FEDERAL COURT OF AUSTRALIA

MZYIA v Minister for Immigration and Citizenship [2011] FCA 642

Citation:	MZYIA v Minister for Immigration and Citizenship [2011] FCA 642
Appeal from:	MZYIA v Minister for Immigration & Anor [2010] FMCA 734
Parties:	**MZYIA v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL**
File number:	VID 917 of 2010
Judge:	**GRAY J**
Date of judgment:	8 June 2011
Catchwords:	**MIGRATION** – visa – protection visa – Tribunal's obligation to give particulars of information it considers might be the reason, or part of the reason, for affirming the decision to refuse to grant visa – Tribunal procured information about an interview given by appellant in relation to proposed cancellation of student visa – whether Tribunal considered this information might be part of the reason for affirming the decision to refuse visa – relevance of Tribunal's reasons for decision
Legislation:	*Migration Act 1958* (Cth) ss 5(1), 36, 91R(3), 424, 424(1), 424A, 424A(1), 424A(2A), 424A(3), 424A(3)(ba), 424AA, 424B(1), 430(1) *Convention relating to the Status of Refugees done at Geneva on 28 July 1951* *Protocol relating to the Status of Refugees done at New York on 31 January 1967*
Cases cited:	*Baig v Minister for Immigration & Multicultural Affairs* [2002] FCA 380 referred to *MZYIA v Minister for Immigration & Anor* [2010] FMCA 734 reversed *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26 (2007) 235 ALR 609 discussed *SZMNP v Minister for Immigration and Citizenship* [2009] FCA 596 followed *SZMPT v Minister for Immigration and Citizenship* [2009] FCA 99 followed

Date of hearing:	17 February 2011
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	37
Counsel for the appellant:	Mr G Gilbert
Solicitor for the appellant:	Victoria Legal Aid
Counsel for the first respondent:	Ms C Symons
The second respondent submitted to any order the Court might make, save as to costs	
Solicitor for the respondents:	Clayton Utz

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 917 of 2010**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MZYIA** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**GRAY J**
DATE OF ORDER:	**8 JUNE 2011**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The order made by the Federal Magistrates Court on 11 October 2010, in proceeding number MLG 446 of 2010, be set aside.

3. There be substituted for that order the following orders:

    (1) A writ of certiorari issue, directed to the second respondent, removing into this Court the decision of the second respondent, made on 26 February 2010, affirming a decision of a delegate of the first respondent to refuse to grant to the appellant a protection visa, for the purpose of quashing that decision;

    (2) The decision of the second respondent, made on 26 February 2010, affirming the decision of a delegate of the first respondent refusing to grant the appellant a protection visa be quashed;

    (3) A writ of mandamus issue, directed to the second respondent, requiring it to hear and determine the application of the appellant for review of a decision of a delegate of the first respondent refusing to grant a protection visa to the appellant, according to law;

(4) The first respondent pay the appellant's costs of the proceeding in the Federal Magistrates Court.

4. 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. The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 917 of 2010**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MZYIA** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**GRAY J**
DATE:	**8 JUNE 2011**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

The nature and history of the proceeding

1 The question in this appeal is whether the Refugee Review Tribunal ("the Tribunal"), the second respondent, failed to comply with a statutory procedural requirement before it made a decision. The requirement is found in s 424A(1) of the *Migration Act 1958* (Cth) ("the Migration Act"). Subject to certain exceptions, the Tribunal was required to give the appellant particulars of information that the Tribunal considered would be the reason, or a part of the reason, for affirming a decision not to grant him a protection visa. The Tribunal was also required to ensure that the appellant understood why the information was relevant to the review and the consequences of it being relied on, and to invite the appellant to comment on or respond to the information. The information in question in this proceeding was information provided by the appellant to the Department of Immigration and Citizenship ("the Department") in connection with the proposed cancellation of a visa that he then held. After the Tribunal had conducted a hearing in relation to the appellant's application for a protection visa, the Tribunal requested the file concerning the cancellation of his earlier visa, which the Department provided to the Tribunal. In its reasons for decision, the Tribunal referred to matters that were the subject of notes of an interview with the appellant, found in that file. The particular question in this appeal is whether the Tribunal considered that that

information would be the reason, or part of the reason, for affirming the decision not to grant the appellant a protection visa.

2 The appellant is a citizen of Pakistan, who arrived in Australia on 17 October 2006, in possession of a valid student visa. On 11 May 2009, he applied for a protection visa. On 22 September 2009, a delegate of the Minister for Immigration and Citizenship ("the Minister"), the first respondent, refused to grant the visa. The appellant applied to the Tribunal for review of the delegate's decision. On 14 December 2009, the appellant appeared before the Tribunal to give evidence and present arguments. On 26 February 2010, the Tribunal made a written decision, with reasons, affirming the decision not to grant the protection visa.

3 On 26 March 2010, the appellant applied to the Federal Magistrates Court of Australia for judicial review of the Tribunal's decision. On 24 June 2010, he filed an amended application. On 11 October 2010, the Federal Magistrates Court gave judgment dismissing the application and the amended application. See *MZYIA v Minister for Immigration & Anor* [2010] FMCA 734.

4 Under the misapprehension that the judgment of the Federal Magistrates Court was only an interlocutory judgment, the appellant applied on 26 October 2010 to this Court for leave to appeal, attaching a draft notice of appeal. No leave to appeal was required. On 9 February 2011, the appellant filed what was described as an amended notice of appeal.

5 By s 36 of the Migration Act, there is a class of visas to be known as protection visas. A criterion for a protection visa is that the person applying for it be a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. The terms "Refugees Convention" and "Refugees Protocol" are defined in s 5(1) of the Migration Act to mean respectively the *Convention relating to the Status of Refugees done at Geneva on 28 July 1951* and the *Protocol relating to the Status of Refugees done at New York on 31 January 1967*. It is convenient to call these two instruments, taken together, the "Convention". For present purposes, it is sufficient to say that, pursuant to the Convention, Australia has protection obligations to a person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside

> the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country

6 The appellant claimed to have a well-founded fear of being persecuted, for the reason of religion, if he should return to Pakistan.

Section 424A of the Migration Act

7 So far as is relevant to the present case, s 424A of the Migration Act provides:

> (1) Subject to subsections (2A) and (3), the Tribunal must:
>
> (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
>
> (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and
>
> (c) invite the applicant to comment on or respond to it.
>
> …
>
> (2A) The Tribunal is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 424AA.
>
> (3) This section does not apply to information:
>
> (a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or
>
> (b) that the applicant gave for the purpose of the application for review; or
>
> (ba) that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department; or
>
> (c) that is non-disclosable information.

The appellant's claims

8 The appellant's father died shortly before the appellant's birth. His mother and older sister and the appellant lived in a house his father and other relatives had inherited from the

appellant's grandfather. It was in a well-to-do area of Lahore. In 2008, after the appellant had come to Australia, the house was sold. The appellant's mother moved to a basic house in a very different area of Lahore. She used the money she received from the sale of the house to fund the appellant's education in Australia. That education was not completed and the appellant's student visa was cancelled on 5 August 2009.

9 The appellant said that his father's brother was a devout Muslim, with connections to extremist Muslims. He claimed to fear being beaten, tortured and possibly killed by extremist Muslims, at his uncle's direction because, while the appellant has been in Australia, he has renounced Islam, ceased to practise it, and made statements critical of it, which have been reported back to his uncle. According to the appellant, his uncle took control over his family after the appellant's father's death. In particular, the uncle controlled the family's assets, which included a farm some distance south of Lahore, where rice and wheat were cultivated, which had also been inherited from the appellant's grandfather. The appellant said that the uncle had beaten his mother and forced her to observe Islam strictly. He had also struck the appellant for not observing Ramadan, pushed the appellant for failing to wear traditional attire, opposed access to music, television and paintings, and been loud and abusive. He had also threatened to kill the appellant's mother if she were to go to the farm or try and sell it. According to the appellant, the uncle gave his mother money derived from the farm from time to time, but it was less than had been provided when the appellant's father was alive. She was trying to sell jewellery to pay for the appellant's education. The appellant claimed his uncle had interfered with the provision of money to support him while he was in Australia.

10 In the course of summarising the appellant's claims in its reasons for decision, the Tribunal said that the appellant had become a vegetarian when he was a child. He was concerned about acts of terror committed by extremists. He had not been to a mosque since he came to Australia. At [41] of its reasons, the Tribunal said:

> He states that he 'used to share (his) views and somehow it got back to Pakistan and (his) village' that he had stopped practising and denounced Islam. He did not ever think that his denouncing of the religion would be known in Pakistan. His intention was to complete his studies and apply for permanent residence and only return to Pakistan for short visits. However, because of the troubles in Pakistan and the fact that the applicant's mother has not been able to sell her rice for 'the same price', he has not been able to afford to pay student fees and did not enrol in 2009.

11 The appellant named a person who might have been responsible for conveying his views back to a family member in Pakistan, so that they reached his uncle. He said that, in November 2008, his uncle telephoned him, called him an infidel and threatened him with physical harm if he should return to Pakistan. His mother had also told the appellant that the uncle has threatened her that if the appellant returns, the uncle will harm him physically.

12 The appellant claimed to have strong views that Islam is bad. He alleged that his uncle had done "bad things" to other people on behalf of Muslim extremists, and had links with such extremists and the capacity to hurt or kill the appellant. His mother had told him that the uncle and other religious extremists had been threatening her constantly and that she was very concerned for the appellant's safety if he returned. He said that he would not be protected by the police because he is no longer a Muslim. He did not have the money to pay necessary bribes to the police for protection. He feared being charged with blasphemy and jailed or killed. He said that he could not move to another part of Pakistan because his uncle and the Muslim extremists would find him. Even if he did move and was not found, the fact that he did not practise Islam, and that he spoke against extremists, would lead to him being harmed by other fundamentalist Muslims. His mother would be pressured by his uncle to inform the uncle as to the appellant's whereabouts.

13 Part of the material the appellant supplied to the Department for the purpose of his application for a protection visa was a statutory declaration he made on 19 June 2009. In that declaration, he said:

> 34 When I decided to denounce my religion I never thought the news would ever get back to Pakistan. I also never intended on returning to Pakistan to live as I was on a student visa and my intention was to finish my studies and to apply for permanent residence in Australia. I wanted to live in Australia where I have the freedom to choose my religion. It was my intention to only go back to Pakistan for very short visits to see my mother. I thought I would be able to avoid any suspicion in relation to my faith if I only stayed for a short time.
>
> 35 However, because of the trouble in Pakistan and the fact that my mother hasn't been able to sell her rice for the same price, I have not been able to afford to pay for my course and therefore have been unable to enrol in 2009. As a result of this I have breached a condition of my student visa and the Department of Immigration and Citizenship have given me a notice of intention to cancel my visa.

The Tribunal's reasons

14 The Tribunal accepted the appellant's account of his family background and education and that his father died before he was born. It also accepted that he was born into a Muslim family but long ago abandoned the religion and became very critical of many of its tenets. It did not think that being slapped by his uncle when he was nine, or pushed by his uncle when he was 13, amounted to significant physical harassment or ill-treatment of a kind sufficient to constitute persecution. The Tribunal focused on circumstances since the appellant's arrival in Australia. It accepted that he had realised that not only was he not interested in Islam but was opposed to it, that his uncle had learned that he had spoken against Islam and threatened to harm him, and that there was a rise in the activities and influence of fundamentalists Islamic groups in Pakistan. The Tribunal accepted that the appellant's uncle is a devout Muslim. It found, however, that the appellant had either exaggerated or constructed the profile he claimed for his uncle. At [91] of its reasons for decision, the Tribunal said:

> I accept that the applicant's uncle…may be a tyrannical patriarch in the family and may boss others about. I have already noted that his treatment of the applicant before the applicant came to Australia does not amount to serious harm. The applicant's evidence about what [the uncle] does to the applicant's mother has not been convincing. If his mother was so controlled and her activities so limited by [the uncle] as the applicant has claimed (he said she was not allowed to remarry nor leave the house, beaten and forced to follow Islam), it is hard to see that she would have been able to allow the applicant to live as he did, dressing in western ways and not going to mosque. As well, the applicant claims that all money for his family comes through [the uncle]. [The uncle] would have been well aware of the direction of the applicant's lifestyle choices if he exerted the control over the applicant's family claimed by the applicant yet sufficient money was provided to enable the applicant to come to Australia to study. That support has only stopped recently and there are other reasons why that could have occurred other than the applicant's uncle hearing what the applicant had said about Islam once when he was drunk, including the applicant's poor academic progress and a drop in the income available from the family's farm. I consider that the applicant has exaggerated the extent of [the uncle's] power over the applicant's family.

The Tribunal referred to the fact that the appellant's uncle had only once expressed disapproval of what the appellant had done while he was in Australia. It concluded that it did not accept that there was a real chance that the uncle would inflict serious harm on the appellant of a kind that could amount to persecution on account of his non-compliance with Islam and his views on religion. The Tribunal did not disregard what the appellant had done while in Australia, because it was satisfied that he had not done those things for the purpose of strengthening his claim (see s 91R(3) of the Migration Act). The Tribunal accepted that

the appellant would not practise as a Muslim if he returned to Pakistan. On the basis of information about circumstances in Pakistan, derived from sources other than the appellant, particularly information about circumstances in Lahore, the Tribunal did not accept that there was a real chance that the appellant would be persecuted for opposing the actions of fundamentalist Islamic militants. The Tribunal did not accept that the appellant would be charged with blasphemy in Pakistan. It did not accept that he would express his views in Pakistan in any way materially different from the way he expressed them when he was there previously. This was not because of a fear of persecution, but because of the significance to him of religion in the context of the whole of his circumstances.

15 The Tribunal did not accept that the appellant's uncle would arrange for him to be harmed by others. Although he might be harmed in a random attack on those adopting a Western lifestyle and appearance in Lahore, the Tribunal found that the chances of his being so harmed were remote.

16 The Tribunal also dealt with, and rejected, claims that the appellant might be subject to serious harm on the basis that he was a failed asylum seeker returning to Pakistan, that he was vulnerable to persecution due to a mental illness, that he was a vegetarian who wore Western clothes and had body piercings, or that his mother had political connections. The Tribunal did not consider whether the appellant could avoid persecution by moving to another part of Pakistan, because it considered that he did not have a well-founded fear of persecution if he were in Lahore.

The interview notes

17 After the Tribunal had conducted its hearing, at which the appellant gave evidence and presented arguments, the Tribunal requested from the Department its file concerning the cancellation of his student visa. The file was made available to the Tribunal. It included notes taken by an officer of the Department of an interview with the appellant concerning the cancellation of his student visa. The notes of this interview revealed that the appellant had advised that he was no longer enrolled at the university where he had done some study, because his family had financial problems and he did not have the funds to cover tuition fees. The notes record that the appellant's explanation of his non-enrolment was in substance as follows:

- Client has single mother in Pakistan and funds obtained via land which father has left to PA mother and child
- due to lack of electricity and water (due to government decision in concentrating on political upheaval) – there has been no resolve in fixing the boor [*sic*] to pump water to clients household. (July 2008 → ongoing)
- Lack of water in irrigation system to water rice. Mother has hired tractor which has cost money to look after the farm (which is the main source of income).
- The output of production was less due to lack of water.
- Government have been involved in the exporting of produce to IRAN and has had an affect [*sic*] on the cost price of produce.

The appellant was never made aware that the Tribunal had this material until he received the Tribunal's reasons for decision, which included the following statements at [38]:

> The Department's file includes a record of interview by a Departmental officer with the applicant in connection with the proposed cancellation of his student visa. It records that there had been difficulties on the farm which had led to reduced income.

The grounds of the application to the Federal Magistrates Court

18 Both the original application and the amended application filed by the appellant in the Federal Magistrates Court did not refer to s 424A of the Migration Act. Each referred to s 424AA. That section imposes on the Tribunal requirements similar to those imposed by s 424A, but permits the Tribunal to discharge those requirements by oral exchange, rather than in writing. The effect of s 424A(2A) (set out at [7] above) is to excuse the Tribunal from its obligations under s 424A if it has met those obligations under s 424AA. In the present case, no issue of the application of s 424AA can arise. The Tribunal did not seek or obtain from the Department the file relating to the cancellation of the appellant's student visa until after the completion of its hearing. At no stage did it attempt to discharge any obligation pursuant to s 424AA by providing particulars of any information from that file to the appellant orally, giving the appellant an oral account of the relevance of any such information and inviting him to comment on or respond to it. The learned federal magistrate appears to have accepted that it was open to the appellant to rely on the proposition that the Tribunal had failed to discharge its obligations pursuant to s 424A of the Migration Act.

19 The federal magistrate discerned from the appellant's amended application four grounds. The first was the reliance the appellant placed on the failure of the Tribunal to discharge its obligations pursuant to s 424A of the Migration Act. The second ground concerned an alleged misapprehension by the Tribunal of the appellant's claim to fear persecution because of religion. The third ground alleged that the Tribunal failed to consider

the appellant's fear of persecution as a result of his political opinion or imputed political opinion. The fourth ground alleged a failure to take into account relevant material, being what the appellant had said to an officer of the Department in relation to the cancellation of his student visa.

20 The federal magistrate rejected all four grounds. It is unnecessary to go to his Honour's reasons for judgment in relation to the second, third and fourth grounds, because they do not concern the issues raised in this appeal.

The federal magistrate's reasons for judgment

21 The federal magistrate's reasons for rejecting the ground based on s 424A of the Migration Act are found at [13]-[57] of his reasons for judgment. His Honour appears to have taken the view that what the appellant was recorded as having said in the notes of interview on 11 June 2009 did not go beyond consistency with what he said in para 35 of his statutory declaration of 19 June 2009. On this basis, his Honour appears to have accepted that the relevant information fell within the exception in s 424A(3)(ba) of the Migration Act, because (in its statutory declaration form) it was information given by the appellant during the process that led to the decision under review, ie the decision to refuse to grant a protection visa, and was not information that was provided orally by the appellant to the Department. Coupled with this, the federal magistrate appears to have taken the view that the only relevance of the notes of interview was as to the time and place when the appellant provided the information he gave in that interview to the Department, and that the time and place of giving information was not itself "information" for the purposes of s 424A. At [46], his Honour said:

> The details of when and where the interview was conducted is not "*information*" as the detail did not contain in its terms a rejection, denial or undermining of the applicant's claims to be a person to whom Australia owes protection obligations

His Honour then referred to, and quoted, *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26 (2007) 235 ALR 609 at [17].

22 At [51], the federal magistrate said:

> The information about reduced farm income in para.38 of the Tribunal's decision is consistent with the evidence about reduced farm income referred to by the applicant

> in his statutory declaration…and with the reference by the Tribunal to the "*drop in the income available from the family's farm"*

At [52], the federal magistrate said:

> The fact that the Tribunal was aware that at an earlier time a consistent statement has been made by the applicant to the Department could not be "*information that the Tribunal considers would be the reason or part of the reason for affirming the decision that is under review*". Such consistent information would be a reason for rejecting the decision of the delegate.

At [55], the federal magistrate said:

> The applicant's previous consistent statement does not contain in its terms a rejection, denial or undermining of the applicant's claim to be a person to whom Australia owes protection obligations. Indeed, if believed, the statement would go towards rejecting, not affirming the decision under review

23 Again, his Honour referred to the passage in [17] of *SZBYR*. His Honour concluded that the statement was therefore not information for the purposes of s 424A(1) of the Migration Act.

The application of s 424A of the Migration Act

24 What was said by Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ in *SZBYR* at [17] is not easy to understand. The paragraph reads:

> Secondly, the appellants assumed, but did not demonstrate, that the statutory declaration "would be the reason, or a part of the reason, for affirming the decision that is under review". The statutory criterion does not, for example, turn on "the reasoning process of the tribunal", or "the tribunal's published reasons". The reason for affirming the decision that is under review is a matter that depends upon the criteria for the making of that decision in the first place. The tribunal does not operate in a statutory vacuum, and its role is dependent upon the making of administrative decisions upon criteria to be found elsewhere in the Act. The use of the future conditional tense (would be) rather than the indicative strongly suggests that the operation of s 424A(1)(a) is to be determined in advance — and independently — of the tribunal's particular reasoning on the facts of the case. Here, the appropriate criterion was to be found in s 36(1) of the Act, being the provision under which the appellants sought their protection visa. The "reason, or a part of the reason, for affirming the decision that is under review" was therefore that the appellants were not persons to whom Australia owed protection obligations under the Convention. When viewed in that light, it is difficult to see why the relevant passages in the appellants' statutory declaration would itself be "information that the tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review". Those portions of the statutory declaration did not contain in their terms a rejection, denial or undermining of the appellants' claims to be persons to whom Australia owed protection obligations. Indeed, if their contents

> were believed, they would, one might have thought, have been a relevant step towards rejecting, not affirming, the decision under review.

25 The foundation for the obligations cast on the Tribunal by s 424A(1) is the formation by the Tribunal of a state of mind, namely that "the Tribunal considers" that some information would be the reason, or a part of the reason, for affirming the decision under review. What was said in *SZBYR* at [17] cannot have been intended to substitute for this subjective (to the Tribunal) test an objective test that the information contain in its terms "a rejection, denial or undermining of" the claims of the applicant in question. The subjective effect of information in relation to an applicant's claims may not always be apparent from the terms of that information. The essential question is how the Tribunal proposes to use the information in its reasoning process. For instance, it is possible for the Tribunal to misunderstand information, and to consider that the information would be the reason, or part of the reason, for affirming the decision to refuse a protection visa, when in fact the information has the opposite effect. *Baig v Minister for Immigration & Multicultural Affairs* [2002] FCA 380 was such a case. There, the Tribunal mistakenly thought that an item of news refuted the applicant's claim that he had been campaigning for a candidate in a by-election. Read in its entirety and properly, the news item supported the applicant's claim. Nonetheless, the Tribunal having reached the requisite state of mind, it was held that it was obliged to comply with s 424A(1) in relation to the news item. See [29]-[34]. It is possible that the Tribunal might propose to make use of information in a particular way to refute the claims of an applicant, whereas others might regard the same information as neutral, or as capable of assisting the claims of that applicant. The important question is not the objective effect of information but the state of mind of the Tribunal, as to whether it "considers" that it would use the information against the applicant.

26 In this respect, the question of the use of the Tribunal's reasons for decision is important. It is true that the time at which the Tribunal reaches the requisite state of mind about an item of information will precede the finalisation of its reasons for decision in any particular case. In most cases, the applicant will not have any means of access to the thought processes of the Tribunal in relation to information as the Tribunal proceeds to make its decision. The only possible source of evidence that the Tribunal has formed the requisite state of mind will be the Tribunal's reasons for decision. Only by examining the Tribunal's disclosed process of reasoning, to see how it has made use of the particular information, can

it be determined that, at some antecedent time, the Tribunal must have reached the state of mind that it considered that the information would be the reason, or part of the reason, for affirming the decision under review. This is why, since *SZBYR*, it has been recognised that, although the reasons are not the starting point, it may be appropriate to refer to them to determine whether the Tribunal had the requisite state of mind. See *SZMPT v Minister for Immigration and Citizenship* [2009] FCA 99 at [16]-[18] and *SZMNP v Minister for Immigration and Citizenship* [2009] FCA 596 at [38].

The Tribunal's use of the notes of interview

27 The first thing to note is that the Tribunal in the present case sought from the Department the material that was in the file relating to the cancellation of the appellant's student visa. It can be assumed that the Tribunal would not have taken this step unless it thought that the file might contain some information that would be of use in its review of the decision to refuse the appellant a protection visa. The Tribunal's power to obtain information is found in s 424 of the Migration Act. Subsection (1) provides:

> In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.

28 By operation of s 424B(1), s 424(1) (as one of the provisions of Div 4 of Pt 7 of the Migration Act) is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with. In other words, the Tribunal does not have a power to get information and to use it or not in relation to an applicant's case, unless it does so in accordance with s 424(1). Having sought and obtained from the Department the file concerning the cancellation of the appellant's student visa, the Tribunal was therefore bound by s 424(1) to have regard to any information in that file in making the decision on the review. It was required to determine whether any, and if so what, information in that file was relevant to the review of the decision to refuse the appellant a protection visa.

29 The Tribunal made specific reference at [38] of its reasons for decision to some of the information contained in the notes of the interview on 11 June 2009, which it obtained from the file it had requested from the Department. This suggests that the Tribunal thought that information was relevant to the determination of the review in the appellant's case. The

Tribunal had an obligation pursuant to s 430(1) of the Migration Act to prepare a written statement of its reasons that, among other things:

> (c) sets out the findings on any material questions of fact; and
>
> (d) refers to the evidence or any other material on which the findings of fact were based.

It may be assumed that, in the second sentence of [38] of its reasons for decision, the Tribunal was complying with its obligation to refer to the evidence or other material on which its findings of fact were based. The Tribunal did not refer specifically to any other item of information or material from the file, concerning the proposed cancellation of the student visa. The fact that it chose to make specific reference to that part of the notes of interview dealing with difficulties on the farm that had led to reduced income suggests that it was making use of that information in relation to its findings.

30 An element of the appellant's case in the Tribunal was that his uncle controlled the family finances and had used his power over those finances to prevent the appellant's mother sending sufficient money to Australia to enable the appellant to continue studying, because the appellant's views about Islam had become known to the uncle. At [91] of its reasons for decision, the Tribunal refuted this argument in the sentence that read, "That support has only stopped recently and there are other reasons why that could have occurred other than the applicant's uncle hearing what the applicant had said about Islam once when he was drunk, including the applicant's poor academic progress and a drop in the income available from the family's farm." There are two possible sources of evidence to support the finding that there was a drop in income available from the family's farm. One is the material from the notes of interview in relation to the possible cancellation of the appellant's student visa. The other is the information in para 35 of the appellant's statutory declaration of 19 June 2009 that his mother had not been able to sell her rice for the same price.

31 The statement in para 35 of the statutory declaration, concerning the price of rice, is more about the state of the market for rice than about any difficulties in producing the same amount of rice. The Tribunal referred in [41] of its reasons for decision to the appellant's mother's inability to sell her rice for "the same price". This item of evidence is different from the material found in the notes of interview. That material contains several facts said to contribute to a lower income from the farm. These are lack of electricity and water, said to

be due to the government's decision to concentrate on political upheaval; a failure to fix the bore to pump water to the household from July 2008 onwards; a lack of water in the irrigation system, to water the rice, so that the output was less; and the expense of hiring a tractor. Only the last of the bullet points in the quote from the notes of interview in [17] above referred to the market price of the produce. The material in the first four bullet points was described aptly by the Tribunal at [38] of its reasons for decision as amounting to "difficulties on the farm".

32 It is clear, therefore, that the appellant did not repeat in para 35 of his statutory declaration all of what he had said in the earlier interview. The statutory declaration was consistent with the notes of interview in the sense that both referred to the market price. The notes of interview, however, contained substantially more information about different matters, concerned with reduced crops (lack of electricity and water) or increased expenditure in producing crops (the purchase of a tractor). To this extent, the federal magistrate did not represent the situation accurately when he said that the information in the statutory declaration was consistent with the information in the notes of interview.

33 The Tribunal's finding at [91] of its reasons for decision of "a drop in the income available from the family's farm" could have been based wholly on the statement in para 35 of the statutory declaration of 19 June 2009 that the appellant's mother had not been able to sell her rice for the same price, or wholly on the material in the notes of interview of 11 June 2009, or on both. The way in which the finding is expressed is not explicit as to the source or sources of the material on which it is based. It is more probable than not that the finding was based, at least in part, on the material in the notes of interview of 11 June 2009. As I have said, having got the information in the notes of interview, the Tribunal was obliged by s 424(1) of the Migration Act to have regard to that information in making its decision on the review. It took the trouble to mention specifically the information concerning difficulties on the farm, and to refer to its source, in [38] of its reasons for decision. I have inferred that it did so by way of compliance with its obligation pursuant to s 430(1) of the Migration Act to refer to the evidence or other material on which its findings of fact were based. There is no other finding of fact expressed in the Tribunal's reasons for judgment to which the material from the notes of interview would be relevant. There was no reason for the Tribunal to mention specifically that information (and no other information from the notes of interview or from the Department's file concerning the cancellation of the student visa) if the Tribunal

did not rely on that information for the making of the finding of fact expressed in the second last sentence of [91] of its reasons for decision.

34 The appropriate conclusion is that the Tribunal made use of the information it obtained from the notes of interview of 11 June 2009 as part of its reasoning in refuting an important aspect of the appellant's claims. It follows that there had been a point at which the Tribunal had reached the state of mind whereby it considered that the information in the notes of interview of 11 June 2009 would be part of the reason for affirming the decision under review. At that point, the Tribunal's obligations pursuant to s 424A(1) of the Migration Act were enlivened. None of the exceptions to those obligations found in s 424A(3) was applicable. The information in the notes of interview was specifically about the appellant. It was not information that the appellant had given for the purpose of the application for review, because it had been given in connection with the proposed cancellation of his student visa. For the same reason, the appellant had not given the information during the process that led to the decision under review. In any event, the information was provided orally by the appellant to the Department. Finally, the information was not non-disclosable information, within the definition of that term in s 5(1) of the Migration Act, which is concerned with restricting the publication of information in the national interest, or the public interest, or in breach of confidence.

35 The federal magistrate was wrong to pose for himself, and to answer, the question whether the information in the notes of interview was "consistent" with the information in para 35 of the appellant's statutory declaration. The question was not whether there was consistency, but whether there was information as to which the Tribunal formed the view that it would be the reason, or part of the reason, for affirming the decision of the Minister's delegate. In any event, the federal magistrate was wrong in his conclusion as to consistency. As I have said at [31]-[32] above, the information in the notes of interview went to factors relevant to reduced crops, or to greater expense in producing crops, as well as to the market price of rice, whereas the information in para 35 of the statutory declaration concerned only market price. The relevance of the notes of interview went well beyond information as to the time and place of the interview itself. As used by the Tribunal, the notes of interview contained information that undermined the appellant's claim that the availability of funds for his education in Australia had diminished because word of his rejection and criticism of Islam had reached his uncle in Pakistan. That information did not, as the federal magistrate

thought, tend towards a rejection of the decision of the delegate of the Minister that the appellant was not a person to whom Australia owed protection obligations under the Convention. In the mind of the Tribunal, it became information that would be part of the reason for affirming the decision to refuse a protection visa. The Tribunal so used it at [91] of its reasons for decision.

Conclusion

36 For the reasons I have given, it is apparent that the Tribunal failed to comply with its obligations pursuant to s 424A(1) of the Migration Act. The federal magistrate was in error in reaching the opposite conclusion. His Honour seems to have fallen into error by regarding the information in para 35 of the appellant's statutory declaration of 19 June 2009 as merely repetitive of the information in the notes of interview of 11 June 2009, when this was not the case. The federal magistrate should have found that there was jurisdictional error on the part of the Tribunal.

37 The appeal should therefore be allowed. The order of the Federal Magistrates Court, dismissing the appellant's application and amended application to that court should be set aside. There should be substituted for that order orders that a writ of certiorari issue, to quash the decision of the Tribunal and a writ of mandamus issue, requiring the Tribunal to hear and determine the appellant's application for review of the decision refusing him a protection visa according to law. The Minister should pay the appellant's costs of the proceeding in the Federal Magistrates Court, as well as the appellant's costs of the appeal.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the reasons for judgment herein of the Honourable Justice Gray.

Associate:

Dated: 8 June 2011