FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZNOX v MINISTER FOR IMMIGRATION & ANOR *[2009] FMCA 708*

MIGRATION – Review of decision of Refugee Review Tribunal – no s.424 letter – Tribunal complied with s.425 – Tribunal complied with s.424AA – findings were open to Tribunal on what was before it – applicant seeking impermissible merits review – Tribunal turned its mind to the task it was jurisdictionally required to consider – country information fell within exception in s.424A(3)(a) – Tribunal applied correct tests – Tribunal considered all integers of applicant's claims and claim arising from evidence – no bias – no jurisdictional error – application dismissed.

Migration Act 1958 (Cth), ss.424, 424B, 424A, 422B, 441A, 425, 424AA, 425A, 426A, 65, 36, 427
Migration Legislation Amendment Act (No.1) 2009 (No.10, 2009), Schedule 1, Item 17
Migration Regulation 1994 (Cth), reg.4.35D

Minister for Immigration and Multicultural Affairs v Lay Lat (2006) 151 FCR 214; [2006] FCAFC 61
SZCIJ v Minister for Immigration and Multicultural Affairs [2006] FCAFC 62
SZFDE v Minister for Immigration and Citizenship (2007) 237 ALR 64; [2007] HCA 35
Minister for Immigration and Citizenship v SZMOK [2009] FCAFC 83
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63; (2006) 228 CLR 152
SZMCD v Minister for Immigration & Citizenship & Anor [2009] FCAFC 46
SJSB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 225
NAST v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 208
Minister for Immigration and Multicultural and Indigenous Affairs v VSAF of 2003 [2005] FCAFC 73
Randhawa v Minister for Immigration and Ethnic Affairs [1994] FCA 1253; (1994) 52 FCR 437
Abebe v The Commonwealth (1999) 197 CLR 510; [1999] HCA 14
SZJHR v Minister for Immigration and Citizenship [2007] FCA 1901
Kopalapillai v Minister for Immigration and Multicultural Affairs [1998] FCA 1126; (1998) 86 FCR 547
W148/00A v Minister for Immigration and Multicultural Affairs (2001) 185 ALR 703; [2001] FCA 679
Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors [1996]

HCA 6; (1996) CLR 259
Minister for Immigration and Multicultural and Indigenous Affairs v NAMW [2004] FCAFC 264; (2004) 140 FCR 572
VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 82
QAAC of 2004 v Refugee Review Tribunal [2005] FCAFC 92
SZMFZ v Minister for Immigration and Citizenship [2008] FCA 1890
SZMPT v Minister for Immigration and Citizenship [2009] FCA 99
SZLPJ v Minister for Immigration & Citizenship [2008] FCA 1721
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 215 ALR 162; [2005] HCA 24
SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609; [2007] HCA 26
Htun v Minister for Immigration and Multicultural Affairs [2001] FCA 1802; (2001) 194 ALR 244
NABE v Minister for Immigration Multicultural and Indigenous Affairs (No.2) [2004] FCAFC 263
Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs [2003] HCA 26
VQAB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 104
WAEE v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 184; (2003) 75 ALD 630
Paul v Minister for Immigration and Multicultural Affairs [2001] FCA 1196; (2001) 113 FCR 396
W389/01A v Minister for Immigration and Multicultural Affairs [2002] FCAFC 432
VCAK of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 459
WAGJ v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 277
NAYU v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 300
Minister for Immigration Multicultural Affairs v Jia (2001) 205 CLR 157
SBBS v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 361
Minister for Immigration and Multicultural and Indigenous Affairs v SBAN [2002] FCAFC 431
VFAB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 872
Re Refugee Review Tribunal; Ex parte H [2001] HCA 28; (2001) 179 ALR 425
SZNAV & Ors v Minister for Immigration & Anor [2009] FMCA 693
SZLTR v Minister for Immigration and Citizenship [2008] FCA 1889
Minister for Immigration & Multicultural & Indigenous Affairs v Sun [2005] FCAFC 201; (2005) 146 FCR 498
MZXRE v Minister for Immigration and Citizenship [2009] FCAFC 82

Applicant:	SZNOX
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1132 of 2009
Judgment of:	Nicholls FM
Hearing date:	23 July 2009
Date of Last Submission:	23 July 2009
Delivered at:	Sydney
Delivered on:	31 July 2009

REPRESENTATION

Appearing for the Applicant:	In person
Solicitors for the Applicant:	Nil
Appearing for the Respondents:	Mr R Baird
Solicitors for the Respondents:	Clayton Utz

ORDERS

(1) The application made on 11 May 2009, and amended on 3 July 2009, is dismissed.

(2) The applicant pay the first respondent's costs set in the amount of $3,087.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1132 of 2009

SZNOX
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application made under the *Migration Act 1958* (Cth) ("the Act") on 11 May 2009, and amended on 3 July 2009, seeking review of the decision of the Refugee Review Tribunal ("the Tribunal") made on 16 April 2009, which affirmed the decision of a delegate of the first respondent to refuse a protection visa to the applicant.

Background

2. The Minister has put a bundle of relevant documents before the Court (Court Book – "CB"), which contains the following relevant background.

3. The applicant is a citizen of India who arrived in Australia on 6 September 2009. He applied for a protection visa on 17 October 2008 (CB 1 to CB 33, with annexure). His claims were initially set out in a document attached to the application (CB 29 to CB 33). His application was refused by a delegate of the respondent Minister on

14 January 2009 (CB 41 to CB 60). He applied for review by the Tribunal on 6 February 2009 (CB 62 to 65).

The applicant's claims to protection

4. The applicant claimed to fear persecutory harm from the authorities in India because of his involvement with the Communist Party of India (Maoist League) ("CPI(M)"), its Radical Youth League ("RYL"), the "People Gorilla Army" [sic? Guerilla] ("PGA") (of which he eventually became a "District level member"), People's War Group ("PWG"), and the Tamil Nadu Liberation Army ("TNLA") (of which he was a "messenger"). He also claimed that the authorities imputed to him as having links with the "Naxalites".

5. He claimed to have been arrested on separate occasions:

    1) In 1996, after participating in a "small rally of communist activists" at which he was arrested and detained. Upon release, he continued to participate in CPI(M) activities.

    2) In 1997, when the police began arresting CPI(M) members "without any warrants". He was charged with "several fake cases" and imprisoned until 1999.

    3) In 2000, when he was arrested on suspicion of involvement in the TNLA's attack on a railway track. While in gaol, he was physically assaulted, forced to confess, threatened, and he "suffered". Once released, he continued his political work.

    4) In 2002, when he was charged with "false cases" and accused of being a "Naxalite", and was put in gaol, but escaped.

6. He further claimed that in 2004, when the CPI(M) was banned, police came to a "forest" where the applicant and party members were hiding and killed "Arivazhagan", a TNLA activist and friend. The applicant escaped. He hid in various places in India and was protected by the TNLA and CPI(M). He and some friends were arrested in 2005, but he managed to escape.

7. His family arranged for him to travel to Australia and he claimed that he could not live anywhere in India because the CPI(M) is banned and that he could not speak any language but Tamil.

The delegate

8. The applicant attended an interview with the delegate on 6 January 2009 (CB 49). The delegate rejected all of the applicant's material claims to fear persecutory harm (CB 41 and CB 48 to CB 60).

9. The delegate's findings were based on:

   1) Inconsistencies between the applicant's statement attached to his protection visa application and what he said at the interview.

   2) Inconsistencies within what he had said at different times at interview.

   3) Inconsistencies between the applicant's evidence and country information.

   4) A lack of documentary evidence to support his claims.

   5) Implausible aspects to the applicant's claims.

10. These findings led the delegate to conclude that that applicant did not have a well-founded fear of Convention related harm and that, therefore, there was no real chance that persecutory harm would occur.

The Tribunal

11. The applicant attended a hearing before the Tribunal on 1 April 2009 (see the Tribunal's record of what occurred at the hearing at CB 92 to CB 96).

12. While accepting some "basic facts" put forward by the applicant, the Tribunal found that it had "comprehensive, unresolved concerns about the applicant's claims and evidence" (see [64] at CB 100). It had extensive and comprehensive reasons for this (see [65] at CB 100 to [74] at CB 103). This led it to conclude:

> *"75. The above factors, considered with the totality of his evidence, lead the Tribunal to conclude that the applicant is not a witness of truth, and that his refugee claims are completely unreliable."*

13. This led it to reject the applicant's factual account of what he said had occurred in India, and to reject the basis upon which he claimed to fear persecutory harm if he were to return (see [76] to [78] at CB 103).

Amended Application to the Court

14. The amended application to the Court puts forward three numbered grounds with some particulars:

    1) The s.424 "invitation" did not comply with s.424(3)(a) and s.424B because it "did not specify the way in which additional information may be given." Nor did it state the "period within which the information was to be given."

    2) The applicant "satisfies the four key elements of the Convention definition" and the Tribunal did not consider this, which was a "factual and legal error".

    3) The Tribunal breached s.424A because it should have provided the applicant with the "independent information that it had about CPI(M) and major incident in India" at a time before the hearing. It used this information.

15. There are also two unnumbered complaints in the amended application:

    1) The Tribunal did not "analyse properly the 'future harm'" that the applicant would experience should he return to India.

    2) The Tribunal did not "assess or carry out the 'real chance' test."

Hearing before the Court

16. At the hearing before the Court the applicant appeared in person. He was assisted by an interpreter in the Tamil language. Mr R Baird appeared for the Minister. The Minister has also put written

submissions before the Court. Despite opportunity, the applicant has not provided any written submissions.

17. The applicant stated that his "second application to the Court" was the "correct one". I understood him to confirm that he wanted the Court to consider the amended (not the originating) application.

18. The applicant told the Court that the "RRT did not believe" him, but rather that "they just sat at a computer and said that nothing happened" to him. He said that he could not return to his country. That he has asked for more documents from India. He needs more time.

19. I explained to the applicant the role of the Court and the role of the Tribunal. That the Court would need to find "jurisdictional error" (a "legal mistake") in order to assist him. In this context, I asked him whether he had received assistance in drafting his applications to the Court. He said that a "friend" who had "studied" wrote it for him.

20. He also complained that the Tribunal found that "what the police did was not possible" and that the law applied unequally to those with money as compared to those without.

Consideration

Ground one

21. Ground one asserts that the Tribunal did not comply with s.424(3)(a) and s.424B of the Act because the invitation did not specify the way, or the period within which, the additional information was to be given.

22. The applicant was unable to assist as to what "invitation" the particulars in this ground referred.

23. I note that this is a case to which s.422B of the Act applies. That section provides that Division 4 of Part 7 of the 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", of course, absent bias (*Minister for Immigration and Multicultural Affairs v Lay Lat* (2006) 151 FCR 214; [2006] FCAFC 61 at [59] to [67], *SZCIJ v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 62 at [8], *SZFDE v Minister for Immigration and Citizenship* (2007) 237 ALR

64; [2007] HCA 35 at [48]). (See also *Minister for Immigration and Citizenship v SZMOK* [2009] FCAFC 83.)

24. The current version of s.424 became operational on 15 March 2009 (see *Migration Legislation Amendment Act (No. 1) 2009*, Act 10 of 2009, Schedule 1, item 17). The application for review predates that date. Under the version of s.424 in force prior to that date, an invitation to give "additional information" (with reference to s.424(2) as it was, or under the current version) must be given by one of the methods in s.441A. Section 424B sets out the contents required for such a written invitation.

25. However, as Mr Baird submitted, there is nothing before the Court to show that any such invitation was given pursuant to s.424, as it was up to 15 March 2009 (from 6 February 2009), or as it became from 15 March 2009, up to the date of the Tribunal's decision. [I note the provisions of *Migration Legislation Amendment Act (No. 1) 2009* (No. 10, 2009), Schedule 1, Item 17 that the amendment referred to "invitations" given pursuant to that section from that date.]

26. In light of a recent decision of this Court concerning the engagement of s.424 and s.424B and an "Acknowledgement of Application" letter sent by the Tribunal which was found to be, in part, an invitation to give information pursuant to s.424 (see *SZNAV & Ors v Minister for Immigration & Anor* [2009] FMCA 693 – "*SZNAV*") I did consider whether the letter reproduced at CB 67 ("Acknowledgment of Application") comes within what was relevantly found in that case.

27. In *SZNAV* a failure to comply with s.424B, when s.424 was said to be engaged, revealed jurisdictional error. The text of the letter in *SZNAV* is reproduced at [3] of that Judgment.

28. With respect, while I have some difficulty with relevant aspects of what was said in *SZNAV*, I am not required to further consider these matters. The letter in the current case is in very different terms to that in *SZNAV*. I cannot see that its language, or the circumstances surrounding it, engages the operation of s.424. (See also what was said in *SZLTR v Minister for Immigration and Citizenship* [2008] FCA 1889 at [34], and the reference to *Minister for Immigration & Multicultural & Indigenous Affairs v Sun* [2005] FCAFC 201; (2005) 146 FCR 498,

and in particular, what was accepted in *MZXRE v Minister for Immigration and Citizenship* [2009] FCAFC 82 per North, Graham and Rares JJ) at [8].)

29. It was certainly the case, as Mr Baird submitted, that there were invitations pursuant to s.425 (inviting the applicant to a hearing – CB 68 to CB 69) and pursuant to s.424AA (inviting the applicant to comment orally at the hearing on information that the Tribunal considered would be the reason or part of the reason for affirming the decision under review – see [45] at CB 95).

30. In relation to the (s.425) invitation to hearing, the Tribunal invited the applicant to appear at a hearing before it, and the applicant ultimately did appear. This invitation, in itself, complied with all the relevant statutory requirements for the provision of the invitation, the giving of notice, and relevant notice periods. I have in mind ss.425, 425A, 441A(4)(c), reg.4.35D(b). There was also the statement of the matter as set out in s.426A.

31. Further, on the only account before the Court of what occurred at the hearing, the Tribunal's own account, the applicant was given the opportunity to set out his claims, evidence, and asked to discuss certain relevant aspects of these.

32. The Tribunal's account shows that it "sufficiently indicated" to the applicant the central issue arising in relation to the review. This was the issue of credibility of the factual basis of the applicant's claims as to what he said had relevantly occurred in India (with reference to *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152 at [47]).

33. In particular, I note:

    1) "The Tribunal alerted the applicant that it was troubled by his claims and evidence …" (see [47] at CB 95)

    2) "The Tribunal alerted the applicant that it had extensive concerns about his claims and his credibility …" (see [51] at CB 96)

34. No error is revealed in this respect.

35. In relation to the invitation pursuant to s.424AA, the Tribunal said:

> *"45. The Tribunal put to the applicant published information indicating that Arivazhagan died on 11 December 2004 … The Tribunal explained that this information was relevant because it differed from the applicant's claims regarding Arivazhagan's death, and may lead the Tribunal to disbelieve the applicant's claims. The Tribunal invited the applicant to comment or respond to this information, advising that he could do so immediately or request additional time to do so. The applicant opted to comment orally at the hearing …"*

36. I note the complimentary nature of s.424A and s.424AA, in that the engagement and application of the latter relieves the Tribunal of the obligation in s.424A(1) (see s.424AA(2A) and *SZMCD v Minister for Immigration & Citizenship & Anor* [2009] FCAFC 46 per Tracey and Foster JJ).

37. For the Tribunal to be relieved of the obligations in s.424A, it is necessary that it comply with all aspects of s.424AA (*SZMCD* per Tracey and Foster JJ). It may be drawn from the extract above (at [31] of this Judgment) that the Tribunal clearly complied with the requirements of s.424AA(b). (See also below at ground three.)

38. If the assertion in this ground is that the Tribunal should have made further enquiries in relation to the claims made by the applicant, that is, that it should have sought other independent information, which presumably may have supported the applicant's claims in some way, I note while s.424 of the Act confers power on the Tribunal to seek additional information that may be relevant to the determination of an application before it, the exercise of such power is discretionary. That section only requires the Tribunal to have regard to such information if it seeks and obtains it. Nor was the Tribunal compelled to obtain additional information pursuant to s.427(1)(d).

39. In all, therefore, this ground is not made out.

Ground two

40. Ground two in the amended application asserts that the applicant satisfies the Convention definition of "refugee". The Tribunal had not

considered this "aspect" and therefore committed a "factual and legal error".

41. It must be noted that the relevant statutory scheme (ss.65 and 36(2) of the Act) requires the Tribunal to reach a requisite level of satisfaction as to the criterion set out, relevantly, in s.36(2). That is, effectively, that the applicant meets the definition of "refugee" as set out in the UN Refugees Convention, such that in these circumstances, a protection visa must be granted (*SJSB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 225 at [15] to[16], *NAST v Minister for Immigration and Multicultural and Indigenous* Affairs [2004] FCAFC 208 at [4] to [5], *Minister for Immigration and Multicultural and Indigenous Affairs v VSAF of 2003* [2005] FCAFC 73).

42. In doing this, the Tribunal is not required to uncritically accept any, or all, of the applicant's claims. Nor is it required to find evidence to "disprove" an applicant's claims (*Randhawa v Minister for Immigration and Ethnic Affairs* [1994] FCA 1253; (1994) 52 FCR 437 at 451).

43. Further, if reference to "factual error" in this ground implies a claim that the Tribunal has made an error of fact, in that there could be said to be some factual error in the Tribunal's analysis, then such an error is not jurisdictional error. Error of fact made by the Tribunal when exercising its jurisdiction is not a jurisdictional error (*Abebe v The Commonwealth* (1999) 197 CLR 510; [1999] HCA 14 at [137]).

44. As was said in *SZJHR v Minister for Immigration and Citizenship* [2007] FCA 1901 at [45]:

> *"An error of fact made by the Tribunal when exercising its jurisdiction is not a jurisdictional error. An error of that kind does not provide this Court with jurisdiction to quash the decision: Abebe v The Commonwealth of Australia (1999) 197 CLR 510 at [137]."*

45. Further, if the applicant seeks to complain that the findings made by the Tribunal were not open to it to make, a plain reading of the Tribunal's decision record reveals that the Tribunal's findings were clearly open to it. No error is demonstrated in this regard *(Kopalapillai*

v Minister for Immigration and Multicultural Affairs [1998] FCA 1126; (1998) 86 FCR 547 at 558 to 559, *W148/00A v Minister for Immigration and Multicultural Affairs* (2001) 185 ALR 703; [2001] FCA 679 at [64] to [69] per Tamberlin and Nicholson JJ).

46. The Tribunal set out the elements of the Convention definition, to which it is bound to have regard in conducting the review in the usual, unexceptional terms in its decision record (CB 88 to CB 89). That the applicant asserts that he satisfied the "key" Convention elements is not to the point. It is for the Tribunal, as the relevant decision maker, to be so satisfied (ss.65 and 36(2)). The Tribunal did turn its mind to the task that it was jurisdictionally charged to consider. It made findings, which were open to it, that led it to conclude that the applicant did not meet the Convention definition.

47. In pressing this ground in these circumstances, I cannot see that the applicant is asking this Court to engage in anything other than impermissible merits review (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* [1996] HCA 6; (1996) CLR 259).

Ground three

48. In the third numbered ground in the amended application, the applicant complains that the Tribunal did not put certain country information to him pursuant to s.424A. The complaint is also that the Tribunal used this information and, more particularly, that it did not put it to him before the hearing.

49. Generally, independent country information comes within the exception contained in s.424A(3)(a) of the Act (*Minister for Immigration and Multicultural and Indigenous Affairs v NAMW* [2004] FCAFC 264; (2004) 140 FCR 572 at [71]; *VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 82 at [12] to [14], *QAAC of 2004 v Refugee Review Tribunal* [2005] FCAFC 92 at [22]).

50. The applicant refers to independent information that the Tribunal had about the "CPI(M)". This may be a reference to what appears in its decision record at paragraphs [52] to [54] (at CB 96).

51. This information, not being about a person, clearly comes within the exception set out in s.424A(3)(a) from the obligation in s.424A(1).

52. As for the information about a "major incident in India", it may be that the applicant is referring to what the Tribunal described as "Major Incidents" in a sub heading in its decision record (see [54] at CB 97 to CB 98), which, for the most part, is also country information, of a non-impersonam nature and would fall within the exception in s.424A(3)(a).

53. The reference to "Arivazhagan", which is "highlighted" at this part of the Tribunal's record ("The death of Arivazhagan" – [58] to [59] at CB 98 to CB 99) is, of course, information about a person and does not come within the exception contained in s.424A(3)(a) from the obligation in s.424A(1).

54. Nonetheless, the Tribunal exercised the option available to it pursuant to s.424AA and put this information to the applicant orally (see [45] at CB 95 and [70] at CB 102). The applicant has not put any transcript of the hearing before the Court to challenge the Tribunal's account of what occurred at the hearing. On what is before the Court, the Tribunal properly fulfilled its obligations in exercising s.424AA. This engaged s.424(2A), and relieved the Tribunal of any obligation pursuant to s.424A(1) in relation to this information.

55. In examining whether s.424A is engaged, and in determining what "would be" the reason or part of the reason for affirming the decision under review, *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26 at [17] provides direction, in that the question is to be determined in advance of the Tribunal's published reasons. That is, it is to be determined at the time that the "issue" is formulated in the mind of the Tribunal and not with regard only to the decision record. However, it is the case that reference can be had to the decision record, so long as that reference comprehends that it is for the purpose only of drawing inferences in informing what "would be" the reason or part of the reason at some earlier point in time. (See *SZMFZ v Minister for Immigration and Citizenship* [2008] FCA 1890 (per Siopsis J) at [36], *SZMPT v Minister for Immigration and Citizenship* [2009] FCA 99 (per Jacobson J) at [14] to [17], *SZLPJ v Minister for Immigration & Citizenship* [2008] FCA 1721 (per Perram J) at [15] to [16].)

56. To the extent that the material set out under "Independent Information" in the Tribunal's decision record otherwise makes reference to individuals in discussing the CPI(M) and other related information, the absence of any transcript of the hearing, or other evidence before the Court, means that there is no evidence before the Court where it can be said that, at some time prior to the publishing of its decision record, any such references "would be" the reason or part of the reason for affirming the decision under review.

57. The reasons themselves do not reveal any anterior point, for example, the Tribunal's account of what occurred at the hearing (other than in relation to "Arivazhagan" – dealt with above) that any such information "would be" the reason or part of the reason for affirming the decision under review.

58. In relation to the applicant's complaint that he should have been given the information about the "CPI(ML)" (or CPI(M)) and the "major incident" before the hearing, s.424A does not impose any such temporal limitation (see *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162; [2005] HCA 24 at [71], [154] and [202] "*SAAP*". See also *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609; [2007] HCA 26 at [13] "*SZBYR*". To the extent that what was said in *SZBYR* at [19] may suggest a position contrary to that proposition, the proposition drawn from *SAAP* that the "temporal effect of section 424A" was not limited to the pre-hearing stage did not determine the outcome in *SZBYR*..

59. In all, this ground is not made out.

Additional complaints

60. In the additional complaints that appear immediately following the grounds in the amended application, it appears that the applicant complains that the Tribunal's failure (as outlined in the three grounds) caused it to fail to "analyse properly the 'future harm' the applicant may face". With the second complaint, he also indicates a relationship in that the failure to analyse the "future harm" caused the Tribunal to fail to apply the "real chance test".

61. In conducting the review, the Tribunal was required to consider whether the applicant satisfied the relevant criteria for a protection visa. In effect, and relevantly, this required it to assess the risk of future harm to the applicant on return to India.

62. The Tribunal did assess this risk when it turned its mind to the question of whether the applicant was at risk of being harmed in India in the "reasonably foreseeable future" (see [17] at CB 90, and [78] at CB 103).

63. In relation to the alleged failure to apply a "real chance" test, I cannot see that the Tribunal did not discharge its duties properly in this regard. A plain reading of its decision record reveals that it understood that the question of whether a person is owed protection obligations by Australia is to be answered by having regard to what will happen in the reasonably foreseeable future if the applicant were to return to the country of claimed persecution. Also, it understood the test that it was required to apply in terms of assessing whether the applicant's fear was "well-founded" (see [15] at CB 89). A plain reading of its decision record does not reveal any failure to correctly identify, and properly apply, relevant legal principles.

64. To the extent that I cannot find jurisdictional error in relation to the applicant's grounds (as liberally read above) in the amended application, it cannot be said that there were any such failures that caused the Tribunal "to fail" in the exercise of its jurisdiction.

Other considerations

Originating application

65. Given that the applicant appeared unrepresented before the Court, and notwithstanding that he pressed only the amended application, I did consider whether there was anything in his originating application that may be of assistance to him.

Ground one of the originating application

66. The originating application contains a ground similar to that of ground three in the amended application, stating that the Tribunal should have put other independent information to him at a time before the hearing.

This other "independent information" was information about "TNLA and Tamil Nadu". This matter has already been dealt with in this Judgment (see [49] above). No error is revealed.

Ground two of the originating application

67. Ground two of the originating application states that the Tribunal failed to take into account relevant considerations and integers of the applicant's claims (no particulars are provided in this respect).

68. The Tribunal is required to deal with all aspect of the applicant's claims as a relevant consideration in the task that it has been jurisdictionally given to perform (*Htun v Minister for Immigration and Multicultural Affairs* [2001] FCA 1802; (2001) 194 ALR 244 ("*Htun*") at [42] per Allsop J, with whom Spender J agreed. See also *NABE v Minister for Immigration Multicultural and Indigenous Affairs* (No. 2) [2004] FCAFC 263 per Black CJ, French and Selway JJ ("*NABE*"), with reference to *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] HCA 26).

69. However, the Tribunal is not required to deal with a case not stated by an applicant, or not arising from the material put before it (*NABE* at [49], *VQAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 104 at [25] and [31], *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; (2003) 75 ALD 630 at [44], *Htun* at [42], *Paul v Minister for Immigration and Multicultural Affairs* [2001] FCA 1196; (2001) 113 FCR 396 at [79]).

70. On the material before the Court, it cannot be said that the Tribunal did not address each claim, and each integer of each claim, put forward by the applicant. Not only this, it also considered a claim arising from the evidence (that is, whether the applicant would fear harm from "other Tamil or separatist groups" – see [76] at CB 103). It noted that it considered his claims "individually and cumulatively" (see [78] at CB 103).

71. If this is a complaint that the Tribunal should have investigated certain aspects of the applicant's evidence, then s.427(1)(d) permits the Tribunal to require the Secretary to the Minster's Department to

arrange for any further investigation. However, as in the case of s.424, the exercise of such a power is discretionary (as I have already noted above). The circumstances before the Tribunal do not reveal any compulsion for the Tribunal to have done so.

72. In all, while it may be said that there is a duty to enquire or investigate in some circumstances (see, for example, *W389/01A v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 432 and *Prasad v Minister for Immigration & Ethnic Affairs* [1985] FCA 47; (1985) 6 FCR 155), in the absence of any such particular reason, as in this case, there is no general obligation on the Tribunal to make further enquiries (see, for example, *VCAK of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 459 at [27], *WAGJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 277 at [24] to [25], and *NAYU v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 300 at [18] to [21]).

73. This complaint does not succeed or assist the applicant.

Ground three of the originating application

74. Ground three in the originating application alleges that the Tribunal did not "carry out its review function", and did not "exercise its jurisdiction". The particulars to this ground are that it did not consider the applicant's arrest and imprisonment for two years, and his position within PWG, and as a messenger for TNLA.

75. To the extent that the applicant claims that the Tribunal did not consider those matters, on any plain reading of its decision record (which is unchallenged before the Court), it is clear that it did.

76. It considered the occasions that the applicant alleged that he had been arrested and detained – between 1997 and 1999, and also between 2000 and 2002. The Tribunal set out the applicant's claims to have been arrested in February 1997 and to have been detained for "2 years without bail" in detail (see [25] at CB 91.4). It specifically "noted" this at the hearing (see [41] at CB 94).

77. In relation to the second occasion of a two year imprisonment, the Tribunal set out the claim (see [25] at CB 91.6), noted what he had said

at the hearing and even: "… wondered how … the party had managed to secure his release on bail" (see [41] at CB 94). It considered the applicant's explanation as to why, if he had a conviction in 1997, he was able to obtain bail for his conviction in 2002. It concluded that: "The Tribunal found the applicant's evidence about the circumstances of his bail in November 2002 to be improvised and confused". It considered his claims in this respect and his explanations, but nonetheless found them to be implausible (see [69] at CB 101).

78. As to his claims to have been involved with, or linked to PWG and TNLA, the Tribunal set out these claims (see [25] at CB 91.3 and CB 91.6). It noted that he discussed his work with PWG at the hearing (see [37] at CB 93), and involvement with the TNLA (see [43] at CB 94). It also referred to these claims in its "Findings and Reasons" (see [62] at CB 100). It ultimately found that it was not satisfied that: "the applicant has any association, actual or perceived, with any Communist groupings, such as … the People's War Group … or … that he acted as a messenger or had any other links with the TNLA …" ([76] at CB 103). These findings were all open to it on what was before it.

79. On a plain reading, it is simply not correct to state that the Tribunal did not consider these particular claims.

80. As to the failure to consider "a major incident in India", this is dealt with above (see [52] and following of this Judgment).

Submissions at the hearing

81. Before the Court the applicant submitted that at the hearing the Tribunal member "sat at the computer" and "said nothing happened" to him. I note that the applicant has put no evidence before the Court to contradict the Tribunal's account of the hearing or to support any claim that the Tribunal member just "sat at the computer". Without evidence, the applicant's "complaints" remain unsupported observations which, on their own, do not reveal error on the part of the Tribunal.

82. To the extent that this may infer some "closed mind" on the part of the member to suggest a complaint that there was bias, or the apprehension of bias, then such allegations are serious charges to make against any decision maker. They must be clearly made and distinctly proved

(*Minister for Immigration Multicultural Affairs v Jia* (2001) 205 CLR 157, *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 361 at [43] to [44], *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431, *VFAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 872, *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28; (2001) 179 ALR 425).

83. The applicant's submissions, therefore, do not assist him in revealing error on the part of the Tribunal.

84. As to the applicant's submission before the Court that he wanted more time to obtain documents from India, if this was a request for more time now, then the appropriate time to have sought such an opportunity was before the Tribunal, not before the Court.

85. In any event, any documents produced now, going to the issue of whether Australia has protection obligations towards the applicant, cannot assist in showing jurisdictional error, bearing in mind the task before the Court now.

86. If, however, this is a complaint that he was not given such an opportunity before the Tribunal, the material now before the Court shows that the applicant was given every opportunity in this regard (see, for example, [24] at CB 90). There is nothing before the Court to support any such allegation, let alone evidence to establish it.

Conclusion

87. For the applicant to succeed, the Court would need to find (at least) jurisdictional error. No jurisdictional error can be discerned. This application, therefore, is dismissed.

I certify that the preceding eighty-seven (87) paragraphs are a true copy of the reasons for judgment of Nicholls FM

Associate: C Darcy

Date: 31 July 2009