FEDERAL COURT OF AUSTRALIA

SZMAR v Minister for Immigration and Citizenship [2009] FCA 1530

MIGRATION – appeal from Federal Magistrate – protection visa application – fear of persecution – procedural fairness – natural justice - *Migration Act 1958* (Cth) ss 424A(1), (2), (3) - jurisdictional error – appeal upheld

Migration Act 1958 (Cth) s 5, s 422B, s 422B(1), s 422B(2), s 422B(3), s 424(1), s 424(2), s 424AA s 424A, s 424A(1), s 424A(1)(a), s 424A(2), s 424A(2A), s 424A(3), s 424A(3)(a), s 425(1)

Attorney-General (NSW) v Quin [1990] HCA 21; (1990) 170 CLR 1
Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576
Kioa v West [1985] HCA 81; (1985) 159 CLR 550
Minister for Immigration and Citizenship v SZKTI [2009] HCA 30; (2009) 238 CLR 489
Minister for Immigration and Citizenship v SZMOK [2009] FCAFC 83; (2009) 257 ALR 427
Minister for Immigration and Ethnic Affairs v Guo and Anor [1997] HCA 22; (1997) 191 CLR 559
Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259
Minister for Immigration and Multicultural Affairs v Lay Lat [2006] FCAFC 61; (2006) 151 FCR 214
Minister for Immigration and Multicultural Affairs v Respondents S152/2003 [2004] HCA 18; (2004) 222 CLR 1
Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham [2000] HCA 1; (2000) 168 ALR 407
Re Minister for Immigration and Multicultural Affairs; Ex parte Miah [2001] HCA 22; (2001) 206 CLR 57
Selvadurai v Minister for Immigration and Ethnic Affairs (1994) 34 ALD 347
SZATV v Minister for Immigration and Citizenship [2007] HCA 40; (2007) 233 CLR 18
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63; (2006) 228 CLR 152
SZBYR v Minister for Immigration and Citizenship [2007] HCA 26; (2007) 235 ALR 609
SZLPO v Minister for Immigration and Citizenship [2009] FCAFC 51; (2009) 177 FCR 1
SZLPO v Minister for Immigration and Citizenship (No 2) [2009] FCAFC 60; (2009) 177 FCR 29
SZMAR v Minister for Immigration and Citizenship [2009] FMCA 604
SZMKG v Minister for Immigration and Citizenship [2009] FCAFC 99; (2009) 177 FCR 555
VXDC v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1388; (2005) 146 FCR 562

SZMAR v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
NSD 761 of 2009

BARKER J
18 DECEMBER 2009
PERTH

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 761 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZMAR**
Appellant

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

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **BARKER J**
DATE OF ORDER: **18 DECEMBER 2009**
WHERE MADE: **PERTH**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The first respondent pay the appellant's costs of the appeal to be taxed.

3. The order of the Federal Magistrates Court made on 7 July 2009 in proceedings number SYG 604/2008 be set aside. In lieu thereof the following orders be made.

4. An order in the nature of a writ of certiorari to quash the decision of the second respondent handed down on 21 February 2008, Refugee Review Tribunal reference number 071821146, to affirm the decision of the first respondent not to grant the applicant a protection visa.

5. The matter be remitted to the second respondent for consideration 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.

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JUDGE: **BARKER J**
DATE: **18 DECEMBER 2009**
PLACE: **PERTH**

REASONS FOR JUDGMENT

APPEAL

1 This is an appeal from the judgment of a Federal Magistrate delivered 7 July 2009. The Federal Magistrate dismissed the appellant's application for judicial review of a decision of the Refugee Review Tribunal (Tribunal) handed down 21 February 2008, by which the Tribunal affirmed a decision of a delegate of the Minister for Immigration and Citizenship (Minister) not to grant the appellant a Protection (Class XA) visa.

APPLICATION FOR PROTECTION VISA

2 The appellant is a citizen of Pakistan who arrived in Australia as a crewman aboard a merchant vessel which he deserted on 29 June 2007. He applied for a protection visa on 13 July 2007 pursuant to the *Migration Act 1958* (Cth) (the Act). In his application the appellant said he had left Pakistan "because I fear I will be harmed if I return to Pakistan". In answer to a question about what he feared, the appellant stated: "I fear that I will be killed or

otherwise harmed". He supported his application with a statutory declaration setting out his circumstances and the basis of the fear he claimed.

3 The appellant stated he was a resident and lived in a village of Swat, in the North West Frontier Province (NWFP). He said he lived in a village which included followers of the imprisoned religious cleric and leader of the Tehreek-e-Nafaz-e-Shariat-Mohammadi group (TNSM). He stated that TNSM is a fundamentalist militant Islamist Wahabi group seeking the imposition of Sharia Law in Pakistan. He further stated the group has links with the Taliban in Afghanistan and that its power in the NWFP is growing alarmingly.

4 In essence, the appellant explained in his statutory declaration that, following her divorce, he married a woman in Pakistan who had earlier been married at the age of 12 or 13 according to Islamic law to a man who subsequently went to Italy and raised a new family. Soon after the appellant's marriage to her, her former husband returned to Pakistan, denied the legitimacy of the divorce of the appellant's new wife and declared that she remain his wife.

5 Subsequently, a religious scholar connected to the TNSM denounced the appellant's marriage during a radio station broadcast stating that the divorce was invalid and the union was against Sharia Law and, because it was against the religion, both the appellant and his wife deserved to be killed. (In later proceedings and later in these reasons this is referred to as the 'fatwa').

6 The appellant stated in his statutory declaration that a fundamentalist view of the Muslim religion is taken in the NWFP and it was his belief that the religious authorities wanted to make an example of him and his wife.

7 The appellant further stated in his statutory declaration:

> On … my greatest fear was realised. On this afternoon my cousin drove me, my wife and my mother to my mother's medical appointment. We were travelling about 3 kilometres from home, on the road between … when 6 armed gunmen on either side of the road opened fire on us. This was at about 5.45pm. The back and side windows were shattered by gunfire. My mother and my wife were in the back seat. They crouched low and were not struck by any bullets. By the grace of God, my cousin … and I also avoided injury.

> When we arrived at our village many people saw the state of the vehicle we were travelling in. We drove into … police station and made a report to the police. Of the six men involved only one was detected and detained. However, he was released by police after seven days.

8 Not long after this event the appellant and his wife separately travelled to Karachi. He then joined a ship and left Pakistan some months later. However, a week before he left the brother of his wife came to Karachi and took her back to Swat. The appellant stated in his statutory declaration that she had since moved from place to place. He expressed fear for his wife's life and his own, should he have to return to Pakistan.

9 The appellant stated in his statutory declaration that he was certain that if he returned to Pakistan he would be tracked down and killed by the followers of TNSM. The appellant further stated that the then recent siege in the Red Mosque in Islamabad testified to the wide influence of these "extremist religious groups".

10 The appellant, who engaged a solicitor/migration agent to assist him, supplemented his application for a protection visa with other information provided by his agent.

11 The Minister's delegate in considering the application acknowledged that TNSM activity is high in the Swat region but ultimately found that the applicant did not have a genuine fear of harm, and that there was not a real chance of persecution occurring should he return to Pakistan. The delegate therefore found that the appellant's fear of persecution as defined under the Refugees Convention was not well founded. The delegate noted the appellant had failed to produce any documents corroborating his claim. The delegate also considered there was sufficient State protection for the appellant and that he could relocate to another, safer area of Pakistan, free from TNSM influence, in any event.

12 In material respects the Minister's delegate found that the appellant's claims had not been substantiated and lacked credibility.

REVIEW IN TRIBUNAL

13 The appellant then sought administrative review of the Minister's delegate's decision in the Refugee Review Tribunal pursuant to the Act.

14 The appellant, through his agent, provided the Tribunal with a range of material that had not been given to the Minister's delegate, including the following:

- A decree sheet concerning the dissolution of the appellant's wife's earlier marriage.
- The marriage agreement between the appellant and his wife.
- An affidavit of the appellant's wife of similar date to the date of the marriage agreement affirming the fact of her marriage to the appellant.
- Contract of marriage between the appellant and his wife of similar date to the prior mentioned documents.
- Statement from an organisation in Swat describing the circumstances leading to the attack upon the appellant and his wife.
- A first information report of the attack upon the appellant, his wife and his mother.
- Advertisement in relation to the intention of his wife to seek a dissolution of her earlier marriage.
- A selection of recent media reports of increasing social, political and religious turbulence in the NWFP, particularly Swat, noting that "a tide of fundamentalism has slowly and surely gripped the province".
- A selection of photographs of the appellant's home located in Swat, noting that it bore the marks of gunfire.

15 The agent in a covering letter submitted that the materials provided dealt with credibility issues raised by the Minister's delegate.

16 The agent also submitted there was a demonstrable lack of State protection, notwithstanding the banning of the TNSM by the Pakistani government. The submission noted that the membership of the group had increased despite it having been proscribed.

17 The agent's submission stated:

> Furthermore, the capacity of the TNSM jihadists to carry out attacks, both selected and indiscriminate, remains undiminished. This explains the travel alerts issued by western governments, including the Australian government warning against travelling to Pakistan. It explains the abductions and killings that have taken place in

> and outside the Swat valley allegedly by terrorist groups including the TNSM. It is disturbing that those who are perhaps most counted as victims of the more recent violence are members of the Pakistani security forces deployed to the NWFP to try to restore some authority in the region.

18 The agent's submission further stated:

> However, the applicant's fear is not one of being the victim of any random terrorist act. On the contrary, his fear is that he will be the victim of a specific, targeted attack because he is viewed as having entered into a blasphemous marriage.

19 The agent therefore submitted that the appellant's inability and unwillingness to avail himself of State protection was justified.

20 The Tribunal held a hearing to which the appellant was invited and later affirmed the Minister's delegate's decision.

21 In the Tribunal's reasons for its decision to affirm the Minister's delegate's decision, the Tribunal noted that a person's fear of persecution for a Convention reason must be "well-founded fear", which adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a well-founded fear if they have genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it, but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or insubstantial or a far fetched possibility. A person can have a well-founded fear of persecution even though the possibility of a persecution occurring is well below 50%. The Tribunal drew these principles from a number of authorities, including *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1.

22 The Tribunal then noted the claims and evidence provided by and on behalf of the appellant to the Tribunal. In particular, it noted that the appellant claimed to be unable to relocate to another part of Pakistan because the TNSM has the capacity to find him anywhere and that there is a demonstrable lack of State protection notwithstanding the banning of the TNSM by the Pakistani government. The Tribunal also noted the appellant's claims that his fear was not one of being the victim of any random act, but that he would be victim of a specific targeted attack, because he is viewed as having entered into a blasphemous marriage.

23 The Tribunal noted country information concerning the TNSM, that the primary objective of the TNSM is the imposition of *shariat* in Pakistan, and ideologically it is dedicated to transforming Pakistan into a Taliban style of state. The country information also indicated the TNSM operates primarily in the tribal belt such as in Swat and the adjoining districts of the NWFP. The country information further stated that, although established in the NWFP, the TNSM has had only limited success in expanding its activities beyond the tribal areas of the province.

24 The Tribunal also noted information concerning divorce in NWFP including if a woman has been deserted by her husband for four years, or if the husband has failed to maintain her for two years.

25 The Tribunal set out much detailed information from newspapers concerning fighting in the Swat district.

26 The Tribunal recorded the answers to a number of questions put to the appellant about matters set out in his written statement. One line of questioning concerned the return of his wife's former husband to Pakistan.

27 Another line of questioning concerned why the appellant had left his wife behind in Pakistan when it appeared from his account that it was his wife who was in the most danger. It appears that in response to this question the appellant claimed that the fatwa issued by the religious scholar during the radio broadcast was also against him.

28 The Tribunal pressed the appellant as to why he did not try to obtain travel documents for his wife. The appellant claimed that it was not easy to do so because they had kept all of their documents in Swat and they had to apply for a passport from Karachi. He also repeated that his wife's brother came to Karachi about a week before he departed and took her back to Swat. The Tribunal pressed this line of questioning (the details of which are to be found at page 14 of 20 of the reasons for the Tribunal's decision):

> The Tribunal put to the applicant that it did not appear that either he or his wife could have a genuine fear of persecution if they were both willing for her to return to Swat. The Tribunal put to the applicant that if they did have such a fear then they would do everything possible to arrange for her travel documents but instead she returned to Swat where she feared she would be killed. The applicant claimed that his wife was

> in hiding and remained in the house and people would not know she was there. The Tribunal suggested that once she went into labour and had the baby that people in the village would know that she had returned. Given that they claimed to live in the same village … it appeared that her return put her in grave danger. The applicant claimed that his sister was living with his wife and would assist in the birth so no one would know. The Tribunal put to the applicant that it found it hard to believe that a birth could be kept secret from such a small community. The Tribunal put to the applicant that it appeared pointless issuing a fatwa against someone who could apparently hide so easily from the person that issued it. The applicant claimed that whilst males have to work and go outside, it's easier for women to remain at home. He claimed his wife was not staying in … at the moment, but would stay with his sister … .

29 The Tribunal then pursued lines of questioning concerning safe relocation to another part of Pakistan.

30 The Tribunal also put to the appellant that his wife appeared to be living in Swat unmolested and safe. It appears the appellant responded by saying he would be unable to live in Swat because the TNSM would be looking for him.

31 The Tribunal put to the appellant that the State was not required to "guarantee" his protection against random acts of violence and even if he was targeted by the TNSM the Tribunal was not satisfied that it was unreasonable for him to relocate to Karachi. The Tribunal put to the appellant that the State appeared willing and able to protect him as they had acted to provide him with protection in the past. To this the appellant appears to have claimed that his life was still continuously in danger.

32 The Tribunal also asked the appellant to go through the documents he had provided to it. The Tribunal asked the appellant to explain the significance of a particular document from the organisation mentioned above. The appellant had apparently claimed that he was not there himself but in Karachi when the organisation met to make the jirga, which was confirmation of the appellant's wife's proper divorce from her former husband. The Tribunal put to the appellant that the document appeared to be a record of the events that he had described and asked if the events were witnessed by members of the organisation or if they recorded information that he had given them. He claimed that his uncle gave the members of the organisation information and other information was obtained by members of the organisation themselves. He claimed that members of the organisation went to families on both sides (his wife and her former husband) to get information. The Tribunal also asked the appellant who comprised the organisation which made the jirga.

33 Because the document from the organisation was dated a year after the apparent meeting of the organisation which made the jirga, the Tribunal put to the appellant that it had concerns about the document. The Tribunal stated in its reasons that it had attempted to contact the organisation by telephone to confirm the veracity of the document but was unable to get through. The appellant explained that areas of Swat had been evacuated by Pakistani forces because of fighting with the TNSM and other Islamist extremists.

34 The Tribunal put to the appellant some other concerns it had to the effect that the fact that there is violence and persecution in the NWFP is not sufficient to find that he is a refugee. It also asked the appellant if he wanted more time to respond to the issues and concerns put to him. However, he said he had put everything that he wanted to say and did not need any more time.

35 After the hearing was conducted, the Tribunal evidently entertained concerns about the reliability of the information supplied by the organisation about the jirga and generally about the fatwa and so placed a request to the Australian Embassy in Islamabad seeking additional information.

36 The written request for information made of the Embassy by the Tribunal was in the following terms:

> 6. The RRT [the Tribunal] would be grateful for the post's assistance in providing answers to the following (if possible, please also detail the nature of the sources consulted in forming this response):
>
> A. Is it possible to confirm the existence of an organisation in the Swat village … Attempts to contact the [organisation] from Australia have been unsuccessful, possibly due to the fact that much of Swat has been evacuated as a consequence of the current fighting in the Swat district.
>
> B. If it is possible to contact the [organisation], please ask the [organisation] to confirm that the elders of the village issue (sic) a jirga ruling declaring that the divorce of [the wife and her former husband] was legal and correct … Please also enquire as to who was in attendance at the jirga and whether the applicant … is known to the [organisation].
>
> C. Can the post please provide advice on whether [the religious scholar] has been known to issue fatwas against people in breach of Sharia law (such as perceived adultery)? Is [the religious scholar] known to specifically name offenders in this regard? And are [the religious scholar's] fatwas honoured? If the post can provide advice in this regard, would it also be possible for the post to provide supporting information as to how this advice was obtained and how the post can be sure that the advice is correct? NB: DFAT Report 698 … advised

> that '[the religious scholar] is not known to name and threaten specific individuals for opposing TNSM in his radio broadcasts' (DFAT Report 698 provided no details as to the nature of the source or authority upon which this advice was based).

37 In January 2008, the Tribunal received DFAT Report: 756 responding to the questions asked as follows:

> **Question 6A:** DFAT's sources indicated that the [organisation] does exist. Mr … is the secretary … The … office is located at … in Swat and was established in 1979. Mr … confirmed that the email address, telephone number and registration number for the … listed … are accurate, however the telephone is currently not functioning. DFAT staff contacted Mr … on his private telephone number …
>
> **6B:** Mr … confirmed that in September 2007 the [organisation's] jirga declared that the divorce of [the appellant's wife and her former husband] was legal and correct. The following people were present at the September 2007 jirga: …. Mr … confirmed the identity of [the appellant] who is the son of …, both of whom are residents of …, Swat.
>
> **6C:** [1.] There is conflicting advice as to whether or not [the religious scholar] has issued fatwas against individuals for breaches of sharia law. [2.] Mr … did not personally hear [the religious scholar's] fatwa against the divorce and his call for the couple to be killed for adultery. [3.] However, in January 2007 Mr … was advised of the fatwa by [the wife's former husband's family]. [4.] Other associates of Mr … are also aware of [the religious scholar's] ruling. [5.] More broadly, Mr … said that [the religious scholar] has been ruling against individuals who breach sharia law (who are specifically named in the fatwas). [6.] Further attempts to contact Mr … to obtain contact details for those who have heard fatwas issued against individuals have proved unsuccessful.
>
> [7.] An earlier RRT enquiry … addressed the question of whether [the religious scholar] names and threatens specific individuals on the radio when issuing fatwas. [8.] In that enquiry we spoke with Mr …, … police station who said that he had not heard [the religious scholar] issue fatwas over the radio against individuals for breach of sharia law. [9.] Recent attempts to contact Mr … through the … police station to follow up on this issue have proved unsuccessful (there is currently a curfew and military activity in Kabal and its surrounds).

38 At page 17 of 20 of the reasons for decision of the Tribunal, the Tribunal summarised the request it made and the response it obtained in the following terms:

> After the hearing the Tribunal put in a request to the Australian Embassy in Islamabad seeking information on the following:
> - Whether the [organisation] could confirm whether a jirga was issued in relation to the marriage of the applicant and his wife.
> - Whether … had issued a fatwa against the applicant and his wife on the radio and whether his fatwas were generally honoured.
>
> The Embassy provided the following response:
> - The Embassy contacted the secretary of [organisation] … who confirmed that they had issued a jirga declaring the divorce of the applicant (sic) and his wife legal and correct.

> • There is conflicting advice as to whether or not … has issued fatwas against individuals for breaches of sharia law. Mr … did not personally hear … fatwa against the applicant and his wife to be killed for adultery but heard of it from the applicant's family in January 2007. Mr … said that … has been ruling against individuals who breach sharia law. An earlier inquiry to Mr … at the … piolice statation (sic) said that he had not … issue fatwas over the radio against individuals for breach of sharia law.

39 The Tribunal then went on in its reasons to note that the appellant's claim of fear of persecution in Pakistan could reasonably be characterised as Convention-related for reasons of "religion", "political opinion" or "membership of a particular social group" in that he claimed he would be murdered by Islamic extremists who are members of the banned group TNSM because they consider he is in a blasphemous marriage.

40 The Tribunal considered the documents and country information provided by the appellant and noted that the country information details the generalised instability in the NWFP and Swat in particular although it did not refer to the appellant or his wife's situation or to the issuance of fatwas.

41 The Tribunal noted that the documents relating to the appellant's marriage to his wife and his wife's previous marriage (provided to the Tribunal) did not in themselves provide corroborative evidence of his claims of persecution as a result of that marriage.

42 However, the Tribunal accepted that a police report it had received and the organisation's jirga supported the appellant's account of the fatwa against him and his wife and the attacks upon them both by his wife's ex-husband and his family.

43 The Tribunal then stated:

> Despite some concerns, the Tribunal accepts that there is a fatwa against the applicant and his wife. However, it is not clear to the Tribunal if the fatwa was made by [the religious scholar] or by the family of the applicant's wife's ex-husband, or how determined the family or [the religious scholar] and TNSM is to execute such a fatwa. Be that as it may, the applicant's fear can be seen as two fold; (i) fear of persecution by TNSM for the imposition Sharia law, including entering a blasphemous marriage; and (ii) fear of harm from the applicant's wife's family. The applicant has given evidence and the … organisation has confirmed his evidence that he and his family were attacked by the applicant's wife's ex-husband and members of his family. Notwithstanding this, the applicant's wife remains living in the area apparently unmolested. The applicant claims it is because she moves around and remains in hiding inside the home, however the Tribunal does not accept such an explanation. It seems to the Tribunal that it would not be possible to escape such a

> fatwa by simply remaining inside the house. The applicant further claims that the fatwa will remain in effect regardless of where they live in Pakistan because the TNSM is everywhere. However, if the fatwa has not been executed in their home province where the TNSM has a major presence, it seems to the Tribunal that the couple could safely relocate to another part of Pakistan where their reach does not appear to extend.

44 The Tribunal then considered the issue of relocation and concluded that if the appellant and his wife genuinely feared for their lives it would be reasonable to relocate to another part of the country "despite the generalised instability of Pakistan at the moment, and the absence of family members in other parts of Pakistan". The Tribunal added:

> Accordingly, the Tribunal is of the view that it would be reasonable for the applicant to relocate to another area of Pakistan where there would not be a real chance that the applicant would face persecution.

45 The Tribunal was also not satisfied that authorities would fail to provide the appellant with the protection should he return to Pakistan. The Tribunal concluded its findings by stating that if the appellant returned to Pakistan now or in the reasonably foreseeable future there was no real chance that he would face persecution because of his race, religion, membership of a particular social group, nationality or political opinion, imputed or otherwise, or for any other reason.

46 Based on all of this and having considered the appellant's claims individually and cumulatively, the Tribunal found he did not have a well-founded fear of persecution within the meaning of the Convention.

PROCEEDINGS BEFORE THE FEDERAL MAGISTRATE

47 In his original application for judicial review, the appellant advanced two general grounds of review before the Federal Magistrate, namely:

1. The decision was not made according to the *Migration Act 1958*.
2. The decision was made contrary to the definition of refugee Convention.

The Federal Magistrate dismissed these grounds: see *SZMAR v Minister for Immigration and Citizenship* [2009] FMCA 604 at [25] - [31].

48 An amended application advanced two further grounds for review, as follows:

1. The second respondent in making its determination failed to record its decision in accordance with section 430 of the *Migration Act*.
2. The decision of the second respondent is affected by jurisdictional error in that

> the second respondent failed to consider the applicant's claim that he feared persecution on the basis that the fatwa still in force against him as the TNSM was not part of the council's decision, he will be tracked down and killed by the followers of TNSM who annihilate people they perceive to be enemies of Islam with impunity.

The amended application also stated that:

> … the Tribunal failed to analyse properly the 'future harm' the applicant may face if he has to go back to Pakistan.
>
> Hence, due to this failure, the Tribunal had committed a serious jurisdictional error by failing to assess or carry out the 'real chance' test, before dismissing the applicant claim.

The Federal Magistrate dealt with these additional grounds or statements and dismissed them: see [32] - [63] of the reasons for judgment.

49 In written submissions filed in support of the application for judicial review, the appellant raised a number of other claimed errors, which the Federal Magistrate dismissed at [85] – [109].

APPEAL TO THIS COURT

50 The notice of appeal filed on 24 July 2009 in this Court, initially identified two grounds of appeal, set out in [2] and [3] of the notice respectively, in the following terms:

> 2. The Federal Honourable FM was erred in holding that the decision of the Tribunal was a privative clause decision and s.474(1) precludes any decision by the Federal Magistrate and failed to consider the recent decision of the High Court of Australia.
> 3. The Court below erred in that it ought to have held that on the evidence before the Tribunal it was open to the Tribunal to find that the appellant was a refugee within the meaning of the Act. In such circumstances the Tribunal erred in that:
>
> Particular
>
> i. it failed to properly apply the consideration that applicant for refugee status ought to be given the benefit of the doubt in circumstances where the Tribunal entertained the possibility that the applicant's claims are plausible, which was the case here.

51 However, on 30 October 2009 the appellant filed an amended notice of appeal with his outline of submissions in support of the appeal. The appeal has since proceeded on the basis that only the following grounds of appeal appearing in the amended notice of appeal are now relied upon:

> The Federal Magistrate erred in failing to find the following jurisdictional errors:

1. The [Tribunal] had failed to provide procedural fairness generally or otherwise pursuant to s.424A of the Act.

   Particulars

   The information obtained by the [Tribunal] after the hearing on 4 December 2007 should have been put to the Applicant to afford him the opportunity to adduce further evidence and make submissions.

2. The [Tribunal] failed to properly apply the legal tests for deciding:
   a. the 'real chance' of persecution, and
   b. the reasonableness of relocation to another part of Pakistan.

52 At the hearing of the appeal, counsel for the appellant said the finding of the Tribunal concerning state protection was intended by him also to be challenged by ground 2. The appeal was effectively argued on that basis.

GROUND ONE – FAILURE TO PROVIDE PROCEDURAL FAIRNESS OR OTHERWISE COMPLY WITH S 424A OF THE MIGRATION ACT

53 *Appellant's submissions:* As explained above, the Tribunal, after the hearing on 4 December 2007, obtained further information from the Australian Embassy in Islamabad concerning the appellant and his wife. It set out in its decision a summary of the request made and the information received.

54 The appellant says that while the Tribunal accepted that a fatwa remained in effect against the appellant and his wife for their apparently "blasphemous marriage", it expressed doubts and concerns about who had made the fatwa and whether there was any serious prospect it would be carried out. The appellant says that it can be reasonably inferred that the source of the Tribunal's doubts, was, in part, its reliance upon this further information from the Australian Embassy.

55 The appellant says that he was not advised that the Tribunal intended to make or had made this further inquiry of the Australian Embassy or that the Embassy had provided information in response and was not given the particulars of the information. The information was specifically about him. On the face of it, therefore, in not seeking the appellant's comments upon this information, the Tribunal denied him procedural fairness as codified by s 424A or, alternatively, in the more general sense identified by the High Court of

Australia in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152.

56 The appellant contends that, although the Tribunal had exhibited some scepticism concerning the wife's ability to avoid execution of a fatwa by simply hiding indoors, it did not communicate its doubts concerning the keenness of the wife's ex-husband's family, the maker of the fatwa – the religious scholar - or the TNSM to execute the fatwa. The Tribunal specifically asked the Embassy about this issue, but does not appear to have received a specific response as to whether fatwas issued by the maker of the fatwa alleged here, were honoured. However, information is provided that the appellant and his wife were the subjects of a fatwa. The Embassy's attempts to further contact its named source and obtain further information were unsuccessful. The appellant contends that this fact at least should have been communicated to the appellant to afford him the opportunity to make further inquiries and, if necessary, adduce information or make further submissions on the point.

57 The appellant submits that the seriousness of the fatwa and the ability of his wife's ex-husband's family or the followers of the TNSM to execute it outside the NWFP goes to the heart of the issues of whether there exists a "real chance" of persecution, and whether the appellant can reasonably relocate within Pakistan or the State can provide him with reasonable protection.

58 Counsel for the appellant refers to the decision of the *Minister for Immigration and Citizenship v SZKTI* [2009] HCA 30; (2009) 238 CLR 489 and notes that where additional information has been obtained under s 424(1) there is no mandatory requirement for the Tribunal to comply with subs (2) and (3). However, the High Court in *SZKTI* and also in *SZLPO v Minister for Immigration and Citizenship* [2009] FCAFC 51; (2009) 177 FCR 1 regarded the provision of procedural fairness, including compliance with s 424A as necessary with regard to additional information sought under s 424(1): see for example *SZKTI* at [38] and [51] where there was no breach of the obligation; and *SZLPO v Minister for Immigration and Citizenship (No 2)* [2009] FCAFC 60; (2009) 177 FCR 29 where there was a breach.

59 *Minister's submissions:* Counsel for the Minister on the other hand submits that the first ground of appeal is misconceived. On behalf of the Minister, counsel submits that, by virtue of s 422B(1) of the Act, Div 4 of Pt 7 of the Act provides a comprehensive procedural

code in respect of the content of the natural justice hearing rule that applies to the decision under review. There are no relevant procedural fairness obligations outside those provided for in this division: see *VXDC v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1388; (2005) 146 FCR 562 at 568-570, [22]-[31], *Minister for Immigration and Multicultural Affairs v Lay Lat* [2006] FCAFC 61; (2006) 151 FCR 214 at 225-226, [60]-[70]; *SZMKG v Minister for Immigration and Citizenship* [2009] FCAFC 99; (2009) 177 FCR 555 at [49]-[50].

60 Counsel for the Minister submits that, in any event, there is no principle of common law procedural fairness that requires disclosure of any and all "information" obtained by a decision-maker that may be relevant to the decision. The hearing rule at common law imposes an obligation in terms that are more narrow, that is to say, a person affected by a proposed decision is entitled to be made aware of information available to the decision-maker that is adverse, credible, relevant, and is of significance to the decision, so that he or she can make submissions and rebut, qualify and/or comment on any such information: *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 at 628-629.

61 In this case counsel submits that no such adverse *information* has been identified by the appellant either in his ground of appeal, or in the submissions supporting the appeal.

62 Insofar as the appellant alleges failure to provide procedural fairness pursuant to s 424A, the Minister submits that the obligation imposed applies only to “information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review”: see s 424A(1)(a). The Minister submits the appellant did not identify, nor attempted to identify the “information” that would meet this description. The appellant simply asserts that it can be reasonably inferred that the source of the Tribunal’s doubts was, in part, its reliance upon this further information obtained from the Australian Embassy.

63 The Minister submits this approach is misconceived. In order to establish a relevant obligation, the appellant is required to identify information which, in its own terms, contains a “rejection or undermining” of the appellant’s claim to be a person to whom Australia owed protection obligations: see *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; (2007) 235 ALR 609 at 615, [17]. In the absence of such information being identified, no duty arises under s 424A(1) of the Act.

64 Counsel further submits on behalf of the Minister that the appellant appears to complain that the Tribunal did not inform the appellant of its continued doubts concerning the extent of the threat posed to the applicant as a consequence of the fatwa. In so doing, the appellant appears to assert, at least indirectly, some obligation on the part of the Tribunal to disclose to the appellant its reasoning processes, something not required by s 424A of the Act.

65 Counsel for the Minister submits that the approach taken by the Tribunal in its decision should be the subject of a different interpretation from that provided on behalf of the appellant. Counsel noted that counsel for the appellant had emphasised the first sentence of the relevant passage, fully set out above, to the following effect:

> However, it is not clear to the Tribunal if the fatwa was made by [the religious scholar] or by the family of the applicant's wife's ex-husband, or how determined the family or [the religious scholar] and TNSM is to execute such a fatwa.

66 Counsel for the Minister submitted that this sentence is of no significance whatsoever. Ultimately what happened was that the Tribunal was given a particular history central to which was a claim that the appellant as well as his wife were fearful of harm in Pakistan and in particular that they lived in fear in Pakistan because of a fatwa, that is, the Swat area because of the fatwa. The appellant's claim indicated that the primary object of the fatwa was his wife and that was a matter that was explored during the hearing in a number of places. What the Tribunal does in its reasons is indicate that certain aspects of the fatwa are not entirely clear to it, but the real reason why the Tribunal then goes on and makes the relocation finding in the terms that it does, follows from there on. After the sentence that counsel for the appellant emphasised, the Tribunal goes on to say:

> Be that as it may, the applicant's fear can be seen as two fold, (i) fear of persecution from TNSM for the imposition of Sharia law, including entering a blasphemous marriage; and (ii) fear of harm from the applicant's wife's family.

Then a little later the Tribunal summarises the position and notes that the appellant's wife "remains living in the area apparently unmolested". The Tribunal rejected the appellant's explanation that she is able to do this because she remains hiding inside the home.

67 Accordingly, counsel for the Minister says the Tribunal took the approach of accepting that there was a fatwa, accepted that there was some risk of harm in the Swat

Valley but, despite that risk of harm, no harm actually came to the appellant's wife who is the principal target of the fatwa.

68 Accordingly, counsel for the Minister submits that the Tribunal proceeded on the basis that it accepted the existence of a fatwa but found that, despite the existence of a fatwa, the wife of the appellant had not been harmed, but not because she remained in hiding.

69 *Appellant's submissions in reply:* In reply, counsel for the appellant submitted that it was all very well for the Tribunal to have accepted that there was a fatwa, but to then go on to say, in effect, the strength of the fatwa can be assessed by looking at the extent to which the wife had been able to escape it, was objectionable. Counsel submitted that this conclusion about the relative weakness of the fatwa was clearly affected by the information which was provided to the Tribunal after the hearing.

70 Counsel for the appellant also submitted that for the purposes of s 424A of the Act, the relevant "information" that should have been put to the appellant for his further comment, and which was relied upon by the Tribunal in whole or in part in making its decision, is to be identified by reference to the summary given by the Tribunal of the information it received from the Australian Embassy. The second dot point setting out the response of the Australian Embassy, counsel submitted, comprises three elements:

1. The identity of the person who issued the fatwa.
2. Whether it was broadcast over the radio.
3. Whether fatwas were generally honoured.

Counsel submitted that while the Embassy did not favour the Tribunal with a reply as to the last matter, on the first two matters there is information contained in the reply and clearly that was relied upon and led to the doubts expressed by the Tribunal in the critical passages of its reasons.

71 *Consideration:* The appellant complains that, by the Tribunal going off and making independent inquiries through DFAT of the Australian Embassy in Pakistan and failing to give the appellant the opportunity to comment on the information supplied before it made its decision to affirm the Minister's delegate's decision to refuse to grant him a protection visa,

he was denied the procedural fairness mandated by s 424A of the Act or "in the more general sense identified by the High Court in *SZBEL*".

72 It is accepted all round that it is to the Act that one must primarily turn to find or define the Tribunal's obligations to act fairly or provide procedural fairness. This is because, in the area of migration law in Australia, the Act has delimited the ordinary grounds of judicial review of administrative action that otherwise apply in most spheres of official decision-making in Australia. Heerey J in *VXDC* set out some of the history of the legislative acts by which this position has been arrived at (see [22] – [31]). Ultimately, s 422B (introduced by the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth)) responded to the invitation of various members of the majority of the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22; (2001) 206 CLR 57 (for example, Kirby J at [181]) to clarify the position and directed that, in relation to Div 4 of Pt 7:

> (1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
>
> (2) Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.
>
> (3) In applying this Division, the Tribunal must act in a way that is fair and just.

73 Earlier, in *Miah* the High Court by a majority found that the Act did not exclude the application of the common law rules of natural justice to the Minister or the Minister's delegate. The Minister's delegate was found to have failed to accord the applicant natural justice by not informing the applicant of substantial new material on which the delegate relied in making his decision and by not giving him an opportunity to respond to the material. Gaudron J, for example, at [86] – [99] stated that:

> The basic principle in respect to procedural fairness is that a person should have an opportunity to put his or her case and to meet the case that is put against him or her [footnote omitted]. Mr Miah was not given the opportunity to put a case by reference to the change in government in Bangladesh or to answer the case made against him by reference to that change. Procedural fairness required that he be given that opportunity.

74 As Heerey J observed in *VXDC* at [30]:

> In the present case it is not easy to see how the drafters of the Explanatory Statement and the Minister could have made it any plainer that the intent of the 2002

> amendments was to reverse the result of *Miah* and provide comprehensive procedural codes which made detailed provision for procedural fairness but excluded the common law natural justice hearing rule. Astute readers will notice the term 'exhaust' is picked up from the majority judgments and included in the Statement and Speech, as well as in the amendments themselves.

75 This interpretation or construction of s 422B has been confirmed by subsequent decisions of the Full Federal Court in *Lay Lat* at 225 – 226, [60] - [70]; *SZMKG* at [49] - [50].

76 Section 422B is therefore an illustration of the "contrary intention" that controls the amplitude of the duty to act fairly or to accord procedural fairness that otherwise ordinarily attends the making of administrative decisions pursuant to statute: see, for example, *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 at 584 per Mason J.

77 Accordingly, while s 422B(3) requires the Tribunal to "act in a way that is fair and just", this is not a general prescription but one that is to be understood in context; it applies "in applying this Division". In other words, it applies only when applying Div 4 as affected by s 422B(1) and (2). It has been held accordingly that s 422B(3) is not of itself a source of a broad duty to act fairly or accord procedural fairness that reflects the common law duty: see *Minister for Immigration and Citizenship v SZMOK* [2009] FCAFC 83; (2009) 257 ALR 427.

78 Cases like *SZBEL* and *SZBYR* however, show that the provisions of Div 4 have not removed, indeed were not intended exhaustively to remove the procedural rights of an applicant to a fair hearing or to have accorded to him or her procedural fairness in the conduct of the hearing in the Tribunal. Rather, Div 4 is the source of specific statutory hearing rights.

79 In *SZBEL*, at [27] the High Court (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ) emphasised the obligation of the Tribunal under s 425(1) of the Act to "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*" (emphasis added). The Court held that in the absence of steps taken by the Tribunal to notify an applicant to the contrary, he or she was entitled to assume that the issues considered dispositive by the Minister's delegate were the issues which arose in relation to the decision under review. If the Tribunal should be inclined to reach its decision by reference to an issue other than those considered

dispositive by the delegate, a failure to notify the applicant would be a denial of procedural fairness. In that case, the Court considered the Tribunal's decision should be quashed.

80 More recently, the High Court in *SZKTI*, in clarifying the nature of the competing powers of the Tribunal under s 424(1) and (2) to obtain information, again emphasised the central importance to the conduct of a hearing by the Tribunal of the obligation created by s 425. The Court (French CJ, Heydon, Crennan, Keifel and Bell JJ), indicated that in cases where the Tribunal goes off on its own and obtains further information, an obligation may arise under s 425 to conduct a second or further hearing. At [51], the Court took a practical approach to this issue, stating:

> Whether an issue must be raised with an applicant for the purposes of a further hearing under s 425(1) will depend on the circumstances of each case. Matters may arise requiring an invitation to a further hearing.

The Court then compared the position of the applicant in *SZKTI* with that of the successful appellant in *SZBEL*. At [51], the Court in *SZKTI* stated:

> However, that is not the case in the present matter. Here Mr Cheah's evidence was additional evidence about an extant issue; *it did not constitute the raising of a new or additional issue* such as to trigger the obligation to give another hearing. This distinguishes the facts here from those considered in *SZBEL*. The extant issue was whether the first respondent had been an active Christian in China. Mr Cheah's knowledge of the first respondent's past activities in China deriving from any account given to him by the first respondent was directly related to that issue.
> (Emphasis added)

81 At [51], the Court touched on the question of a right to procedural fairness in such a case outside the terms of the Act:

> Further, s 422B of the Act suggests that there is no residual procedural fairness requirement to give another hearing extraneous to Div 4 of Pt 7. If there were any extraneous right to procedural fairness, as suggested by the first respondent, there was no breach of the obligation here. Importantly, the first respondent had an opportunity to deal with Mr Cheah's information by responding (as he did) to the letter from the RRT conforming with s 424A.

82 This final dicta concerning a right to procedural fairness extraneous to Div 4 of Pt 7 of the Act would appear to respond to a more general contention that the operation of Div 4 of the Act does not entirely exclude the common law rules relating to procedural fairness, or, perhaps more probably, the possibility left open in *SZBEL* at [49], that:

> Finally, even if the issues that arise in relation to the decision under review are properly identified to the applicant, there may yet be cases which would yield to analysis in the terms identified by the Full Court of the Federal Court in *Alphaone*. It

would neither be necessary nor appropriate to now foreclose that possibility.

83 Earlier in the judgment of the Court in *SZBEL*, the Court referred to the decision of the Full Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576. At [32] the High Court said that, in *Alphaone*, the Full Court of the Federal Court had "rightly said", (at 590 – 591):

> It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material

In citing this passage, the Court at [32] emphasised the passage – "that would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues".

84 In *Alphaone*, at 591 – 592, the Full Federal Court, by reference to earlier authority, observed more particularly:

> Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material.

While the High Court in *SZBEL*, at [30] – [31], seem to express some reservations about this analysis, it is this passage, nonetheless, that I understand comprises the "analysis" referred to by the Court at [49].

85 The fact that in *SZKTI*, the Court at [51] merely stated that s 422B of the Act "suggests" that there is no residual procedural fairness requirement to give another hearing extraneous to Div 4, would also appear to leave open the possibility that there may be such a requirement. However, in the case before me counsel for the appellant limits his contentions to the denial of the procedural fairness the appellant was entitled to under s 424A, or in a more general sense as identified by the High Court in *SZBEL*.

86 The particular requirements of s 424A, which are spelt out in a provision that has the heading "Information and invitation given in writing by Tribunal", are 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.

87 Under s 424A the Tribunal must give an applicant clear particulars of any information that the Tribunal considers will be the reason, or a part of the reason, for affirming a decision under review; and ensure that the applicant understands why it is relevant to the review and the consequences of it being relied upon in affirming the decision that is under review; and, importantly, invite the applicant to comment on or respond to it.

88 The appellant bases his case primarily on the obligation of the Tribunal under s 424A to provide clear particulars of any information that the Tribunal considers will be the reason, or part of the reason, for affirming the decision that is under review and inviting him to comment and respond to that information. By focusing the argument in this way it is not necessary to undertake an analysis of whether a further hearing is required under s 425 by reference to the "newness" or "additional" features of the information provided, as mentioned

in *SZKTI*. Rather, the question is whether the information obtained by the Tribunal was a reason or part of the reason for the Tribunal's decision for affirming the delegate's decision, a narrower question perhaps. The plain command of s 424A(2) is that the Tribunal must invite in writing an applicant's comment and response if it is possessed of information of this character: *SZBYR* at [14].

89 So understood, certain things should be noticed about s 424A. First, unlike the common law test of procedural fairness in relation to information held by a decision-maker but not shared by the decision-maker with a person affected, the specific duty created by s 424A does not depend (subject to what is said below) on the applicant showing that the information was adverse to his or her interests and credible, relevant and significant to the decision to be made, this being the well recognised common law test in such cases and stated, for example, by Brennan J in *Kioa v West* at 628 – 629.

90 However, as the joint judgment in *SZBYR* at [17] points out, given that the information in question must be the reason or a reason for affirming the decision reviewed, the information will only meet this description if it contains a "rejection, denial or undermining" of the appellant's claim to a protection visa.

91 The ultimate s 424A issue then is whether information is information that "the Tribunal considers would be the reason, or a part of the reason, *for affirming* the decision under review" (emphasis added). That form of wording is not without its own interpretive complexities and difficulty in application, but it is the one Parliament has chosen to adopt and the Court must give effect to.

92 Section 424A(2A) provides that the Tribunal is not obliged to give particulars of information nor invite comment or response "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 s 424AA". Section 424AA deals with information and invitation given orally by the Tribunal while the applicant is appearing before it. That did not happen here and so s 424A(2A) is not presently relevant.

93 Section 424A(3) further provides that the section does not apply to information in various categories. None of these categories apply in this case and the Minister does not

contend otherwise. Section 424A(3)(a) is not relevant because the information here was specifically about the applicant. Further, the particular information was not information that the applicant gave for the purposes of the application for review. Additionally, the information was not information that the applicant gave during the process that led to the decision under review. Nor was it "non-disclosable information" as that expression is defined by s 5 of the Act. While there was plainly discussion in this case during the Tribunal hearing about the existence of the organisation in the Swat village, whether a jirga ruling had been given by it and whether the appellant was present at a meeting of the organisation if it was given, and information concerning fatwas and the particular fatwa alleged, the particular information obtained by the Tribunal from the Post in Pakistan was not given by the appellant.

94 There can be little doubt that the material supplied to the Tribunal in DFAT Report: 756, and set out above at [37], constitutes "information" for the purposes of s 424A. What is set out in the answers is the "information". See generally *SZBYR* at [16] – [18].

95 The next question then is whether the decision-making record before the Court discloses that the Tribunal considered that this information from the Australian Embassy in Pakistan "would be the reason, or a part of the reason for affirming the decision under review". As just noted, this is a phrase not without its own interpretive complexity and difficulty in application. One might say that it is unlikely often to be the case that the Tribunal will state expressly that it "considers" that particular information "would be the reason" or even "would be a part of the reason" for affirming a decision made. Instead, it will usually be by regarding a decision-making record that one will be able to form a judgement about the extent to which particular "information" was, in the event, "the reason" or "a part of the reason" for affirming such a decision. That this is so is, I think, reflected in the observation of the Full Court of the Federal Court in *SZLPO (No 2)* at [21] where, when considering whether the appellant had established that information as to the sources consulted by a certain organisation constituted information that the Tribunal then considered would be the reason, or a part of the reason, for affirming the delegate's decision, noted that there was no "direct evidence" of what the Tribunal considered at that time; it was a matter for "inference". The same approach to discerning the reason for decision is also to be found, I believe, in the Court's analysis in *SZBYR*.

96 In *SZLPO (No 2)* the Tribunal had made a request of DFAT in the following terms:

> 6. The RRT would be grateful for a response to the following question(s) (*if possible, please also detail the nature of the sources consulted in forming this response*).
>
> A. Please contact the office of the National Ameer of the Ahmadiyya Muslim Jamaat of Bangladesh to verify the authenticity of the applicant's letter and his claim to be a member of the Ahmadi community.
> [Emphasis added by the Full Federal Court at [8]]

97 The report that came in from DFAT stated as follows:

> Post contacted the office of the National Ameer of the Ahmadiyya Muslim Jamaat of Bangladesh in Dhaka. We received the following response on 31 July 2007 from the office in writing:
>
> *Text Begins*
> On receipt of your query on the captioned subject, we have investigated the case and came to the conclusion as under:
> *A.* The letter of introduction submitted *is false* and *not signed* by Mr. Asaduzzaman Bhuiyan, President, Ahmadiyya Muslim Jama'at, Krora.
> *B.* The applicant is *not a member* of Ahmadiyya Muslim Jama'at.
>
> *Sources*
> 1. Direct consultation with Mr. Asaduzzaman Bhuiyan, President, AMJ, Krora, who confirmed that he did not sign such letter and he never had such "Letter Pad".
> 2. Investigation from the nearby Jama'at of the applicant's birth place Sreemangal, Moulvibazar.
> 3. Our records.
> [Emphasis in the original report from DFAT]

98 The Tribunal sent the applicant a s 424A letter seeking comment on this report and set out verbatim the report down to but not including the heading "Sources" or the material that followed that heading.

99 The Full Court of the Federal Court (Lindgren, Stone and Bennett JJ), at [24], noted that when the Tribunal requested of DFAT that, "if possible please also detail the nature of the source consulted in forming this response", the Tribunal was making it clear that it understood that the office of the National Ameer would have to consult sources. Apparently the Tribunal wished to ensure that the answer to be given as to the authenticity of the letter of introduction and of the appellant's claim to be a member of the Ahmadi community was reliable.

100 At [27], the Full Court observed:

> While the Tribunal's reason for decision do not refer to the sources of the information provided by the Office of the National Ameer, in the 'Claims and Evidence' section of its reasons for decision the Tribunal set out the course of the correspondence, and found that the letter of introduction was fraudulent. It did so on the basis of the response of the Office of the National Ameer of 2 August 2007 to the effect that the letter of introduction was false and was not signed by Mr Bhuiyan and that SZLPO was not a member of Ahmadiyya Muslim Jama'at. *Although the Tribunal did not say so, it must have been reinforced in its finding in relation to the letter of introduction by the fact that the Office of the National Ameer had consulted Mr Bhuiyan himself*, who confirmed that he did not sign the letter and said that he had never had a 'letter pad' of the kind in question, and had also consulted the Jama'at near to SZLPO's birth place, Sreemangal, Moulvibazar.
> [Emphasis added]

101 At [30], the Full Court considered it was not clear from SZLPO's response to the s 424A letter that he appreciated Mr Bhuiyan had said that he had not signed the letter of introduction or that inquiries had been made locally of the Jama'at, Sreemangal, in relation to SZLPO's membership. Accordingly, SZLPO's response could well have been different had he known the source of the information.

102 The Full Court, at [31], held that it was to be inferred from the terms of the Tribunal's request of DFAT and the terms of the Tribunal's reasons for decision, that the Tribunal "thought that the nature of the sources that had been consulted by the office of the National Ameer would itself be part of the reason for affirming the decision under review".

103 In the case now before me, the Tribunal asked DFAT to obtain the response of its Post in Pakistan to three questions or issues and requested, as in the case of the request considered by the Court in *SZLPO (No 2)*, "if possible please also detail the nature of the sources consulted in forming this response". The three questions or issues, summarised, were:

- Confirmation of the existence of an organisation in the Swat village.
- Confirmation by the organisation that the elders of the village issued a jirga ruling declaring that the divorce of the wife and her former husband was legal and correct and also as to who was in attendance at the jirga and whether the appellant was known to the organisation.
- Advice on whether the religious scholar has been known to issue fatwas against people in breach sharia law (such as perceived adultery) and whether the religious scholar was known to specifically name offenders in this regard. Further, whether the religious scholar's fatwas are honoured.

104 DFAT Report: 756 was subsequently provided to the Tribunal and dealt with these three questions or issues as follows:

> **Question 6A:** DFAT's sources indicated that the [organisation] does exist. Mr … is the secretary … The … office is located at … in Swat and was established in 1979. Mr … confirmed that the email address, telephone number and registration number for the … listed … are accurate, however the telephone is currently not functioning. DFAT staff contacted Mr … on his private telephone number …
>
> **6B:** Mr … confirmed that in September 2007 the [organisation's] jirga declared that the divorce of [the appellant's wife and her former husband] was legal and correct. The following people were present at the September 2007 jirga: …. Mr … confirmed the identity of [the appellant] who is the son of …, both of whom are residents of …, Swat.
>
> **6C:** There is conflicting advice as to whether or not [the religious scholar] has issued fatwas against individuals for breaches of sharia law. Mr … did not personally hear [the religious scholar's] fatwa against the divorce and his call for the couple to be killed for adultery. However, in January 2007 Mr … was advised of the fatwa by [the wife's former husband's family]. Other associates of Mr … are also aware of [the religious scholar's] ruling. More broadly, Mr … said that [the religious scholar] has been ruling against individuals who breach sharia law (who are specifically named in the fatwas). Further attempts to contact Mr … to obtain contact details for those who have heard fatwas issued against individuals have proved unsuccessful.
>
> An earlier RRT enquiry … addressed the question of whether [the religious scholar] names and threatens specific individuals on the radio when issuing fatwas. In that enquiry we spoke with Mr …, … police station who said that he had not heard [the religious scholar] issue fatwas over the radio against individuals for breach of sharia law. Recent attempts to contact Mr … through the … police station to follow up on this issue have proved unsuccessful (there is currently a curfew and military activity in Kabal and its surrounds).

105 In the reasons of the Tribunal referred to earlier, at [38] above, the Tribunal summarised the Embassy's response as follows :

> - The Embassy contacted the secretary of [organisation] … who confirmed that they had issued a jirga declaring the divorce of the applicant (sic) and his wife legal and correct.
> - There is conflicting advice as to whether or not … has issued fatwas against individuals for breaches of sharia law. Mr … did not personally hear … fatwa against the applicant and his wife to be killed for adultery but heard of it from the applicant's family in January 2007. Mr … said that … has been ruling against individuals who breach sharia law. An earlier inquiry to Mr … at the … piolice statation (sic) said that he had not … issue fatwas over the radio against individuals for breach of sharia law.

106 This summary reflected much, but not all of the information actually provided in the DFAT Report: 756. The first response noted in these reasons for decision, confirming the issuing of the jirga, reflected the substance of the response to question 6B. In summarising

the evidence in the way it did the Tribunal may be taken to have implicitly accepted that the organisation does exist, which was the first issue of concern raised in question 6A. The information so considered by the Tribunal supported the appellant's claims and was not such as to reject, deny or undermine his claim. The s 424A duty would not apply to it.

107 In the response to question 6C, the following comparison with the Tribunal's summary may be made:

- The first sentence in the Tribunal's summary of the response, commencing "There is conflicting advice…", reflects the first sentence of the DFAT response commencing "There is conflicting advice …".
- The second sentence of the Tribunal's summary "Mr … did not personally hear …", reflects the second sentence of the DFAT response "Mr … did not personally hear …".
- The second sentence of the Tribunal's summary also appears to include information contained in the third sentence of the DFAT response commencing, "However, in January 2007, Mr … was advised as to the fatwa …".
- The Tribunal's summary does not make reference to or include the fourth sentence of the DFAT response commencing, "Other associates of Mr … are also aware of [the religious scholar's] ruling".
- The third sentence of the Tribunal's summary commencing, "Mr … said that … has been ruling against individuals who breach sharia law", reflects the substance of the fifth sentence of the DFAT information provided commencing ,"More broadly, Mr … said that …".
- The Tribunal's summary does not include any reference to the information in the sixth sentence of the DFAT response, namely, "Further attempts to contact Mr … to obtain contact details for those who have heard fatwas issued against individuals have proved unsuccessful".
- The next or fourth sentence of the Tribunal's summary commencing, "An earlier inquiry to Mr … at the … police station", reflects in substance the seventh and eighth

sentences of the DFAT response, which referred to an earlier Tribunal inquiry about the religious scholar issuing fatwas and information then obtained.

- The Tribunal's summary did not make any reference to the ninth sentence of the DFAT response that made reference to "Recent attempts to contact Mr … through the … police station to follow up on this issue have proved unsuccessful (there is currently a curfew and military activity in Kabal and its surrounds)".

108 The s 424A issue in this case then is whether it may be said, or inferred, that the Tribunal considered the information provided by the Post in Pakistan to the Tribunal in relation to answer or issue 6C "would be the reason, or a part of the reason" for affirming the decision under review.

109 In the critical passage of the Tribunal's reasons for decision set out at [43] above, the Tribunal accepted that there is a fatwa against the appellant and his wife. It noted this acceptance "despite some concerns".

110 "Be that as it may", as the Tribunal put it, the Tribunal proceeded to determine the appellant's claim to refugee status having regard to the existence of the fatwa. First, the Tribunal noted the appellant's fear as being two-fold, namely, fear of persecution by TNSM by reason of having entered a "blasphemous marriage", and fear of harm from the appellant's wife's ex-husband's family. The Tribunal then noted the evidence, confirmed by the organisation, that the appellant and his family were attacked by his wife's ex-husband and members of his family. However, the Tribunal immediately observed that, "Notwithstanding this, the applicant's wife remains living in the area apparently unmolested". The Tribunal then proceeded to discount the appellant's explanation that this was because she was able to hide inside the home, and stated that "it would not be possible to escape such a fatwa by simply remaining inside the house". No other evidence is referred to at this point to justify this view, although earlier in its reasons the Tribunal records its discussion generally on this point with the appellant (see [28] above).

111 In light of this reasoning and these findings it is evident that the reason, or a part of the reason, for the Tribunal's decision to affirm the delegate's decision under review was that

the Tribunal did not consider that the fatwa should be accorded a high level of seriousness, in the sense it was at all likely to be acted upon.

112 Having made its findings concerning the significance of the wife's unmolested residence in the NWFP, the Tribunal immediately added that if the fatwa has not been executed within their home province, where the TNSM has a major presence, then it "seems to the Tribunal" that the couple could safely relocate to another part of Pakistan where their reach does not appear to extend. This finding, in my view, also rests to some degree on the Tribunal's consideration that the fatwa should not be accorded a high level of seriousness.

113 Finally, the Tribunal stated that it was not satisfied that authorities in Pakistan would fail to provide the appellant with protection should he return to Pakistan. This finding seems to have some regard to the evidence that the police attended to take some action following the report of the attack on the appellant by the ex-husband of his wife and his family. But, in my view, it also rests, to some degree, on the Tribunal's consideration that the fatwa should not be accorded a high level of seriousness.

114 In short, while the Tribunal accepted that there was a fatwa against the appellant and his wife, "despite some concerns", it then minimised, if not discounted that finding by immediately going on to refer to the evidence concerning the appellant's wife remaining living in the area apparently unmolested and rejecting the explanation provided by the appellant as to why the existence of the fatwa and its likely enforcement was consistent with the wife's conduct. By so doing, the Tribunal implicitly found the fatwa should not be accorded a high level of seriousness. The findings concerning relocation and state protection rested, to some degree, on this implicit finding or, at least, there is a real risk that they did so.

115 In these circumstances, the information obtained by the Tribunal from the Post in Pakistan – ambivalent and unhelpful though it was in aspects – must have reinforced the doubts of the Tribunal that led it to discount the level of seriousness of the fatwa and so were the reason or, at least, a part of the reason why the Tribunal thought the decision of the delegate should be affirmed.

116 While, during the hearing, the Tribunal questioned the appellant about the reasons for his wife returning to the Swat valley and the extent to which her life might be considered to

be in danger, the Tribunal did not, in my view, sufficiently communicate its doubts concerning the keenness of the wife's ex-husband's family or the religious scholar, or the TNSM to execute the fatwa. These were the very particular questions posed by the Tribunal to the Australian Embassy in Pakistan. While the Tribunal did not receive a particular response from the Post in Pakistan concerning whether fatwas issued by the religious scholar or the TNSM were honoured, the information provided plainly did not allay the concerns of the Tribunal and, furthermore, the Post advised in the sixth sentence of its response to question 6C, that further attempts to contact the source to obtain contact details for those who have heard fatwas issued against individuals had proved unsuccessful. Information of this sort can have a corrosive or undermining effect no doubt on a decision-maker who already entertains doubts about the strength of claims being advanced by an applicant. If the information obtained by the Tribunal had been provided to the appellant for comment or response under s 424A with the advice that the information to hand supports a view that the fatwa should not be accorded a high level of seriousness, he may well have been in a position to respond to the information by making further inquiries himself and, if necessary, by adducing further information or making further submissions on the point.

117 In these circumstances, I find the information in answer 6C obtained by the Tribunal from the Post in Pakistan following the formal hearing with the appellant was "information that the Tribunal considers would be reason, or a part of the reason, for affirming the decision that is under review" for the purposes of s 424A(1). That being so, the Tribunal should have invited comment and response on and to this information as required by s 424A(2), the information having first been particularised in the manner required by s 424A(1).

118 The Court's consideration to this point has been in relation to whether the Tribunal breached the obligation imposed upon it by s 424A(2) to give the relevant information and invitation to the applicant. I find that that obligation was breached and, by reason thereof, the Tribunal committed jurisdictional error: see *SZBYR* at [13].

119 So far as the appellant's complaint that he was denied procedural fairness "in the more general sense identified by the High Court in *SZBEL*" is concerned, I am unable to discern the particular basis upon which this submission is advanced by the counsel on the appellant's behalf.

120 I have set out above the relevant passage of *SZBEL* in which the Court made reference to the possible application of the analysis of the Full Federal Court in *Alphaone,* although leaving the issue for further consideration. I am unable to detect any basis for application of that analysis on the facts of this case. Accordingly, I do not consider the appellant has made out a denial of procedural fairness in "the more general sense" contended for.

121 In summary, in relation to this first ground of appeal, I consider the appellant was denied procedural fairness by reason of the Tribunal's breach of its statutory duty to accord procedural fairness to the appellant in terms of s 424A(1) and (2) of the Act. In that regard I consider the Tribunal committed a jurisdictional error in affirming the delegate's decision without inviting the comment and response of the appellant to the information it had to hand from the Post in Pakistan before doing so.

122 The Federal Magistrate, in my view, erred in law in not finding that the Tribunal committed such jurisdictional error. For that reason, I would allow the appeal on this ground.

GROUND TWO – REAL CHANCE OF PERSECUTION, RELOCATION AND STATE SECURITY

123 *The appellant's submissions:* The appellant contends that the Tribunal simply assumed that execution of the fatwa would be avoided by his relocation to another area of Pakistan. However, if a fatwa is a religious prescription of general application, it is difficult to see how relocation within a Muslim country would negate its effect. Counsel for the appellant acknowledges that fundamentalist elements may be stronger in different areas of Pakistan, but no part of the country is free from its reach, a submission made previously on behalf of the appellant but not addressed by the Tribunal. Given the existence of a fatwa, the appellant submits it was not reasonable to expect the appellant to relocate because such relocation would not solve the problem.

124 Counsel further submits that the Tribunal's comments about "cultural imperatives that require his wife to live in the company of other family members" did not accurately address the argument raised by the appellant on relocation. As a seaman, the appellant would be required to be missing from home for long periods of time. He specifically argued that were he and his wife to move to Karachi, "a woman on her own is not safe". This goes beyond

"cultural imperatives". It goes to the question of the safety of unaccompanied Pakistani women. Accordingly, the relocation option is not reasonably practical within the parameters explained by the High Court in *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40; (2007) 233 CLR 18. The move would place the appellant's wife at risk and there was an "appreciable" risk of harm to the appellant at the hands of fundamentalist Islamists.

125 The appellant further submits that the ability to seek protection from the Pakistani State has no bearing upon the issue whether that State protection can be reasonably effective. The Tribunal appears to have extrapolated from the fact that one of the appellant's attackers in the past was arrested and briefly detained, that the State could provide reasonable protection. This evidence was actually supportive of the opposite conclusion as it demonstrated the ineffectiveness of the police to apprehend the other offenders or to prosecute the one offender who was apprehended, given the Tribunal acknowledged that Pakistan:

> is a country where great violence and terror has occurred and there is undoubtedly persecution, it is not impossible that the applicant could become the victim of random acts of violence, however, this would arguably make him the victim of civil disorder and not necessarily a refugee from persecution.

126 This observation, counsel for the appellant submits, is inimical to a finding of reasonably effective state protection.

127 *The Minister's submissions:* Counsel for the Minister submits that this ground of appeal is in two parts, and asserts an error in the Tribunal's application of the legal principles applicable to the assessment of the "real chance" test, and the issue of relocation within Pakistan (and State protection). The two separate parts can conveniently be dealt with together.

128 The Minister submits that, although the appellant's submissions assert legal errors, the detail of the submissions simply takes issue with the Tribunal's factual findings and conclusions. Accordingly, what the Court is invited to do, is to engage in merits review of the Tribunal's decision, not a role of the Court, whether at first instance, engaging in judicial review, or on appeal: *Attorney-General (NSW) v Quin* [1990] HCA 21; (1990) 170 CLR 1; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185

CLR 259, *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1; (2000) 168 ALR 407.

129 *Consideration:* In my view, the Tribunal's findings concerning the likelihood of persecution, relocation and state protection were made by the Tribunal as a consequence of its reasoning that the fatwa against the appellant and his wife should not be accorded a high level of seriousness. In light of my finding that the appeal should be allowed on ground one, I consider the Tribunal's findings as to these issues are also attended by jurisdictional error.

130 Had I found differently in relation to ground one and rejected the appellant's submissions that he was denied s 424A procedural fairness, I would have also dismissed ground two on the basis that each of the findings concerning persecution, relocation and state protection were factual findings open to the Tribunal not attended by jurisdictional error, primarily for the reasons submitted on behalf of the Minister.

CONCLUSION AND ORDERS

131 For the reasons given above, the appeal should be allowed with costs. I will hear from counsel for the parties as to the appropriate orders now to be made.

I certify that the preceding one hundred and thirty-one (131) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker.

Associate:

Dated: 18 December 2009

Counsel for the Appellant:	Mr T Ower
Counsel for the Respondents:	Mr A Markus
Solicitor for the Respondents:	Australian Government Solicitor

Date of Hearing: 5 (Sydney) and 20 (Perth) November 2009

Date of Judgment: 18 December 2009