tribunal here was much more emphatic if not dogmatic on this point than it had been earlier in its reasons at [111].

49. In response to the Applicants' contentions that they would not be safe elsewhere in India because members of the family would [ultimately] track them down,[10] particularly by virtue of the second Applicant's connections to politicians and the police force, the Tribunal did not accept that there was a real chance that the Applicants would be tracked down by family members if they relocated to another state in India, based on country information before the Tribunal.

50. Further, at [177], the Tribunal disagreed with the Applicants' submission that the country information before the Tribunal was unreliable.

51. At [178], the Tribunal said that the country information "indicates that the local police do not have the resources, or language abilities to conduct background checks on individuals relocating to a new area from elsewhere in India." I pause here simply to note that the Tribunal

[9] *Plaintiff M13/2011 v Minister for Immigration and Citizenship* (2011) 121 ALD 466; (2011) 277 ALR 667.
[10] See, for example, [117] of the Tribunal's reasons, which records the First Applicant's evidence in response to the Tribunal's inquiries.

does not seem to have considered that the same lack of resources available to the police may, or may not, also be relevant to what sort of state protection could be provided to persons who do relocate. If lack of resources of the local police is considered by the Tribunal to be a relevant consideration for one purpose (*i.e*. the capacity to monitor new arrivals into a particular area), presumably the same fact is a relevant consideration for other purposes, such as the capacity of the local police to protect. It would appear that, as a matter of process, the Tribunal did not consider this.

52. In relation to country information more generally, at [181], the Tribunal confirmed that it did not accept that it should disregard it "regarding the ability of the Applicants to relocate within India from the Punjab, to a large population centre such as New Delhi or Mumbai."

53. In rejecting the Applicants' contention that it was not reasonable for them to relocate to another part of India, specifically "given the social structure within India", at [184], the Tribunal said,

> *... whilst the Tribunal recognises that the Applicants will not be able to access the financial and emotional support of their families in the Punjab, if they return to another area of India, such as New Delhi or Mumbai, or another larger city in India, the Tribunal finds that they have the education background and language skills to relocate successfully.*

54. As a further observation regarding the process or procedure of the Tribunal: on the one hand, the Tribunal accepted the Applicants' evidence in relation to family and social structure, and in relation to their fears and the risk of harm.[11] On the other hand, the Tribunal also here has relied on the more generalised country information about which Kirby J has warned that a court should be somewhat circumspect because of its necessarily general nature.[12]

55. I pause here to note that courts have recognised the [relative] expertise of tribunals that comes from, among other things, the regular

[11] See, for example, [146] of the Tribunal's reasons regarding the family circumstances of the Applicants. And see also [162] and [165] in relation to the influence and power of the Gujjars and the Applicants' Convention-related basis for their fear and risk of harm from "non-state" agents, being members of their families.
[12] See, for example, his Honour's comments, discussed further below, in *SZATV* 233 CLR at [82].

consideration of, for example, country information.[13] I also note that the Tribunal can have regard only to the information that is before it. Thus, in relation to country information in relation to "honour killings" in India in relation to inter-caste marriages, it set out the information it considered relevant. Because this Court only has a "supervisory role" and cannot inquire into the merits of the Tribunal's decision, the following issue must be regarded only as hypothetical.

56. The matter I seek to raise, but cannot resolve or have regard to is this: what if, contrary to the country information used in the current appeal, there was/is country information that confirmed that "honour killings" for inter-caste marriages did take place in large cities such as Mumbai and New Delhi? Similarly, what if, contrary to the country information used in the current appeal, there is country information in a different migration matter, which highlighted the lack of law and order, for example, in Mumbai? Indeed, as is the fact, what does the Court do where it is aware of country information from other migration/refugee appeals where there is country information put before the Tribunal in another case which confirms that honour killings for inter-caste or inter-religious marriages in large cities in India does occur? Either or both kinds of country information, I suggest, would more likely than not put a different complexion on the country information regarding the risks to parties who are in an inter-caste or inter-religious marriage used by the Tribunal in this case.

57. I hasten to add that I do not suggest, either in this case or any other, that the Tribunal has accessed or used country information selectively. I stress that highlighting divergent or contradictory country information must be considered only as a hypothetical question in the current matter because this Court can only deal with the matters properly before it. I confirm that I have had no regard in the current appeal to this possible conflict of evidence in country information used by differently constituted panels of the Tribunal. I mention it simply to bring it to the attention of the Tribunal (and perhaps the Minister) for consideration in the future.

[13] See, for example, the comments of Gleeson CJ in *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 at [7].

58. In relation to the Applicants' concerns in relation to the right-wing *Shiv Sena* political party (based in Mumbai) the Tribunal said, at [187], that "even if this became a particular issue for the Applicants in Mumbai, there is little in the country information to suggest that the Applicants would have to suppress their religious views if they lived in New Delhi."

59. In relation to this "country information" concerning *Shiv Sena*, subject to what is said later in these reasons, I note that (a) there is nothing in the original country information, noted by the Tribunal at [50] – [53], that referred at all to this political party, (b) the only country information that referred to it is the "additional country information", at [126] – [127] of the Tribunal's reasons, which information was not provided to the Applicants. The Tribunal used this information regarding *Shiv Sena* and that organisation's activities in Mumbai, to go on to say, at [187], that the Applicants could move to New Delhi where *Shiv Sena* is apparently not so active.

60. At [188] the Tribunal concluded its decision, saying: "Accordingly, on balance, weighing each of these matters together, the Tribunal finds that the Applicants' internal relocation within India would be reasonable in the circumstances."

Legal Principles

61. I consider the following matters of principle: (a) "jurisdictional error",[14] (b) the use of "country information", and (c) "illogicality" and "irrational" decisions.

A. Jurisdictional Error

62. Although already noted, it is important to recall the limited and circumscribed nature of the review Application now before this Court,

[14] Accepting that Part 7 Division 4 of the Act provides an "exhaustive statement of [the] natural justice hearing rule," in relation to jurisdictional error, I include here issues of procedural fairness, as discussed by the High Court, for example, in *Re Refugee Review Tribunal; Ex Parte Aala* (2000) 204 CLR 82 and *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 (the case of VEAL, of course, is relevant to the importance of ensuring that reasons for decision must be read properly in context), and matters relevant to 'proper consideration' of matters by the tribunal, including matters pertaining to 'internal relocation', as in *Plaintiff M13/2011 v Minister for Immigration and Citizenship* (2011) 277 ALR 667.

which is necessarily limited to jurisdictional error, as opposed to any review of the merits of the Tribunal's decision. In a sense, Mason J's oft-quoted observation is signal and the least difficult aspect of judicial review to grasp in this regard. In *Minister for Aboriginal Affairs v Peko-Wallsend*, his Honour said (in the context of a claim of asserted "unreasonableness") (emphasis added): "a court should proceed with caution … lest it exceed its **supervisory role** by reviewing the decision on its merits."[15]

63. Often, if I may say, it is somewhat easier to define this notoriously difficult term – jurisdictional error - by reference to what is excluded rather than what it comprehends. The obverse of such an observation is simply to say that a court will know jurisdictional error when it sees it. Writing before his ascension to the Bench, Keane J commented: "… I do not intend to discuss the difficulties which arise in deciding on which side of the "legality/merits" line particular cases fall. Particular circumstances, no doubt, throw up particular problems. The point, for present purposes is that, while the line may not always be a bright one, it is there."[16]

64. Of particular significance in the current Application, as in all such matters, is to recall the clear statements of principle, often made, to the effect that "merits review" is not, and may not be, part of the judicial review process. Some of the relevant cases from which this principle is derived are noted below. However, the *locus classicus* is often considered to be the comments of Brennan J in *Attorney-General (NSW) v Quin*.[17]

65. The are many cases which explore – to varying degrees – the so-called 'metes and bounds' – of what does and what does not constitute jurisdictional error. That said, the notoriously difficult, on the one hand, and somewhat 'flexible' (as in no 'bright line' definition) or discretionary nature of what is and what is not 'jurisdictional error'

[15] *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 42.
[16] P. Keane, "Judicial Power and the Limits of Judicial Control," in *Centenary Essays for the High Court of Australia* (ed. P. Cane) (Sydney: LexisNexis Butterworths, 2004) pp.295-313 at p.298. The learned authors of *Judicial Review of Administrative Action* (Fourth Edition) (M. Aronson, B. Dyer, M. Groves) (Sydney: Lawbook Co., 2009) [1.90] state (internal citations omitted) : "Jurisdictional error is indeed uncertain, but one must ask why. In Australia, at least, the answer is that it has become a conclusion."
[17] (1990) 170 CLR 1 at 35-36.

requires an even greater degree of caution in approaching matters of this kind. Indeed, from another but related area of discourse, the High Court continues to maintain that "[i]t is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error."[18] With utmost respect, it may be the case that attempts to give some boundary or guidance – particularly to non-superior courts - to what is and what is not jurisdictional error must necessarily remain (a) a piece-meal exercise, and (b) be 'defined', to the degree that it can, by what it is not rather than by what it is. If this be true, jurisdictional error must be, like 'beauty', rather in the eye of the beholder – to some degree at least.

66. All of this said, perhaps beginning with *Eshetu*, and in subsequent cases, it is contended by learned commentators that Gummow J in particular has endeavoured to give some greater clarity or 'bright lines' regarding 'jurisdictional error.'[19] Accordingly, and in my view in keeping with Mason J's instruction in *Peko-Wallsend* about the Court's function to be pre-eminently "supervisory" and not engaged in merits review, it is submitted that matters of process (*e.g. considerations* that must be taken into account, compared with *procedures* that must be followed) are properly amenable to the Court's supervisory function, whereas the 'quality' of the decision is not.[20]

67. I note in particular Gummow J's comments in *Eshetu*, at [145] (and other places), where his Honour speaks about "a criterion of reasonableness review." His Honour said (internal citations omitted) that such 'criteria' "would permit review in cases where the satisfaction of the decision-maker was based on findings or inferences of fact which were not supported by some probative material or logical grounds."

68. By way of further example (and reminder of basal principle), in the joint judgment of McHugh, Gummow & Hayne JJ in *Minister for*

[18] *Kirk v Industrial Relations Commission* (2010) 239 CLR 531 at [71].
[19] *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 especially at pp.658-659. See C. Beaton-Wells, "Judicial Review of Migration Decisions: Life after s157," (2005) 33 *Federal Law Review* 141; M. Taggart, "'Australian Exceptionalism' in Judicial Review," (2008) 36 *Federal Law Review* 1.
[20] See also the wide-ranging discussion in M. Crock & L. Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia*, (Sydney: The Federation Press, 2011), Chapter 19 "Judicial Review of Migration Decisions."

Immigration and Multicultural Affairs v Yusuf, at [82] (internal citations omitted), their Honours said:[21]

> *It is necessary, however, to understand what is meant by "jurisdictional error" under the general law and the consequences that follow from a decision-maker making such an error. As was said in Craig v South Australia, if an administrative tribunal (like the Tribunal)*
>
> > *"falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."*
>
> *"Jurisdictional error" can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from Craig, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law.*

69. Then in *Minister for Immigration and Citizenship v SZMDS*, Heydon J cautioned, at [85] (note 60), against "construing the words of non-judicial decision-makers minutely and finely either with an eye keenly focussed on the perception of error, or with an ear keenly attuned to the

[21] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323. For recent consideration of 'jurisdictional error', see, for example, the discussion in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 by French CJ at [59]. See also the comments of the High Court in *Minister for Immigration & Citizenship v SZJSS* (2010) 243 CLR 164 at [23], [26] & [30].

perception of error."[22] Similar comments were also made by Kirby J in *SZATV*, where (at [98]) his Honour cautioned against conducting a review of an administrative decision "in an over-zealous way."[23]

70. Earlier, in *Waterford v Commonwealth*, Brennan J said with customary succinctness:[24]

> *…a finding on a matter of fact cannot be reviewed on appeal unless the finding is vitiated by an error of law.*

71. Rather more recently, the High Court said in *Minister for Immigration and Citizenship v SZJSS*, at [23] (internal citations omitted):[25]

> *[23] General principles governing the limited role of the courts in reviewing administrative error have long been identified. As Mason J observed in Minister for Aboriginal Affairs v Peko-Wallsend Ltd, "mere preference for a different result, when the question is one on which reasonable minds may come to different conclusions" is not a sufficient reason for overturning a judicial decision upon a review. Further, Brennan J said in Attorney-General (NSW) v Quin*
>
> > *"The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."*

72. In the joint judgment of Gummow and Hayne JJ in *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs; Appellant S396/2002 v Minister for Immigration & Multicultural Affairs*, at [73] and [78], their Honours said (internal citations omitted; unless otherwise specified, emphasis in original text):[26]

> *[73] The objective element [of the Convention definition of "refugee"] requires the decision-maker to decide what may happen if the applicant returns to the country of nationality.*

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[22] *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611. To similar effect, see the plurality reasons of Brennan CJ, Toohey, McHugh & Gummow JJ in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at p.272, and Kirby J at p.291.
[23] *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18. See also the comments in *NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 216 ALR 1 by McHugh J at [38] – [39] (dissenting in the result) and by Hayne and Heydon JJ at [158].
[24] (1987) 163 CLR 54 at [14].
[25] *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164.
[26] *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs; Appellant S396/2002 v Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473.

> ***That is an inquiry which requires close consideration of the situation of the particular applicant.*** *[emphasis added]*
>
> *[77] Further, there is a serious risk of inverting the proper order of inquiry by arguing from an a priori classification given to the applicant, or the applicant's claim, to a conclusion about what may happen to the applicant if he or she returns to the country of nationality, without giving proper attention to the accuracy or applicability of the class chosen. That is, there is a real risk of assuming (wrongly) that a particular applicant will be treated in the same way as others of that race, religion, social class or political view are treated in that country….*
>
> *[78] The central question in any particular case is whether there is a well-founded fear of persecution. That requires examination of how* ***this*** *[emphasis in original text] applicant may be treated if he or she returns to the country of nationality.* ***Processes of classification may obscure the essentially individual and fact-specific inquiry which must be made****. [emphasis added]*

B. Country Information

73. Subject to what is said later in relation to s.424A(3), it is sufficient to note the caution expressed by Kirby J in *SZATV*, at [82], in relation to the utility and reliability of "country information." His Honour said:[27]

> *In the nature of things, country information available to refugee adjudicators is often expressed at a high level of generality. It may not extend in sufficient detail to establish, in a convincing way, the differential safety of other towns, districts or regions of the one country. The fact that in Australia the inquiry is relevant only to the well-foundedness of the fear of persecution on the part of the refugee applicant indicates that, where otherwise a relevant "fear" is shown, considerable care will need to be observed in concluding that the internal relocation option is a reasonable one when, by definition, the applicant has not taken advantage of its manifest convenience and arguable attractions.*

C. "Illogicality" and "Irrationality"

74. In relation to this aspect of the review/appeal raised by the Applicants, I note the detailed instruction provided in the joint judgment of

[27] *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18.

Crennan and Bell JJ in *Minister for Immigration and Citizenship v SZMDS*. Beginning at [121], their Honours said, at [130] – [131]:[28]

> *[130] In the context of the Tribunal's decision here, "illogicality" or "irrationality" sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65, is one at which no rational or logical decision maker could arrive on the same evidence. In other words, accepting, for the sake of argument, that an allegation of illogicality or irrationality provides some distinct basis for seeking judicial review of a decision as to a jurisdictional fact, it is nevertheless an allegation of the same order as a complaint that a decision is "clearly unjust" or "arbitrary" or "capricious" or "unreasonable" in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached. Not every lapse in logic will give rise to jurisdictional error. A court should be slow, although not unwilling, to interfere in an appropriate case.*
>
> *[131] What was involved here was an issue of jurisdictional fact upon which different minds might reach different conclusions. The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.*

Discussion

75. In what follows, I confine myself to the following matters: (a) the application of s.424A(3) and the consideration and use of "country information"; (b) was there proper consideration by the Tribunal of the High Court decision in *Plaintiff M13/2011*in reaching its conclusion that it was reasonable for the Applicants to relocate within India?, and

[28] *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611.

(c) was the Tribunal's decision in relation to relocation within India "illogical" or "irrational/unreasonable"?

A. Application of s.424A(3) & Country Information

76. The question of the applicability and operation of s.424A(3) was not raised by either of the parties in the primary Application and Response. However, upon consideration of the Tribunal's reasons subsequent to the hearing, it was raised with them by the Court. Written submissions were received only on behalf of the First Respondent.

77. That section, which has (like other sections of the Act following judicial determination) undergone various iterations, is now in the following terms:[29]

> *(1) Subject to subsections (2A) and (3), the Tribunal must:*
>
> *(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and*
>
> *(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and*
>
> *(c) invite the applicant to comment on or respond to it.*
>
> *2A) The Tribunal is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 424AA.*
>
> *(3) This section does not apply to information:*

[29] The relevant history of amendment is helpfully noted in the Full Court decision of *SCMCD v Minister for Immigration and Citizenship* (2009) 174 FCR 415, discussed later in these reasons.

(a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or

(b) that the applicant gave for the purpose of the application for review; or

(ba) that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department; or

(c) that is non-disclosable information.

78. I note also that s.420(1) of the Act provides (emphasis added): "The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is *fair, just*, economical, informal and quick." Section 420(2) provides (emphasis added):

The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case.

79. In relation to s.424A, I note, firstly, the observation by Kirby J in *SZBYR v Minister for Immigration and Citizenship*, at [33]: "This is an area of law where there is a multitude of decisional authority and a proliferation of dicta."[30] The First Respondent's solicitors helpfully referred to a number of the 'decisional authorities', although there was no specific reference (for understandable jurisprudential reasons) to the High Court's consideration of s.424A in *SZBYR*, or to Weinberg J's discussion in *SZEEU*, which I note below.

80. Secondly, without comment (other than my respectful agreement with them) I note the observations of Weinberg J in the Full Court decision

[30] *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609.

in *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs*.[31] Beginning at [174], his Honour said:

> *[174] There are several other comments that I wish to make about these appeals generally. They seem to me to illustrate, and not for the first time, the problems that can arise when the legislature embarks upon the course of establishing a highly prescriptive code of procedure for dealing with visa applications, and with subsequent applications for review, instead of simply allowing for such matters to be dealt with in accordance with the well-developed principles of the common law.*
>
> *[175] One of the reasons for the difficulty is that the legislature has chosen to use the term "information" when searching for a global expression designed to trigger the obligations imposed under s 424A. The term "information" is not defined in the Act, and if it were, it would not necessarily conduce to clarity. "Information" is inapt, as a word, to encompass at least some of the circumstances that would normally give rise to a duty, as a matter of natural justice, to invite comment from an applicant. Its use in s 424A can lead to unsatisfactory results.*
>
> *[180] Distinctions ... which are highly refined, and which require the Tribunal to engage in extraordinarily sophisticated reasoning, do not seem to me to serve any worthwhile purpose.*
>
> *[181] Were it not for SAAP, it would matter little whether any notice, in compliance with a duty to act fairly, was given orally or in writing. Indeed, in some cases it might not matter whether such notice was given at all. The Tribunal's duty would be simply to ensure that it acted fairly. If it failed to give the applicant the requisite notice, but it could be convincingly shown that this had made not the slightest difference, the decision would be allowed to stand. That would accord with the reasoning in Stead, Dagli and Lu.*
>
> *[182] However, since SAAP, fairness is no longer the touchstone. Indeed, it may be regarded as being only marginally relevant. The requirements of the section have been construed as being imperative, and accordingly, must be met, whatever the circumstances may be. The only limiting requirement is that the information in question be "a part of the reason" for affirming the decision. The causal connection must be real, but need not be great. It is not necessary to show that "but for" the information in*

[31] *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214. The other members of the Full Court were Moore and Allsop JJ.

> *question the result would have been different. It is sufficient simply to show that the "information" contributed in some way, which renders it an operative causal link, to the decision itself.*
>
> *[183] With great respect, I doubt that the legislature ever contemplated that s 424A would give rise to the difficulties that it has, or lead to the results that it does. The problems that have arisen stem directly from the attempt to codify, and prescribe exhaustively, the requirements of natural justice, without having given adequate attention to the need to maintain some flexibility in this area. This desire to set out by way of a highly prescriptive code those requirements was no doubt well-intentioned, and perhaps motivated by a concern to promote consistency. However, the achievement of consistency (assuming that this goal can be attained) comes at a price. As is demonstrated by the outcome of at least some of these appeals, codification in this area can lead to complexity, and a degree of confusion, resulting in unnecessary and unwarranted delay and expense. To put the matter colloquially, and to paraphrase, "the cake may not be worth the candle".*

81. I observe that in *SBZYR*, the plurality judgment of Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ said, at [16], that because the parties proceeded on the assumption of the correctness of, among other cases, the Full Court decision in *SZEEU*, the appeal in *SZBYR* was not a relevant occasion 'to determine whether that assumption was correct.'[32]

82. How s.424A came to be in its present form is best understood by reference to the High Court's decision in *SAAP*, and by the later decisions of the Full Court of the Federal Court to which I will refer shortly.

83. In *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*, McHugh, Kirby and Hayne JJ, in separate judgments, considered at some length the operation of s.424A and the consequences for a Tribunal decision if there was no compliance with the terms of that section.[33] For current purposes, it is sufficient to note the following from the judgment of McHugh J.

[32] *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609.
[33] *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294.

84. Beginning at [45] of his judgment, his Honour outlined the "construction of the Division" of the Act, being Division 4 of Part 7 (ss.423 – 429A). Then, at [51], McHugh J highlighted a number of "gaps" in the operation of s.424A. He said:

> *Unfortunately, the section does not state how the obligation to give the applicant information and to invite comment on it applies to information that the Tribunal receives in a case like the present. It does not state how the obligation is performed, or whether it is required to be performed, when the applicant (or the applicant's representative) is present while the Tribunal receives evidence from a person….*

85. In providing some answers that solve this dilemma, his Honour said, at [55] (internal citation omitted):[34]

> *The main purpose of the Division is to accord procedural fairness to applicants in determining whether a decision of the Minister or the Minister's delegate should be affirmed. The Tribunal is the vehicle through which this purpose is effected. The Tribunal is empowered to use an inquisitorial process to conduct the review of the decision. The Division does not provide for an adversarial contest that culminates in a trial of issues joined between the parties. It is inconsistent with the inquisitorial nature of the review to require the Tribunal to obtain all information relevant to the decision under review before invoking the s 425 procedure. This is particularly the case if subsequent information emerges that affects the decision under review. Such information may emerge at any time. Given that the Tribunal exercises all the powers of the Minister or the Minister's delegate when conducting the review, there is no reason to confine the exercise of the Tribunal's power to "get any information that it considers relevant" to a particular point in time.*

86. In relation to the operation of s.424A, McHugh J said, at [61]:[35]

> *Arguably, it is unnecessary to require the Tribunal to provide adverse material to the applicant in writing when the applicant is present to hear the information given by another person that the Tribunal receives as evidence. However, an applicant may not understand the significance of that information. So it is in the interests of fairness that the applicant should have the information in writing and should be given an opportunity to*

[34] See also McHugh J's further comments at [56] and [58].
[35] See also the comments by Hayne J at [192], [199] and [201].

comment on it. For that reason, s 424A should not be regarded as spent because the applicant is present at the hearing.

87. His Honour then turned to the question of whether failure to comply with s.424A constituted jurisdictional error. McHugh J confirmed that it did.[36]

88. I have earlier noted that the First Respondent referred to five Full Court decisions of the Federal Court of Australia in its later written submissions in support of the Minister's principal contention, namely, that s.424A(3)(a) absolves the Tribunal from any duty or requirement to provide any country [or additional country] information to the Applicants that "is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member." Accordingly, so the First Respondent submitted, the principles articulated by the High Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* have no application to the current matter.[37]

89. I note summarily the following from three of the cases to which the First Respondent referred, which selection of cases is sufficient for current purposes.[38]

90. First, in *NAMW*, the Full Court (Merkel & Hely JJ) held, at [144] – [145], that it was procedurally unfair not to provide relevant country information to the Applicant in that case.[39] I note however that this decision was made, in time and in statutory circumstance, before the enactment of s.424A in its current form.

91. Secondly, in *SZHXF*, the Full Court (Tamberlin, Gyles & Stone JJ) said, at [12] and [13] (emphasis added):

[12] The views of the Tribunal as to the reliability of certain information or sources of information are not generally material which in itself goes to affirming the decision under review. Those views are part of the evaluation or appraisal of the evidence itself

[36] See the discussion at [72] – [77]. To similar effect was the conclusion of Hayne J, at [204] – [208], with which Kirby J agreed, at [173].
[37] *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294.
[38] *Minister for Immigration & Multicultural & Indigenous Affairs v NAMW* (2004) 140 FCR 572; *Minister for Immigration & Citizenship v SZHXF* (2008) 166 FCR 298; *SZMCD v Minister for Immigration & Citizenship* (2009) 174 FCR 415.
[39] Also see the comments in 140 FCR at [139].

and are properly characterised as part of the Tribunal's reasoning or thought processes. As such, they are not required to be disclosed to an applicant on the basis that they constitute "information"…

[13] Where a source of information is perceived by the Tribunal to be ***generally reliable****, the information derived from that source may then be used to weigh and assess evidence about the claims advanced by an applicant. The consequences of this assessment of the applicant's evidence may support a conclusion that he or she is owed protection obligations, or it may not. Whatever the conclusion, this process of assessment cannot properly be described as materially undermining the applicant's claim. Rather, it is a process which allows the Tribunal to investigate and evaluate the claims advanced by the applicant by weighing his or her evidence against another reliable source of information. Although information derived from such sources is used as part of the Tribunal's process of consideration of the evidence advanced by an applicant, it is not of itself "information" within the meaning of s 424A of the Act, which is required be disclosed to the applicant.*

92. In the same case and in relation to s.424A(3)(a) in particular, the Court said, at [19] and [20] (internal references omitted; unless otherwise specified, emphasis added)

In considering whether certain information is specifically ***about*** *[emphasis in original text] an applicant or another person for the purposes of s 424A(3)(a) of the Act, it is not necessary for the Tribunal, as a separate requirement, to make a finding that the relevant "information" is "just about a class of persons of which the applicant or other person is a member". … the reference to the "class of persons" in s 424A(3)(a) "is not another criterion to be met". Rather,* ***the reference "is designed to underline the specificity required by precluding any argument that reference to a class would be taken as a reference to all individuals falling within it*** *…" [emphasis added]*

The first respondent submits that the "information" concerning the reliability of the AMJB's advice as to whether a person is a genuine Ahmadi is specific information "about" the first respondent himself because it impacts on his credibility. In our view, this submission is incorrect. The Tribunal's attitude towards the reliability of a particular source of information only relates to the soundness and dependability of information from ***that*** *[emphasis in original text] source; it is not an attitude, nor a*

> *piece of "information" for the purposes of s 424A of the Act, "about" the particular applicant. In this case, the degree of connection between* ***the "information" acquired*** *from the AMJB and the first respondent* ***is not sufficiently close to be properly characterised as being information "about" him***. *[emphasis added]*

93. Finally, in *SZMCD*, the joint judgment of Tracey and Foster JJ (with Moore J agreeing) helpfully outlined, beginning at [56], the legislative history of Part 7 of the Act. At [71] and [73], their Honours observed (emphasis added):[40]

> *[71] The policy and purpose reflected in s 424A is that the Tribunal should be compelled:*
>
> *(a)* ***To put the visa applicant on fair notice in writing of critical matters of concern to the Tribunal****;*
>
> *(b)* ***To ensure that the visa applicant understands the significance of those matters to the decision under review; and***
>
> *(c)* ***To give the applicant a reasonable opportunity to comment on or to respond to those matters of concern***.
>
> *[73] Section 424A is obligatory. Non-compliance with its provisions will very often amount to jurisdictional error. Section 424AA is discretionary. Non-compliance with its provisions will result in the Tribunal not having the benefit of s 424A(2A). In that event, it must strictly comply with s 424A.*

94. Tracey and Foster JJ quoted, at [76], from the judgment of McHugh J in *SAAP* (in the context of a discussion of s.424AA), thus (*SAAP* at [73]):

> *In SAAP v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 24; (2005) 228 CLR 294 at [73], McHugh J held that it was necessary to have regard to "the language of the relevant provision and the scope and object of the whole statute" in determining whether a failure to observe a procedural requirement of an enactment results in jurisdictional error.*

[40] Later in the reasons, at [102], their Honours set out in full relevant parts of the Explanatory Memorandum that related to the 2007 amendments to the Act, which included amendments to s.424A.

95. Their Honours then considered, beginning at [80], the operation of ss.424A and 424AA, which, they said, the legislature should be taken to have intended to operate in a "coherent and complementary fashion." And at [81], they said: "Subject to subs (2A) and subs (3) of s 424A, the Tribunal is obliged to comply with the requirements of s 424A(1). No discretion is involved."[41]

96. At [82] – [83], "country information" was discussed and the plurality referred, with approval, to the remarks of Beaumont J in *NAMW*, notwithstanding that his Honour dissented in that case.[42]

97. Finally, at [88] and [89], Tracey and Foster JJ said (emphasis added):

> *[88] If the information under consideration by the Tribunal is the type of information covered by subs (3) of s 424A or if the Tribunal has engaged the provisions of s 424AA and complied with the requirements of that section, it need not meet the requirements of s 424A(1). This is because s 424A(2A) relieves the Tribunal of the obligation to do so if s 424AA has been complied with and s 424A(3) relieves the Tribunal of the obligation to do so if the information is of a kind covered by that subsection.*
>
> *[89] The provisions are designed to facilitate the conduct of reviews contemplated by Pt 7 of the Act. If s 424A were triggered during the run of a review hearing and s 424AA had not been enacted, the hearing would have had to be adjourned in order to enable the s 424A(1) written particulars to be given. Such an outcome would be disruptive and inconvenient. If, as is now the case since the introduction of s 424AA into the Act,* ***clear particulars of the relevant information are given at the hearing orally and the Tribunal otherwise complies with s 424AA(b) in its entirety****, then the obligations imposed upon the Tribunal by s 424A(1) will be satisfied in substance during the course of the review hearing by the giving of those oral particulars. In that way, the objects sought to be achieved by s 424A(1) will be met.*

The Tribunal's Decision

98. At [125] – [132], the Tribunal records "Additional Country Information", "Population Statistics and Official Languages",

[41] See also their Honours' comments at [87].
[42] See *NAMW* 140 FCR 572 at [64] – [74].

"Education" and "Corruption Issues." In my view, this information is somewhat "curious" because, at [111], the Tribunal stated:

> *The Tribunal invited the Applicants to comment upon the country information set out at paragraphs regarding relocation within India at paragraphs 50-53 above. In addition, the Tribunal noted there was little in the country information to indicate that Punjabi families perpetrated honour crimes outside the Punjab.*

99. Having previously invited the Applicants to comment on matters of concern to the Tribunal, somewhat surprisingly, this 'additional country information', together with the other matters to which I have referred, was never provided to the Applicants, nor were they invited, or provided an opportunity, to comment on it. In relation to this information, the Respondent said that s.424A(3)(a) applied, so as not to require it to be put to the Applicants.

100. However, what is striking, and certainly distinct from 'general country information' that would otherwise come within the provenance of s.424A(3)(a), is that the Tribunal went to the trouble of underlining particular parts of this extra country information and stated (or confirmed) that the Tribunal itself provided this emphasis. Presumably this was to stress, for the attention of the Applicants (and anyone else reading its reasons), that this highlighted country information was directly relevant or applicable to Applicants and the application before it.

101. Put another way: in this case, the Tribunal clearly went to the trouble of underlining, and thereby highlighting, specific country information, which otherwise would not be required to be provided to the Applicants for information and comment pursuant to s.424A(3)(a). However, the necessary inference must be that the highlighted sections of that information, according to the Tribunal, was in fact (and was intended to be) of particular relevance to the Applicants before it and not of more general application. Otherwise, why go to the trouble of highlighting (by underlining and by stating that the Tribunal had provided the emphasis) it if it was (or is) not directly relevant to these Applicants and their particular circumstances? By emphasising this precise information, the further, necessary inference must be that the Tribunal intended to use and to rely upon it in determining [adversely] the

Applicants' claim. Yet, there is no indication in the reasons of the Tribunal that it provided any of the highlighted information to the Applicants.

102. Indeed, on the face of the Tribunal's reasons, it seems clear that the Tribunal did not refer any of the information it set out at [125] – [132] to the Applicants, or give them any opportunity to comment on it. Not to have done so, and then to rely on it to determine the application adversely to the Applicants is a course that is antithetical to the policy and purpose of s.424A articulated in the joint judgment of Tracey and Foster JJ in *SZMCD* cited earlier in these reasons.

103. Having previously sought comment from them in relation to, among other things, country information, and but for s.424A(3), it is somewhat surprising that the Tribunal did not do so in relation to the additional matters set out in [125] – [132] of its reasons. This is especially so since the information there recorded highlights – by the Tribunal – certain important matters, such as assessments of the Shiv Sena by, among others, "Human Rights Without Frontiers International", language matters in relation to Delhi and Mumbai, country information regarding education, and details of the extent of political corruption in India. In relation to each of these particular matters the Applicants gave evidence to the Tribunal.

104. Each of the matters just noted appear in that part of the Tribunal's decision headed "Findings and Reasons", which begin at [133]. Thus matters concerning 'official languages' are referred to by the Tribunal at [143] and [144], and the same matter is relevant to the Tribunal's comments concerning relocation, at [166] and following. Inter-caste marriages are discussed by the Tribunal at [172], while corruption and state protection are addressed at [173] and [177], and country information at [173] and [177]. The Tribunal referred to additional information concerning 'education' at [131], and specifically to this paragraph (and [55]) at [185]. Likewise, the additional information regarding *Shiv Sena* is located at [125] – [126], and in its 'Findings and Reasons' at [187].

105. All of this is to identify that, on a plain reading of the Tribunal's 'Findings and Reasons', there is an express, or reasonably inferred, connection between some or all of the additional material set out at

[125] – [132] of its decision which has been highlighted (a) by underlining and (b) by notation, but in relation to none of it was it referred to the Applicants for consideration or comment. As I have already said, the fact that the Tribunal went to the trouble of underlining sections of this additional information confirms that the Tribunal considered it to be of particular significance to its reasons and conclusion in relation to these particular Applicants.

106. Further, by accepting the highlighted sections of the additional country *information* (with emphasis being provided by the Tribunal itself), the Tribunal seemingly has given priority to [untested and unchallenged] "information" notwithstanding that it accepted the *evidence* of the parties. Thus, on its face, "information" (and all of the imprecision suggested by that term as observed by Weinberg J in *SZEEU*) takes precedence over "evidence" accepted by the Tribunal given by the parties.

107. In my view, by highlighting specific or particular parts of the additional country information (and not only highlighting the information but also adding after each section underlined the italicised words - "Tribunal emphasis"), the Tribunal has made information specifically (as opposed to generally applicable to members of a certain class) applicable to the Applicants before it. To paraphrase the words of the Full Court in *SZHXF*, the Tribunal in this case has highlighted the information so that it can and should properly be characterised as information "about" or specifically referable to the Applicants.

108. To the Applicants and to any reader of its reasons, the emphasis given to the additional country information by the Tribunal must be taken to be confirming that the underlined sections played a particular or specific function in the Tribunal coming to its decision in relation to the Applicants before it. But for the underlining, and the notation of "Tribunal emphasis", the additional country information would, more likely than not, come within the terms of s.424A(3)(a) of the Act. However, by taking the action that it did, in my view, the Tribunal brought that country information within the mandatory terms of s.424A(1), whereby the Tribunal must give to the Applicant(s) "clear particulars of any information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under

review." It failed to provide this specific information, or 'clear particulars of it', to the Applicants.

109. Having taken the course that it did in its use of the additional, highlighted country information, the Tribunal failed to conform to the terms of s.424A(1) and denied the Applicants the opportunity to be apprised of information upon which the Tribunal plainly intended to, and did in fact, rely in affirming the decision under review. Further, failure to provide the information in the circumstances outlined here clearly failed to meet the objects of Part 7 of the Act as recorded by the Full Court in *SZMCD* at [71] and [73], noted earlier in these reasons. The failure to comply with the terms of s.424A of the Act as detailed here, in my view, constituted jurisdictional error.

B. "Consideration of" *Plaintiff M13/2011*

110. In the *Hindmarsh Island Bridge* case, and later decisions of the Full Court of the Federal Court of Australia, there has been extensive discussion of what "to consider" (or "have regard to") means.[43] For example, in *Tickner v Chapman*, Kiefel J said:[44]

> *It requires that the minister have regard to what is said in the representations, to bring his mind to bear upon the facts stated in them and the arguments or opinions put forward and to appreciate who is making them. From that point the minister might sift them, attributing whatever weight or persuasive quality is thought appropriate. However, the minister is required to know what they say. A mere summary of them cannot suffice for this purpose, for the minister would not then be considering the representations, but someone else's view of them, and the legislation has required him to form his own view upon them.*

111. In the present matter, the Tribunal dealt with the judgment of Hayne J in *Plaintiff M13/2011* at [169] – [170] of its reasons. The Tribunal stated that Hayne J's "findings" were at "paragraph 19" of his Honour's judgment. In my view, it might properly be characterised, in the words of Kiefel J in *Tickner v Chapman*, as something of a "mere

[43] See *Tickner v Chapman* (1995) 57 FCR 451 (Black CJ, Burchett & Keifel JJ); *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248 (Stone, Foster & Nicholas JJ).
[44] *Tickner* 57 FCR at at pp.495-96. See also similar comments by Black CJ at p.462, and by Burchett J at pp.476-477. In *Khadgi*, see 190 FCR at [57], [63] & [78] – [84].

summary." In my view, such is not proper "consideration of" the judgment of Hayne J in *Plaintiff M13*.

112. Respectfully, there is rather more to the High Court judgment of Hayne J than only or just "paragraph 19" as stated by the Tribunal. In my view, in the light of the authorities to which I have referred, the Tribunal, as a matter of procedure, did not adequately or properly "consider" his Honour's judgment in *Plaintiff M13/2011*. Had it done so, the result may have been the same, or it may not. But an inadequate consideration of a High Court case, which is directly relevant to the matter before the Tribunal, in my view, has also led to jurisdictional error.

113. I should note that, in my view, it is not for this Court to direct the Tribunal how, to what degree, in what way, or which particular [other] parts of a certain judgment should form part of the Tribunal's consideration. This is particularly so in relation to judgments of the High Court. To give such direction would risk fettering the task and responsibilities of the Tribunal and further risk interfering with the discretion (and fact-finding responsibility) that reposes with the Tribunal alone.

C. Was the Tribunal's Decision "illogical"?

114. Earlier in these reasons I set out relevant principle from the judgment of Crennan and Bell JJ in *SZMDS* in relation to considerations regarding "illogicality" and "irrationality."

115. In my view, subject to the matters I have noted in relation to (a) its use of "emphasised" country information and (b) the proper consideration of all relevant aspects of the decision in *Plaintiff M13/2011*, the Tribunal formed a view that was open to it on the evidence. Indeed, the comments of Crennan and Bell JJ in *SZMDS*, at [131] are most apt to dispose of the contention that its conclusion was not open to it and 'illogical'. Their Honours said:

> *... the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence*

can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.

116. Accordingly, on the basis of the evidence considered, and in the light of authority, there is no basis to uphold the contention of the Applicants that the decision of the Tribunal was "illogical" or "irrational/unreasonable."

Conclusion

117. The only grounds upon which, in my view, the Tribunal's decision may properly be challenged are:

(a) its treatment, consideration and use of the highlighted and emphasised – by the Tribunal – additional country information, which it failed to provide to the Applicants and give them an opportunity to comment on it, thereby constituting a failure to comply with the requirements of s.424A(1) of the Act, and

(b) its inapt or cursory consideration of the High Court decision in *Plaintiff M13/2011*.

118. Because of these successful challenges to the Tribunal's decision, writs should issue to bring the record of the Tribunal into this Court to quash the decision; the matter must be re-determined, according to law, by the Tribunal.

119. The Applicants should have their costs in accordance with the scale that is part of this Court's Rules.

I certify that the preceding one hundred and nineteen (119) paragraphs are a true copy of the reasons for judgment of Judge Neville

Date: 24 May 2013