FEDERAL COURT OF AUSTRALIA

NBKT v Minister for Immigration and Multicultural Affairs [2006] FCAFC 195

MIGRATION - appeal from decision of Federal Magistrate - application for protection visa - whether Refugee Review Tribunal failed to comply with s 424A of the *Migration Act 1958* (Cth) in respect of provision of information to appellant - whether Tribunal asked wrong question or applied wrong test in considering claim of fear of persecution on religious grounds - whether Tribunal denied appellant procedural fairness having regard to the manner of examination of independent country information - lapse of time between entry into Australia and bringing of application for protection visa – consideration of s 91R(3)(b) – where appellant converted to Christianity while in Australia

PRACTICE AND PROCEDURE - leave to amend notice of appeal - whether respondents prejudiced by granting of leave - whether exceptional circumstances required to be shown by appellant - whether allowance to be granted by the Court to permit recently published judgments to be understood and applied by legal profession - grounds not raised before Federal Magistrate

_____*Migration Act 1958* (Cth) ss 91R(3)(b), 424A, 425
Migration Regulations 1994 (Cth)

_____*NBKT v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FMCA 6 referred to
_____*SZDJQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 533 cited
_____*SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 followed
_____*VWBF v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 851 cited
_____*VAAC v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 168 cited
_____*Gomez v Minister for Immigration and Multicultural Affairs* (2002) 190 ALR 543 cited
_____*SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162 cited
_____*Tin v Minister for Immigration and Multicultural Affairs* [2000] FCA 1109 cited
_____*Paul v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 396 cited
_____*VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 cited
_____*WAGP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 124 FCR 276 cited
_____*VWFP and VWFQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 231 cited
_____*NAZY v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 87

ALD 357 discussed
_____*M55 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 131 cited
_____*SZERV v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1221 cited
_____*SZCJD v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 609 discussed
SZHFC v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 1359 cited
_____*SZDPY v Minister for Immigration and Multicultural Affairs* [2006] FCA 627 cited
_____*Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 216 ALR 1 cited
_____*S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 cited
_____*Craig v The State of South Australia* (1995) 184 CLR 163 cited
_____*Abebe v The Commonwealth of Australia* (1999) 197 CLR 510 cited
_____*SZANK v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1478 cited
_____*Minister for Immigration and Multicultural and Indigenous Affairs v Lay Lat* (2006) 151 FCR 212 cited
_____*SZCIJ v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 62 cited
_____*NAST v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1536 cited
_____*SBCC v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 129 cited
_____*Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548 cited

NBKT v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS AND REFUGEE REVIEW TRIBUNAL
NSD 344 OF 2006

GYLES, STONE AND YOUNG JJ
20 DECEMBER 2006
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 344 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**NBKT** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGES:	**GYLES, STONE AND YOUNG JJ**
DATE OF ORDER:	**20 DECEMBER 2006**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

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1. The appellant be granted leave to amend the notice of appeal.
2. The appeal be dismissed.
3. The appellant pay the first respondent'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 344 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**NBKT** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**GYLES, STONE AND YOUNG JJ**
DATE:	**20 DECEMBER 2006**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

GYLES J

1 _____I agree with the orders proposed by Young J and with his Honour's reasons for those orders.

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I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Gyles.

Associate:

Dated: 20 December 2006

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 344 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**NBKT** **Appellant**
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	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**GYLES, STONE AND YOUNG JJ**
DATE:	**20 DECEMBER 2006**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

STONE J

2 _____I agree with the orders proposed by Young J and with his Honour's reasons for those orders.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Stone.

Associate:

Dated: 20 December 2006

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 344 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**NBKT** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**GYLES, STONE AND YOUNG JJ**
DATE:	**20 DECEMBER 2006**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

YOUNG J

3 _____This is an appeal from a decision of the Federal Magistrates Court delivered on 31 January 2006 which dismissed an application for review of a decision of the Refugee Review Tribunal: *NBKT v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FMCA 6. On 31 January 2005, the Tribunal affirmed the decision of a delegate of the first respondent ('the Minister') to refuse to grant the appellant a protection visa.

4 _____The appellant, who is a citizen of the People's Republic of China, arrived in Australia on 11 March 1999 on a temporary business visa. Her business visa expired and she remained in Australia. She was taken to Villawood Detention Centre on 27 August 2004. On 19 November 2004 the first respondent's governmental department received the appellant's application for a protection visa. In her protection visa application, the appellant claimed that she had been sent to Australia by the company she worked for in China to develop the company's business in Australia. She claimed that the company had borrowed 10 million RMB from a government-owned bank and had not made repayments on the loan and that the managing director of the company had accused her of stealing the money and going overseas.

The appellant said that her parents had told her that she would be regarded as the person responsible for the company's debt and that she may be sent to gaol if she returned to China.

5 _____The appellant's protection visa application was refused by the Minister's delegate on 23 November 2004. The appellant applied to the Tribunal for review of the delegate's decision.

6 _____Under cover of a letter from her adviser dated 24 January 2005, the appellant provided written submissions to the Tribunal in support of her application for review ('the written submissions'). The written submissions comprised the letter from her adviser and an untranslated statement prepared by the appellant herself. They expanded on the appellant's claims as stated in her protection visa application and introduced a claim that the applicant feared persecution on the basis of her conversion to Christianity.

PROCEEDINGS BEFORE THE TRIBUNAL

7 _____The appellant attended and made submissions through an interpreter at the Tribunal hearing on 31 January 2005. She read out her statement which formed part of the written submissions. She reiterated the claims in her protection visa application and written submissions and made additional claims concerning, inter alia, her hatred of the Chinese Government and the communist regime. She said that she feared persecution for a combination of political and religious reasons.

8 _____The Tribunal questioned the appellant on a range of matters, which are detailed in the Tribunal's reasons for decision. The Tribunal put to the appellant several times during the hearing that it was having difficulty in accepting that she had a fear of persecution for the reasons she claimed. The Tribunal told the appellant that her claims concerned things that had happened a long time ago and pointed out to the appellant that she had arrived in Australia in 1999 but had not applied for a protection visa for another five and a half years. The Tribunal questioned the appellant about her delay in applying for a protection visa. The appellant responded to the effect that she was telling the truth. She said she had a 'varied visa' when she arrived in Australia (presumably referring to the business visa). She also said she was not aware at that time that protection visas existed and claimed that she did not know of the risks she faced in China until just before she applied for a protection visa.

9 _____The Tribunal asked the appellant a series of questions about her Christianity. The Tribunal enquired as to when the appellant became a Christian. She replied that she was baptized about 6 months earlier in early July 2004. She said that before her baptism she had attended various churches in or around Sydney but she could not say which ones. When asked about her denomination, the appellant claimed that she was an ordinary Christian. The Tribunal asked her if she was Baptist or Catholic and she replied that she was not a Catholic, but was a Christian. The Tribunal put to the appellant that independent country information on persecution of Christians in China indicated that there has been significant growth of Christianity and that there were many millions of Christians in China. In light of this country information, the appellant was asked why she feared persecution for reasons of her religion. The appellant responded that many Christians are persecuted in China. She claimed that she had read media reports and been told by friends that the Chinese authorities do not allow worship and she could be sent to prison. She said that the authorities do things differently to what they say and that there is a 'dark underside' in China which is not apparent.

10 _____The Tribunal rejected all of the appellant's claims. The Tribunal did not accept her claim based on her involvement with the loan affair. It did not accept that if she returned to China that she would be subjected to any investigation about events which occurred over five and a half years ago, or that a summons or warrant had been issued against her. The Tribunal also rejected her claim that she would not receive effective protection from the Chinese authorities because they were corrupt and there was no access to independent or international organisations. It found that if the appellant hated communism and wanted political freedom, she would have applied for a protection visa soon after she arrived in Australia to ensure her long term safety, even though she had a temporary business visa.

11 _____Turning to the appellant's claims based on her Christianity, the Tribunal found that she showed very little knowledge of the Christian religion, could not identify the churches she had attended, and did not know what denomination she was (but noted that she claimed she was not a Catholic). The Tribunal regarded her claims about her religious practice in Australia as 'vague and unsubstantiated'. The Tribunal accepted independent country information that there are now many millions of Christians in China and that the Christian church is one of the most rapidly growing in China. It was satisfied that there was no real chance that the appellant would be subject to serious harm amounting to persecution because

she had become a Christian. The Tribunal also referred to s 91R(3)(b) of the *Migration Act 1958* (Cth) as a basis upon which to reject the appellant's claim. Section 91R(3)(b) requires that any conduct engaged in by an applicant for a protection visa in Australia be disregarded unless the Tribunal is satisfied that the conduct was engaged in for a purpose other than to strengthen the applicant's claims to be a refugee. The Tribunal said that, given her limited knowledge of Christianity, it was satisfied that the appellant had only become a Christian in order to strengthen her claims for a protection visa. It stated that '[a]ccordingly, the Tribunal therefore disregarded this evidence and her participation in the events they record'.

12 _____Overall, the Tribunal found that the appellant was not a credible witness and noted various contradictions between the information she provided in her protection visa application, the written submissions and the evidence she gave at the hearing. The Tribunal concluded that the appellant had embellished her claims in order to enhance her claims for a protection visa. It found that there was no real chance that the appellant would be subjected to serious harm amounting to persecution for a Convention reason if she were to return to China.

PROCEEDINGS IN THE FEDERAL MAGISTRATES COURT

13 _____In the Federal Magistrates Court, the appellant claimed that the Tribunal had made a number of jurisdictional errors. First, the appellant alleged that the Tribunal had failed to ask itself whether or not there was a chance that if the appellant did not join an officially registered Catholic or Protestant Church she would suffer persecution for reasons of her religion. The appellant also alleged that the Tribunal had denied her procedural fairness and had failed to comply with s 425 of the *Migration Act* because it had not afforded her an opportunity to respond to the allegation that she had become a Christian only to strengthen her claims for a protection visa, or to the suggestion that s 91R(3)(b) applied to the evidence of her religious activities. The appellant contended that the Tribunal's conclusion that she had only become a Christian in order to strengthen her claims for a protection visa were not fairly based on findings or inferences of fact supported by logical grounds.

14 _____The Federal Magistrate carefully considered each of the claims made by the appellant and set out the Tribunal's findings and reasons for decision in considerable detail. Relevantly, her Honour considered the evidence concerning the appellant's claim that she

feared persecution on the basis of her religion. The Federal Magistrate noted that the appellant's claims to fear persecution on the basis of her religion were 'limited and very generally expressed' before the Tribunal. Her Honour concluded at [64]:

> *'… Questioning the Tribunal's findings on the extent of the [appellant's] involvement in the Christian faith and what country information was relevant in determining whether a well-founded fear of persecution arose seeks impermissible merits review. The correct test was followed. The Tribunal asked itself the right question. It gave proper consideration to the particular circumstances of the [appellant]on the limited evidence she had advanced about her practice of Christianity and what she would do on return to China. The findings that the Tribunal made were open to it on the evidence before it.'*

15 _____The appellant did not contend in the Federal Magistrates Court that the Tribunal had failed to comply with s 424A. Nor did she take issue with the Tribunal's reliance on the five and a half year delay between her arrival in Australia in 1999 and her application for a protection visa in 2004.

ISSUES ON APPEAL

16 _____The appellant's notice of appeal dated 21 February 2006 contained three grounds of appeal. At the commencement of the hearing, counsel for the appellant sought leave to file an amended notice of appeal. The proposed amended notice of appeal substantially revised the grounds of appeal, and included a new ground that the Tribunal failed to comply with s 424A. The Court reserved its decision as to whether to grant leave to the appellant to amend the notice of appeal, but directed the parties to make submissions on the assumption that leave to amend had been granted.

17 _____As argued in this Court, there were three grounds of appeal. The first ground concerns the Tribunal's alleged failure to comply with s 424A of the *Migration Act* in respect of information contained in her protection visa application which formed part of the Tribunal's reasons for decision. The second ground is that the Federal Magistrate erred in not holding that the Tribunal had made a jurisdictional error by failing to ask itself the correct question, or apply the correct test, in considering whether the appellant had a well-founded fear of persecution for reasons of her religion. The third ground was that the appellant was denied procedural fairness having regard to the way in which independent country information concerning the operation of registered and unregistered Christian churches in

China was put to her.

18 _____Both parties addressed submissions to, and relied upon, excerpts from the transcript of the Tribunal hearing. The transcript of the Tribunal hearing was included in the appeal book.

LEAVE TO APPEAL

19 _____The Minister objected to the grant of leave to amend the notice of appeal, submitting that there were no 'exceptional circumstances' which would warrant the Court's consideration of the s 424A point: *SZDJQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 533. It was also submitted that the appellant had provided no explanation as to why the argument was not raised in the Court below. The argument based on s 424A was fully available to the appellant in the Federal Magistrates Court and, so the Minister said, it should have been raised there.

20 _____The appellant relied on the fact that the Federal Magistrate's decision was handed down before the Full Court's decision in *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 ('*SZEEU'*), and submitted that no prejudice would be occasioned to the Minister by raising the s 424A claim.

21 _____The appellant submitted that this Court should adopt Heerey J's approach to the grant of leave to raise a s 424A claim in *VWBF v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 851 ('*VWBF'*) at [23]:

> *'[T]here is [a] question whether leave should be granted to raise this point, which was not argued before the Magistrate. For the reasons given in* SZCJD *[2006] FCA 609 at [19], I think the appellant should have leave. The operation of s 424A has been the subject of a recent Full Court decision handed down on 24 February 2006,* SZEEU *[2006] FCAFC 2. In that case there crystallised for the first time at Full Court level what Weinberg J at [121] described as the "unanticipated but potent combination" of the Full Court's decision in* Al Shamry *(2001) 110 FCR 27 and the High Court's decision in* SAAP *(2005) 215 ALR 162. It may be true, as counsel for the Minister in the present case pointed out, that there were single judge decisions in June and July 2005 which considered this point, and the hearing before the Magistrate took place on 7 September 2005. Nevertheless some reasonable allowance should be made for the blizzard of cases concerning the Act that descend upon the profession and some time allowed before they can be taken as absorbed into the general understanding, even of those specialising in this area.'*

22 _____The essential question is whether it is expedient in the interests of justice to allow the new ground based on s 424A(1) to be argued and determined. The considerations that are relevant to this question include the appellant's prospects of success on the appeal on the new ground, the explanation given by the appellant for failing to raise the argument before the Tribunal or the Federal Magistrate, the prejudice to the respondent in allowing the appellant to raise the new argument, any potentially serious consequences to the appellant if leave to amend is refused, and the integrity of the appellate process: see *VAAC v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 168 at 177 [26]; *Gomez v Minister for Immigration and Multicultural Affairs* (2002) 190 ALR 543 at 548-549 [18].

23 _____The new ground of appeal raises a short and potentially important point. The point could not have been met by any evidence had it been raised below. I accept that no particular prejudice will be occasioned to the Minister by allowing the point to be raised. On the other hand, there is force in the Minister's submission that the point ought to have been raised below and that appellant should be bound by the conduct of her case. I am, however, conscious that the decision in *SZEEU* has created some uncertainty as to the operation of s 424A, as counsel for the Minister conceded in the course of argument. With some reservations, I have concluded that this is a case in which the Court should exercise its discretion to allow the new ground to be raised by the proposed amended notice of appeal. The other amendments to the proposed notice of appeal do not occasion any difficulty because they operate to confine the appellant's case rather than to extend it.

SECTION 424A ARGUMENT

24 _____Section 424A of the *Migration Act* provides:

> *'(1) Subject to subsection (3), the Tribunal must:*
> *(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and*
> *(b) ensure, as far as 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:*
> …
> *(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:*
> …
> *(b) that the applicant gave for the purpose of the application;…'*

25 _____Regulation 5.02 of the Migration Regulations 1994 (Cth) requires that where an applicant is in immigration detention, any document to be served under the *Migration Act* may be served on the appellant in person or on another person authorised by her to receive documents on her behalf. Regulation 5.01 defines 'document' as, relevantly, an invitation, notice, notification or statement in writing. The authorities make it clear that 'information' within the meaning of s 424A must be provided to the appellant in writing: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162 ('*SAAP'*) at 179 [65]. In *SZEEU* at 262 [215], Allsop J said that the Court does not consider whether or not failure to provide the information would result in any unfairness; the obligation to provide particulars in writing pursuant to s 424A applies as long as the information formed the reason, or part of the reason, for affirming the decision under review.

26 _____The appellant contended that the Tribunal failed to comply with s 424A(1) because it did not give the appellant written particulars of information which it relied on in affirming the decision under review. The relevant information was said to be the date of the appellant's arrival in Australia, 11 March 1999, and the date of her application for a protection visa, 17 November 2004 ('the date information'). The appellant submitted that the Tribunal relied on those dates in finding that she had delayed five and a half years before applying for a protection visa, which formed part of the Tribunal's reasons for rejecting her claim to fear persecution in China. The appellant submitted that the Tribunal relied on that information adversely to the appellant without providing her with written particulars, ensuring that she understood the significance of that information for the review, or inviting her to comment on it. The appellant argued that the Tribunal had therefore failed to comply with s 424A(1). While counsel for the appellant conceded that the argument was a technical one, the Court

does not embark upon an enquiry as to whether the breach was so trivial as not to warrant relief: *SZEEU* at 265 [231] per Allsop J.

27 _____In response, the Minister submitted that the date information fell within the exception in s 424A(3)(b). It was said that this is a complete answer to the requirement imposed by s 424A(1): *SZEEU* at 267 [253] and *VWBF*.

28 _____Two main issues arise in relation to s 424A. The first is whether the date information constitutes 'information' to which s 424A(1) applies. The second issue is whether the appellant 'gave' the date information to the Tribunal for the purposes of the application, thus bringing it within the exemption in s 424A(3)(b). It was not disputed that the five and a half year period between those dates formed part of the Tribunal's reasons for affirming the decision under review: *SZEEU* at 252 [158] per Weinberg J, and 262 [215] per Allsop J.

The meaning of 'information' in s 424A(1)

29 _____The meaning of 'information' was considered in the context of s 424A(1) by Allsop J in *SZEEU* at 259-260 [204]-[205]:

> *'The assessment whether the Tribunal has complied with s 424A(1) requires close attention to the reasons of the Tribunal, because it is the information that the Tribunal considers relevant that must be assessed in order to see whether, prior to the decision being made, it would be the reason or a part of the reason for affirming the decision.*
>
> *Information is that of which one is told or apprised; it is knowledge communicated concerning some particular fact, subject or event: The Complete Oxford English Dictionary (2nd Ed 1991). In this context, the word has been taken as referring to knowledge of relevant facts or circumstances communicated to, or received by, the Tribunal:* Tin v Minister for Immigration and Multicultural Affairs *[2000] FCA 1109 at [3], approved in* VAF *at [24] or knowledge which has come to, or has been gained by, the Tribunal:* Paul *at [95].'*

30 _____In contrast with the above, the Tribunal's subjective appraisals, thought processes or determinations are not information for the purposes of s 424A: *Tin v Minister for Immigration and Multicultural Affairs* [2000] FCA 1109 at [54], *Paul v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 396 (*'Paul'*) at 428 [95] per Allsop J and *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206

ALR 471 (*'VAF'*) at 476-477 [24] per Finn and Stone JJ. The concept of information does not extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the Tribunal in weighing up the evidence by reference to those gaps: *WAGP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 124 FCR 276 at 282 [26]-[27]. The distinction between 'information' that is part of the Tribunal's reason on one hand, and 'subjective appraisals', 'thought processes' and 'determinations' of the Tribunal on the other hand, may be plain in some cases, but in other cases it may prove to be very fine, if not elusive: *Paul* at 428 [95]; *VWFP and VWFQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 231 [36] (*'VWFP'*).

31 _____It is not necessary that the information is integral to the Tribunal's reasoning process; s 424A(1) is enlivened even if the information forms only a minor or subsidiary part of the Tribunal's reason for affirming the decision under review: *SZEEU* at 252 [158] per Weinberg J and at 262 [215] per Allsop J; and *SAAP* at 179-180 [68] and 184-185 [83] per McHugh J, 203 [173] per Kirby J and 211 [208] per Hayne J.

32 _____The appellant relied on *SZEEU* in support of her contention that the dates of her arrival in Australia and application for a protection visa constituted 'information' for the purposes of s 424A(1). In *SZEEU*, the Full Court considered five appeals that raised similar issues. In one of those appeals, *SZEOP*, the Court held that the date of a protection visa application was 'information' caught by s 424A(1) in circumstances where the Tribunal had regard to the appellant's delay in applying for a protection visa: at 236 [67]-[69], 254 [171] and 267 [253]. In that case, the Tribunal had found that the appellant had arrived in Australia in January 2001 but did not make any claims for refugee status before making his application for a protection visa in August 2004. The Tribunal concluded that the appellant's claims to be a refugee arose out of discussions while he was in immigration detention and affirmed the decision under review.

33 _____In Moore J's reasons for judgment in *SZEEU*, his Honour defined the date of the appellant's protection visa application as 'the date of application information': at 236 [67]. Weinberg and Allsop JJ both adopted Moore J's definition in their separate reasons for judgment. All three judgments appear to proceed on the assumption that 'the date of

application information' was capable of being information for the purposes of s 424A. In the result, their Honours differed as to whether the date of application information was part of the reason for the Tribunal's decision: at 236 [67]-[69] per Moore J, 254 [171] per Weinberg J, and 267 [253] per Allsop J.

34 _____The appellant relied specifically on Allsop J's findings in *SZEEU* at 267 [253]-[254]. There his Honour held that 'the date of application information' was knowledge gained by the Tribunal from the appellant's visa application which formed part of the Tribunal's reasons for its decision. His Honour considered that it was information required to be provided to the appellant in accordance with s 424A(1) because the Tribunal relied upon the fact that the appellant had delayed in applying for a protection visa in finding that the appellant did not fear persecution. Weinberg J agreed with Allsop J: at 254 [171].

35 _____It is also relevant to note that in *VAF* all members of the Court considered that the appellant's tardiness in applying for a protection visa constituted information within the meaning of s 424A, although Finn and Stone JJ (Merkel J dissenting) held that it was not information that formed part of the reasons for the Tribunal's decision.

36 _____Thus, *SZEEU* affords clear authority that the date of a protection visa application may be information required to be provided to an applicant pursuant to s 424A(1) if it is knowledge gained by the Tribunal that forms part of its reason for decision. In the present case, the date of the appellant's arrival in Australia and the date of her protection visa application were relied upon by the Tribunal in concluding that the appellant did not have a well-founded fear of persecution.

37 _____I propose to follow *SZEEU*. In arguing this appeal, the appellant did not contend that *SZEEU* was wrongly decided insofar as it held that the date of a protection visa application can constitute information within the meaning of s 424A(1). Accordingly, for the purposes of this case, I accept that the dates of the appellant's arrival in Australia and her protection visa application constituted information to which s 424A(1) prima facie applies.

38 _____Nevertheless, I feel a degree of unease about the conclusion that the date of a relevant protection visa application, and the date of an applicant's arrival in Australia, constitute information within the meaning of s 424A(1). In the present case, and in most cases, those

dates will not only be uncontentious, they will also be integral to the applications for review and the decisions which are under review at each stage of the process. Here, the appellant's protection visa application contains both dates. The decision by the Minister's delegate to refuse the protection visa application referred to both dates. The appellant was provided with a copy of that decision on 23 November 2004. When the appellant applied to the Tribunal for review of the delegate's decision on 1 December 2004, she did not take issue with the accuracy of the dates recorded in the delegate's decision. It seems somewhat odd, and hardly consistent with the statutory purposes of s 424A, to extend it to information that is basic to the whole review process.

39 _____In *VWFP*, I said at [52]:

> *'In my view, it does not follow from the decisions in* SAAP *and* SZEEU *that the statutory purpose of s 424A is irrelevant to its proper construction and application. In* SAAP, *McHugh J at 181 [73] said that s 424A is a statutory formulation of the obligation to accord procedural fairness in the conduct of a review, and endorsed statements in this Court to the same effect: see* SAAP *at 179 [66]. Hayne J emphasised the crucial role played by the language, scope and objects of s 424A in its construction and application: see* SAAP *at 211 [208]. In* Paul, *Allsop J construed and applied s 424A in the light of its purpose of 'ensuring that the claimant is fully informed of information adverse to his or her case (in the manner described by the section) so that investigation may be made, and steps may be taken, somehow, if possible, to meet it': see* Paul *at 429-430 [104]. In* Al Shamry *at 40 [39], Merkel J said that s 424A enacts a basic principle of the common law rules of natural justice that a person whose interests are likely to be affected by an exercise of power be given an opportunity to deal with relevant matters adverse to his or her interests that the repository of the power proposes to take into account in deciding upon its exercise. Cases may arise in which it is appropriate to take account of the statutory purpose of s 424A in determining whether there is any information within the meaning of s 424A, or whether particular information is the reason, or a part of the reason, for the Tribunal's decision. I do not consider that there is anything to the contrary in* SZEEU.*'*

However, this is not the occasion to reconsider the finding in *SZEEU* that the date of a protection visa application can constitute information that attracts s 424A, as the point was not fully argued before this Court.

40 _____The other observation I would make is that the potential difficulty I have identified is, as Weinberg J observed in *SZEEU* at 254-255 [175]-[180], the product of the legislature's choice of the term 'information' when searching for a global expression to trigger the

operation of s 424A. I doubt that the legislature intended that s 424A should apply to information that is as basic to the whole review process as the dates upon which the applicant arrived in Australia and applied for a protection visa.

The exemption in section 424A(3)(b)

41 _____The second issue is whether the appellant 'gave' the date information to the Tribunal for the purposes of the review, such that the information fell within the exemption in s 424A(3)(b). Counsel for the Minister argued that the appellant gave both pieces of information to the Tribunal for the purposes of her application for review, although he conceded that the appellant had not expressly volunteered the date of her protection visa application at the hearing.

42 _____As to the date of her arrival in Australia, the Minister said that the appellant expressly gave the information to the Tribunal in the following exchange between the appellant and the Tribunal member:

> *'[TRIBUNAL MEMBER]: When did you arrive in Australia?*
>
> *THE INTERPRETER: 11.3.1999.'*

43 _____As to the date of the protection visa application, it was submitted that the giving of the information by the appellant derived from a number of sources. First, the Minister pointed out that the appellant affirmed to the Tribunal that everything she said in her protection visa application was correct. The Minister relied on the following statements by the appellant at the hearing:

> *'[TRIBUNAL MEMBER]: Now, we will come to that part of the hearing where I want to put a number of questions to you. The first I must ask, is everything you have said in your Protection Visa application, your application for review and other statements correct in every respect?*
>
> *THE INTERPRETER: Yes.*
>
> *[TRIBUNAL MEMBER]: Are there any changes that you would like to make?*
>
> *THE INTERPRETER: No.'*

44 _____Secondly, the Minister relied on a statement by the appellant's adviser in the written

submissions which were provided to the Tribunal for the purposes of the review. The adviser's letter to the Tribunal said that 'the [appellant's] claims were stated in a document attached to her protection visa.' The document attached to her protection visa ('the appellant's statement') was dated 17 November 2004. It was contended that the date of the actual application can be inferred from the date of the appellant's statement, as it is logical that the statement would have been prepared at about the same time as the application was made. The Minister submitted that even if the precise date of the protection visa application cannot be inferred, the precise date was not of significance to the Tribunal; rather it was the five and a half year delay between the appellant's arrival in Australia in 1999 and her application for a protection visa in 2004 which formed part of the reason for the Tribunal's decision. Thus, it was submitted that the appellant gave the relevant information to the Tribunal within the meaning of s 424A(3)(b), by way of the written submissions provided by her adviser to the Tribunal on 24 January 2005.

45 _____Thirdly, the Minster relied upon a number of other references in the transcript of the Tribunal hearing in which the Tribunal member mentioned the date of the appellant's protection visa application and the delay between her arrival in Australia and her application for a protection visa. The appellant responded that 'all I said was truth' and said that she held a 'varied visa' (presumably a business visa) when she arrived in Australia, and that back then, she didn't know that visas such as protection visas existed.

46 _____The appellant contended that none of these events enliven the exemption in s 424A(3)(b).

47 _____In relation to the date of her arrival in Australia, the appellant contended that s 424A(3)(b) is not applicable because the Tribunal raised the issue of the protection visa application form and the answers contained in it during questioning of the appellant in the course of the hearing. In relation to the date of her application for a protection visa, the appellant submitted that at no time did she give the date of her original application to the Tribunal.

48 _____The appellant relied heavily on Jacobson J's decision in *NAZY v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 87 ALD 357 ('*NAZY*') at 363 [39]. In that case, Jacobson J held that the exemption in s 424A(3)(b) applies to information

from a protection visa application which an applicant for review expressly adopts and puts forward as part of his or her application for review by the Tribunal. Following Gray J's approach in *M55 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 131 ('*M55'*), but distinguishing the case on the facts, Jacobson J held that information provided by an applicant during questioning by the Tribunal member in the course of a hearing does not fall within the scope of s 424A(3)(b). His Honour held that the mere adoption of an earlier statement at the hearing before the Tribunal does not render it information given by the applicant for the purposes of the review. The appellant submitted that Jacobson J's approach in *NAZY* was accepted as correct by Moore J in *SZEEU* at 225 [20]: see also Weinberg J at 252 [157]; cf *SZERV v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1221 per Dowsett J.

49 _____The Minister submitted that Jacobson J's finding in *NAZY* that the information must be expressly adopted and put forward by an applicant, as opposed to being proffered as a response to the Tribunal's questioning, should be regarded as 'a gloss on the words of s 424A(3)(b)'. It was submitted that *NAZY* should not be read as authority for the proposition that the Tribunal cannot elicit information from an applicant through questions, the answers to which fall within s 424A(3)(b).

50 _____The principle which the appellant extracts from *NAZY* is that information must be put to the Tribunal 'in chief', rather than being elicited by the Tribunal's own questions, in order to fall within the exemption in s 424A(3)(b). The rationale for this narrow approach to the exemption is that by giving the information to the Tribunal other than by way of response to questioning, the applicant is assumed to be aware of the significance of the information: *NAZY* at 363 [37]. In some circumstances, *NAZY* may reflect an understandable approach to the particular facts. But in the present case, where the date information comprises no more than basic facts known to the appellant which are foundational to the application for review, I consider that the appellant's reliance on *NAZY* is stretched too far.

51 _____In *M55*, Gray J held at [24] that the Magistrate had erred in finding that the provision of the appellant's passport as part of the original protection visa application was sufficient to exclude the operation of s 424A(1). However, Gray J went on to find at [25] that because the appellant's counsel had provided a written submission to the Tribunal which expressly relied

upon the terms of his protection visa application, he had thereby invited reference to the copy passport which was attached to his application form. His Honour said that there could be little doubt that the appellant intended the Tribunal to look at this material. In his Honour's view, it was sufficient for the appellant to be taken to give the information contained in the copy passport to the Tribunal for the purpose of his application for review, and held that the information fell within s 424A(3)(b).

52 _____In *NAZY*, the relevant information comprised a statement in the protection visa application that the applicant had not previously been convicted of a crime or offence in any other country. Subsequently, the applicant stated in his application to the Tribunal that he had been convicted of an offence in India. In the course of the hearing, the Tribunal asked the applicant who had completed the protection visa application for him in English, as he was not fluent in English. The applicant said that a friend had completed it for him. Later, the Tribunal asked the applicant to explain the inconsistency between the statement in the protection visa application and his subsequent statement that he had been convicted of an offence. The applicant's response was that the inconsistency was as a result of a translation. In these circumstances, it is not difficult to understand Jacobson J's conclusion at [39] that it cannot be said that the appellant provided the information in the protection visa to the Tribunal as part of his application. It is, however, another step to accept the general proposition that information given in the course of a Tribunal hearing must be put forward in chief before it can fall within the exception in s 424A(3)(b).

53 _____In *VWBF*, a letter had been written on behalf of the appellant to the Tribunal which invited the Tribunal to refer to '[m]y tape recorded interview at the DIMIA on 13th March 2002.' The appellant had made statements in that interview which was 'information' to which s 424A(1) applied. The issue for consideration by Heerey J was whether the exemption in s 424A(3)(b) applied because the appellant had 'given' this information for the purposes of the review. After a review of the authorities on s 424A(3)(b), Heerey J concluded at [48]-[51]:

> *'For no apparent reason, almost all the discussion of s 424A(3)(b) in the cases proceeds on the basis that the provision uses the word "provide". The subsection in fact uses the verb "to give", which simply conveys the notion of delivering or handing over (Shorter Oxford English Dictionary). If this matter were free from authority, there would be much to be said for the view*

> *that an applicant "gave" information for the purpose of the Tribunal review application if the information was delivered to the Tribunal by the applicant, whether in answer to a question asked by the Tribunal or whether volunteered. Either way, the information is conveyed from applicant to Tribunal. If we were to read or hear "At the trial, A gave information about fact X to the court", we would take that as equally comprehending the possibility of A giving evidence about X in chief, or in cross-examination, or in answer to a question from the judge.*
>
> *Likewise, if an applicant says to the Tribunal "What I said in my visa application is true" and that application contains fact X, the normal meaning conveyed would be that the applicant is giving the information constituted by fact X to the Tribunal, as well as the further fact that fact X had been asserted by the applicant when he made the visa application.*
>
> *Such a reading of s 424A(1) and (3)(b) would be consistent with common law concepts of natural justice which require the decision-maker to give the person affected notice of relevant information obtained from another source but not, generally speaking, to invite comment on the evaluation of material submitted by the person himself: see* Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd *(1994) 49 FCR 576 at 591-592 and the cases there cited.*
>
> *In any event, in the present case, the information in question was positively advanced on behalf of the appellant in the letter of 9 December 2002. The reasoning in* M55, SZCKD, SZCJD *and* SZDPY *applies.'*

54 _____Heerey J also considered whether the Full Court's decision in *SZEEU* can be regarded as an endorsement of the decision in *NAZY*, and he concluded that it cannot. In one of the five appeals considered in *SZEEU*, *SZBMI*, the appellant's protection visa application attached a written statement in which the appellant explained in some detail the circumstances in which he had fled overseas from Bangladesh ('the flight information'). Before the Tribunal, the appellate confirmed that he had read his earlier statement before signing it and that it contained true and correct information. This evidence founded a submission that the flight information had been adopted at the hearing before the Tribunal and consequently fell within the exception in s 424A(3)(b). Moore J did not accept that this evidence transformed the flight information into information that the appellant had provided to the Tribunal in his application for review. His Honour added that, in his opinion, the approach of Jacobson J in *NAZY* was correct. Weinberg J said at [157] that the adoption of the earlier statement by the appellant did not render it information provided by him in his application for review. Allsop J agreed with Moore J that the flight information fell within s 424A(1). His Honour did not expressly address the exception in s 424A(3)(b): at [219].

55 _____This discussion can be contrasted with the Full Court's discussion of one of the other appeals under consideration in *SZEEU*, namely *SZDXA*. There, the relevant information was the fact that the appellant had a temporary business visa to Australia. Moore J concluded that, while the Tribunal originally came to know of this fact from sources other than the appellant, it was tolerably clear from the Tribunal's reasons that it had discussed the fact with the appellant during the course of his evidence and he had affirmed that he had entered Australia on a business visa. In these circumstances, Moore J concluded that the information fell within the exception in s 424A(3)(b): at [91]. Weinberg J agreed with Moore J: at [173]. Later in his judgment and in the course of more general observations, Weinberg J said that the adoption of an earlier statement in the course of evidence can bring it within the scope of s 424A(3)(b): at [179]. Allsop J agreed with Moore J's conclusions and reasons in relation to the appeal in *SZDXA*: at [263].

56 _____The different ways in which the Full Court approached the s 424(3)(b) issue in *SZBMI* and *SZDXA* may be explicable on the basis that the first case concerned a detailed statement concerning flight information, whereas *SZDXA* concerned a specific piece of factual information (entering Australia on a business visa) which was adopted in terms by the appellant in the course of his evidence. For present purposes, however, the important point that emerges from this discussion is that the decision of the Full Court in *SZEEU* does not endorse the generality of the principle that the appellant in this case seeks to draw from *NAZY*.

57 _____In *SZCJD v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 609 ('*SZCJD'*), Heerey J said at [42] that the exception in s 424A(3)(b) would apply to information which is affirmed by an applicant for the purposes of the review, even if the information might also have been obtained by the Tribunal from another source. His Honour referred to Moore J's reasons in *SZEEU* at 242 [91], with whom Weinberg J at 254 [173] and Allsop J at 268 [264] agreed. In circumstances where the information is necessarily within the knowledge of the applicant himself, his Honour held at [43] that:

> *'To conclude that an applicant "gave" information for the purpose of the Tribunal application it is not necessary that the information was initially volunteered by the applicant. Information is equally given if it comes in response to questioning by the Tribunal.'*

There is no inconsistency between this approach and *SZEEU*: see also *SZHFC v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 1359 at [24]-[25].

58 _____In *SZDPY v Minister for Immigration and Multicultural Affairs* [2006] FCA 627 ('*SZDPY*'), Kenny J considered the circumstances in which information provided by the applicant for review during the Tribunal hearing will fall within the exemption in s 424A(3)(b). In that case, the appellant provided answers in response to questions posed by the Tribunal about his educational history. The appellant argued that the information was not subject to the exemption in s 424A(3)(b) because it had been given in response to questions in the nature of 'cross examination' by the Tribunal. Kenny J rejected the appellant's argument. Her Honour found that the Tribunal's questions were specific and arose, naturally enough, from the appellant's visa application, and the appellant gave direct answers. Her Honour noted that the relevant information was simple and could easily be given in response to such questions. Kenny J held that the Full Court's reasoning in *SZEEU* supports the proposition that where an applicant affirms a specific fact before the Tribunal, that information will be covered by s 424A(3)(b): see *SZEEU* at 242 [91] per Moore J, at 214 [173] per Weinberg J, and at 268 [264] per Allsop J. Her Honour concluded at [35] that while the Tribunal had reference to the appellant's visa application in discussing some aspects of the information with the appellant, the appellant 'gave' the Tribunal the relevant information at the Tribunal hearing.

59 _____These authorities highlight the importance of giving careful consideration to the nature of the information that is said to fall within s 424A(3)(b) and the circumstances in which it is communicated to, or elicited by, the Tribunal. There may be good reasons for requiring that the applicant affirm or actively give specific 'information' for the purposes of the review, in order for the exemption in s 424A(3)(b) to apply. Both *SZEEU* and *NAZY* suggest that the exception may not apply where the appellant does no more than affirm the accuracy of a statement which contains many diverse pieces of information. At the same time, the weight of authority indicates that artificial distinctions should not be drawn between information that is provided by an applicant in the course of his evidence in chief rather than in answer to questions posed by the Tribunal.

60 _____In the present case, the relevant information was uncontentious factual material that formed an essential element of the decisions which were under review by the Tribunal. The

appellant either expressly provided or affirmed the relevant dates in response to basic propositions put by the Tribunal at the hearing. The Tribunal's questions arose naturally from the appellant's application. In these circumstances, and given the uncontentious factual nature of the information, I consider that the exemption in s 424A(3)(b) applies.

61 _____The appellant expressly stated the date of her arrival in Australia to the Tribunal at the hearing. I do not accept the appellant's argument that s 424A(3)(b) cannot apply because the date was given in response to a question posed by the Tribunal. The mere fact that the Tribunal elicited a response from the appellant, which confirmed an uncontentious detail of her application, does not render the information incapable of falling within the exemption in s 424A(3)(b). It is not inconsistent with *NAZY* or *SZEEU* to hold that the exemption applies in such circumstances, given the nature of the information and the context in which it was communicated.

62 _____I also find that the appellant 'gave' the date of her arrival in Australia and the approximate date of her protection visa application via her visa application and the written submissions provided to the Tribunal by the appellant's adviser. The appellant affirmed that the details of her application were correct. The written submissions contained a statement which expressly referred to the appellant's statement attached to her protection visa application. In that statement, which was dated 17 November 2004, the appellant said that she 'came to Australia on strength of a 457 working visa on 11.3.99'. Thus, for the purposes of s 424A(3)(b), the information was given in the written submissions: *VWBF* at [51].

63 _____Furthermore, by filing written submissions with the Tribunal that expressly referred to and incorporated the statement of grounds which was attached to her visa application, the appellant invited the Tribunal to refer to her protection visa application. As in *M55*, there can be little doubt that the appellant intended that the Tribunal should look at her protection visa application and its attachments. This is a sufficient basis to find that the appellant gave the date of her protection visa application to the Tribunal for the purposes of the review application.

64 _____It follows that this ground of appeal must fail.

THE APPELLANT'S ALLEGED FEAR OF RELIGIOUS PERSECUTION

65 _____The second ground of appeal was based on the appellant's claim to fear persecution by reason of her Christianity. The appellant claimed that the Federal Magistrate had erred in not holding that the Tribunal had committed jurisdictional error by reason of its failure to ask itself the correct question or apply the right test. In the amended particulars, the appellant contended that the Federal Magistrate had wrongly applied *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 216 ALR 1 ('*NABD*') instead of *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 ('*S395*') in considering whether the appellant had a well-founded fear of persecution for reasons of her religion.

66 _____In *NABD*, McHugh J summarised two errors that were made by the Tribunal in *S395*. The first error was described by McHugh J at 8-9 [28] of *NABD* as the Tribunal's failure to exercise its jurisdiction because it had erroneously assumed that it is reasonable for a homosexual person in Bangladesh to conform to the laws and social expectations of Bangladeshi society and practise their homosexuality discreetly. In *S395*, this assumption led to error because the Tribunal failed to consider the reasons why the applicants had acted discreetly in the past and what consequences might attach if they lived openly as homosexuals in Bangladeshi society. The second error was that, by classifying the applicants as discreet homosexuals and analysing the amount of persecution that may be expected by that group, the Tribunal failed to assess the applicants as individuals: see McHugh J in *NABD* at 9 [29].

67 _____In *NABD*, the appellant relied on *S395* to support his claim that the Tribunal had failed to ask the correct question because it had sought to categorise the way in which he expressed his religious belief with insufficient regard to his individual circumstances. The High Court (Gleeson CJ, Hayne and Heydon JJ, McHugh and Kirby JJ dissenting) distinguished *S395*. Based on the material before the Tribunal, including information about the appellant's conduct while in detention in Australia, the majority held that it was open to the Tribunal to conclude that, were the appellant to practise his religion in the way that he chose to do so, there was no real risk of persecution on his return to Iran: at 4 [11] per Gleeson CJ and at 40 [167]-[168] per Hayne and Heydon JJ.

68 _____It is instructive to examine the reasons given by the majority. Gleeson CJ said that, having found that the appellant had become a Christian after leaving Iran, the Tribunal correctly addressed the question of what was likely to happen to the appellant on account of his religion if he returned to Iran. In addressing that question, it was open to the Tribunal, as a matter of factual judgment, to accept the distinction offered by the country information between converts to Christianity who go about their devotions quietly and persons involved in active proselytising, and to regard it as useful in considering the individual position of the appellant: at 3-4 [7]-[11]. In their joint judgment, Hayne and Heydon JJ pointed out that the Tribunal had made findings about the way in which the appellant had practised his faith and about what he would chose to do in Iran. In particular, the Tribunal found that the appellant was not constrained in the practice of his faith and nor would he be in Iran due to a perception that to behave more openly or aggressively would leave him at risk of persecution: at 40 [166]. Their Honours concluded at 40 [168]:

> *'At no point in its chain of reasoning did the tribunal divert from inquiring about whether the fears which the appellant had were well founded. It did not ask (as the tribunal had asked in Appellant S395/2002) whether the appellant could* avoid *persecution; it asked what may happen to the appellant if he returned to Iran. Based on the material the tribunal had, including the material concerning what the appellant had done while in detention, it concluded that were he to practise his faith in the way* he *chose to do so, there was not a real risk of his being persecuted.'*

Accordingly, Hayne and Heydon JJ held that the Tribunal did not ask itself the wrong question. It considered whether the appellant had a well-founded fear of persecution if he returned to Iran; it did not ask whether it was possible for the appellant to live in Iran in such a way as to avoid adverse consequences: at 36 [151].

The Tribunal's consideration of the appellant's religious activities

69 _____Adapting the language in *S395*, the appellant contended that that the Tribunal erroneously assumed that it was reasonable for Christians in China to practise their faith in conformity with the laws of China. The appellant said that the Tribunal should have considered whether there was a chance that the appellant would not join the official Catholic or Protestant Church on her return to China but, instead, would join an unofficial Christian church; and, if those events transpired, whether there was a chance that the appellant would suffer persecution for reasons of her religion as a member of an official Christian church. It

was contended that the Tribunal's failure to ask the right question amounted to a substantive error of law going to jurisdiction: *Craig v The State of South Australia* (1995) 184 CLR 163 at 179.

70 _____The appellant submitted that her claims concerning her Christianity should have put the Tribunal on notice that she may not practise her religion in an official church in China. The appellant relied on the fact that she told the Tribunal that she was not a Catholic or a Protestant, she did not know what denomination she was, and she was not associated with any particular church. The written submissions prepared by her adviser stated that she fears that 'because she has become a Christian she will be persecuted by Chinese authorities because "Christians are persecuted in China".'

71 _____The appellant submitted that the Tribunal and the Federal Magistrate erroneously relied upon the 'limited' nature of the appellant's claims concerning her Christianity. Counsel for the appellant conceded that the claims were not 'comprehensive' or 'exhaustedly described'. Nonetheless, it was submitted that the material was sufficient – 'just sufficient' – to put the Tribunal on notice that there was a chance or possibility that she would not practise her Christianity in an official church in China. Having raised that possibility, it was contended that the Tribunal should have decided, on the basis of all the circumstances, whether there was a real chance that the appellant would be persecuted in China.

72 _____Additionally, the appellant contended that the Tribunal failed to consider the clear distinction in the country information between Christians practising in official and unofficial Christian churches. The appellant argued that the Tribunal failed to turn its mind to the appellant's beliefs and ask whether there was a chance that she would join an unregistered church. The appellant argued that the Tribunal had asked the question whether the appellant could live in China and practise her religion without attracting adverse consequences. It was submitted that this was the wrong question: *S395* at 500 [80] per Gummow and Hayne JJ. She submitted that an imperative preliminary question to the fundamental question whether she had a well-founded fear of persecution is whether or not there was a chance that the appellant would join an official or an unofficial Christian Church. The appellant said that the Tribunal did not consider the latter scenario, and so committed jurisdictional error.

73 _____The appellant's argument seeks to build a 'chance' upon a 'chance'. In my view, this

argument finds no support in the authorities. It is well established that the Tribunal is not obliged to make out the appellant's case: *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510 at 576 [187] per Gummow and Hayne JJ. Given the general nature of the appellant's claims concerning her Christianity, the Tribunal was under no obligation to determine whether there was a chance that she would join an unofficial church before proceeding to ask the fundamental question whether there was a chance that she would be persecuted in China for reasons of her religion. It was open to the Tribunal on the material before it to conclude that there was no real chance that the appellant would be persecuted in China for reasons of her religion. The appellant was indifferent about what sort of Christian church she had joined, or may choose to join in China, and the Tribunal approached the question on that basis. In the circumstances, the Tribunal was not obliged to speculate whether she would or would not join an official or unofficial church in China, or to assess whether or not there was a chance that she would be persecuted in China because of her Christian faith on the basis of a hypothetical possibility that she would join an unregistered Christian church on her return to China.

74 _____In my view, the appellant's argument involves a distortion of the approach that the High Court endorsed in *S395* and *NABD*. In effect, the argument uses the very vague and general claims that the appellant made concerning her practice of Christianity as the basis for arguing that the Tribunal was bound to address the possibility that the appellant might join an unofficial Christian church in China. However, the appellant did not give any evidence or make any claims to suggest that she intended to join, or would join, an unofficial Christian church if she returned to China. Further, nothing about her background or individual circumstances suggested that she would do so. In this Court, counsel for the appellant acknowledged that the possibility that the appellant might join an unofficial Christian church if she returned to China was not based on anything that appeared from the appellant's own evidence, claims or individual circumstances. Rather, it depended solely on the fact that the written submissions that accompanied her application to the Tribunal referred to a country report by the US Department of State that said that the Government in China sought to restrict religious practice to government-sanctioned organisations and registered groups. This is a wholly inadequate basis for the contention that the Tribunal fell into jurisdictional error.

75 _____The High Court's decision in *NABD* makes it clear that, where the Tribunal accepts

that an applicant has become a Christian, the Tribunal's task is to determine what is likely to happen to the applicant on account of the applicant's religion if he or she is returned to the country of origin. This is a factual inquiry which must be undertaken by reference to the applicant's individual circumstances. In the present case, based on the appellant's own evidence, including her religious practice in Australia, the Tribunal concluded that if she were to continue to practice her Christianity in the way she had chosen, there was no real risk of her being persecuted on account of her religion if she returned to China. The Tribunal's approach discloses no error of law.

76 _____The appellant agitated substantially similar arguments before the Federal Magistrate. Having considered the argument in detail, the Federal Magistrate found that the Tribunal did not ask itself the wrong question. Her Honour found that the Tribunal had considered the fundamental question whether the applicant had a well-founded fear of persecution on the ground of religion if she returned to China. In doing so, it had rightly considered what the appellant would do, not what she was entitled to do, 'insofar as possible on the limited claims before it'. The Federal Magistrate pointed out that the appellant had not drawn a distinction between members of official or unofficial churches, although the written submissions had made mention of human rights practices in China and the government's attitude to religion. Further, the appellant made no claims before the Tribunal about the manner in which she would practise her Christianity in China other than that she wished to continue to practise her religion. Her Honour went on to state at [44]-[45]:

> *'It is apparent that the Tribunal proceeded on the basis that it accepted the limited claims made by the applicant, about what she would do – that she wanted to believe in Christianity for the rest of her life and would be heartbroken if she could not practise it. Critically, it did not proceed on an erroneous "assumption" that it was reasonable for a Christian person in China to conform to the laws of China. It did not merely ask itself whether she may face persecution if she were to join the official church. It sufficiently addressed the distinction between official and unofficial churches (albeit briefly) in the particular circumstances of this case in noting (as was relevant to its conclusion about the limited nature of the applicant's claims) that she did not claim that she would refuse to join the unofficial church and, more pertinently given the Tribunal's view of the independent information relied on, that she did not claim that she would deliberately defy the Chinese government.*
>
> *As was acknowledged by counsel for the applicant, the applicant's description of what she would do in China was far from "comprehensive" and*

> *exhaustively described (see* Appellant S395/2002 *per Gummow and Hayne JJ at [83]). However this does not lead to the conclusion that in this case the Tribunal asked what it was reasonable for the applicant to do rather than what she would do leading it to engage in an inappropriately narrow inquiry. It did not erroneously assume that the applicant could join the official church. It was open, given the limited claims made by the applicant, for the Tribunal to proceed on the basis that the applicant would merely seek to practise her Christianity without defying the government. It considered the applicant's individual circumstances based on her limited claims and what may happen if she returned to China in light of the available information. It is apparent from the Tribunal decision and the independent information relied on by the Tribunal that, rather than failing to consider whether the applicant would join an unofficial church, the Tribunal took this possibility into account. This is consistent with the Tribunal's reliance on information which referred to the millions of Christians in China (in both official and unofficial churches) and the fast growth of the Christian church in China (including unofficial church members estimated to be between 30 and 50 million).'*

77 _____I respectfully agree with the Federal Magistrate.

78 _____The appellant mounted similar arguments by reference to the second error identified by McHugh and Kirby JJ in *S395*. She complained that the Tribunal erred by selectively relying on the country information and failing to distinguish between 'Christians who are likely to join a registered church' and 'Christians who are likely to join an unofficial church'. The appellant contended that the Tribunal's failure to comprehend the difference in the Chinese authorities' attitude to official churches, compared with unofficial churches, caused the Tribunal to consider the appellant's claims in an impermissibly limited way. The appellant argued that by categorising the appellant simply as a Christian, and failing to consider whether there was a chance that she would join an unofficial church in China, the Tribunal had failed to consider her individual circumstances and thus fell into jurisdictional error.

79 _____This argument was also raised by the appellant in the Federal Magistrate Court. The Federal Magistrate pointed out that the Tribunal made findings, as far as possible, about the way in which the appellant would choose to practise her faith in China based on the information before it. It related those conclusions about her individual circumstances – in particular that she would not deliberately defy the Chinese government but just wanted to practise Christianity – to the information it had about conditions in China in relation to Christians and Christianity both in the official and unofficial churches. In her Honour's view,

there was no lack of logic in the Tribunal choosing to take into account the information that it did.

80 _____The Federal Magistrate also rejected the appellant's contention that the Tribunal reached a conclusion that 'registered and unregistered churches were treated similarly by authorities'. Her Honour was satisfied that the Tribunal had not erred in this regard as its ultimate concern was with the applicant, not with Christians as a class. Her Honour stated, quite properly, that it was for the Tribunal to determine as a matter of factual judgment whether to accept any distinction between official and unofficial churches (or some other categorisation of Christian) made by independent information and to regard it as useful in considering the position of the appellant: *NABD* at 3 [8] per Gleeson CJ.

81 _____I find no error in her Honour's conclusions. It is not for this Court to reconsider the Tribunal's factual findings as to the applicant's involvement in the Christian faith and what country information was relevant in determining whether a well-founded fear of persecution arose. As the Federal Magistrate rightly found, the Tribunal gave proper consideration to the particular circumstances of the applicant on the limited evidence she had advanced about her practice of Christianity. Moreover, as the Federal Magistrate noted, even if it could be said that there was other information available to the Tribunal which was contrary to that relied on by it, it was a matter for the Tribunal to decide what weight should be given to particular items of country information as part of its fact-finding function: *NABD* at 3 [8] per Gleeson CJ; *SZANK v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1478 at [16] per Hely J.

82 _____No error has been identified in the Federal Magistrate's decision, or in the reasons or conclusions of the Tribunal.

PROCEDURAL FAIRNESS – INACCURATE COUNTRY INFORMATION

83 _____The proposed amended notice of appeal contains an allegation that the appellant was denied procedural fairness in the way in which she was questioned by the Tribunal. The specific ground of appeal is that the Tribunal put to the appellant for comment the proposition that independent country information revealed that 'registered and unregistered churches were treated similarly by authorities, and there is co-existence and cooperation between

official and unofficial churches, both Catholic and Protestant, which is very blurred between the two'. The appellant contends that the country information provided no support for this proposition, and was in fact to the contrary effect. Consequently, the appellant contends that she was denied procedural fairness.

84 _____Although this argument appears in the proposed notice of appeal, it was barely touched upon in oral argument. In my opinion, the argument has no merit. The assessment of country information falls squarely within the Tribunal's province as the finder of fact: *NABD* at 3 [8] per Gleeson CJ. As I have said, the Federal Magistrate considered the Tribunal's assessment of the country information and its categorisation of Christian groups and found no error. In my view, the assessment that the Tribunal made of the country information was open to it.

85 _____Further, there is no scope for the operation of general requirements of procedural fairness outside the specific provisions of Division 4 of Part 7 of the Act: see s 422B(1); *Minister for Immigration and Multicultural and Indigenous Affairs v Lay Lat* (2006) 151 FCR 212 at 225 [66]; and *SZCIJ v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 62 at [8]. And, even if there were scope, I do not consider that the proposition that the Tribunal put to the appellant concerning the position of registered and unregistered churches in China involved any infringement of procedural fairness.

Section 91R(3)

86 _____After the Tribunal had dealt with other issues and towards the end of its reasons for decision, it referred to s 91R(3) and said:

> *'Given her limited knowledge about Christianity and vague and unsubstantiated claims about practicing it here (for example she does not provide any evidence of her Baptism, church attendance, or even a letter from the local pastor or priest supporting these claims), the Tribunal is satisfied that she had only become a Christian in order to strengthen her claims for a protection visa. Accordingly, the Tribunal has therefore disregarded this evidence and her participation in the events they record.'*

87 _____Relying on this passage, the Minister submitted that the appellant's conversion to Christianity and her practice of Christianity in Australia constituted 'conduct' which must be disregarded for the purposes of assessing whether she had a well-founded fear of persecution

if she were to return to China. The Minister pointed out that the appellant had withdrawn any ground of appeal relating to s 91R and submitted that s 91R was a complete answer to the appellant's case.

88 _____Section 91R(3) provides:

> *'(3) For the purposes of the application of [the Migration Act] and the regulations to a particular person:*
>
> *(a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;*
>
> *disregard any conduct engaged in by the person in Australia unless:*
>
> *(b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.'*

89 _____Section 91R places the onus of proof on the appellant to establish that her activities in Australia were engaged in for reasons other than for the purpose of strengthening her refugee claims. The onus of proof is to the civil standard; but it is borne by the applicant: *NAST v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1536 at [26] per Wilcox J.

90 _____The Tribunal appears to have accepted that the appellant had become a Christian in July 2004, although she did not identify herself as belonging to a particular denomination. On these facts alone, the Tribunal was obliged to consider properly her claim to fear persecution in China for religious reasons. The appellant was not claiming that if she went back to China she would be persecuted because of any particular conduct that she engaged in whilst in Australia. Rather her claim was that if she went back to China she would be persecuted because of her conversion to Christianity and her desire to practice her religion in China.

91 _____The Minister's argument raises a question whether the acquisition of religious faith can be regarded as 'conduct' within the meaning of s 91R. The appellant submitted that there is an important distinction between the fact of her conversion to Christianity, and subsequent

conduct which she engaged in, by way of practice of her Christian faith, in Australia.

92 _____In *SBCC v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 129 (*'SBCC'*), French, Lander and Besanko JJ considered the application of s 91R(3) in the context of a claim based on the appellant's religious practices in Australia. The Court said at [43]:

> *'It is sufficient to say that the Tribunal's findings of fact were clear and open on the evidence and were fatal to the appellant's claims. The Tribunal found that the appellant had fabricated his claim to be a Falun Gong practitioner since 2002. It accepted that he had done Falun Gong exercises while in detention but because of his fabrication of earlier involvement and what it regarded as his superficial knowledge, the Tribunal was not satisfied that he had engaged in the more recent activities other than for the purpose of strengthening his refugee claim.'*

93 _____Their Honours continued at [45]:

> *'Whatever reservations might properly be held about the exploration of a person's religious knowledge in determining whether he or she is an adherent to a particular religion, it does provide a rational foundation for determining whether a person's claim to profess a particular religion is genuine. Such an inquiry is necessary in a case in which a person claims that his or her continued adherence to a religion upon return to the home country will attract persecution on that ground. Here, there was ample ground for the Tribunal to find that the appellant's case was fabricated and, a fortiori, that it could not be satisfied as required by s 91R(3) that his engagement in Falun Gong activities was otherwise than for the purpose of strengthening his claim to be a refugee.'*

94 _____The Court in *SBCC* accepted that it is open to the Tribunal to find as a fact that a person's claim to profess a particular religion is not genuine. However, the decision does not go so far as to say that s 91R(3) can be applied to disregard a person's decision to adopt a particular religion; rather s 91R(3) was applied to disregard the applicant's engagement in Falun Gong activities.

95 _____Unlike *SBCC*, the Tribunal in the present case did not expressly find that the appellant's conversion to Christianity had not occurred or that it was not genuine. In fact, the Tribunal's observation that it was satisfied that she had only become a Christian in order to strengthen her claims for a protection visa seems to accept that she did in fact become a

Christian. It is one thing for the Tribunal to find that a claim to religious conversion is not genuine. It would be another thing for a Tribunal to accept that a religious conversion was genuine, but then to conclude that the fact of conversion should be disregarded under s 91R(3).

96 _____Conversion is a matter of conscientious belief rather than conduct: *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548 at 552 [16] per Gray J. In cases where the fact or genuineness of a religious conversion is not in dispute, I have considerable doubt whether s 91R(3) would authorise the Tribunal or the Court to disregard the fact of religious conversion, as distinct from conduct that might thereafter be engaged in by the convert in Australia.

97 _____In the circumstances of this case, however, it is unnecessary to express any final view on this issue. Before the Tribunal referred to s 91R(3), the Tribunal made findings about the appellant's knowledge and practice of her Christian faith. Moreover, the Tribunal addressed the issues on the premise that the appellant had in fact genuinely converted to Christianity, and proceeded to consider the appellant's claim to fear persecution on the basis of her Christianity. The Tribunal's primary conclusions on the question whether the appellant had a well-founded fear of persecution on religious grounds stand quite independently of the observation that the Tribunal subsequently made concerning the application of s 91R(3).

98 _____Similar observations may be made concerning the decision of the Federal Magistrate. The Federal Magistrate observed that the Tribunal only referred to s 91R(3) after finding against the applicant on the broadest basis of accepting that she was a Christian. The balance of the Federal Magistrate's discussion was directed towards grounds of appeal that have now been abandoned.

99 _____Accordingly, I consider that the appeal can be disposed of without determining whether or not the Minister's reliance on s 91R(3) was misplaced.

ORDERS

100 _____For the reasons above, I would grant leave to amend the notice of appeal and dismiss the appeal. I would also order that the appellant pay the Minister's costs of the appeal.

I certify that the preceding ninety-eight (98) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Young.

Associate:

Dated: 20 December 2006

Counsel for the Appellant:	J Griffiths SC and C Bova (pro bono)
Counsel for the First Respondent:	T Reilly
Solicitor for the First Respondent:	Phillips Fox
Date of Hearing:	16 August 2006
Date of Judgment:	20 December 2006