FEDERAL MAGISTRATES COURT OF AUSTRALIA

MZXJA & ORS v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 375*

MIGRATION – Protection visa – whether jurisdictional error – whether breach of s.424A of *Migration Act 1958* – psychiatrist's report provided by applicant – whether 'information' – use by Tribunal to make adverse finding of credit against applicant – whether failure to consider persecution of applicant by reason of religion on return to Burma – application allowed.

Migration Act 1958, ss.422, 424A

MZWEL v Minister for Immigration and Multicultural Affairs [2006] FCA 442
in SAAP v Minister for Immigration and Multicultural and Indigenous Affairs [2005] 215 ALR 162
Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576
SZCNG v Minister for Immigration & Anor [2006] FMCA 505
SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 2
VAF v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 206 ALR 471
Minister for Immigration and Multicultural Affairs v Lay Lat [2006] FCAFC 61
SZCRJ v Minister for Immigration and Multicultural Affairs and Anor [2006] FCAFC 62
SZCNG v Minister for Immigration & Anor [2006] FMCA 505
Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 197 ALR 389
Appellant 395/2002 v Minister for Immigration and Multicultural Affairs (2003) 203 ALR 112.

First Applicant:	MZXJA
Second Applicant:	MZXJB
Third Applicant:	MZXJC
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP

Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	MLG 463 of 2006
Judgment of:	McInnis FM
Hearing date:	1 November 2006
Delivered at:	Melbourne
Delivered on:	27 March 2007

REPRESENTATION

Counsel for the Applicant:	Mr W. G. Gilbert
Solicitors for the Applicant:	Victoria Legal Aid
Counsel for the First Respondent:	Mr R. Knowles
Solicitors for the First Respondent:	Clayton Utz

ORDERS

(1) A writ of certiorari issue directed to the Second Respondent, quashing the decision of the Second Respondent dated 24 February 2006.

(2) A writ of mandamus issue directed to the Second Respondent, requiring the Second Respondent to determine according to law the application for review.

(3) The First Respondent shall pay the Applicants' costs fixed in the sum of $5,000.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 463 of 2006

MZXJA and OTHERS
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The Applicants seek judicial review of a decision of the Refugee Review Tribunal (the Tribunal) dated 24 February 2006. In its decision the Tribunal affirmed the decision of a delegate of the First Respondent to refuse the Applicants' application for a protection visa.

2. The Applicants are Burmese citizens. The Second Applicant is the daughter of the First Applicant, and the Third Applicant is the adopted niece of the First Applicant. The First Applicant is a 47 year old woman of Chin ethnic group and a Christian. She had lived in Chin State from 1959 until 1995. From 1995 up until the time she left Burma she had lived in Rangoon. The First Applicant arrived in Australia on 16 March 2005 and made an application for a protection visa on 29 April 2005. It is noted that further application documents were relied upon by the Applicants' adviser for the Second and Third Applicants.

3. It is the First Applicant that makes a distinct claim to be a refugee. Her claim was that if she returned to Burma she faced a real chance of persecution by the authorities on account of her Chin ethnicity, her Christian religion and her pro-democracy political opinion. In her statutory declaration in support of the application for a protection visa (Court Book pp.29-32 dated 28 March 2005) the First Applicant claimed she was a Christian who grew up in Chin State Burma. Specific reference was made to her Chin ethnicity and Christian faith. It was claimed that the military government "always repressed us in our practice of our religion."

4. Specific reference was made to the government allegedly taking over land belonging to Chin Christians. Applications by the Chin Christians were rejected, and the Chin Christian people were allegedly abused by the military. As a child the First Applicant claimed to have witnessed soldiers forcing Chin Christian people in her village to work without pay and were forced to overwork. The First Applicant claimed to have heard about many rapes of Chin Christian women by Burmese military soldiers. The First Applicant's husband worked as a clerical officer for a health department in her village and in 1995 his job was transferred to Rangoon. The First Applicant's sister was already residing in Rangoon and another sister moved to Rangoon in 2004. Another sister of the First Applicant lives in Zakaing State.

5. The Second Applicant was born in 1995. One of the First Applicant's sisters and husband were killed in a motor accident in Chin State and their surviving daughter, the Third Applicant, then lived with the First Applicant and her husband and they adopted her.

6. After the First Applicant moved to Rangoon, she began volunteering as a Sunday school teacher in a Chin Christian church. She claimed that authorities ordered the members of the church to stop singing in prayer. The First Applicant's husband was concerned about inadequate health care for Chin Christians in the Chin State and travelled to Chin State to speak to Chin Christians about hygiene and sanitation as part of his health department work. The First Applicant's husband it was claimed organised pamphlets about health care for Chin Christians. The First Applicant's husband it was claimed was interested in politics and concerned about repression of Chin Christians by their government.

7. In 1997 the First Applicant and her husband became members of the National League for Democracy ("NLD"). It was claimed that the First Applicant's husband's main motivation for joining the NLD was to "promote equality and human rights for Chin Christians." Meetings were held at their house and the First Applicant's husband became very active and was involved in production and distribution of pamphlets promoting the interests of Chin Christians and demanding an end to the repression of Christianity by the government. The First Applicant's husband became a leader in a particular area for the NLD and was working underground with his activities kept secret. The First Applicant claimed to have assisted her husband in his activities including distribution of pamphlets. The First Applicant claimed that her family gave financial assistance to NLD.

8. The First Applicant's husband was part of a group of NLD supporters touring Burma in 2003 accompanying Aung San Suu Kyi. The Applicant's husband upon return to Rangoon was arrested and it was claimed that ultimately he died in prison. In December 2004 the First Applicant claimed that soldiers came to her flat at night, searched the premises and took all the papers including NLD stamps and family photographs. It was claimed that among the papers were minutes of NLD meetings which had been held at the First Applicant's residence.

9. The First Applicant then claimed that she went into hiding with relatives, but on 5 January 2005 soldiers sealed off her apartment. She claimed that with the assistance of her sister and a broker she obtained false documents including a passport and a visa in her sister's name in order to leave Burma. The First Applicant claimed that she was afraid that if she returned to Burma she would be arrested, detained and tortured on account of her political activities and those of her late husband. She feared she would be prevented from practising Christianity freely.

10. The Tribunal in its decision dated 24 February 2006 relevantly sets out the following further information under the heading, "Claims and Evidence":

> *"On 29 September 2005 the Tribunal received a letter from the applicant's advisers. They submitted that the applicant had a well founded fear of persecution on account of her Christian religion,*

her Chin race, her pro-democratic political opinion, her membership of a particular social group consisting of her family by reasons of her husband's political activities in the NLD and her religious and political activities in Australia. They provided a number of reports regarding the treatment of Christians in Burma. The advisers referred to country information regarding the persecution of Christians in Chin state and the persecution of members of the NLD for reasons of their political opinions. It was submitted that the applicant also had a sur place claim for refugee status on account of her engagement in religious and political activities in Australia. She attended functions for celebrating Aung San Suu Kyi's birthday and is active in the Chin Christian Baptist Church in Mooroolbark. The applicant's advisers provided a letter from the Victorian Chin Baptist Church dated 7 August 2005 confirming that the applicant and her daughters were active members in the church. They stated that military regime in Burma oppressed the Christian Chin people in Burma."

(Court Book p.204)

11. The Tribunal conducted a hearing on 8 November 2005 where the First Applicant was represented and gave oral evidence. The Third Applicant and another witness also gave oral evidence.

12. After the hearing the Tribunal forwarded a letter pursuant to s.424A of the *Migration Act 1958* (the Migration Act) to the First Applicant dated 17 November 2005 (the s.424A letter) (Court Book pp.176-179).

13. In the s.424A letter the Tribunal invited the First Applicant to comment on information that "would subject to any comments you make, be the reason, or part of the reason, for deciding that you are not entitled to a protection visa". The information referred to by the Tribunal included a reference to discrepancies in dates referred to by the First Applicant in her declaration compared with evidence before the Tribunal and detailed reference to information concerning NLD. Specific reference was made to country information from various sources, particularly relating to the activities of the NLD.

14. Further the Tribunal referred to the Second Applicant lodging a student visa application on 21 December 2004, accompanied by a confirmation of enrolment dated 16 November 2004 and a police clearance certificate dated 13 December 2004. The Tribunal notes in its s.424A

letter that "this suggests that arrangements had been made for her to leave Burma prior to the police searching your home" (Court Book p.178). Reference was made to documents on the Department file indicating that the First Applicant had resided with other relatives in Dagon township. In a student guardian visa application in the name of another person, reference is made to a man claimed to be that person's husband, and the Third Applicant's father. The Third Applicant's student visa application according to the Tribunal, on her birth certificate reference is made to the father and mother and the documents indicate that she lived in Dagon township. The Tribunal then notes that the First Applicant claimed that her husband was the father of the Third Applicant and that they lived in Sang Yaung township.

15. After reciting those details the Tribunal then proceeds under the heading, "The information is relevant because:" to state the following:

> *"The inconsistencies in your account indicates that you may not be telling the truth regarding the events of May 2003 and the aftermath.*
>
> *You were unable to answer questions about NLD and what was occurring with the NLD and Aung San Suu Kyi in 2001-2004. The Tribunal would have expected you to know some of the information noted above regarding the NLD if you were a member of the NLD.*
>
> *Your failure to contact the NLD until December 2004 or to know that the International Red Cross were visiting some of those held in prison after May 2003 casts doubt on your account of looking for you husband after he disappeared.*
>
> *You stated that the NLD was not active in Chin state. The information quoted above indicates that it is. This casts doubt on you (sic) claimed involvement in the NLD."*
>
> (Court Book p.178)

16. The Tribunal then refers to the student visa application of the Second Applicant and invites the First Applicant to comment on the information.

17. The First Applicant responded to the Tribunal s.424A letter in a detailed response dated 17 January 2006 (Court Book p.183). In that letter the First Applicant's agent in part states:

> *"…We also submit that, on account of (the First Applicant's) symptoms of psychological trauma, including impaired concentration and memory, as documented by Associate Professor Suresh Sundram in the attached report dated 16 January 2006, the Tribunal should afford a liberal benefit of the doubt to the Applicant. I is submitted that the minor inconsistencies in the evidence should not undermine the overall credibility of the Applicant's claims."(sic).*

18. The report from Professor Sundram is dated 16 January 2006 (Court Book pp.187-189). In his report Professor Sundram, a consultant psychiatrist, refers to making the assessment of the First Applicant at the request of her Red Cross case worker and solicitor due to concerns regarding the First Applicant's mental heath. Professor Sundram in his report states that he assesses and manages patients of the Asylum Seeker Resource Centre (ASRC). He conducted an assessment of the First Applicant on 14 January 2006 in the presence of her adopted daughter, the Second Applicant, and a Chin interpreter. He claims to have had access to referral notes from the case worker and solicitor and "a decision from the Department of Immigration dated 17/11/2005". It is assumed that the reference by the witness to "a decision" refers to the s.424A letter from the Tribunal.

19. In his report the psychiatrist concludes that the First Applicant is "suffering from a pathological grief response that has been complicated by a major depressive disorder".

The Tribunal's decision

20. The Tribunal was not satisfied that the First Applicant was, as she claimed to be, it did not accept that she left Burma using a passport in her sister's name in order to avoid detection by the authorities. Despite its doubts about her identity the Tribunal proceeded to assess the First Applicant's claims. It accepted that the First Applicant was a Chin Christian who had lived in the Chin State until 1995. It found, however that she had not been persecuted in the past by reason of her religion (Court Book p.217). It did accept from country information

that Chin Christians in Chin State experienced discrimination and on occasions serious harm at the hands of the authority. However, as indicated on the base of the First Applicant's own evidence the Tribunal found the First Applicant had not suffered persecution for reasons of being a Chin Christian.

21. The Tribunal found that although Christians experienced discrimination in Burma the Applicants were able to practice their religion in Rangoon and the discrimination experienced by the Applicants did not amount to persecution for convention reasons.

22. Specifically the Tribunal in its decision made the following finding:

> *"The Tribunal accepts that the applicant is a Chin Christian and that she lived in Chin State until 1995. The Tribunal accepts the country information that Christian Chins in Chin State are discriminated against by the authorities and that on occasion this discrimination amounts to serious harm and persecution. The applicant's husband obtained a university degree from Rangoon University. He was a government worker in Chin State and he was promoted and transferred to Rangoon. The applicant indicated that she was a Sunday School teacher in Chin State and attended the Baptist Church there. Her evidence was quite confusing regarding whether the church she worshipped at in Chin State was closed down. However, she indicated that after the church was closed down – although she was not sure when this happened – the pastor continued to give sermons freely in the area. The applicant's evidence was that she did not have any problems with the authorities in Chin State. The Tribunal finds that the applicant has not been persecuted in the past for reasons of being a Chin Christian. The applicant moved with her husband to Rangoon in 1995 and from then on attended church regularly. She indicated that there were a number of Baptist churches in her area that she was able to attend."*
>
> (Court Book p.217)

23. The Tribunal found that the First Applicant was not a member of the NLD and made that finding on the basis that the First Applicant lacked knowledge about the NLD. It referred to the First Applicant's claim that her husband joined the NLD in 1997 and after dealing with the details of the claim, relevantly concluded:

> *"… The applicant has provided several different accounts as to what she did after her husband disappeared at this time. Further, her evidence as to her husband's activities and what occurred was very vague…"*
>
> (Court Book p.218)

24. Significantly the Tribunal then stated:

> *"… Due to the vagueness of the applicant's responses in relation to her husband's activities, and her lack of knowledge of the NLD even though they were meeting at her home the Tribunal does not accept that her husband was a member of the NLD."*
>
> (Court Book p.219)

25. That finding was strengthened according to the Tribunal's reasoning by problems with documentation which accompanied the application for a student guardian visa details of which were analysed by the Tribunal in its decision (Court Book p.214 and p.219).

26. The Tribunal referred to the psychiatrist's report and relevantly states the following:

> *"The Tribunal refers to the psychiatrist's report provided by her advisers. The Tribunal accepts that the applicant is suffering from some type of pathological grief response that has been complicated by major depressive disorder. The Tribunal accepts this may have occurred by the death of her husband or some other traumatic event, but does not accept that her husband has died in the circumstances that she has claimed. The Tribunal takes into account the psychiatrist's comments regarding the applicant's ability to give coherent evidence and the memory problems that she may have. The Tribunal accepts that the applicant did have significant problems in recalling details when questioned and finds that the evidence she gave regarding her experiences in Chin State as a Christian were confused and the dates appeared to have been mixed up, but there was a core claim that the Tribunal was able to accept about harm that occurred to Christians in Chin State. Her evidence regarding her involvement in the NLD, her husband's involvement in the NLD and her husband's disappearance was inconsistent, contradictory and vague. These matters were not peripheral matters, but went to the core of her claims. This is particularly so in relation to the documents which indicate that her husband had signed*

documents several months after he was purported to have disappeared.

The applicant's evidence about the raid of the authorities on her flat have indicated that they took NLD paperwork and family photographs; they did not question her or speak to her at all during the raid. As put to her at the hearing, if the authorities were interested in the applicant and wanted to arrest her they could have detained her at that time and questioned her. Further, the Tribunal has not accepted that the applicant's husband was a member and or actively involved in the NLD, nor that the applicant was a member or supporter of the NLD. For these reasons the Tribunal does not accept that her home was searched by the authorities and that her flat had been sealed. ***The Tribunal also notes that the psychiatrist does not mention this incident; in fact he stated "I gained the impression that (the First Applicant) was not directly interrogated by the police but they would question neighbours and friends about her and her contacts. This was both highly stigmatising and frightening as she believed she could be arrested." The Tribunal would have expected her to have mentioned the raid on her home whilst she was present, to the psychiatrist****." (emphasis added).*

(Court Book p.220)

27. The Tribunal did not accept that any pro-democracy activities which the First Applicant might have engaged in in Australia would lead to difficulty on her return because she was a low level participant (Court Book p.223). It considered the First Applicant's activities in Australia were more social and religious in nature (Court Book p.223).

The issues

Breach of s.424A: Report of Professor Sundram

The Applicant's submissions

28. It was submitted that the s.424A letter asked the First Applicant to comment on a number of matters. The report of Professor Sundram was included in the Applicant's response and he described how the First Applicant was suffering "a pathological grief response that has been complicated by a major depressive disorder". He specifically

described her as having difficulty in engagement with marked impaired concentration of memory and requiring constant prompting to provide useful information. Specifically it was noted that in his report, Professor Sundram states:

> *"… It does not in the least surprise me that she was either unable to provide information or consistent answers as her psychiatric disorders will impact significantly upon her recall and understanding…"*
>
> (Court Book p.188)

29. It was submitted that the report from Professor Sundram was obtained in an endeavour to overcome any adverse view the Tribunal may have formed about the First Applicant's capacity to recall aspects of her claim and to otherwise explain inconsistencies.

30. It was conceded by the Applicants that the Tribunal is not bound to accept the report of the psychiatrist. Further it was conceded that it is a matter for the Tribunal to assess the expertise of the author of the report and attach such weight to his opinions as it sought fit.

31. Significantly, however it was submitted that the Tribunal without warning used the report for an unexpected purpose namely, to further undermine the credit of the First Applicant. That much is apparent from the extract from the Tribunal's decision set out earlier in this Judgment (paragraph 26). Specific reference to the words emphasised in that extract where the Tribunal quotes from the psychiatrist's report.

32. It was submitted that the Tribunal using the expression "the Tribunal also notes…" made it clear that a reasonable part of its reasons for the Tribunal's finding was the fact that the First Applicant did not tell the psychiatrist about the raid by police on her home. This was part of the reasoning process it was submitted as otherwise there would have been no purpose in mentioning it. Reliance was placed upon the decision of Kenny J in *MZWEL v Minister for Immigration and Multicultural Affairs* [2006] FCA 442 where Her Honour said:

> *"26 On a fair reading of the RRT's reasons for its decision, the RRT's knowledge that the standard letter contained an assurance of privacy was knowledge that the RRT considered was a part of the reason it affirmed the decision*

under review. In SZEEU, Weinberg J discussed, at [163], the application of the expression "a part of the reason" in s 424A, observing that:

"The strict view that the courts have taken in relation to breaches of natural justice can, in my view, inform the application of the expression 'a part of the reason' in s 424A. The cases suggest that this expression should be read benevolently, in favour of an applicant for review. If there is any doubt as to whether information that is adverse to an applicant did form a part of the reason for decision, that doubt should generally be resolved in favour of the applicant."

27 *His Honour accepted, at [164], that "the similar claims information" in the case of SZBMI "played a part ... in the Tribunal's conclusion"; and therefore constituted a part of the reason for its decision. Weinberg J explained, at [164], that:*

"The fact is that the Tribunal regarded the similar claims information as a significant matter, sufficiently important to warrant specific mention. Although the Tribunal dealt with the matter as though it simply bolstered a conclusion that it had already arrived at, rather than an element in the decision-making process, it does not follow that it did not play "a part" in its reasons for decision. ... The actual process by which a decision is reached is, of course, a complex matter. It is not always as neat as the reasons themselves may suggest. The reasoning may not proceed in a linear fashion, and the Tribunal's reasons must, of course, be read as a whole."

28 *Allsop J, in SZEEU at [216]-[217], explained the application of the expression "a part of the reason" as follows:*

"In my view, in the light of [SAAP Minister for Immigration and Multicultural and Indigenous Affairs (2005) 215 ALR 162], in circumstances where one is faced with a decision of the Tribunal with reasons and the complaint is a contravention of s 424A(1), the question to ask, by reference to the reasons of the Tribunal in the context in which one finds them (as revealing what would be the reason or a part of the reason for affirming the decision immediately prior to the making of the decision), is whether the information in question was a part (that is any part) of the reason for affirming the decision. To the extent that the reasons of the

relevant majorities in [Paul v Minister for Immigration and Multicultural Afairs (2001) 113 FCR 396] and VAF can be seen to require that the relevant part of the reason have a stature or importance, or be of a character, which would make it unfair not to invoke the procedures of s 424A, I think SAAP requires that such an approach be rejected. It is only necessary that the information be a part of the reason.

That said, it is necessary to recognise the guidance that one nevertheless receives from aspects of [33] in VAF. One always needs to analyse and interpret the reasons of the Tribunal in order to understand the reason for the ultimate reason or conclusion of the lack of satisfaction of the existence of protection obligations. Merely because something is contained in the text of the reasons of the Tribunal which involves "information" does not conclude the question whether it was (and, in the relevant sense, would be) a part of the reason for affirming the decision. The whole of the written reasons must be analysed and interpreted in their context to assess why it was that the Tribunal acted as it did (and so, in the relevant sense, to assess what would be, prior to making the decision, the reason or a part of the reason). Having thus ascertained the reason or reasons (if there be more than one) why the Tribunal was not relevantly satisfied, any information that was (and thus, in the relevant sense, would be) a part of the reasoning process to explain such reason engages the operation of s 424A, without any additional requirement (for which Paul and VAF appear to call) that the relative importance of the information to the reasoning process be assessed to form a judgment as to whether fairness requires the engagement of s 424A. The above tasks of assessment or interpretation of the Tribunal's reasons, of ascertaining what was any reasoning process and of assessing the relevance of any information thereto may not be straightforward and may lead to conclusions about which minds may differ.""

33. It was argued that the information in question in this instance was given to the Tribunal by a third party and not the First Applicant. Hence it was submitted on behalf of the Applicants that the obligation to comply with s.424A is not excluded by the operation of s.424A(3)(b) of the Migration Act. It was noted that *in SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] 215 ALR 162 of the decision did not turn on the fact that the First Applicant's daughter gave evidence to the Tribunal rather that the source of the evidence before the Tribunal was a person other that the First

Applicant. It was submitted there should be no difference in the present case simply because the psychiatrist's report was forwarded under cover of a letter from the Applicants' adviser. It was argued that the Applicants should not be in a worse position because the evidence was not given during the hearing.

34. In the alternative it was submitted that the First Applicant could not be expected to have known that the Tribunal would use the report for an entirely different purpose see *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 (*Alphaone)*). In the presence case the Tribunal accepted the diagnosis of the psychiatrist who referred to the First Applicant's difficulty in conveying information. Accordingly, neither the First Applicant nor her advisers could reasonably have anticipated the gravamen of the report would be used against the First Applicant. This is, her failure to mention that aspect of her claim to the psychiatrist would go to her credit when the difficulty in recall was the very subject of the report.

35. Through the course of submissions Counsel referred to what is submitted to be an appropriate summary of the law which applies to s.424A of the Migration Act filed in a decision of Barnes FM in *SZCNG v Minister for Immigration & Anor* [2006] FMCA 505 (*SZCNG).* It was submitted that the following paragraphs from the Court's judgment deal with a large number of the issues which are relevant to the present application. The relevant paragraphs are [25] to [67]. For convenience, I set out the following paragraphs from Her Honour's Judgment:

> *"26. Section 424A is as follows:*
>
> *(1) Subject to subsection (3), the Tribunal must:*
>
> *(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and*
>
> *(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and*

(c) invite the applicant to comment on it.

(2) The information and invitation must be given to the applicant:

(a) except where paragraph (b) applies–by one of the methods specified in section 441A; or

(b) if the applicant is in immigration detention–by a method prescribed for the purposes of giving documents to such a person.

(3) This section does not apply to information:

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

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

(c) that is non-disclosable information.

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31. *In SAAP v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 215 ALR 162 the majority of the High Court found that the Tribunal had failed to comply with s.424A of the Act, in that it was obliged to give a visa applicant written particulars of information it had obtained from evidence her oldest daughter had given at the Tribunal hearing. In reaching this conclusion the majority found that s.424A applied when the procedure for a Tribunal hearing under s.425 of the Act was engaged and to information given during the course of the Tribunal hearing. (see McHugh J at [52] – [63], Kirby J at [154] – [170] and Hayne J at [184] – [202]).*

32. *In SAAP it was not disputed that the evidence in issue that had been obtained from the applicant's daughter constituted "information" that the Tribunal considered would be the reason or a part of the reason for affirming the decision that was under review. In this case the material in question is the evidence from the applicant's niece and her husband as to their familial relationship with the applicant. It is the case that s.424A(1) does not apply to "the subjective appraisal or thought process of the Tribunal) (see Paul v Minister for Immigration & Multicultural & Indigenous*

Affairs (2001) 113 FCR 396 at [95] per Allsop J with whom Heerey J agreed and Tin v Minister for Immigration & Multicultural Affairs [2000] FCA 1109 at [54] per Sackville J).

33. *Thus, as Allsop J stated in Paul at [91], the concept of "information" would not extend to the subjective views of the Tribunal as to the evidence, in particular in this case as to whether to accept the evidence of the applicant's niece and her husband. However, as Allsop J also pointed out in Paul, the distinction between information or knowledge that has come to or been gained by the Tribunal and subjective appraisal or thought processes:*

> *"can become very fine. If the subjective thought processes of the Tribunal are as they are because of the perceived importance of some piece of knowledge, those thought processes may merely reveal the relevance (for the purposes of para 424A(1)(b)) of information (for para 424A(1)(a)), requiring the Tribunal to give particulars of that information and to explain its relevance" (at [95]).*

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41. *Hence it is necessary to consider whether any of the exceptions to the s.424A(1) obligation apply. It was contended for the respondent that if s.424A(1) applied, nonetheless the material was information "that the applicant gave for the purpose of the application" within s.424A(3)(b). A number of issues are raised in relation to the scope of this exception. I note first that the word "application" in s.424A(3)(b) means the proceeding before the Tribunal (see Minister for Immigration & Multicultural & Indigenous Affairs v Al Shamry (2001) 110 FCR 27 and SZEEU). Consistent with this interpretation and with the approach to s.424A taken in SAAP and SZEEU, I am satisfied that the fact that the information in question was known to the applicant is beside the point. An applicant would know information which he gave to the Minister in connection with an application for a protection visa. Nonetheless s.424(1) would apply if such information was the reason or part of the reason for affirming the decision under review. Further, as pointed out for the applicant, when s.424A(1) applies it requires not only that the Tribunal give particulars of information to the applicant in writing but also that it ensure, as far as is reasonably practicable,*

that the applicant understands why the information is relevant to the review (s.424A(2)) and is invited to comment. This is what is of importance, even if an applicant knows the particular information in question.

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57. *Moreover while the circumstances in SAAP differ factually because the Tribunal in that case sought the information from the appellant's daughter, the attitude taken by the majority of the High Court to the interpretation of s.424A is of significance. In considering the operation of s.424A, McHugh J drew a clear distinction between obtaining information from the applicant and obtaining information from a third person and contemplated that the Tribunal was under an obligation to give the applicant notice of any adverse material that emerged when a third person gave evidence to the Tribunal during the Tribunal hearing (at [54]). His Honour stated at [60] that the Division "should be interpreted so as to require the Tribunal to give the applicant the opportunity to comment on adverse material obtained at a hearing before the Tribunal (when the applicant or another person gives evidence)".*

58. *Further, McHugh J indicated that it would be anomalous if the Tribunal summoned a person to give evidence which disclosed adverse material but was not required to put that material to the applicant (at [58]). While these views were expressed in the context of considering whether s.424A was exhausted at the time of the invitation to appear, nonetheless it is relevant to note that in SAAP the majority proceeded on the basis that information given by a third person would be subject to the s.424A obligation. It does not appear to have been argued in SAAP that the information given by the appellant's daughter was given by the appellant within s.424A(3)(b).*

59. *Critically McHugh J also stated at [63]:*

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

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

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62. In SZEEU Weinberg J at [159] to [163] addressed the rigorous approach taken by the High Court and adopted by the Full Court of the Federal Court when considering the consequences of a breach of natural justice. His Honour concluded at [163] that:

> *"The strict view that the courts have taken in relation to breaches of the rules of natural justice can, in my view, inform the application of the expression 'a part of the reason' in s.424A. The cases suggest that this expression should be read benevolently, in favour of an applicant for review. If there is any doubt as to whether information that is adverse to an applicant did form a part of the reason for decision, that doubt should generally be resolved in favour of the applicant".*

63. Such an approach would also suggest that the exceptions to s.424A in subsection (3) should be read strictly, consistent with the fact that s.424A is, as McHugh J put it in SAAP at [77], "one of the centrepieces of the Migration Act's regime of statutory procedural fairness". Also see Gummow J at [136], Kirby J at [173] and Hayne J at [204] – [208] in SAAP.

First Respondent's submissions

36. First it was argued by the Applicants that the term "information" in s.424A(1) of the Migration Act refers to knowledge of relevant facts or circumstances communicated to or received by the Tribunal. Also reference was made to *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2 (SZEEU) where the court relevantly states:

> *"205 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].”*

37. It was submitted that "information" does not include the Tribunal's subjective appraisals, thought processes or determinations. Further it does not extend to identify gaps, defects or lack of detail or specifically in the evidence or to conclusions arrived at by the Tribunal when weighing up the evidence by reference to such gaps, defects or other deficiencies in that evidence (see *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 at [24]).

38. A fair reading of the Tribunal's decision it was submitted reveals that it did not consider the psychiatrist's report as being part of its reasons for decision. Reference was made to the extract from the Tribunal's decision set out earlier in this judgment (paragraph 26).

39. It was submitted from that paragraph that where the Tribunal states "for these reasons" it does not accept the Applicant's home was searched by authorities and her flat had been sealed.

40. It provides reasons for its finding. Those reasons stand alone as the Tribunal then goes on to state that it "also notes" that the psychiatrist did not mention the incident. Accordingly, it was submitted that the reason for the Tribunal's decision in the present case are distinguishable from those which were the subject of a Federal Court decision in *MZWEL v Minister for Immigration and Multicultural Affairs* [2006] FCA 442 (MZXWEL) relied upon by the Applicants. It was argued that the mere mention of the matter in the Tribunal's decision does not of itself elevate it to the status of a part of the reason for the decision. In the alternative it was argued the report from Professor Sundram was information the Applicant gave for the purpose of the application before it and therefore falls within the exception s.424A(3)(b) and that accordingly s.424A does not apply.

41. Further it was submitted that to the extent that the Applicant claims not to have been expected to know the Tribunal would consider the psychiatrist’s report in the way it did, seeks to invoke the common law natural justice hearing rule. Section 422B of the Migration Act, it was submitted, means that the natural justice hearing rule did not apply to

the review before the Tribunal (see *Minister for Immigration and Multicultural Affairs v Lay Lat* [2006] FCAFC 61 at [60] - [70]; *SZCRJ v Minister for Immigration and Multicultural Affairs and Anor* [2006] FCAFC 62 at [7] - [8])

42. It was further argued by the First Respondent that the First Applicant and her representatives were aware that credibility was in issue and should have expected to understand that a lack of consistency between various recitals of her claims would undermine the prospect that the Tribunal would accept the First Applicant's claims. It was submitted the Tribunal was under no obligation to inform the First Applicant of its preliminary conclusions about her claims (see *Alphaone* at 591-592).

Reasoning

43. A useful summary which I accept of the principles which apply to s.424A are set out by Barnes FM in *SZCNG*. It is not necessary to restate her Honour's reference to the principles, save and except to note and apply what her Honour stated as set out earlier in this judgment.

44. In my view a key issue for the court to consider in the present case is whether or not the psychiatrist report could be regraded as ‘information’, which could properly be regarded as the reason or part of the reason for the Tribunal's decision.

45. On a proper reading of the Tribunal's decision I am satisfied that the finding by the Tribunal concerning the failure to mention the relevant incident to the psychiatrist, whilst referred to as being a matter which the Tribunal "also notes" appears as part of the paragraph where the crucial finding was made by the Tribunal for the reasons given that it did not accept that the First Applicant's home was searched by the authorities and her flat had been sealed. Whilst that finding precedes the reference to the psychiatrist's report, and failure to mention the incident, and despite the fact that it has been referred to by the Tribunal as something which it "also notes", I am satisfied that at the very least it has strengthened the Tribunal's adverse conclusion about the incident.

46. If it did not form part of the reason then there was no need to mention it or to "also note" it in the reasons. Perhaps of more significance is the Tribunal's statement that it "would have expected her to have mentioned the raid on her home whilst she was present, to the psychiatrist." That expectation not having been met in my view leads the Tribunal as part of its reasoning process to reject the First Applicant's evidence concerning the raid of the authorities on her flat. That incident was clearly a significant factual incident relied upon by the First Applicant in support of her application.

47. I accept that this was properly regarded as "a part of the reason" for the purpose of s.424A of the Migration Act. I accept as Weinberg J states in SZEEU cited with approval by Kenny J in MZWEL "that this expression should be read quite benevolently in favour of an applicant for review." Whilst I may have some doubt as to whether the information of the psychiatrist formed part of the reason for the decision that doubt in this instance I accept should be resolved in favour of the First Applicant.

48. It is necessary to further consider the question of whether the 'information' was information of a type however, which would attract the operation of s.424A(3)(b).

49. There is no dispute in the present case that the psychiatrist's report was forwarded as an attachment to the letter in response from the First Applicant's agent for and on behalf of the First Applicant to the Tribunal's s.424A letter.

50. In my view the information whilst attached to correspondence forwarded for and on behalf of the First Applicant, does not then make it information that the First Applicant "gave for the purpose of the applicant". I accept the information in the report of the psychiatrist was information from the psychiatrist as an expert witness as submitted by the First Applicant, but the source of the evidence before the Tribunal in this instance was a person other than the First Applicant and accordingly the report from the psychiatrist should not be distinguished from evidence which may have been given by another person called on behalf of the First Applicant at a hearing.

51. In my view where a Tribunal receives information from a third party, namely, a psychiatrist as in the present case, which is clearly information of a kind directed towards the mental state of the Applicant, it is incumbent upon the Tribunal to then comply with s.424A of the Migration Act by notifying the First Applicant if it be the case that the content of that report may be used for another purpose. In the present case it is clear that rather than simply relying upon the diagnosis of the psychiatrist, the Tribunal then used the history taken by the psychiatrist in an adverse manner toward the First Applicant. It is somewhat ironic that in the present case the diagnosis which includes a difficulty in recalling events set out in the psychiatrist's report should then lead to the Tribunal considering the history in that report to strengthen its adverse finding against the First Applicant and her failure to resolve inconsistencies in her version of events.

52. In my view there has been a clear breach of s.424A and the breach is not saved by the application of s.422(B) of the Migration Act as I am satisfied that the First Applicant does not need to rely upon any concept of a common law natural justice hearing rule in support of the alleged breach of s.424A.

53. The breach of s.424A in the Tribunal's decision clearly operates as a detriment to all Applicants and in my view is sufficient to constitute jurisdictional error.

Failure to consider claim in relation to practice of a religion on return to Burma

Applicants' submissions

54. It was noted that the Tribunal found that the First Applicant had not been persecuted in the past for reasons of being a Chin Christian. The First Applicant however, clearly articulated a claim that she feared she would not be able to practice her Christianity freely if she returned to Burma, and that claim was made in the context of being a Chin Christian and/or being a person who was actively involved in the practice of a religion in Australia by joining the Chin Baptist Church in Victoria.

55. It was submitted that the Tribunal concentrated on the First Applicant's claimed political activity and that part of the reason for dismissing the First Applicant's political activities was that they appeared to the Tribunal to be "religious rather than political in nature".

56. The Tribunal it was noted referred to country information about pro-democracy activity in Australia and that people who were at risk were those who might be considered by Burmese authorities with leadership potential. It was argued that the Tribunal's decision, an extract of which appears earlier in this judgment (see reference to Court Book p.223) dismissed the First Applicant's claims after assessing her activities as being low level and "more in the nature of social and religious activities".

57. It was submitted that whilst the Tribunal considered country information concerning the First Applicant's claim about past persecution, it did not engage in the same analysis when considering the future. Whilst accepting her activity in Australia was religious in nature, it then placed that material under what was described by the First Applicant's submissions as "the umbrella of a claimed involvement with the NLD and/or attendance at pro-democracy rallies." It was submitted this misunderstood the claim and did not give separate consideration to it as a distinct convention ground.

58. The Tribunal, it was submitted, did not consider the claim in the context of what may happen to her on return to Rangoon or the Chin State. Accordingly the Tribunal fell into error of a kind identified in *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 and/or *Appellant 395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 112.

First Respondent's submissions

59. The First Respondent referred to the extract from the Tribunal's decision set out earlier in this judgment (see Court Book p.223).

60. It was submitted that reference should be made to another part of the Tribunal's reasons for decision where it relevantly stated:

> *"The Tribunal finds that the applicant has been discriminated in the past for reasons of being a Christian Chin and accepts that there may have been some surveillance of her through her neighbours for reason of being a Christian Chin. However, the Tribunal finds that the applicant has never been persecuted for reasons of being a Christian Chin. Her own evidence and the country information indicate that she would be able to practise her Christian religion if she was to return to Rangoon. The Tribunal finds the applicant does not have a well founded fear of persecution on account of her Christian religion or her Chin race…"*
>
> (Court Book p. 221)

61. It was also noted that during its recital of the evidence the Tribunal relevantly states:

> *"The applicant indicated that she was a Sunday School teacher in Chin State and attended the Baptist Church there. Her evidence was quite confusing regarding whether the church she worshipped at in Chin State was closed down. However, she indicated that after the church was closed down – although she was not sure when this happened – the pastor continued to give sermons freely in the area. The applicant's evidence was that she did not have any problems with the authorities in Chin State. The Tribunal finds that the applicant has not been persecuted in the past for reasons of being a Chin Christian. The applicant moved with her husband to Rangoon in 1995 and from then on attended church regularly. She indicated that there were a number of Baptist churches in her area that she was able to attend."*
>
> (Court book p.217)

62. That passage was followed by the extract where the Tribunal recited the First Applicant indicated the First Applicant was able to practice her religion in Rangoon. The First Respondent submitted that that extract reveals an examination of past discrimination, but the Tribunal then proceeds in its reasoning to consider what might happen if the Applicant were to return to Rangoon. It was argued that the Tribunal in its conclusion (set out earlier in this judgment at paragraph..... page 223 court book) had considered discrete elements upon which it was claimed there might be reasons for a surplus claim and rejected them.

63. It did that by making findings concerning how Chin Christians were treated and the First Applicant's own evidence.

64. The First Respondent submitted that when taken as a whole the issue of the Applicant's religious activities and the existence of any surplus claim was addressed and, in particular, the Applicant's ability to practice Christianity upon return to Burma.

Reasoning

65. In my view the First Respondent's submissions in relation to this grant are correct. A proper reading of the Tribunal's decision reveals in the extracts set out earlier in this judgment that the Tribunal has recited the claim of part-persecution and has then been cognisant of the surplus claim. It has specifically noted the activities of the First Applicant in Australia, and that she has spent a lengthy time in Australia. It then concluded in a manner free of jurisdictional error that the Applicant did not face a real chance of persecution and found the First Applicant would not have a well founded view of persecution by reason of her religious beliefs. Whilst it did emphasise the political activity, it is clear from the extracts set out earlier in this judgment that the religious activities both in Burma in the past, and in Australia, was not sufficient to provide any basis upon which the First Applicant would be at risk of persecution for a convention reason.

66. In my view the Tribunal clearly accepted the First Applicant's own evidence that she would be able to practice "her Christian religion if she was to return to Rangoon". It was not then required to further explore other options and in my view has reached a conclusion after reciting the relevant facts on this issue in a manner free of jurisdictional error. Accordingly this ground should fail.

Conclusion

67. It follows for the reasons given, however, that on the basis of a breach of s.424A of the Migration Act, the decision of the Tribunal should be set aside and orders made accordingly.

I certify that the preceding sixty-seven (67) paragraphs are a true copy of the reasons for judgment of McInnis FM

Associate:

Date: 27 March 2007