FEDERAL COURT OF AUSTRALIA

NBKS v Minister for Immigration and Multicultural and Indigenous Affairs

[2006] FCAFC 174

MIGRATION – operation of articles 1A(2) or 1C(5) of the Convention Relating to the Status of Refugees 1951 – s 424A of the *Migration Act 1958* – information that should have been subject of the provision of particulars.

Migration Act 1958 (Cth) ss 36, 65, 424A

Convention Relating to the Status of Refugees 1951

Minister for Immigration and Multicultural Affairs v QAAH [2006] HCA 53
NBGM v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 54
NBGM v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 150 FCR 522
NBGM v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1373
NBKS v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1554
SZEEU v Minister for Immigration and Multicultural Affairs and Indigenous Affairs (2006) 150 FCR 214
QAAH v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 145 FCR 363
QAAH v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1448
SZCNP v Minister for Immigration and Multicultural Affairs [2006] FCA 1140
SZECF v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1200
SZEEU v Minister for Immigration and Multicultural affairs and Indigenous Affairs (2006) 150 FCR 214
SZGGT v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 435
Tin v Minister for Immigration and Multicultural Affairs [2000] FCA 1109
VAF v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 206 ALR 471
VBAP of 20002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 965
VEAJ v Minister of Immigration and Multicultural and Indigenous Affairs (2003) 132 FCR 291

NBKS v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS AND REFUGEE REVIEW TRIBUNAL
NSD 2399 OF 2005

TAMBERLIN, WEINBERG & ALLSOP JJ
1 DECEMBER 2006
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 2399 OF 2005**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **NBKS**
Appellant

AND: **MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **TAMBERLIN, WEINBERG & ALLSOP JJ**
DATE OF ORDER: **1 DECEMBER 2006**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Orders 2 and 3 made by the Court on 10 November 2005 be set aside, and in lieu thereof the Court orders that:
   (a) There be an order in the nature of certiorari to quash the decision of the Refugee Review Tribunal (the "Tribunal") made on 17 January 2005.
   (b) There be an order in the nature of mandamus requiring the Tribunal to review according to law the decision of the delegate of the Minister to refuse the protection visa sought by the applicant.
   (c) The first respondent pay the costs of the applicant.
3. The first respondent pay the appellant's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 2399 OF 2005**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**NBKS** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**TAMBERLIN, WEINBERG & ALLSOP JJ**
DATE:	**1 DECEMBER 2006**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

TAMBERLIN J

1 I have had the benefit of reading the reasons of Allsop J and I agree with the orders proposed by his Honour.

2 I am not persuaded that there was jurisdictional error in this matter arising from a failure by the Refugee Review Tribunal ("the Tribunal") to comply with s 424A of the *Migration Act 1958* (Cth) ("the Act") in relation to the report of Dr Nair. During the hearing before the Tribunal, an issue was raised as to whether the appellant, upon being returned to Iran and placed in a potentially confrontational situation with Iranian authorities, would react in a manner that may appear threatening or retaliatory. It was submitted for the appellant that if placed in a pressurised situation such as this, he may express views against the regime that would result in him being imputed with an anti-regime opinion. In making a finding adverse to the appellant on this point, the Tribunal relied on the fact that Dr Nair had not discussed in his report the likely reaction of the appellant during such a confrontation with Iranian

authorities.

3 In my view, the fact that the Tribunal did not draw the appellant's attention to the absence of any reference to this potential situation in Dr Nair's report does not constitute non-compliance with s 424A. In this case, the "information" is the substance of the report provided to the appellant; it is not the use which might be made of the report in the course of the Tribunal's deliberations. The Tribunal's failure to inform the appellant that the absence of any reference to his potential reaction to a confrontational situation would be used as part of its reasoning does not constitute a failure to provide "information." Rather, it constitutes the absence of an indication to the appellant as to the process of appraisal and evaluation by the Tribunal of the material before it. In this case, the appellant had access to the whole report of Dr Nair. When considering the "information" conveyed in the report, it is evident on its face that it makes no reference to any reaction by the appellant to a confrontational situation. This information, namely, that there **is** no reference, has therefore been disclosed. What this particular complaint amounts to is a submission that there exists an additional requirement that the Tribunal, when reflecting on the material, weighing the information and formulating its line of reasoning, must tell the appellant the **way** in which that information will be used.

4 It is settled law that the Tribunal does not have an obligation to disclose thought processes under s 424A in reaching its decision. In the course of the Tribunal's reasoning towards a conclusion, it is unreasonable to impose a requirement that the Tribunal must go back to the appellant and point out that a report given to the appellant will or might be used in a particular way or be assigned significance in the Tribunal's reasoning process: see, for example, *Tin v Minister for Immigration and Multicultural Affairs* [2000] FCA 1109 and *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471. In my view, such a requirement in this case would unduly impede the reasonable and proper exercise of the Tribunal's function. As a decision-maker develops reasons for a decision, it will often be the case that a certain piece of information, item of evidence or absence of material may be seen to assume particular significance. In some cases, this may occur some time after the hearing, and it is possible that the significance may not have been apparent at the time when the information was provided or obtained.

5 The principle noted above recognises and gives weight to this feature of the decision-making process which makes it impractical to provide an applicant with details of the Tribunal's course of reasoning and the significance of omissions in respect of information. Except in special circumstances, it is generally unrealistic to expect administrative tribunals to reopen hearings, seek additional comments from applicants or invite applicants to adduce further evidence after there has been a full hearing. In the circumstances of this case, there was no failure to comply with s 424A.

6 Regarding the failure of the Tribunal to inform the appellant in relation to the internet search and its outcome, I am of the opinion that there was a breach of s 424A. The information sought was specifically about the appellant, and there was no indication given to the appellant that such a search would be or had been undertaken without his knowledge and without any disclosure of the result. A specific search of the type undertaken in this case cannot be treated as simply having recourse to a legitimate source of judicial notice or a permissible source of information as, for example, might be found from a search of standard reference works such as reputable encyclopaedias or dictionaries. In this case, a specific enquiry was made and reliance placed on the results. On this point, I agree with the reasoning of Allsop J that the fact of the search and the negative result was information which ought to have been disclosed to the appellant under s 424A to provide an opportunity for the appellant to make submissions in response. I also agree that there are no discretionary considerations applicable which would disentitle the appellant from relying on the jurisdictional error made in failing to inform the appellant of the outcome of this independent investigation.

7 Furthermore, I agree with the reasoning of his Honour in relation to the consequences for this case regarding the recent High Court decision in *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 54 as to the effect of s 36 of the Act.

I certify that the preceding seven (7) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tamberlin.

Associate:

Dated: 1 December 2006

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 2399 OF 2005**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**NBKS** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**TAMBERLIN, WEINBERG & ALLSOP JJ**
DATE:	**1 DECEMBER 2006**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

WEINBERG J

8 I have had the advantage of reading, in draft, the reasons for judgment prepared by Allsop J. I agree with his Honour that, having regard to the High Court's recent decisions in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53 and *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54, the appellant's contentions regarding the operation of Arts 1A(2) and 1C(5) of the *Convention Relating to the Status of Refugees 1951* and ss 36 and 65 of the *Migration Act 1958* (Cth) ("the Act") must be rejected.

9 Allsop J would, however, allow the appeal because the Refugee Review Tribunal ("the Tribunal") failed to comply with s 424A of the Act. There are two separate bases for that conclusion. The first relates to a report prepared by Dr Ramesh Nair, a clinical psychologist. The Tribunal relied upon Dr Nair's failure to address a particular matter in that report, in arriving at a finding adverse to the appellant. The second relates to two internet

searches that the Tribunal conducted. The Tribunal noted that those searches did not reveal the appellant's name, and relied upon that fact in rejecting one of his arguments.

10 Section 424A is in the following terms:

> *"(1) Subject to subsection (3), the Tribunal must:*
>
> *(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and*
>
> *(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and*
>
> *(c) invite the applicant to comment on it.*
>
> *(2) The information and invitation must be given to the applicant:*
>
> *(a) except where paragraph (b) applies—by one of the methods specified in section 441A; or*
>
> *(b) if the applicant is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.*
>
> *(3) This section does not apply to information:*
>
> *(a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or*
>
> *(b) that the applicant gave for the purpose of the application; or*
>
> *(c) that is non-disclosable information."*

11 Allsop J has set out the factual background to the s 424A issues. It is sufficient for my purposes simply to outline some additional matters that seem to me to be relevant in resolving these issues.

12 Dealing firstly with Dr Nair's report, it appears that an issue arose at the Tribunal hearing as to how the appellant might react if returned to Iran. In particular it was submitted on his behalf that he might retaliate during a confrontation with Iranian authorities. It was suggested that, if put under pressure, while being questioned, he would be likely to become agitated to such a degree that he might seem threatening to the authorities. It was also suggested that if he were in a confrontational situation, he would be likely to "express his

views against the regime …". It was submitted that this might lead to his being imputed with an anti-regime opinion.

13 As a result of these submissions, and apparently at the behest of the Tribunal, the appellant's advisors, the Refugee Advice and Casework Service (Aust) Inc, wrote to the Tribunal on 18 November 2004 asking it to obtain Dr Nair's assessment in relation to the following questions:

> - *"How do you think [appellant's name] would react if he were returned to Iran?*
> - *If placed under pressure by Iranian authorities (such as interrogation), how do you believe [appellant's name] would respond?"*

14 These questions were obviously formulated with some care by the appellant's advisors. They reflected the submission that had been advanced, without evidence to support it, that there was a particular risk associated with the appellant's mental state that might cause him to engage in an attack upon the regime if questioned in a confrontational manner by the Iranian authorities.

15 On 19 November 2004, the Tribunal wrote to Dr Nair. However, it altered the questions formulated on behalf of the appellant, and substituted a more general question:

> *"How likely would [appellant's name] be to act appropriately (that is, to act with moderation, in his own best interests) in a stressful or confrontational situation?"*

16 The Tribunal's question was less direct, and much less helpful in informing Dr Nair of the precise matter regarding which his views were being sought, than the two questions formulated by the appellant's advisors. It elicited from Dr Nair a response dated 23 November 2004 which was couched in general terms, and merely spoke of the appellant's general psychological condition, and his ability to cope with any stressful situation. Not surprisingly, Dr Nair's response did not address the second of the two questions that had concerned the appellant's advisors when they wrote to the Tribunal on 18 November 2004.

17 On 23 November 2004, the Tribunal wrote to the appellant's advisors providing them with a copy of Dr Nair's response for their information. In its letter to the advisors, the

Tribunal noted that it had taken account of the questions that the appellant's advisors had suggested be put to Dr Nair, but "decided to ask a more general question which would incorporate the situation raised by those questions".

18 On 26 November 2004, the Tribunal sent the appellant's advisors a letter which plainly purported to satisfy the requirements of s 424A. The letter referred to a number of matters that had been discussed at the hearing, but made no mention whatever of Dr Nair's report.

19 On 10 December 2004, the appellant's advisors made written submissions on behalf of the appellant, and responded to the matters raised in the Tribunal's letter of 26 November 2004. In their 14 page submission, they referred to Dr Nair's report, and reiterated the argument which they had earlier advanced, that faced with interrogation the appellant was likely to become agitated and say something, or act in a manner, that would expose him to serious harm on the basis of an imputed political opinion.

20 In its reasons for decision, the Tribunal observed that there was no recent evidence to suggest that the appellant was "still physically violent". However, it accepted that his behaviour might deteriorate on his return to Iran.

21 The Tribunal then said:

> *"As to whether he might be imputed with a political opinion as a result, it was further argued that, if he were in a confrontational situation, he would be likely to "express his views against the regime …". **However Dr. Nair's report of 23 November 2004 does not state that he might react in this way** and, in light of my other findings about his past political activity, I cannot be satisfied that he might."*
>
> (Emphasis added)

22 In the judgment below (*NBKS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1554), the primary judge rejected the appellant's submission that the Tribunal had been obliged, under s 424A, to invite comment as to what significance, if any, should be attached to Dr Nair's failure to state that the appellant might express views critical of the regime if put in a confrontational situation. His Honour accepted the Minister's submission that the Tribunal's failure to refer to what Dr Nair did not say did not contravene

the section because Dr Nair's omission did not constitute "information" in the relevant sense. The primary judge went on to say that, even if he was wrong about that, the fact that the Tribunal had provided the appellant's advisors with a copy of Dr Nair's entire report meant that the requirements of the section had been met. He noted that the advisors had not, at any stage, repeated their earlier request that Dr Nair be asked to comment specifically upon how the appellant might react if closely questioned by the Iranian authorities.

23 Put simply, the primary judge considered that the reason Dr Nair had not addressed the second of the two questions formulated by the appellant's advisors was perfectly obvious. That question had never been put to Dr Nair for his consideration. It was therefore clear why he had not addressed it. His Honour said that the Tribunal was not obliged by s 424A to provide particulars of what in any event was obvious.

24 The primary judge was satisfied that the appellant had the opportunity to comment on the lacuna in the report. Quite plainly something could have been said regarding that matter in the submission made on behalf of the appellant after his advisors were provided with a copy of the report. However, it is significant that his Honour then added (at [43]):

> *"I accept that there is a troubling curiosity about the Tribunal failing to act on the request of the applicant's representatives that Dr Nair specifically address the likely conduct of the applicant were he to return to Iran and confronted by the authorities, and then point to the failure of the report to address that question as supporting its view that the applicant would not react as his representative submitted. However that is not the point raised and if it were, then the characterisation of any potential jurisdictional error would be problematic particularly in circumstances where the Tribunal has found, as matter of fact, that the applicant had not engaged in political activities before leaving Iran as he had claimed."*

25 His Honour plainly had grave reservations regarding the Tribunal's reasoning on this point. However, he was not persuaded that mere doubtful logic amounted to a breach of s 424A.

26 On the appeal to this Court, Allsop J is of the view that the absence of any statement in Dr Nair's report regarding the likely behaviour of the appellant in a confrontational situation was not treated by the Tribunal merely as a "gap", but as implicitly probative of the psychologist's view that there was no such danger. As his Honour observes, if the form of Dr

Nair's report, including what it did not say, did not have this significance for the Tribunal there would have been no point in mentioning it.

27 Allsop J is of the opinion that the Tribunal's use of the omission in Dr Nair's report was "information" that should have been the subject of a letter in compliance with s 424A. His Honour considers that the Tribunal's failure to comply with the strict requirements of that section is fatal, and that jurisdictional error has therefore been established.

28 In my opinion, Allsop J is correct.

29 The problem in this case stems from the Tribunal's belief that the "more general question" which it formulated encompassed within it, with sufficient specificity, the two questions posited by the appellant's advisors.

30 In my opinion, the "more general question" did no such thing. It instead diverted attention from the critical issue, and invited the more general response that it elicited.

31 In *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214, I commented upon some of the difficulties associated with the use of the term "information" in s 424A.

32 One such difficulty is that there is no uniformity in the case law as to whether the term "information" in s 424A is confined to positive statements of fact, or whether as more recent judgments suggest, it can encompass omissions.

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

34 In *SZECF v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1200, Allsop J analysed *VAF* with some care. His Honour explained why the joint judgment of Finn and Stone JJ should not be understood as rejecting absolutely the notion that an omission could constitute "information".

35 In *SZEEU*, Allsop J reiterated what he had earlier said in *SZECF*. His Honour stated that it was necessary to exercise care in applying what was said in *VAF* by Finn and Stone JJ. He did not see their Honours' joint judgment as requiring a formalistic analysis of information such as prior statements depending upon whether its or their relevance was from the text or from the absence of text. I agreed with his Honour.

36 In *SZGGT v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 435, Rares J agreed with the reasoning of Allsop J in both *SZECF* and *SZEEU*. His Honour said (at [72]):

> *"The later provision of some material fact to support a claim is often, if not usually, able to be characterized as an 'omission' from the initial claim only because the initial claim conveys a representation, by implication or inference, that it is itself a complete account. And, in such a case it will be that latter representation which, in my opinion, is 'information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision which is under review' within the meaning of s 424A(1)(a)."*

37 In *SZGDB v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 431 (delivered on the same date as *SZGGT*), Rares J again expressed agreement with Allsop J. His Honour accepted that "information" in the context of s 424A could include what the appellant himself failed to mention, as well as what he positively asserted.

38 To the same effect is *SZCNP v Minister for Immigration and Multicultural Affairs* [2006] FCA 1140. There Tamberlin J rejected a submission on behalf of the Minister that the term "information" in s 424A did not encompass a failure to mention a matter to the Tribunal. His Honour noted that in the instant case the matters raised in the original application had been used by the Tribunal to suggest recent invention by the appellant. That meant that the Tribunal used the omission in a way that went beyond "mere omissions" in the sequence of facts presented by the appellant. This amounted to a positive use of information, as opposed to an observation made in relation to a failure to give information or make a claim.

39 It seems to me that each case must depend upon its own particular circumstances. There is no reason in principle why an omission (which the Tribunal views as important, and which is plainly adverse to the applicant's case) should be treated any differently, when it comes to s 424A, than a positive statement. That is particularly so when, as the Tribunal

seems to have done here, it treats the omission as though it provides implicit support for a positive assertion that is detrimental to an applicant's case. It makes no difference whether the omission is to be found in a prior statement of an applicant or, as in this case, in a statement provided by a third party.

40 It is true that the Tribunal provided the appellant with a copy of Dr Nair's report, and with a letter detailing the question that it had posed for consideration. However, in the Tribunal's mind, the critical aspect of that report was not what it said, but rather what it did not say. The reason that Dr Nair's report was silent as to that aspect was simply that he was not asked the critical question.

41 I accept that the appellant's advisors are likely to have understood that Dr Nair did not address the second of the two questions which they themselves had formulated because the Tribunal, in its wisdom, had not specifically posed that question. What they are not likely to have appreciated, however, was that the Tribunal would then use Dr Nair's failure to support the confrontation argument as a basis for concluding that he rejected that argument. Indeed, the failure to invite comment upon this point in the s 424A letter might very well have led them to the opposite conclusion.

42 If, contrary to my view, the Tribunal did comply with s 424A(1)(a) when it provided the report of Dr Nair to the appellant's advisors it still did not comply with s 424A(1)(b). It did not ensure that, so far as reasonably practicable, the appellant understood why the omission from Dr Nair's report was relevant to the decision under review. Section 424A(1)(b) is no less important in the overall scheme of s 424A than s 424A(1)(a). Self-evidently, the Tribunal also did not comply with s 424A(1)(c).

43 In relation to the second s 424A issue, I also agree with Allsop J that the Tribunal failed to comply with that section by not informing the appellant of the fact that it had conducted internet searches, which, it appeared, had revealed no internet sites containing his name. In my opinion, that fact constituted "information" within the meaning of s 424A.

44 The primary judge said (at [46]):

> *"On the present state of the authorities, the Tribunal almost certainly should have provided this "information" to the applicant* ***if it was the reason or***

> ***formed part of the reason*** *for its decision. However counsel for the Minister submitted it was not of that character. In my opinion, this submission is correct. The central question raised on behalf of the applicant and addressed by the Tribunal was whether the applicant's history in Australia would become known to the Iranian authorities with the result that the applicant would be imputed with a particular political opinion critical of the regime in Iran. The Tribunal answered that question by pointing out that the AAT's decision recorded the applicant as not being a "witness of credit" and that there were "serious questions about the veracity of the refugee claim" made by him in India. Its rejection of this aspect of the applicant's claim (that the AAT decision would result in imputed opinions on his return) rested on what the AAT said, and not whether what the AAT said was readily available on the Internet."*
>
> (Emphasis added)

45 Once again, put simply, his Honour concluded that the fact that the Tribunal had carried out the internet searches, and had not located any reference to the appellant's name, did not form part of the reason for the Tribunal's decision. It must be remembered, however, that the Tribunal carried out these searches in response to an argument on behalf of the appellant that he would be exposed to danger if he were returned to Iran because of what he had said about the regime during the course of the AAT hearings into his refugee status held some years earlier. The fact that the AAT regarded the appellant as a person of little or no credibility would not avoid that risk, if the Iranian authorities could, in some way, gain access to the earlier AAT decision. Indeed, the risk to the appellant might be significant even if those authorities knew nothing more than that he had made claims to refugee status, thereby at least by implication, impugning the Iranian state.

46 It follows, as Allsop J has concluded, that the appellant ought to have been invited to comment upon the Tribunal's internet searches. The Tribunal regarded the fact that those searches had been conducted, and had not resulted in the appellant's name being discovered, as one reason for rejecting this particular limb of the appellant's case. As such, and in accordance with *SZEEU*, the searches, and the results obtained, formed part of the reason for its decision. This ground of appeal must also succeed.

47 It also follows that I agree with Allsop J that the appeal must be allowed with costs.

I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Weinberg.

Associate:

Dated: 1 December 2006

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 2399 OF 2005**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**NBKS** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**TAMBERLIN, WEINBERG & ALLSOP JJ**
DATE:	**1 DECEMBER 2006**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

ALLSOP J

48 This is an appeal from orders made by a Judge of the Court ([2005] FCA 1554) that dismissed an application for review of a decision of the Refugee Review Tribunal (the Tribunal) which had affirmed a decision of a delegate of the first respondent Minister not to grant the appellant a class XA protection visa.

49 The appeal raises two groups of issues. First, there are issues arising out of the operation of articles 1A(2) and 1C(5) of the Convention Relating to the Status of Refugees done at Geneva 28 July 1951 and the Protocol relating thereto done at New York on 31 January 1967 (together the Convention) and ss 36 and 65 of the *Migration Act 1958* (Cth) (the Act). These issues raise questions about the application of *QAAH v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 145 FCR 363 and *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 522. Appeals in both cases were decided by the High Court on 15 November 2006 (*Minister for*

Immigration and Multicultural Affairs v QAAH [2006] HCA 53 and *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54). Secondly, there are issues concerning the application of s 424A of the Act.

The Background Facts

50 An appreciation of both groups of issues is assisted by the facts preceding the making of the relevant decision by the Tribunal.

51 The appellant is an Iranian. In the late 1980s he, together with his then wife and children, left Iran. He reached India, via Pakistan. In 1990 the United Nations High Commission for Refugees (UNHCR) recognised the appellant as a refugee under its mandate pursuant to the statute of the office annexed to Resolution 428(V) adopted by the General Assembly on 14 December 1950 (the UNHCR Statute), which was not in the same terms as article 1A(2) of the Convention.

52 The circumstances which led to the recognition of the appellant as a refugee by the UNHCR were recorded in a document prepared by a legal officer of the UNHCR on 19 February 1998. This document was referred to by the Tribunal. It stated:

> *"According to records kept in the UNHCR office in New Delhi, you, your wife Marzi and your two children, Maryam and Majid, entered India from Pakistan on 24 March 1990 with the assistance of an agent. You indicated to our office in New Delhi that you were a member of the National Movement of Iranian Resistance (PMOI) and that you had distributed a newspaper called NAMIR on behalf of PMOI for seven years. You also indicated that you loaned your car for party work. In February/March 1989, you indicated that riots occurred in four cities which had the support of NAMIR. You advised that you feared arrest for your party activities, having been arrested and detained on at least one previous occasion (from 22 April 1986 to 26 May 1987). You were interviewed by two different UNHCR officers and* ***your story was found to be credible****. You were then recognised as a refugee under the mandate of UNHCR."*
> [emphasis added]

53 In 1991, while in India, the appellant applied for and was granted a visa by the Australian Government. The visa was issued on 28 June 1991. The visa granted was a Class 202 Visa. (The Tribunal described it as a Class 200 Visa: see p 9 of the Tribunal decision.) The issue of the visa was apparently based on the summary prepared by the Principal

Migration Officer at the Australian High Commission in New Delhi which stated:

> *"Applicant has been in India for one year.*
>
> *Is from Shiraz and is an ethnic Bakhtiyari. Not surprisingly, a supporter of former PM Dr Shahpour Bakhtiyar. Activities included usual distribution of National Resistance Movement literature, posters etc.*
>
> *Business premises – a garage – were raided on several occasions by Sepah pasdaran in the period 1984-86, when the regime was cracking down on its perceived enemies; often in a fairly arbitrary way in the provinces.*
>
> *Was arrested in early 1986 by local pasdaran, taken to Khalidi Street Komiteh (central) and* ***detained for three weeks, in which time he claims to have been subjected to various physical and mental tortures, including smashing of ankles; physical scars are evident on his body and each ankle is a mess.*** *Credibility lent to this account by his admitting that under torture, he told them whatever they wanted to know.*
>
> *Was then taken to Adilabad prison (central Shiraz) and housed in Section 49 [political wing] for eleven months. Appeared before Revolutionary Prosecutor's Office three times and was ultimately released on weekly reporting basis to Komiteh in 1987.*
>
> *After his experiences, felt a real anger against regime and continued his activities, albeit in a low-key way. Following public demonstrations throughout Iran in early 1990, he participated in ones in Shiraz but when the regime's reaction swiftly followed with known dissidents being arrested, he decided to flee the country.*
>
> *Claims acceptable under Class 202 in the present climate. Proceed to further processing."*
> [emphasis added]

54 The nature of this visa was discussed by the primary judge at [37]-[38] as follows:

> "*The Refugee visa is an off-shore visa. In 1991 the material criteria for a Refugee visa were set out at reg 101 of the in the Migration Regulations:*
> 101. The additional criteria in relation to a refugee visa are the following criteria:
> (a) the applicant is a person subject to persecution;
> (b) the applicant is living:
> (i) outside the country of which the person is a citizen; or
> (ii) if the person is not usually a resident of that country-outside the person's usual country of residence; and
> (c) the Minister is satisfied that:
> (i) permanent settlement in Australia is the appropriate course for the applicant; and

(ii) such settlement would not be contrary to the interests of Australia.

Of importance is the first criterion, the applicant is a person subject to persecution. That criterion does not require consideration of whether the applicant has a well founded fear of persecution as that notion arises in the definition of refugee in the Convention, nor is the first criterion limited to persecution for the reasons identified in the Convention: see Minister for Immigration and Multicultural and Indigenous Affairs v Huynh *[2004] FCAFC 47 at [9] and [22]*.

The present criterion for a Refugee visa is discussed in R Germov and F Motta Refugee Law in Australia *Oxford University Press, 2003 at pp 62-64. However, that discussion relates to the relevant criteria of a Refugee visa found in the current* Migration Regulations *1994 (Cth). While the criteria for such a visa under the* Migration Regulations *1994 (Cth) differ from those operative in 1991 (and set out at [38] above), the authors' comments are, in my opinion, apt to describe the criteria for a Refugee visa in 1991. They say at 63-64:*

> These requirements are clearly narrower than those set out under Article 1A(2) of the Refugees Convention – in that the decision-maker does not have to consider whether the applicant has a fear of persecution and whether this fear is 'well-founded'. Indeed, the regulations require consideration by the Minister or his delegate…as to whether the applicant is outside their home country and is actually subject to persecution. The Minister can also have regard to the 'degree of the persecution' to which the applicant is subject – meaning that, even though the applicant has suffered 'persecution', the Minister may not consider it severe or grave enough to qualify the applicant for the grant of this particular visa. … Furthermore, there is no right of appeal against a decision to refuse a Subclass 200 (Refugee) Visa. In this regard the off-shore Refugee Visa, despite employing the term 'refugee', is only loosely connected with the Refugees Convention, since, strictly speaking, the Refugees Convention only operates to ensure *non-refoulement* to a refugee recognised according to its definition once they are in the territory of the protecting state. In other words, a person cannot claim refugee status under the Refugees Convention outside the territory of the state concerned (and in Australia's case, outside the migration zone) – and this is reflected in the requirements of the Subclass 200 (Refugee) Visa.
>
> (Emphasis original)

The significance of this is that the grant of the Refugee visa in 1991 did not involve a determination or assessment by Australia as a contracting state to the Convention that the applicant was a refugee to whom Australia owed protection obligations. It is true that some assessment was made by UNHCR. However that assessment does not, on the material presently before me, suggest it was made on behalf of Australia. There is, in that material (as reproduced in the Tribunal's reasons), a letter from the principle migration

> *officer at the Australian High Commission in New Delhi in March 1991. However all the letter reveals is that the officer appeared to be satisfied that the applicant had suffered persecution in Iran. In so far as the letter evidences any assessment by that officer, it was that the applicant's 'claims' were 'acceptable under Class 202'. This is probably a reference to a global special humanitarian program visa dealt with, specifically, by reg 103 of the* Migration Regulations *in force at the time. The Tribunal proceeded on an assumption that was not correct. That is, the Tribunal assumed that because of the name attaching to the visa granted to the applicant in 1991, there had been an assessment, in the applicant's favour, of whether Australia owed him protection obligations under the Convention."*

It should be noted that some of these conclusions are contentious.

55 Later in 1991, the appellant came to Australia with his family.

56 In 1995, the appellant, after pleading guilty, was convicted of three counts of possession of a trafficable quantity of opium. He was released in 1997, having served the minimum term of his sentence.

57 Not long after the appellant's release from prison, an order was made for his deportation based on these serious offences. By this time he was estranged from his wife and family.

58 The appellant lodged an appeal from this decision which was heard by the Administrative Appeals Tribunal (the AAT), which affirmed the deportation decision. In its reasons, the AAT accepted that the Convention was applicable to the appellant (that is, in effect, and relevantly for later discussion, that he had been recognised by Australia as a refugee for the purposes of article 1A(2) of the Convention), but that because of his serious offences he was liable to deportation for reasons recognised by Article 33(2) of the Convention. Article 33 is in the following terms:

> *"Prohibition of expulsion or return (refoulement)*
> 1. *No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*
> 2. *The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted*

> *by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."*

Importantly for the debate about the first group of issues referred to above the AAT expressed the view that there was insufficient evidence to justify a conclusion under article 1C(5) of the Convention in relation to the appellant. The Tribunal stated the following in this respect:

> *"…The* [AAT] *does not believe that there is sufficient evidence to justify the application of the cessation clause of the* [Convention] *(Paragraph 1C(5)) to the circumstances of this case. While there have been undoubted improvements in the human rights situation in Iran it remains a volatile and highly unpredictable society as recent well publicised events have illustrated."*

59 The Tribunal also noted that evidence provided to it by the appellant's former wife and her brother:

> *"raised serious questions about the veracity of the refugee claim made by [the applicant] in India…"*

60 The legal steps then taken by the appellant were described by the primary judge as follows at [4] and [5] of his reasons:

> *"The applicant did not make himself available for deportation. He was located on 1 September 2000 and taken into immigration detention, where he remains. In October 2000, the applicant sought an extension of time to appeal from the decision of the AAT. On 1 November 2000, Emmett J dismissed the application on the basis that, on the ground advanced, the appeal was doomed to failure. The applicant sought an extension of time in which to appeal from the decision of Emmett J. On 7 February 2001, Stone J dismissed the application on the basis that the appeal would be doomed to failure.*
>
> *On 20 May 2003 the applicant filed, in this Court, an application under s 39B of the* Judiciary Act 1903 *(Cth) seeking an injunction to restrain the Minister from returning the applicant to Iran or removing him from Australia. The applicant discontinued those proceedings on 23 June 2003. He had not been deported because he had refused to complete an Iranian passport application for travel to Iran and Iranian authorities refused to accept citizens who were returned involuntarily. The applicant made an application for the deportation order to be revoked and the Minister refused to revoke the order in July 2004."*

61 The appellant's claims before the Tribunal were described by the primary judge at

[9]-[15] of his reasons as follows:

> *"Generally, the applicant's claims were that he feared persecution on the basis of actual or imputed political opinion. In summary, the applicant's claims were as follows.*
>
> *The applicant was a supporter of Dr Shahpoor Bakhtiar, former Prime Minister and caretaker of the Shah monarchy. He supported democracy and opposed the ruling Ayatollahs and the Islamic regime. His business premises were raided several times by Sepah Pasdaran during 1984 and 1986. The applicant was a leading member of a group of people working against the Iranian government and active in an underground anti-government movement, the National Movement of Iranian Resistance (NIRM, NMIR or NAMIR) ("NIRM"), and was involved in distributing anti-government literature. He received information about what days to set for demonstrations, passed on that information to others in Shiraz, and participated in about twenty demonstrations against the government.*
>
> *The applicant distributed anti-government literature, which led to his arrest in 1986. He was detained for 11 months without trial, and during this time witnessed the hanging of other prisoners, including friends, and was tortured, both physically and mentally. He was then brought before a judge who knew his father and who was lenient towards the applicant. The judge ordered his released, noting he could have ordered his execution for the crime, and required him to report weekly to the security authorities (and sign at the local Komiteh, sometimes up to 5 or 6 times a week).*
>
> *After his release, he continued his political activities and participated in four major demonstrations in Shiraz, with the last held in February or March 1988. Following public demonstrations in early 1990 or late 1989 he fled Iran because dissidents were being arrested in the wake of the demonstrations. There was a warrant for his arrest in Iran, issued in 1989 or 1990. The judge that sentenced the applicant was replaced by a judge from Tehran who wanted to review his case on the basis that the applicant's friends had been executed and he had not. In 1991 his younger brother was assaulted in the army because they knew him to be the applicant's brother.*
>
> *One day, as the applicant and his wife were leaving his home in their friend's car, four to five Nissan Patrol vehicles from the Komiteh approached his home and, according to his neighbours, members of the Komiteh broke into his house. Three days later, the applicant's father-in-law arranged for a soldier in the military and under his command to take the applicant and his wife to Pakistan. He and his wife then travelled to India. The applicant had been involved in some anti-government activities while in India (and later in Australia for a period of one year).*
>
> *After arriving in Australia the applicant travelled to India on an Iranian passport in 1992. He returned to India at the request of his wife's family, as his wife's brother needed to leave Iran with the assistance of a smuggler and*

the applicant was required to assist the wife's brother in India. On meeting with his wife's brother he realised he had been deceived, that the money he had sent for the brother to purchase a passport to leave Iran had not been required for that purpose, and the applicant returned to Australia.

Following his release from detention in Iran, the applicant was unable to access medicine to alleviate his pain and stress, and resorted to taking opium, which he continued to use until he was imprisoned for possession and trafficking opium into Australia in 1995. While imprisoned in Australia, his mother travelled from Iran to visit. On her return to Iran, the applicant's mother was detained for two days for having made contact with the applicant. The applicant also claims that before 1998, his mother, his sister and their neighbour had been stabbed by persons from 'fanatical radical groups'."

The Tribunal's Decision

62 The Tribunal set out in some detail the appellant's claims before the delegate. The Tribunal then set out in some detail what was said at the hearings held by the Tribunal on 9 and 15 November.

63 The Tribunal expressed the view that the central issue that it had to consider was whether at the time of the decision the appellant had a well-founded fear of prosecution for a Convention reason. This issue was said to arise because of the operation of s 36(3) of the Act, notwithstanding that the appellant may have previously been recognised as a refugee and article 1C(5) may not apply. In this respect the Tribunal considered itself bound to apply the first instance decisions in *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1373 and *QAAH v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1448.

64 Critical to the view the Tribunal took was the weight that should be given to the evidence of appellant's former wife and her brother that was given to the AAT and that was before the Tribunal to the effect that, contrary to much of his evidence, the appellant was not politically active in Iran before leaving. This led to what appears to have been the agreement of the Tribunal member that the appellant's adviser would suggest questions which would be posed to a Dr Nair about the appellant's likely behaviour if he returned to Iran. A report was obtained from Dr Nair about the mental state of the appellant. The report was provided to the appellant's advisor. Dr Nair was not asked any direct question about the appellant's likely behaviour if he returned to Iran.

65 After dealing at length with the evidence before it, the Tribunal disposed of the mater as follows. First, it accepted that Australia had recognised the appellant as a refugee. It therefore saw article 1C(5) as relevant. This enquiry, that is one based on the premise of the political activities of the appellant described by the UNHCR, led to the following conclusion:

> *"If he were involved in the political activities described by UNHCR, and imprisoned on that basis, country information indicates that a person in that position could face a real chance of harassment, re-arrest and/or ill treatment for reason of political opinion. I accept that the general situation in Iran in 1991 was one of repression and abuses of basis human rights of dissidents as to the present situation, Amnesty International's most recent report on Iran observes that scores of political prisoners, including prisoners of conscience, continue to serve sentences imposed in previous years following unfair trials, and scores more have been arrested (Amnesty International Report for 2004, Iran, http://web.amnesty.org/report2004/irn-summary-eng, accessed 17 November 2004). On the basis of this evidence, Art 1C(5) would not apply."*

66 The Tribunal then proceeded to deal with the question afresh as to whether it was satisfied that the appellant had a relevant well-founded fear. In undertaking this task, the Tribunal rejected the evidence of the appellant. It is unnecessary to recount the various respects in which the Tribunal found his evidence to be unsatisfactory. These are discussed by the primary judge in his reasons at [18]-[26]. It is sufficient to summarise it by saying that the Tribunal rejected his evidence about his political activity in Iran.

67 The Tribunal did recognise that, upon return to Iran, the appellant will come to the attention of the Iranian authorities. It recorded that the Department's view was that it is possible that Iranians returning from abroad will be questioned and detained if there is any evidence of their participation in anti-regime activities while abroad. The appellant's adviser in this respect submitted that the material available publicly in the AAT decision in 1999 and his political activity in Australia would become available to the Iranian authorities. The Tribunal dealt with this in the following way:

> *"…It has been submitted by RACS that details about the applicant are contained in the AAT decision made in 1999 and that his history in Australia would become apparent to the Iranian authorities through this means. It has been argued that, even if he were not politically active in Iran in the past, 'the fact that he was recognised as a politically active refugee by UNHCR and the Australian government would lead the Iranian authorities to assume that he does in fact hold anti regime political opinions, that he participated in anti government activities and his activities were of such magnitude that the*

> *UNHCR and the Australian government granted him with refugee status' (RACS submission received 30 December' (RACS submission received 30 December 2004).* ***I consider the chance remote that this AAT decision will come to the attention of the Iranian authorities, as the applicant's name does not appear in any context when a general keyword search is done on the internet using Google and MSN search engines)****, and the Iranian authorities would, therefore, have to look up the AAT decision lists, then key in the applicant's name, in order find the decision. There is no evidence that they might become aware that his case was heard by the AAT at all and it is therefore unclear why they might undertake such a search. However, even if they did read the AAT's decision, I note that the President Member repeatedly observes in it that Mr* [name provided] *was not a 'witness of credit' (paras 66, 71, 97) and further that there were 'serious questions about the veracity of the refugee claim' made by him in India (para 98). For these reasons I am not satisfied, and do not accept, that the content of this decision might give rise to a political opinion being imputed to the applicant by the Iranian authorities."*
> [emphasis added]

68 The appellant's adviser also put that he may, upon return, retaliate during any confrontation with Iranian authorities and so be imputed with an anti-regime political opinion. The Tribunal rejected this. In so doing it had cause to refer to Dr Nair's report. The Tribunal stated:

> *"As to his future conduct and imputed political opinion, it has been argued that Mr* [name provided] *may retaliate during a confrontation with Iranian authorities such that he may be imputed with an anti-regime opinion, and that during questioning on return he would be likely to become agitated to such a degree that he may seem threatening to the authorities. Although there is no recent evidence before the Tribunal that Mr* [name provided] *is still physically violent. I accept that his behaviour may deteriorate on return to Iran, as is observed by Dr Nair (23 November 2004). As to whether he might be imputed with a political opinion as a result, it was further argued that, if he were in a confrontational situation, he would be likely to 'express his views against the regime…'.* ***However Dr Nair's report of 23 November 2004 does not state that he might react in this way****, and in light of my other findings about his past political activity, I cannot be satisfied that he might.*
>
> *I accept that Mr* [name provided] *may be questioned on or soon after his arrival. However, as I am satisfied that he was not perceived by the authorities to be involved in anti-government political activities before he left Iran, and am also satisfied that he has not been involved in such activities since then, I consider the chance remote that he may be subjected to serious harm in Iran because of political opinion imputed to him."*
> [emphasis order]

The Decision of the Primary Judge

69 As to the first group of issues referred to at [4] above, the primary judge found:

1. that the Tribunal had erred in concluding that Australia had recognised the appellant as a refugee for the purposes of the Convention;
2. that the Tribunal erred in applying s 36(3) of the Act because the subsection had no application to the entry or residence in the country of nationality or habitual residence, being the country the applicant has fled and about which the well-founded fear of prosecution was to exist; and
3. that the Tribunal had, however, directed itself to the correct question required by s 36(2) of the Act – the application of Article 1A(2) of the Convention whether the appellant had a well-founded fear of persecution for a relevant Convention reasons.

70 As to the second group of issues referred to at [4] above, the primary judge found that there had been no breach of s 424A. As to Dr Nair's report, his Honour held that the absence of any reference by Dr Nair as to how the appellant might react was not "information" for the purpose of s 424A. He said the following at [41] and [42] of his reasons.

> *"Counsel for the Minister responded by submitting that there was no relevant 'information' which was not provided as required by s 424A and, in any event, the entire report of Dr Nair was provided to the applicant. It was submitted that there was no denial of procedural fairness because the representatives of the applicant were given a copy of Dr Nair's report and subsequently made a written submission relying on part of it. Further, the representatives did not repeat an earlier request that Dr Nair be asked to comment on how the applicant was likely to react when returned to Iran and how he would respond if placed under pressure by Iranian authorities.*
>
> *In my opinion, the submissions of counsel for the Minister are correct. Without foreclosing the possibility that circumstances could arise where what did not appear in or was not referred to in a document was 'information' for the purposes of s 424A, this is not such a case. What is 'information' was discussed by a Full Court in* Win v Minister for Immigration and Multicultural Affairs *(2001) 105 FCR 212. Information must be provided to give an applicant an opportunity to demonstrate the information should not be relied on by the Tribunal. In the present case, the applicant was given Dr Nair's report. It was clear, on its face, that it did not specifically address the question of how the applicant would react in a confrontation with Iranian authorities even though it had been a specific matter the applicant had suggested that the Tribunal ask Dr Nair to address. That it did not address it, would have been obvious to the applicant or his advisers. Why it did not*

> *would have been also clear. It was because it was not a specific matter on which Dr Nair was ultimately asked to comment. In my opinion the Tribunal was not obliged by s 424A to provide particulars of what was obvious, namely the report did not discuss how the applicant would react in a confrontation with Iranian authorities."*

71 As to the argument that the results of the web searches directed to the AAT, the primary judge took the view that while that was information for the purposes of s 424A of the Act, it was not information that the Tribunal considered would be the reason or a part of the reason for affirming the decision. His Honour said the following at [46]:

> *"On the present state of the authorities, the Tribunal almost certainly should have provided this 'information' to the applicant if it was the reason or formed part of the reason for its decision. However counsel for the Minister submitted it was not of that character. In my opinion, this submission is correct. The central question raised on behalf of the applicant and addressed by the Tribunal was whether the applicant's history in Australia would become known to the Iranian authorities with the result that the applicant would be imputed with a particular political opinion critical of the regime in Iran. The Tribunal answered that question by pointing out that the AAT's decision recorded the applicant as not being a 'witness of credit' and that there were 'serious questions about the veracity of the refugee claim' made by him in India. Its rejection of this aspect of the applicant's claim (that the AAT decision would result in imputed opinions on his return) rested on what the AAT said, and not whether what the AAT said was readily available on the Internet."*

Arguments and Disposition

72 In the light of the views that I have as to the operation of s 424A in this case, it is convenient to deal with the second group of issues referred to at [4] and [27] and [28] above first.

Dr Nair's Report

73 The primary judge took the view that there was no information because, in effect, the absence of any comment by Dr Nair was a product of the fact that Dr Nair had not been asked to comment. In argument before us, the Minister relied on what Finn and Stone JJ said in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 at [24] to the effect that a gap or lack of evidence was not "information".

74 In my respectful view, both his Honour's approach and the Minister's submissions do not deal with how the Tribunal dealt with the issue. As part of its reasons for not being satisfied that the appellant might react in a confrontational way upon his return to Iran, the Tribunal cited the fact that Dr Nair's report did not state that he might. This was not in answer to a proposition that Dr Nair's report did say that. Rather, it was a statement that the form of Dr Nair's report and its failure to say that the appellant would behave in this way was of assistance in concluding that he would not. That is, the absence of such a statement in Dr Nair's report was taken by the Tribunal as supportive of the conclusion that he would not behave in that way, implicitly a relevant proposition as to how the appellant would behave upon return to Iran was being extracted from the form of Dr Nair's report. As I said in *SZEEU v Minister for Immigration and Multicultural affairs and Indigenous Affairs* (2006) 150 FCR 214 at [221]-[225], care needs to be exercised in applying [24(iii)] of *VAF*. Here, the absence of something in Dr Nair's report was not merely taken as a gap, but was implicitly probative of Dr Nair's view that there was no such danger. If the form of Dr Nair's report (including what it did not say) did not have this significance for the Tribunal there would have been no point in mentioning it.

75 In my view, the information which should have been the subject of a letter in compliance with s 424A was that Dr Nair had reported and did not state that the appellant might react in a way to express his views against the regime. The letter should have pointed out why this was relevant to the review – that it tended against the proposition that he might so behave.

The internet searches about the AAT

76 The primary judge said that the results of the searches were not part of the reason for the purposes of s 424A(1). I cannot agree. The paragraph quoted above has two cumulative reasons. The first was that a search conducted by the Tribunal member had not thrown up information about the appellant, and thus a search of that kind would not throw up information about the appellant. The second was that even if it did, and even if the AAT decision were to be found, it would be understood by the Iranian authorities reading the decision that the Presiding Member thought the appellant not to be a "witness of credit". Both were aspects of the reasoning of the Tribunal. Applying *SZEEU* at [215] (with which Weinberg J agreed) the relevant test is:

> *"In my view, in the light of SAAP, in circumstances where one is faced with a decision of the Tribunal with reasons and the complaint is a contravention of s 424A(1), the question to ask, by reference to the reasons of the Tribunal in the context in which one finds them (as revealing what would be the reason or a part of the reason for affirming the decision immediately prior to the making of the decision), is whether the information in question was a part (that is any part) of the reason for affirming the decision. To the extent that the reasons of the relevant majorities in Paul and VAF can be seen to require that the relevant part of the reason have a stature or importance, or be of a character, which would make it unfair not to invoke the procedures of s 424A, I think SAAP requires that such an approach be rejected. It is only necessary that the information be* ***a*** *part of the reason."*

77 The web search results were a part of the reason.

78 The Minister submitted that relief may be refused where there is an entirely alternative basis for the Tribunal's decision. Various cases were referred to, including *SZEEU*. In my reasons in *SZEEU*, I sought to summarise the position as follows:

> *"Section 424A not having been complied with, the appellant is entitled to statutory writs under s 39B(1) of the* Judiciary Act 1903 *(Cth) unless a legitimate reason to withhold such relief can be identified.*
>
> *In* SAAP *McHugh J referred to the discussion by Gaudron J and Gummow J of the issue and relevant cases in* Re Refugee Review Tribunal; Ex parte Aala *(2000) 204 CLR 82 at [57]-[62]. From that I take the following to be in accordance with principle. First, subject to what follows, if s 424A is not complied with, the Court does not engage in an enquiry as to whether the breach was so trivial as not to warrant relief. The failure to comply with the statutorily mandated provisions leads to the conclusion that there was a lack of statutory authority to make the decision. In the operation of s 424A and the principles of procedural fairness, adherence to mandated process and procedure is vital. Secondly, as a matter of discretion, relief will be withheld for reasons going to the conduct of the applicant as discussed in Aala and SAAP. No such considerations apply here. Thirdly, if it can be shown that there is a basis, otherwise unimpeached, upon which the decision was reached, unaffected by the failure to accord procedural fairness or to comply with the required statutory procedure, relief can be withheld.*
>
> *Mr Prince submitted that the discretionary reasons which could lead to writs not issuing did not include the existence of an entirely separate unimpeached basis for concluding that Australia did not have protection obligations. I do not agree. What the majority in SAAP stated was that one did not engage in an evaluative analysis of the triviality or seriousness of the failure to observe the statutory requirements. The same was said by Gaudron J and Gummow J in Aala. However, Aala and SAAP leave open (see especially [58] and [59] in Aala) the basis to refuse relief if it can be shown that grant of relief would*

> *lack utility. The examples given by Gaudron J and Gummow J in Aala at [58] were (a) where the decision-maker was bound by the governing statute to refuse, (b) where the submissions could only have been answered, as a matter of law, against the person denied the opportunity of making them and (c) if the decision under review has no legal effect.*
>
> *If it can be shown that there was a basis for the Tribunal's decision which can be seen to be entirely independent of the failure to follow s 424A, in my view, that is sufficiently analogous to the first of the alternatives referred to in [58] of Aala to warrant withholding of relief."*

79 It is unnecessary and inappropriate to put any gloss on cases such as *SZEEU* that deal with s 424A unless necessary. The conceptual distinctions bound up in the terminology of the section can lead to almost metaphysical debate. I am of the view the above matters set out in *SZEEU*, and the other cases cited by the Minister (*VBAP of 20002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 965 at [13]; and *VEAJ v Minister of Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 291 at [54]-[55]) do not apply here. There was no clear and independent basis separate from the information to which s 424A apply upon which one could be satisfied that the failure to follow s 424A had no possible effect. The lack of persuasiveness of what appears in the last two sentences of the passage cited at [24] above leads me to conclude that the conclusion reached earlier in that paragraph which involved reliance on the information was operative on the Tribunal. I would not be prepared to withhold relief because of the cumulative and alternative way the Tribunal approached the matter.

80 Thus, I respectfully disagree with the primary judge in his conclusions that the information about the results of the internet searches did not require a s 424A(1) letter; and I reject the submissions of the Minister that relief ought be withheld for discretionary reasons.

81 For the above reasons, in my view, the appeal should be allowed and the decision of the Tribunal set aside.

The first group of issues

82 Given the views that I have in relation to s 424A it is strictly unnecessary to deal with the other views. However, on the view that I have formed as to the proper approach to be taken, I can express my views shortly.

83 I should say at the outset that any economy of despatch is not a reflection on the thoughtful and careful submissions advanced by Mr Prince on behalf of the appellant.

84 The appellant's argument for this Court not to follow [25] of the reasons for judgment of Black CJ (which was expressly concurred in by Mansfield J and Stone J) in *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 522. That paragraph was as follows:

> *"The members of the Full Court have reached differing conclusions both as to the outcome of the appeal and as to the reasons for the outcome. As a majority would dismiss the appeal, that will be the order of the Court. Given the practical importance of the case, I think it appropriate to observe that whilst there are two lines of reasoning leading to the majority conclusion that the appeal should be dismissed, there is a common conclusion about the task to be performed by the decision-maker on an application for a permanent protection visa where the relevant circumstances are said to have changed since the appellant was granted a temporary protection visa. The majority would agree that s 36 mandates that the decision-maker must be satisfied that, at the time the decision is made, the applicant for a permanent protection visa then has a well-founded fear of persecution for a Convention reason. The circumstance that a previous decision-maker was satisfied that the applicant had such a fear when a temporary protection visa was granted is not sufficient to establish what s 36 requires."*

85 A majority of the High Court in *QAAH* and *NBGM* has unequivocally decided that the proper approach for the Tribunal to take was an analysis under Article 1A(2). It is unnecessary to recount in detail the approach of the majority beyond the recognition of this essential matter. Thus the conclusion of the High Court was in accordance with the agreement of the majority of the Full Court in [25] of *NBGM.*

86 Mr Prince submitted that the argument that he put forward about the place of s 65 in the Act was not considered by the Full Court in *NBGM.* I am not persuaded that that is correct. Nevertheless, that is not a good enough reason to reconsider the view of the majority in *NBGM,* in any event the High Court has now settled the issue.

Orders

87 The orders that I would make are:

1. The appeal be allowed.

2. Orders 2 and 3 made by the Court on 10 November 2005 be set aside, and in lieu thereof the Court orders that:

   (b) There be an order in the nature of certiorari to quash the decision of the Refugee Review Tribunal (the "Tribunal") made on 17 January 2005.

   (c) There be an order in the nature of mandamus requiring the Tribunal to review according to law the decision of the delegate of the Minister to refuse the protection visa sought by the applicant.

   (d) The first respondent pay the costs of the applicant.

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

I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Allsop.

Associate:

Dated: 1 December 2006

Counsel for the Appellant:	Mr S Prince
Solicitor for the Appellant:	Legal Aid Commission of NSW
Counsel for the Respondent:	Mr G Johnson
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	18 May 2006
Date of Judgment:	1 December 2006