FEDERAL COURT OF AUSTRALIA

SZJZB v Minister for Immigration and Citizenship [2008] FCA 1731

MIGRATION - application for a protection visa – whether wife's evidence to Tribunal constituted "information" within the meaning of s 424A – whether wife's evidence relevant only to credibility of husband's claims – whether Tribunal complied with s 424A.

Held: appeal upheld

Migration Act 1958 (Cth)

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88; [2005] HCA 72
MZXBQ v Minister for Immigration and Citizenship (2008) 166 FCR 483; [2008] FCA 319
Parramatta City Council v Hale (1982) 47 LGRA 319
SZBEL v Minister for Immigration and Multicultural Affairs (2006) 228 CLR 152; [2006] HCA 63
SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609; [2007] HCA 26
SZGSI v Minister for Immigration and Citizenship (2007) 160 FCR 506; [2007] FCAFC 110
SZHXK v Minister for Immigration and Citizenship [2007] FCA 759
SZJZB & Anor v Minister for Immigration & Anor [2008] FMCA 848
SZKLG v Minister for Immigration and Citizenship (2007) 164 FCR 578; [2007] FCAFC 198

SZJZB v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
NSD 1077 OF 2008

JAGOT J
19 NOVEMBER 2008
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1077 OF 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZJZB**
First Appellant

SZJZC
Second Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **JAGOT J**
DATE OF ORDER: **19 NOVEMBER 2008**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal is upheld.

2. Orders 1 and 2 made by the Federal Magistrates Court on 26 June 2008 are set aside.

3. The decision of the Refugee Review Tribunal dated 21 November 2006 is quashed.

4. The application for review of the decision made by a delegate of the first respondent to refuse to grant to the appellants a protection (class XA) visa is remitted to the Refugee Review Tribunal to be dealt with according to law.

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 eSearch on the Court's website.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1077 OF 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZJZB** **First Appellant**
	SZJZC **Second Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**JAGOT J**
DATE:	**19 NOVEMBER 2008**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 This is an appeal against an order of the Federal Magistrates Court dismissing the appellants' application for judicial review in connection with refusal of a protection (class XA) visa under s 65 of the *Migration Act 1958* (Cth) (*SZJZB & Anor v Minister for Immigration & Anor* [2008] FMCA 848). Under s 36(2) of the Act the criterion for a protection visa is that the applicant for the visa is (relevantly) 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 (meaning, in accordance with s 5(1), the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees). Section 474 of the Migration Act protects "privative clause decisions" (defined to include decisions with respect to protection visas) from challenge other than on the grounds of jurisdictional error.

BACKGROUND

2 The appellants are husband and wife and are citizens of India. They arrived in Australia on 14 May 2006. On 22 June 2006 the appellants applied for protection visas with the Department of Immigration and Citizenship. A delegate of the first respondent refused the applications on 16 September 2006. On 9 October 2006 the appellants applied to the Tribunal for a review of that decision. The Tribunal affirmed the delegate's decision on 21 November 2006.

3 The second appellant did not make any specific claims under the Convention. The appellants' appeal to this Court relates only to the circumstances of the first appellant. The first appellant claimed persecution by reason of his involvement with the Muslim Ittehed Majlish (MIM) party in Hyderabad and subsequent refusal to join the Telegu Desham Party (TDP).

4 For convenience I refer to the first appellant as the appellant except where necessary to distinguish between the evidence before the Tribunal of the first and second appellants (when I refer to the appellant husband and appellant wife respectively).

5 On 15 July 2008 the appellants filed a notice of appeal to this Court from the orders of the Federal Magistrates Court. The notice of appeal specifies three grounds, the first and third of which overlap. For convenience I have identified the substance of the first and third claims together in summary form. The appellant claims that the Federal Magistrates Court should have found jurisdictional error in that:- (i) in breach of the Migration Act and the requirements of procedural fairness, the Tribunal did not give the appellant written details of evidence adverse to his claims and an opportunity to comment on that evidence (being evidence his wife gave at the hearing in circumstances where the Tribunal's decision was influenced by alleged inconsistencies between that evidence and the claims of the appellant), and (ii) the Tribunal wrongly found that the appellant did not take threats to his safety seriously and that those threats did not constitute serious harm. The primary judge dealt with arguments to the same or a similar effect.

DISCUSSION

6 The second claim may be dismissed immediately. The Tribunal was entitled to make the factual findings it did in deciding whether it was satisfied that the appellant was a person to whom Australia owed protection obligations under the Convention. As the primary judge observed merits review is not available. The appellant's second claim is an invitation to impermissible merits review of factual findings that were open to the Tribunal on all of the evidence.

7 The first and third claims require (and received from the primary judge) more detailed consideration. As the primary judge found, the Tribunal put the appellant wife's evidence to the appellant husband during the hearing. Hence, s 425 of the Migration Act was satisfied. The starting point is thus s 424A of the Migration Act and related provisions. Section 424A of the Migration Act is as follows:

> (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.
>
> (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.
>
> (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.

8 Section 424AA (referred to in s 424A(2A)) is as follows:

> If an applicant is appearing before the Tribunal because of an invitation under section 425:
>
> (a) the Tribunal may orally give to the applicant 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) if the Tribunal does so - the Tribunal must:
> (i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and
> (ii) orally invite the applicant to comment on or respond to the information; and
> (iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and
> (iv) if the applicant seeks additional time to comment on or respond to the information - adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.

9 For completeness, I note that s 425(1) provides that:

> (1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.

10 Section 422B of the Migration Act provides that Div 4 of Pt 7 (in which s 424A is located) "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with".

11 It is also necessary to identify (as the primary judge did) the parts of the Tribunal's statement of decision and reasons that underlie them.

12 The Tribunal's statement of decision and reasons is divided into parts. The third part is entitled "claims and evidence". In that part the Tribunal, amongst other things, set out the material available as part of the original application, the application for review, the hearing and from other sources. In dealing with the material that became available at the hearing the Tribunal noted inconsistencies within the appellant's material and between the appellant's material and that provided by his wife. The appellant husband, during oral evidence, said that between January 2005 and May 2006 (after he claimed to have received threats and suffered

an attack on his shop due to his political activities) he continued to live at home but went to Madras, Bombay and Delhi to make inquires about going overseas. He was thus at home in Hyderabad for only two to three months. His uncles lived in Madras and Bombay. His shop was finished because there was no one to look after it in his absence. The Tribunal pointed out that, at the beginning of the hearing, the appellant husband had said he lived in Hyderabad. The appellant responded that he did but as there was no embassy in Hyderabad he went to the other cities to make inquires and repeated that he had only spent two to three months in Hyderabad. His wife and mother continued to live in Hyderabad.

13 The Tribunal also asked the appellant husband more detailed questions about his shop. The appellant husband said the shop was attacked in January 2005 (after the elections in September 2004 and threats he had received but had not taken seriously until the attack on his shop).

14 The Tribunal took evidence from the appellant wife. The appellant wife said her husband had lived in Hyderabad from January 2005 until they came to Australia and had not lived anywhere else during that period. She said that her husband closed the shop after it was attacked which was in September 2004. They received assistance from her father.

15 After recording this evidence the Tribunal said:

> The Tribunal asked the applicant husband why his spouse stated that he lived in Hyderabad and did not live anywhere else. The applicant stated he has an uncle in Mumbai and he made trips to Mumbai to inquire about coming to Australia. The Tribunal noted that the applicant said earlier that he only spent two months in Hyderabad while his wife stated that he continued to live there. The applicant said that his wife meant that he lived in Hyderabad but travelled to other areas.
>
> The Tribunal asked the applicant to comment on the fact that his wife said that the attack on the business occurred in September 2004 while the applicant husband said it was in January 2005. The applicant husband said it happened in January 2005. The applicant said that may be his wife had a bad memory and may be she had forgotten.

16 In that part of its statement entitled “findings and reasons” the Tribunal accepted that the appellants were nationals of India. The Tribunal then said:

> The Tribunal notes that the applicant’s claims differed significantly between his written evidence provided with the application and the oral evidence given to the Tribunal. There were also significant differences in evidence of the applicant

husband and applicant wife concerning important aspects of the claims. The Tribunal does not rely on such inconsistencies in reaching its decision and does not consider these to be adverse to the applicant.

The Tribunal found the applicant not to be a credible witness. Many aspects of his oral evidence changed as the hearing progressed.

17 The Tribunal dealt with the appellant's claims as follows:

(1) The Tribunal did not accept that the appellant was actively involved in the activities of MIM. During the hearing the appellant displayed extremely limited knowledge about MIM and was unable to provide consistent information or information about when he joined the party, the procedure for joining, or how many seats the party won in elections. The appellant could not explain why he was only targeted after the election in September 2004 and had not brought his membership card to the hearing despite bringing his tax card from India. For these reasons the Tribunal considered that the appellant's involvement in the MIM party was minor with the consequence that there was no real chance of the appellant being persecuted for this reason.

(2) The Tribunal did not accept that the appellant and his shop had been attacked due to his refusal to join the TDP. The Tribunal said this claim "lacked details". The evidence the appellant gave about his business was inconsistent. The appellant did not bring to the hearing evidence he said he had about his claimed assault and hospitalisation related to the attack on his business. The Tribunal did not accept that the appellant, his wife or shop had been attacked.

(3) The Tribunal found that the appellant's evidence about threats from the TDP party related to the period between September 2004 and January 2005 and no other time. Further, that the appellant had not taken the threats seriously so they could not amount to serious harm.

(4) The Tribunal considered the appellant's conduct inconsistent with the existence of a well-founded fear of persecution because he claimed that the threats started after September 2004 and he was physically harmed and his business ransacked in January 2005. When asked where he resided he initially

said at home in Hyderabad and subsequently said that he moved to other areas and only spent two to three months in Hyderabad. He explained this inconsistency by saying his home was in Hyderabad but he lived elsewhere. The Tribunal did not accept this evidence and found the appellant to be "evasive on this issue". The Tribunal did not accept that the appellant resided anywhere other than Hyderabad.

(5) The Tribunal noted that the appellant said his wife and mother continued to reside in the family home in Hyderabad after the threats and attack. The Tribunal considered that if the appellant feared for the safety of his wife and mother due to the threats against them by the TDP they would not continue to reside in the family home in Hyderabad. Further, that the appellant's conduct in taking more than a year to leave India was inconsistent with the appellant having a well-founded fear of persecution.

(6) The Tribunal considered that the appellant had not provided any details of fear or persecution for being a Muslim member of the MIM party in a Hindu area. The Tribunal said that in the absence of any evidence it was not satisfied that the appellant had a well-founded fear of persecution because of his religion.

(7) Having regard to all incidents reported by the appellant, singularly and cumulatively, the Tribunal was not satisfied that there was a real chance of the appellant being persecuted for any Convention reason in the foreseeable future.

(8) The Tribunal also noted that the appellant said the MIM and TDP parties were only active in the state of Andrha Pradesh. The Tribunal did not accept the appellant's claim he would be recognised in other states because it did not accept that the appellant had a high profile within the MIM party. Consequently, the Tribunal found that any persecution the appellant might face was localised and it would be reasonable for the appellant to relocate to another part of India given that he had run his own business, come to Australia, and gained employment.

(9) In the part of its statement entitled "conclusions" the Tribunal said:

> Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicant does not satisfy the criterion set out in s 36(2) for a protection visa.

18 The primary judge observed that the Tribunal had no obligation to put to the appellant inconsistencies in his own evidence given at the hearing (s 424A(3)(b)). Further, that independent country information was within the exception in s 424A(3)(a). With respect to the claim based on the evidence given by the appellant's wife, the primary judge reasoned as follows:

(1) The Full Court of the Federal Court has held that the word "applicant" in s 424A means an individual applicant. Hence, evidence given by one applicant relevant to another applicant is not within the exception in s 424A(3)(b) (*SZGSI v Minister for Immigration and Citizenship* (2007) 160 FCR 506; [2007] FCAFC 110). For s 424A to be engaged, however, the evidence must constitute information that would be the reason or part of the reason for affirming the decision under review.

(2) The Tribunal commenced its findings and reasons with the statement that inconsistencies between the evidence of the appellant and his wife were not relied upon or considered to be adverse to the appellant.

(3) The obligation in s 424A does not require notice to be given "of every matter the Tribunal might think relevant to the decision under review" (*SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609; [2007] HCA 26 at [15]). In the context of s 424A the meaning of "information" is related to "the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence" (*SZBYR* at [18]). On this basis the Tribunal's appraisal of the inconsistency between the evidence of the appellant and his wife was not "information" within the meaning of s 424A.

(4) However, it was necessary to consider whether the evidence given by the wife and that of the appellant itself engaged the obligation in the section. The primary judge said:

64. Had there not been other evidence to the same effect from the applicant before the Tribunal at this time, it may well be that a statement from another person that the applicant continued to live in the place where he allegedly claimed to fear experiencing harm would be such that, if true, it would "undermine" his claim to have a well-founded fear of persecution. However the Tribunal had the same information provided to it by the applicant at the commencement of the Tribunal hearing – that he had lived at his address in Hyderabad until coming to Australia in May 2006. He subsequently said he moved to other areas and only spent two to three months in Hyderabad. Any reliance that might thereafter be placed by the Tribunal on what the wife said later on the same issue would not necessarily be because of the statements of fact contained in her evidence as such, but rather because of inconsistency between what she said and the applicant's changed evidence to the Tribunal to the effect that he had spent only two to three months in Hyderabad after January 2005 (and see *SZKLG* [*SZKLG v Minister for Immigration and Citizenship* (2007) 164 FCR 578; [2007] FCAFC 198 at [33]). Similarly the wife's evidence as to the date when the business was attacked would be relevant because of its inconsistency with the applicant's evidence.

65. On the approach taken by Heerey J in *MZXBQ* [*MZXBQ V Minister for Immigration and Citizenship* (2008) 166 FCR 483; [2008] FCA 319] any appraisal of such inconsistency in evidence would go to the applicant's credibility, rather than being of itself such as to undermine the applicant's claims to have a well-founded fear of persecution as claimed. In those circumstances it cannot be said that the questioning of the applicant wife and her answers would be of dispositive relevance to the Convention claims advanced by the applicant before the Tribunal. As the first respondent submitted, consistent with the approach taken in *SZBYR* at [17] – [18] and *MZXBQ* at [27], the appraisal of inconsistency and the credibility finding that resulted do not constitute information for the purposes of s.424A(1). Nor do the Tribunal's thought processes in respect of the applicant's credibility (see *VAF* [*VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471; [2004] FCAFC 123 at [24]]).

66. Moreover, if in some circumstances it is appropriate to have regard to the Tribunal reasons for decision in determining whether a s.424A(1) obligation arose at a prior time (see *SZEEU* [*SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214; [2006] FCAFC 2] and *SZICU* [*SZICU v Minister for Immigration and Citizenship* [2008] FCAFC 1 at [25])], not only did the Tribunal expressly disavow any reliance on the differences in the evidence of the applicant husband and the applicant wife, but in the particular circumstances of this case there were also significant differences in the evidence of the applicant husband himself which provided a basis (and hence could be said to be part of the reason) for the Tribunal's failure to accept that the applicant resided anywhere other than Hyderabad and supported its view that the applicant's conduct was not consistent with the existence of a well-founded fear of persecution. In *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 the High Court stated that s.424A did not apply to information consisting of a letter about the applicant's claims received by the Department because in its findings and reasons the Tribunal stated that it "gave no weight" to the letter. The High Court stated at [12]:

> As for s 424A, it is enough to notice that that provision is directed to "information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review". The Tribunal said, in its reasons, that it did not act on the letter or the information it contained.

> That is reason enough to conclude that s 424A was not engaged.
>
> (See *SZHXK v Minister for Immigration and Citizenship* [2007] FCA 759 at [18] to the same effect).
>
> **67**. This provides an alternative basis for concluding that s.424A did not apply to the wife's evidence at the hearing. I also note for completeness that, as the reasons for decision indicate, the Tribunal made known to the applicant the "substance" of what his wife said at the hearing relevant to the issues for determination. No failure to comply with s.425 in the sense considered in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 or a lack of procedural fairness in the manner considered in *VEAL* is apparent.

19 *SZBYR* establishes a number of propositions. Section 424A is a mandatory provision. Contravention involves jurisdictional error. The operation of the section is not limited to the pre-hearing stage but depends on the criteria for the making of the decision independent from the Tribunal's particular reasoning on the facts in the case. The criterion established by s 36 of the Migration Act is whether the appellants are or are not persons to whom Australia owes protection obligations under the Convention. Viewed in that light the information in the applicant's statutory declaration in *SZBYR*, if believed, did not contain in terms a rejection, denial or undermining of the appellants' claims. Rather, the content (if believed) would tend to support the application to overturn the decision to refuse the protection visa. In context, "information" in s 424A relates to evidentiary material or documentation not gaps in such material, lack of details, inconsistencies, disbelief about such material or other thought processes, appraisals or conclusions by the Tribunal. In other words the focus must be on the evidence or material in question (documentary or oral). The effect of s 424A is "not to create a back-door route to a merits review in the federal courts of credibility findings made by the Tribunal" (at [21]).

20 The primary judge's principal conclusions were: - (i) the appellant wife's evidence that her husband continued to live in Hyderabad at all times after the claimed attacks following the September 2004 elections (if taken in isolation) could be seen as undermining his claim to a well-founded fear of persecution, (ii) however, in this case the appellant husband had given the same evidence as the wife at the beginning of the hearing before the Tribunal, being the evidence he later changed or qualified, (iii) accordingly, the appellant wife's evidence (in the face of the appellant husband's evidence to the same effect at the beginning of the hearing) was relevant not because of the facts therein asserted but because of inconsistency affecting an appraisal of the appellant husband's credibility, and (iv) for these

reasons, the substance of what the appellant wife said did not contain a rejection, denial or undermining of the appellants' claims and was thus not “information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review” within the meaning of s 424A.

21 The respondent Minister supported these conclusions submitting that the Tribunal’s reasons (specifically, the questions put to the appellant husband about the inconsistencies between his evidence and that of the appellant wife) could not properly be used to infer that, at any time, the Tribunal considered the material would be the reason, or a part of the reason, for affirming the decision under review. The respondent Minister: - (i) described this as impermissible speculation contrary to the reasoning in *SZBYR* at [22] and *MZXBQ* at [25], (ii) emphasised the function of the words “in their terms” in *SZBYR* at [17], and (iii) noted that the appellant bore the onus of proving any breach of s 424A.

22 It is true that *SZBYR* and *MZXBQ* speak against the use of the Tribunal’s reasons to determine compliance with s 424A on the basis that 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” (*SZBYR* at [17]). It is for this reason that the focus of the inquiry must be the provision under which the protection visa was sought (s 36) and whether the information contains any “rejection, denial or undermining of the appellants' claims to be persons to whom Australia owed protection obligations”.

23 I accept the respondent Minister’s submission that the appellants’ onus to establish breach must not be overlooked. I accept also that the appellants may only discharge the onus “in accordance with proper legal requirements and by inference not suspicion …” (*Parramatta City Council v Hale* (1982) 47 LGRA 319 at 345). I do not accept that the terms of s 424A mean that any attempt to draw inferences about the Tribunal’s consideration necessarily descends into impermissible speculation. Much will depend on the nature of the material said to constitute the information within the meaning of s 424A. I also do not accept that the evidence of the appellant wife needed to demonstrate any patent falsity of the appellant husband’s claims before s 424A might be engaged. *SZBYR* at [17] – [18] and

SZKLG (2007) 164 FCR 578; [2007] FCAFC 198 at [32] do not impose that threshold requirement.

24 The issue is not easy to resolve. Nevertheless, the conclusion I have reached is different from that of the primary judge. As the primary judge observed, any assessment of the existence of a well-founded fear of persecution would be affected by evidence about the appellant husband having continued to live in his home in Hyderabad. The appellant wife's evidence, in my view, remained relevant to the assessment of the existence of the claimed well-founded fear of persecution despite the husband's initial evidence to the same effect. In other words, the husband's initial evidence about where he lived did not mean that the wife's evidence was relevant only as part of an assessment of the husband's credibility. The nature of the appellant wife's evidence must also be considered. Her evidence about where her husband lived after the claimed attacks was centrally relevant to the substance of his claims of persecution in Hyderabad for political and religious reasons. For these reasons, I consider that the facts of this case enable and require an inference to be drawn about breach of s 424A.

25 The fact that, ultimately, the Tribunal did not use the wife's evidence to assess the substance of the claim (as opposed to the husband's credibility) is not an answer. *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88; [2005] HCA 72, to which the primary judge referred, was decided before *SZBYR*. More importantly, the parties in *VEAL* effectively conceded that s 424A had no application (at [11]). *SZEEU* (2006) 150 FCR 214; [2006] FCAFC 2 and *SZHXK* [2007] FCA 759, also referred to by the primary judge, pre-date *SZBYR*. The observation in *SZICU* [2008] FCAFC 1 at [25] leaves open the question of the permissibility of examining the Tribunal's decision when determining the application of s 424A reasons in the light of the High Court's decision in *SZBYR*. The respondent Minister submitted that *SZBEL v Minister for Immigration and Multicultural Affairs* (2006) 228 CLR 152; [2006] HCA 63 at [33] – [43] established that the Tribunal was not obliged to raise the inconsistencies between the evidence of the appellants because it did not use that material to dispose of the appeal. *SZBEL* primarily concerned s 425 of the Migration Act which provides that the Tribunal "must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review". It is not inconsistent with the reasoning in *SZBYR* about the obligations imposed by s 424A. Further,

and insofar as the Tribunal's reasons are relevant to the present task, disavowal of reliance on the information is itself potentially ambiguous rather than determinative of the issue given the terms of s 424A.

26 The husband's presence at the hearing and the questions the Tribunal put to him about the inconsistency between his evidence and that of his wife also does not assist the respondent Minister. While those circumstances presumably would have excluded any claim to a breach of the common law obligation of procedural fairness, the obligation in s 424A cannot be satisfied by oral notice. The particulars must be provided in the form of a document (ss 424A(2) and 441) or consistent with the obligations in s 424AA. The respondent Minister did not submit that the Tribunal complied with s 424AA during the hearing.

27 I also do not accept that this was a case in which no useful result could ensue from the grant of relief. The observation in *SZBYR* at [29] related to a case where the Tribunal made a factual finding of a lack of any nexus between the claims and the Convention. This meant that the Tribunal, irrespective of any other issue, was bound to refuse the application for review of the decision declining the grant of a protection visa. The observation in *MZXBQ* at [31] concerned an issue that was peripheral to the claims. The same cannot be said in the present case.

28 For these reasons I consider that the appeal should be upheld and consequential orders made.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot.

Associate:

Dated: 19 November 2008

The Appellant appeared in person.

Counsel for the First Respondent: Mr J Mitchell

Solicitor for the First Respondent: DLA Phillips Fox

The Second Respondent did not appear.

Date of Hearing: 12 November 2008

Date of Judgment: 19 November 2008