FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZMCD v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 1039

MIGRATION – Visa – Protection (Class XA) visa – Refugee Review Tribunal – application for review of decision of Refugee Review Tribunal affirming decision not to grant protection visa – citizen of Pakistan claiming well-founded fear of persecution from the TNSM – whether the Tribunal failed to comply with *Migration Act 1958* (Cth) s.424AA - whether the Tribunal failed to comply with its obligation to advise the applicant of his right to seek additional time to respond – whether Tribunal failed to consider whether to give additional time – whether Tribunal failed to give clear particulars of information and ensure the applicant understood its relevance – relocation – whether the Tribunal failed to consider whether the applicant would attract similar persecution from different fundamentalist groups if he relocated within Pakistan – whether Tribunal failed to address whether it would be reasonable for the applicant to relocate – a failure to follow s.424AA is not of itself jurisdictional error – the consequence of a failure to follow s.424AA is that s.424A(2A) will not come into operation – persecution may reasonably be avoided by relocation – consideration of applicant's particular circumstances – Tribunal under no obligation to make applicant's case – whether decision on well-founded fear independent from decision on relocation – credibility – no jurisdictional error.

Migration Act 1958 (Cth) ss.424AA, 425, 474

Minister for Immigration and Multicultural Affairs v Rajalingam (1999) 93 FCR 220 cited.
SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609; 81 ALJR 1190; [2007] HCA 26 cited.
NBKS v Minister for Immigration & Multicultural & Indigenous Affairs (2006) 156 FCR 205; [2006] FCAFC 174 cited.
SZEEU v Minister for Immigration & Multicultural & Indigenous Affairs (2006) 150 FCR 214; [2006] FCAFC 2 cited.
SZLTC v Minister for Immigration and Citizenship [2008] FMCA 384 cited
SZLQD v Minister for Immigration and Citizenship [2008] FCA 739 followed.
Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437; 124 ALR 265; 35 ALD 1 followed
SZCBT v Minister for Immigration and Multicultural Affairs [2007] FCA 9 cited.
Craig v South Australia (1995) 184 CLR 163 cited
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 cited
SZATV v Minister for Immigration and Citizenship (2007) 237 ALR 634;

[2007] HCA 40 followed.
SZFDV v Minister for Immigration and Citizenship (2007) 237 ALR 660; [2007] HCA 41 followed.
Luu v Renevier (1989) 91 ALR 39 followed.
Minister for Immigration and Multicultural Affairs v SZFDE (2006) 154 FCR 365; [2006] FCAFC 142 cited.
NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) (2004) 144 FCR 1; [2004] FCAFC 263 cited.

Applicant:	SZMCD
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 731 of 2008
Judgment of:	Scarlett FM
Hearing date:	16 June 2008
Date of Last Submission:	16 June 2008
Delivered at:	Sydney
Delivered on:	28 July 2008

REPRESENTATION

Counsel for the Applicant:	Mr O'Donnell
Solicitors for the Applicant:	Legal Aid Commission of NSW
Counsel for the Respondent:	Mr Reilly
Solicitors for the Respondent:	Sparke Helmore

ORDERS

(1) The Application is dismissed.

(2) The Applicant is to pay the First Respondent's costs fixed in the sum of $5000.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 731 of 2008

SZMCD
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Application

1. The Applicant, a citizen of Pakistan, asks the Court to set aside a decision of the Refugee Review Tribunal made on 4th March 2008. The Tribunal affirmed a decision of the delegate of the Minister for Immigration and Citizenship not to grant the Applicant a Protection (Class XA) visa.

2. The Applicant seeks:

   a) A declaration that the decision was made in excess of jurisdiction and is invalid;

   b) A writ of certiorari quashing the Second Respondent's decision;

   c) A writ of prohibition prohibiting the First Respondent, the Minister, from giving effect to or proceeding further upon the decision;

d) A writ of mandamus compelling the Tribunal to rehear and redetermine the matter according to law; and

e) Costs.

Background

3. The Applicant arrived in Australia on 24th August 2007 and applied for a Protection (Class XA) visa on 6th September. He claimed to be a sailor who would regularly return to his home village near Swat in the North West Frontier Province (NWFP) between voyages. He claimed that in January 2007 people tried to force him to:

   a) join a jihad;

   b) grow a beard;

   c) stop listening to music;

   d) destroy his electronic appliances; and

   e) stop his daughters from attending school.

4. The Applicant claimed that he was warned and attacked. He claimed to fear that he would be killed if he returned to Pakistan.

5. A delegate of the Minister refused his application on 6th November 2007. The delegate gave these reasons for refusing the application:

   a) It would be reasonable for the Applicant to relocate within Pakistan.

   b) The Applicant's family had remained in the same place and there was no evidence that they had been threatened or had faced mistreatment when the Applicant had been away or when he had returned, except for the last time.

   c) The Applicant had been to Australia and other countries before and had not previously sought asylum.

   d) The Applicant may need to re-adjust to the norms imposed by Islamic fundamentalists to avoid the risk of being attacked.

6. The delegate found that the Applicant may be caught up in communal violence but did not find that he had a real chance of persecution for a Convention reason. However, even if the delegate were wrong, the Applicant could relocate within Pakistan.

Application for Review by the Refugee Review Tribunal

7. The Applicant applied to the Refugee Review Tribunal for a review of the delegate's decision on 26th November 2007. The Tribunal wrote to the Applicant on 19th December 2007 and invited him to attend a hearing on 24th January 2008.

8. The Applicant attended the hearing on 24th January and gave evidence with the assistance of an interpreter in the Pashto language. He supplied the Tribunal with copies of newspaper articles and articles from the Internet.

The Refugee Review Tribunal Decision

9. The Tribunal signed its decision on 22nd February 2008 and handed its decision down on 4th March. The Tribunal affirmed the delegate's decision not to grant the Applicant a Protection (Class XA) visa.

The Tribunal's Findings and Reasons

10. In its decision, the Tribunal set out the Applicant's claims in his application for a protection visa[1], his evidence to the Tribunal at the hearing[2] and independent country information about the role of the TNSM, the Movement for the Enforcement of Islamic Laws in the NWFP[3].

11. The Tribunal found that the Applicant was a citizen of Pakistan, based on his evidence at the hearing and his Pakistani passport.

12. However, the Tribunal formed the view that the Applicant's material claims lacked credibility and could not be accepted. The Tribunal gave these reasons:

[1] Court Book 64
[2] Court Book 65 - 68
[3] Court Book 68 - 74

- The Applicant's evidence that the TNSM's activities had only become bad since February or March 2007 was not consistent with the country information, which stated that they had been very active since 2001.

- There were inconsistencies between the Applicant's evidence to the Tribunal and statements in his application for a protection visa which raised concerns about the Applicant's credibility.

- There were inconsistencies between the Applicant's evidence to the Tribunal and his application for a protection visa about when the Applicant moved to Mangora and when he left and moved elsewhere. The Tribunal found that if the Applicant was living in Mangora at the time he claimed to have been then the events that he said had happened to him in his home village could not have occurred.

13. The Tribunal did not accept the Applicant's claim that he was afraid to live in his home village of Totalo Bandai, or in Mangora, or anywhere else in Pakistan.

14. The Tribunal noted the Applicant's claim to be an ordinary member of a political party called the ANP and that his problems stemmed from his membership of that party. The Tribunal did not accept that the Applicant's ordinary membership of the ANP or the fact that he undertook community work would have caused him problems with the TNSM.

15. The Tribunal then went on to consider whether, if it was wrong in its findings, the Applicant would be able to obtain effective state protection. It found:

> *The country information suggests that the police are generally ineffective against the TNSM in the Swat area. The Tribunal therefore cannot be satisfied that the applicant would be able to obtain effective State protection if he lives in the North West Frontier Province*[4].

16. The Tribunal then considered the question of relocation within Pakistan. It had regard to country information which indicated that the

[4] Court Book at 76

influence of the TNSM was confined to the NWFP, although there was some suggestion that the TNSM leader may have had some involvement in the siege of the Red Mosque in Islamabad in July 2007.

17. The Tribunal found that there was no real chance that the TNSM would pursue and persecute an individual outside the NWFP if the individual was of little importance to the overall agenda of the TNSM and stated:

> *The Tribunal is of the view that it is a remote and far fetched possibility that the applicant would be of sufficient interest to the TNSM for the organization to pursue, locate and persecute the applicant in Karachi or some other part of Pakistan*[5].

18. The Tribunal then considered the Applicant's particular circumstances when considering the overall reasonableness of relocation within Pakistan. It noted that he was a seaman by occupation and spent considerable periods of time at sea. His occupation would not be affected by his place of residence. The Tribunal stated that when it discussed this issue with the applicant he did not raise any other grounds or problems about relocating, but only referred to the threat from the TNSM.

19. The Tribunal was satisfied that the Applicant and his family could reasonably relocate within Pakistan and therefore found that there was no real chance that he would be at risk of persecution should he return to Pakistan. Accordingly, the Tribunal affirmed the decision not to grant the Applicant a Protection (Class XA) visa.

Application for Judicial Review

20. The Applicant commenced proceedings in this Court on 28th March 2008. He filed a Further Amended Application in court on the day of the hearing.

21. The Applicant relies on four grounds of review. He claims that the Tribunal decision was affected by jurisdictional error in that:

    a) Having chosen to give the applicant adverse information orally at the hearing pursuant to s.424AA of the Migration Act, the

[5] *Ibid*

Tribunal failed to give him clear particulars of that information as required by s.424AA(a);

b) Having chosen to give the applicant adverse information orally at the hearing, the Tribunal failed to ensure, as far as is reasonably practicable, that he understood why the information was relevant to the review, and the consequences of the information being relied on in affirming the decision that was under review, as required by s.424AA(b)(i);

c) Having chosen to give the Applicant adverse information orally at the hearing, the Tribunal failed to clearly advise the Applicant that he may seek additional time to comment on or respond to the information, as required by ss.424AA(b)(iii) and (iv);

d) *(The Applicant's original Ground 4 was abandoned)*;

e) The Tribunal:

i) failed to address the correct question;

ii) failed to give proper, genuine and realistic consideration to a relevant matter; or

iii) failed to make further enquiries with respect to a relevant matter.

Submissions

22. Counsel for the Applicant, Mr O'Donnell, submitted that the Tribunal fell into jurisdictional error in two ways in considering the question of relocation, by:

a) not complying with the requirements of s.424AA when it chose to give the Applicant information indicating that the TNSM had a limited influence outside the Malakand area of Pakistan; and

b) failing to apply the doctrine of relocation properly when it:

(i) failed to consider whether the Applicant would attract similar persecution from different fundamentalist groups if he relocated to another part of Pakistan; and

(ii) failed to address the question properly of whether it would be reasonable for the Applicant to relocate within Pakistan in order to avoid persecution from the TNSM.

23. The fact that the Tribunal cited the "what if I am wrong" test from *Minister for Immigration and Multicultural Affairs v Rajalingam*[6] indicated that the relocation decision was not logically independent of the decision regarding the Applicant's refugee claims. Thus, there is no scope for withholding relief on the "futility" principle in *SZBYR v Minister for Immigration and Citizenship*[7], *NBKS v Minister for Immigration & Multicultural & Indigenous Affairs*[8], or *SZEEU v Minister for Immigration & Multicultural & Indigenous Affairs*[9].

24. The Tribunal put to the Applicant during the hearing that some of his evidence was inconsistent with country information on Pakistan. The Tribunal Member said:

> *It is important and I'm going to explain to you why it is and then I will give you an opportunity to respond. If I find that the evidence you give me is inconsistent with the country information, it could lead to me forming a view that you are not a (indistinct)*[10] *and this could lead me to the conclusion that you are not a refugee. If that were the case, then the decision made by the department would be affirmed and if that happens, it means that you would not be entitled to a protection visa and your application will fail…*
>
> *…So if the TNSM is not influential anywhere else but in the North-West Frontier Province it shouldn't be a problem to relocate somewhere else in Pakistan.*
>
> *Now, would you like to comment on or respond to that and you don't have to do that immediately. You can ask for more time if you want to.*[11]

25. There followed a rather confused exchange between the Tribunal and the Applicant, ending with the Tribunal saying:

---

[6] (1999) 93 FCR 220
[7] (2007) 235 ALR 609; 81 ALJR 1190; [2007] HCA 26 at [29]
[8] (2006) 156 FCR 205;[2006] FCAFC 174 at [78]-[80]
[9] (2006) 150 FCR 214; [2006] FCAFC 2 at [230]-[234]
[10] Mr O'Donnell of counsel submitted that the indistinct phrase was "a witness of truth"
[11] Transcript of Tribunal hearing, page 25, annexed to the affidavit of Cvetanka Jankulovska, affirmed 28 April 2008.

No, I've made a comment to you. Do you want to say anything about that?

26. The Applicant replied:

No, I don't have anything.[12]

27. Mr O'Donnell submitted that at no stage did the Tribunal ask the Applicant in terms whether it would be reasonable for him and/or his family to relocate within Pakistan. He also pointed out that the Tribunal did not send the Applicant a letter under s.424A of the Migration Act.

28. Counsel for the Applicant referred the Court to the decision of Driver FM in *SZLTC v Minister for Immigration and Citizenship*[13] and also the decision of Marshall J in *SZLQD v Minister for Immigration and Citizenship*[14]. In *SZLTC,* Driver FM noted that if the Tribunal embarks upon a course of oral disclosure at the hearing under s.424AA, there are resultant obligations in s.424AA(b). He also said:

> *It also appears that if the Tribunal embarks upon a course of disclosure under s.424AA it does not enjoy the protections in s.424A(3). It would have been a simple matter for the Parliament to reproduce the exclusions in s.424A(3) in s.424AA. The fact that Parliament has chosen not to reproduce those exclusions lead me to think that they do not apply in relation to disclosure under s.424AA.*[15]

29. Mr O'Donnell submitted that the fact that, had the Tribunal not chosen to disclose country information orally under s.424AA it would not have been obliged to disclose it in writing under s.424A, does not exonerate it from complying with the terms of s.424AA once it had chosen to disclose that information orally.

30. He also submitted that the Tribunal did not comply with its obligation to advise the Applicant that he might seek additional time to comment on or respond to the information. He submitted that the Applicant was clearly perplexed by the information put to him and did not know how to respond. In the context of a stressful hearing conducted through an interpreter and without an adviser present, the Tribunal's statements

[12] Transcript page 26
[13] [2008] FMCA 384
[14] [2008] FCA 739 at [13]
[15] [2008] FMCA 384 at [16]

were not sufficient to discharge the Tribunal's obligation under s.424AA(b)(iii) to advise him that he may seek additional time to comment or respond.

31. In the alternative, it was submitted that the Applicant did request more time to reply but the Tribunal failed to consider whether to give him that time.

32. Counsel for the Applicant submitted that the Tribunal failed to give the Applicant clear particulars of the information and failed to ensure that the Applicant understood its relevance and consequences. It was clear, he submitted, from the Applicant's confused responses that he did not understand what was being put to him, why it was relevant to the review or what the consequences might be if the Tribunal relied on it.

33. Further, Mr O'Donnell submitted that the Tribunal applied the doctrine of relocation (see *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs*[16]), which asks whether an applicant could obtain the protection of his government by moving to a different area within his own country, where it would be reasonable to expect the Applicant to do so.

34. Mr O'Donnell submitted that the Tribunal had failed to consider whether the Applicant would attract similar persecution from different fundamentalist groups if he returned to a different part of Pakistan. He submitted that, in determining whether an applicant can escape persecution through relocation, the Tribunal is obliged to do more than consider whether those who persecuted or threatened the Applicant in the past would seek him out in his new locale; it must also ask itself whether the Applicant would be more likely to attract persecution from different persons and groups in his new locale (see *SZCBT v Minister for Immigration and Multicultural Affairs*[17]).

35. The Applicant had claimed an unwillingness to obey the demands of Islamic fundamentalists that had raised the ire of the TNSM in his home region, which caused him to be imputed with a political or religious opinion for which he claimed he would be persecuted. Mr O'Donnell submitted that the Tribunal did not consider was wether

[16] (1994) 52 FCR 437; 124 ALR 265; 35 ALD 1 at 440-442
[17] [2007] FCA 9, per Stone J at [22] and [30]

the Applicant's unwillingness to obey the demands of Islamic fundamentalists in other areas of Pakistan would provoke them to persecute him.

36. It was submitted that the Tribunal fell into jurisdictional error by either asking itself the wrong question or failing to consider relevant material: *Craig v South Australia*[18]*; Minister for Immigration and Multicultural Affairs v Yusuf*[19].

37. In the alternative, it was submitted that the Tribunal failed to address properly whether it would be reasonable for the Applicant to relocate. It was imperative for the Tribunal to consider whether it would be reasonable to relocate within Pakistan. When the Tribunal raised the issue with the Applicant, he did not raise any other grounds or problems, but only referred to the threat from the TNSM[20].

38. Mr O'Donnell submitted that the reasonableness of Applicant moving his family to another part of Pakistan was never squarely raised with the Applicant. Real questions arose as to the practicality and safety of moving the Applicant's wife and young children to an area that lacked extended family support but were not considered.

39. Mr O'Donnell submitted that, whilst the errors referred to related only to the issue of relocation and did not touch the Tribunal's findings on the credibility of the Applicant's persecution claims, it was not the case that it would be futile to grant relief. The Tribunal's citation of the "What if I am wrong" test from *Minister for Immigration and Multicultural Affairs v Rajalingam*[21] would seem to imply that the decision on relocation was not logically independent of its findings regarding the Applicant's refugee claims because it was not confident of those findings. It is far from clear, he submitted, that the grant of relief would be futile.

40. Counsel for the First Respondent, Mr Reilly, submitted that the Applicant's first three grounds, all of which relate to a breach of s.424AA of the Act, must fail. The term "information that would be the reason, or a part of the reason, for affirming the decision that it under

[18] (1995) 184 CLR 163 at 179
[19] (2001) 206 CLR 323 at [82]
[20] Court Book at 76
[21] *supra*

review" in s.424AA(a) must have the same meaning as in s.424A(1) (*SZLTC v Minister for Information and Citizenship*[22]. An applicant must demonstrate that the country information constitutes in its terms a rejection, denial or undermining of the applicant's claims to be owed protection obligations (*SZBYR v Minister for Immigration and Citizenship*[23].

41. Mr Reilly submitted that there is no basis to suggest that the country information referred to by the Tribunal falls within s.424AA.

42. Further, there can be no breach of s.424AA in the absence of s.424A being engaged by the information concerned. Any such information must not only fall within s.424A(1) but must not be excluded by s.424A(3). The country information falls within s.424A(3)(a).

43. Mr Reilly submitted that the decision of Driver FM in *SZLTC* at [16] that the exceptions in s.424A(3) do not apply to s.424AA is inconsistent with the decision of Marshall J in *SZLQD v Minister for Immigration and Citizenship*[24] at [12].

44. In any event, Mr Reilly submitted that even if s.424AA was engaged the Tribunal did not fail to comply with it.

45. Turning to the Applicant's fifth ground that the Tribunal erred in its finding that it was reasonable to relocate within Pakistan, Mr Reilly submitted that the arguments of the Applicant essentially sought merits review. The test for relocation is simply whether it is practicable in the particular circumstances of the Applicant (*SZATV v Minister for Immigration and Citizenship*[25]; *SZFDV v Minister for Immigration and Citizenship*[26], which in turn depends on the objections raised to relocation (*Randhawa v Minister for Immigration and Local government and Ethnic Affairs*[27]). The Applicant made no specific objection to relocation. The Tribunal considered the Applicant's circumstances and found it was reasonable for the Applicant relocate.

---

[22] *supra* at [18]-[21]
[23] *supra* at [17]
[24] *supra*
[25] (2007) 237 ALR 634 ; [2007] HCA 40 at [24]
[26] (2007) 237 ALR 660
[27] *supra* at 443C-D

46. The Tribunal did not have to make the Applicant's case for him (*Luu v Renevier*[28]) or attempt to stimulate elaborations that he did not wish to give (*Minister for Immigration and Multicultural Affairs v SZFDE*[29]).

47. Mr Reilly also submitted that, even if the Court were of the view that one or more grounds had been made out, relief should be refused in the Court's discretion. All the Applicant's grounds asserted error in the Tribunal's relocation decision and not its primary conclusion that that the Applicant's fears were not well founded because his claims lacked credibility (see *SZBYR* at [27]-[29]. A fair reading of the decision did not indicate any real doubt about the Tribunal's primary conclusions and its conclusions as to relocation were independent of the Tribunal's primary conclusions.

48. In a submission in reply, filed in Court on the day of the hearing, counsel for the Applicant submitted that it was held in *SZBYR* that, in order to qualify as "information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review" for the purposes of s.424A(1) and s.424AA(a), the information must, in its terms, reject, deny or undermine the Applicant's claim to be a refugee. This does not require that the information deal with the Applicant specifically, nor does it exclude country information.

49. Mr O'Donnell went on to submit that the information put to the Applicant at the hearing related directly to the Applicant's refugee claims, which was that the influence of the fundamentalists group that had persecuted the Applicant was limited to the North West Frontier Province. This, he submitted, was clearly information that constituted a "rejection, denial or undermining of the Applicant's claims".

50. Further, Mr O'Donnell submitted that s.424AA is not dependant on s.424A being engaged, referring to *SZLTC* at [16] and [17]. He submitted that there is no inconsistency between those comments and *SZLQD* at [12].

51. Mr O'Donnell submitted that s.424AA is similar in effect to s.424. Both are facultative provisions enabling the Tribunal to make enquiries in a certain way, but imposing certain duties on the Tribunal if it

[28] (1989) 91 ALR 39 at 45
[29] (2006) 154 FCR 365; [2006] FCAFC 142 at [199]-[200]

chooses to exercise the power granted to it. Thus, while the Tribunal is under no obligation to use its power in s.424AA(a) to put adverse information to the Applicant orally at the hearing, once it chooses to do so, it is obliged to comply with the requirements of s.424AA(b).

52. Mr O'Donnell went on to submit that the Tribunal failed to comply with its obligations in s.424AA(b) and thus fell into jurisdictional error.

53. Further, it was submitted that the Tribunal erred in relation to its relocation finding by failing to consider whether the Applicant would attract similar persecution from different fundamentalists. It was not a case of making the Applicant's case for him. The practical difficulties of moving the Applicant's wife and five small children to a different province of Pakistan arose clearly on the material before the Tribunal (see *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)*[30]).

54. It was also submitted the Court should not exercise its discretion not to grant relief on the basis that the Tribunal's decision rested on a basis that was independent of the basis affected by jurisdictional error.

Conclusions

55. The Applicant's first three grounds all rely on claims of a breach of the requirements of s.424AA of the Migration Act:

a) failing to give clear particulars as required by s.424AA(a) (Ground 1);

b) failing to ensure, as far as is reasonably practicable, that the Applicant understood the relevance of the information and the consequences of its being relied on as required by s.424AA(b)(i) (Ground 2); and

c) failing to advise the Applicant that he may seek additional time to comment on or respond to that information as required by s.424AA(b)(iii) and (iv) (Ground 3).

[30] (2004) 144 FCR 1; [2004] FCAFC 263

56. In my view, s.424AA does not of itself impose any obligation on the Tribunal. It provides a way for the Tribunal, if it chooses to do so, to give oral particulars of adverse information to an applicant at a hearing that may otherwise need to be given in writing under s.424A(1). It is clear that no obligation is placed on the Tribunal to do so:

> *If an applicant is appearing before the Tribunal because of an invitation under section 425:*
>
> > *(a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review.*

57. Clearly, there is a discretion given to the Tribunal as to whether it will follow the procedure in s.424AA or not (see *SZLQD* at [12] and *SZLTC* at [15]). There is no obligation to do so.

58. However, if the Tribunal does follow the procedure in s.424AA, then sub-section 424A(2A) comes into play:

> *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.*

59. The effect of the submission of counsel for the Applicant, as I understand it, is that:

a) there is no obligation on the Tribunal under s.424AA(a) to give particulars of information to an applicant orally at the hearing, but, if the Tribunal chooses to do so, then obligations arise under s.424AA(b);

b) because there is no s.424AA(c) in similar terms to s.424A(3)(a), there is no exclusion of country information from the particulars of information that must be given to the Applicant for comment or response; and

c) a failure to comply with s.424AA(b) will lead to jurisdictional error.

60. The first proposition is clearly correct. The second and third are not correct.

61. Counsel for the First Respondent and for the Applicant have respectively argued that the comments of Marshall J in *SZLQD* at [12] are inconsistent/not inconsistent with those of Driver FM in *SZLTC* at [16] and [17]. If there is any inconsistency, then this Court must follow the decision in *SZLQD,* because it is a decision on appeal from the Federal Magistrates Court.

62. In *SZLTC*, Driver FM said at [16]:

> *It appears from the terms of s.424AA that if the Tribunal elects to embark upon a course of oral disclosure at a hearing, there are resultant obligations as set out in s.424AA(b)(i)(ii)(iii) and (iv). It also appears that if the Tribunal embarks upon a course of disclosure under s.424AA it does not enjoy the protections in s.424A(3).*

63. In *SZLQD,* Marshall J said of s.424AA at [12]:

> *That section places no obligation on the Tribunal but enables it, if it so chooses, to orally give to an applicant any information which the Tribunal considers would be part of the reason for affirming the decision under review. It does not compel the Tribunal to orally give an applicant any particulars of country information which it intends to rely on. So much is apparent from that part of the explanatory memorandum accompanying the bill which introduced s.424AA where the following was said:*
>
> > *'New section 424AA provides a new discretion for the RRT to orally give information and invite an applicant to comment on or respond to the information at the time that the applicant is appearing before the RRT in response to an invitation issued under section 425. This will complement the RRT's existing obligation under section 424A, in that, if the RRT does not orally give information and seek comments or a response from an applicant under section 424AA, it must do so in writing, under section 424A. The corollary is that if the RRT does give clear particulars of the information and seek comments or a response from an applicant under section 424AA, it is not required to give the particulars under section 424A.'*

64. In my view, with respect, the decision in *SZLQD*, with its reference to the explanatory memorandum, provides the key to understanding the operation of s.424AA. Once it is understood that, as the explanatory memorandum says, that s.424AA **complements** the Tribunal's existing obligations under s.424A, it becomes clear why there is no equivalent to s.424A(3)(a) in s.424AA. There does not need to be.

65. There is an inconsistency between *SZLTC* and *SZLQD*. Driver FM said that "if the Tribunal embarks upon the course of disclosure under s.424AA it does not enjoy the protections in s.424A(3)"[31]. Marshall J said that s.424AA "does not compel the Tribunal to orally give an applicant any particulars of country information which it intends to rely on"[32]. With respect, the Court must follow the latter view.

66. The reason why there is no need for an equivalent to s.424A(3)(a) in s.424AA can be understood when one considers s.424A(2A). Sections 424AA and 424A are complementary and must be read together. Once that is understood, the purpose and operation of s.424AA becomes clear.

67. The Tribunal has a discretion whether or not to give oral particulars of information to an applicant at a hearing. If it chooses to do so, then it must do so in the way set out in s.424AA(b). If the Tribunal complies with the requirements of s.424AA, the consequence is that s.424A(2A) applies and the Tribunal is relieved of its obligation under s.424A(1).

68. If the Tribunal chooses to give oral particulars of information under s.424AA but fails to comply with the requirements of s.424AA(b), the consequence is not that it falls into jurisdictional error. The consequence is that s.424A(2A) is not engaged. That may or may not mean that the Tribunal has failed to comply with s.424A(1).

69. This is the reason why there is no equivalent to s.424A(3) in s.424AA. There does not need to be, because the jurisdictional error, if there is one, is a failure to comply with s.424A(1). Section 424AA does not provide an alternative procedure to the one provided in s.424A; it is simply a way of enabling the Tribunal to bring s.424A(2A) into operation. Subsection 424A(2A) is an exception to s.424A(1), just as s.424A(3) is.

---

[31] [2008] FMCA 384 at [16]
[32] [2008] FCA 739 at [12]

70. In this case, the Tribunal gave oral particulars of country information to the Applicant. In my view, the particulars given were sufficiently clear to indicate the Tribunal Member's concerns. The Tribunal offered the Applicant the opportunity to comment on or respond to the information and told him that he could ask for more time if he wanted to[33]. True it is that the Applicant had some difficulty in comprehending exactly what the Tribunal wanted, but I am satisfied that the explanation given was sufficient to comply with s.424AA. The Tribunal asked the Applicant if he wanted to say anything about the country information and he replied:

> *No, I don't have anything*[34].

71. There is no breach of s.424AA(a) or (b). Even if there were, it does not follow that any jurisdictional error would arise. A failure to comply with s.424AA is not of itself a jurisdictional error. The consequence of a failure to comply with s.424AA is the same as the consequence of not adopting the procedure set out in s.424AA, namely that s.424A(2A) will not come into operation. That means that the Tribunal must comply with s.424A(1) and if the Tribunal breaches s.424A(1), then there will be a jurisdictional error.

72. In this case, the information put to the Applicant was Independent Country Information which is excluded from the operation of s.424A(1) by s.424A(3). There is no jurisdictional error. Grounds 1, 2 and 3 all fail.

73. The Applicant's fifth ground claims that the Tribunal fell into jurisdictional error in finding that it would be reasonable for him to relocate to another part of Pakistan.

74. The "relocation principle" has been set out in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs*[35], where Black CJ said at 440-441:

> *Although it is true that the Convention definition of refugee does not refer to parts or regions of a country, that provides no warrant for construing the definition so that it would give refugee status to those who, although having a well-founded fear of*

[33] Transcript at page 25
[34] Transcript page 26
[35] *supra*

> *persecution in their home region, could nevertheless avail themselves of the real protection of their country of nationality elsewhere within that country. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country. If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders.*[36]

75. It is that relocation principle which has been accepted by the High Court in *SZATV v Minister for Immigration and Citizenship*[37] and *SZFDV v Minister for Immigration and Citizenship*[38].

76. In *Randhawa* Black CJ set out the way that the question of relocation should be dealt with:

> *Once the question of relocation had been raised for the delegate's consideration she was of course obliged to give that aspect of the matter proper consideration. However, I do not consider that she was obliged to do this with the specificity urged by counsel for the appellant. I agree that it would ordinarily be quite wrong for a decision-maker faced with a relocation possibility to take the general approach that there must be a safe haven somewhere without giving the issue more specific attention, but the extent of the decision-maker's task will be largely determined by the case sought to be made out by an applicant. In the present case the applicant raised several issues, all of which were dealt with by the decision-maker. If the appellant had raised other impediments to relocation the decision-maker would have needed to consider these but having regard to the issues raised by the appellant and to the material that was before the decision-maker on the issue of relocation she was entitled to come to the conclusion that the appellant could reasonably be expected to relocate elsewhere in India.*[39]

77. In *SZATV,* Gummow, Hayne and Crennan JJ considered the question of what is reasonable and practicable in deciding relocation matters:

> *What is "reasonable", in the sense of "practicable", must depend upon the particular circumstances of the applicant for refugee*

[36] *Randhawa* at FCR 440-1; ALD 268; ALD 4
[37] *supra* at [10}
[38] *supra* at [14]
[39] *Randhawa* at FCR 443

status and the impact upon that person of relocation of the place of residence within the country of nationality[40].

78. In *SZFDV*, which was handed down on the same day as *SZATV*, Gummow, Hayne and Crennan JJ said:

> *As indicated in the reasons in SZATV, and as a general proposition to be applied to the circumstances of the particular case, it may be reasonable for the applicant for a protection visa to relocate in the country of nationality to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution*[41].

79. In the case before this Court, the Tribunal considered the Applicant's submissions on relocation. He had claimed a fear of persecution by the TNSM and he told the Tribunal that he feared the TNSM anywhere in Pakistan:

> *MS SYMONS: Do you have any fear of living in Magura?*
>
> *INTERPRETER: Yes, I do.*
>
> *MS SYMONS: Why is that?*
>
> *INTERPRETER: It was all dominated by those people and they know each other.*
>
> *MS SYMONS: Had you considered moving somewhere else in Pakistan?*
>
> *INTERPRETER: There's no safety anywhere from those people. They are everywhere and you can feel it.*
>
> *MS SYMONS: What do you think is likely to happen if you were to return to your village?*
>
> *INTERPRETER: That (sic) because I am obvious to them already, if I go there they will finish my life.*
>
> *MS SYMONS: What if you were to return and live somewhere else in Pakistan; for example in Karachi?*
>
> *INTERPRETER: Yes, but to stay in Karachi is more dangerous for me, for I don't know that whatever activities they are doing either locally and widespread*

[40] *SZATV* at [24]
[41] *SZFDV* at [14]

around the country that in Karachi will be dangerous to me.

MS SYMONS: Now, you lived in Karachi for two months before you left?

INTERPRETER: Yes, I spent two months in there.

MS SYMONS: Did you have any incidents with the TNSM there?

INTERPRETER: I wasn't staying in one place. I was just moving in there.

MS SYMONS: That's all the questions I want to ask you. Is there anything you would like to tell me?[42]

80. The Applicant then went on to speak about his membership of the political party known as the ANP. After the Tribunal explored the details of the Applicant's membership of the ANP, the Tribunal then went on to put to the Applicant the country information that has been previously discussed.

81. The Tribunal had this to say about relocation:

> *When considering the overall reasonableness of relocation to Karachi or some other part of Pakistan the Tribunal has considered the applicant's particular circumstances. The applicant is a seaman by occupation and spends considerable periods of time at sea. His occupation would not be affected by where he resides. When the Tribunal discussed with the applicant the possibility of relocation he did not raise any other grounds or problems, such as problems with his family moving or other difficulties, and only referred to the threat from TNSM.*[43]

82. The Tribunal has clearly considered the Applicant's circumstances as they were before the Tribunal and has given him the opportunity to raise any other relevant matter. It is not up to the Tribunal to make the Applicant's case for him (*Luu v Renevier*[44] per Davies, Wilcox and Pincus JJ at 45). There was no evidence before the Tribunal about threats from different fundamentalists or about the practicality and safety of moving the Applicant's family to another part of Pakistan and no obligation on the Tribunal to ask about these things.

---

[42] Transcript at 23 and 24
[43] Court Book at 76
[44] *supra*

83. The Tribunal clearly considered the case for relocation and no jurisdictional error has been made out. Ground 5 fails.

84. The Applicant has also submitted that the Tribunal's decision on relocation was not necessarily logically independent of its findings about the Applicant's refugee claims and the application of the "What if I am wrong" test implies a lack of confidence by the Tribunal about its findings on the Applicant's refugee claims.

85. The Tribunal found that the Applicant's material claims "lack credibility and cannot be accepted"[45]. The Tribunal set out the reasons for this view. There is no suggestion that the Tribunal lacked confidence in its finding. Credibility is a matter for the Tribunal and there was evidence upon which the Tribunal could have made the finding that it did. As a general rule, it cannot be said that the application of the "What if I am wrong" test carries with it the implication that the Tribunal lacks confidence in its findings.

86. There is no jurisdictional error. The Tribunal decision is a privative clause decision and is not subject to prohibition, mandamus, declaration or certiorari, as the Applicant seeks. (s.474).

87. It follows that the application will be dismissed with costs. I consider that this matter is one where a fixed costs order is appropriate, as are most matters of this type in this Court.

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

Associate: V. Lee

Date: 25 July 2008

[45] Court book 74