FEDERAL COURT OF AUSTRALIA

SZMCD v Minister for Immigration and Citizenship [2009] FCAFC 46

MIGRATION – interpretation of s 424AA of the *Migration Act 1958* (Cth) – whether failure on the part of the Refugee Review Tribunal to comply with s 424AA once it chooses to provide oral particulars of information at a review hearing constitutes jurisdictional error – the Tribunal has a discretion whether or not to invoke the provisions of s 424AA – a decision not to invoke s 424AA or non-compliance with the requirements of that section once invoked does not amount to jurisdictional error – *obiter dicta* to the contrary by Driver FM in *SZLTC v Minister for Immigration and Citizenship* [2008] FMCA 384 not followed and disapproved – whether *country information* is information within the meaning of s 424AA – *country information* not *information* within s 424AA – in the instant case the Tribunal complied with s 424AA in any event – the Tribunal was not obliged to consider the "*what if I'm wrong test*" (as to which see *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220) – for this reason, error in the application of that test would not matter – the Tribunal's conclusions in respect of relocation were an independent and additional basis for its decision – appeal dismissed

Acts Interpretation Act 1901 (Cth), s 15AB(1), s 15AB(2)(e)
Migration Act 1958 (Cth), s 36 and Pt 7, especially ss 411, 422B, 424, 424AA, 424A, 424C, 425, 425A
Migration Legislation Amendment Act (No 1) 1998 (Cth), s 3 of Sch 3 of Pt 1
Migration Amendment (Review Provisions) Act 2007 (Cth)

SZMCD v Minister for Immigration and Citizenship (2008) 219 FLR 141, [2008] FMCA 1039, affirmed
Craig v State of South Australia (1995) 184 CLR 163 applied
Minister for Immigration and Multicultural Affairs v Rajalingam (1999) 93 FCR 220 followed
Minister for Immigration and Multicultural and Indigenous Affairs v NAMW (2004) 140 FCR 572 followed
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 applied
QAAC of 2004 v Refugee Review Tribunal [2005] FCAFC 92 followed
Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437 applied
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294 applied
SZATV v Minister for Immigration and Citizenship (2007) 233 CLR 18 followed
SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609, (2007) 81 ALJR 1190 applied
SZCBT v Minister for Immigration and Multicultural Affairs [2007] FCA 9 distinguished
SZFDV v Minister for Immigration and Citizenship (2007) 233 CLR 51 followed
SZITH v Minister for Immigration and Citizenship (2008) 105 ALD 541, [2008] FCA 1866 cited
SZKCQ v Minister for Immigration and Citizenship (2008) 170 FCR 236 cited

SZLML v Minister for Immigration and Citizenship [2009] FCA 83 cited
SZLQD v Minister for Immigration and Citizenship [2008] FCA 739 cited
SZLTC v Minister for Immigration and Citizenship [2008] FMCA 384, overruled
SZLWI v Minister for Immigration and Citizenship (2008) 171 FCR 134 cited
SZLXI v Minister for Immigration and Citizenship (2008) 103 ALD 589, [2008] FCA 1270 cited
SZMAE v Minister for Immigration and Citizenship [2008] FCA 1701 cited
SZMMP v Minister for Immigration and Citizenship [2009] FCA 233 cited
VJAF v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 178 followed
WAJW v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 330 followed

SZMCD v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
NSD 1292 of 2008

MOORE, TRACEY AND FOSTER JJ
15 APRIL 2009
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1292 of 2008**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **SZMCD**
Appellant

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

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **MOORE, TRACEY AND FOSTER JJ**
DATE OF ORDER: **15 APRIL 2009**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the first respondent's costs of and incidental to the appeal, excluding any costs incurred after the hearing of the appeal in relation to the contention made by the first respondent concerning the appropriate principles governing the weight and status to be accorded to decisions of single judges of this Court exercising its appellate jurisdiction.

3. The first respondent pay the appellant's costs incurred in respect of the further Written Submissions filed on behalf of the appellant on 24 November 2008, after the hearing of the appeal.

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 Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1292 of 2008**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **SZMCD**
Appellant

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

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **MOORE, TRACEY AND FOSTER JJ**
DATE: **15 APRIL 2009**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

MOORE J

1 I have had the advantage of reading the reasons for judgment of Tracey and Foster JJ in draft form. I gratefully adopt their Honours' account of the background, relevant legislation and authorities, the issues and the submissions of the parties. I agree with the orders their Honours propose (including the order as to costs) and their reasoning concerning grounds of appeal five, six and seven. I would like to briefly explain why I agree that the Tribunal did not fall into jurisdictional error having regard to the procedures embodied in s 424AA of the *Migration Act 1958* (Cth).

2 It cannot be doubted that s 424AA and s 424A are intended to be complementary. This is obvious from the legislative history and the terms of both sections. The former section, if complied with, relieves the Tribunal of the duty imposed by the latter. The only possible point of uncertainty about the operation of the two sections, at least as revealed in these proceedings, is whether a possibly imperfect but unnecessary attempt to comply with the former might somehow give rise to jurisdictional error, irrespective of the fact that the

circumstances did not create a duty to comply with the latter. I say unnecessary because in the present case the contentious information was "country information" comprehended by s 424A(3)(a) of the Act (that is, information that was not specifically about the applicant or another person and was just about a class of persons of which the applicant or other person is a member). Accordingly, there was no duty under s 424A to give particulars of that information. As there was no duty under that section, it was unnecessary for the Tribunal to seek to avoid (as it is entitled to do) the performance of the duty by seeking to act in the way contemplated by s 424AA if this is what it was intending to do. Any non-compliance with s 424AA in circumstances where there was no duty otherwise imposed by s 424A, is, in my opinion, of no legal consequence. Where there is an imperfect attempt to give effect to s 424AA the result merely is that the exemption offered in s 424A(2A) is not engaged. However, there can be no non-engagement of that subsection in circumstances such as the present given that s 424A does not, in any event, apply. If there is no obligation to provide particulars under s 424A, then s 424A(2A) has no field of operation having regard to the opening words of that subsection, which presupposes the existence of such an obligation. Section 424AA is, in my opinion, clearly not intended to create a duty to take particular steps independently of the existence of a duty under s 424A. In a case such as the present it cannot be said that the Tribunal failed to perform a duty that might give rise to jurisdictional error.

3 Given the conclusions I have just expressed, it is inappropriate to engage in a discussion about whether, in this case, the Tribunal complied, in fact, with the requirements of s 424AA when, in law, it did not have to do so.

I certify that the preceding three (3) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Moore.

Associate:

Dated: 9 April 2009

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1292 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZMCD**
Appellant

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

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **MOORE, TRACEY AND FOSTER JJ**
DATE: **15 APRIL 2009**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

TRACEY AND FOSTER JJ

INTRODUCTION

4 This is an appeal from a decision of a Federal Magistrate given on 28 July 2008 (*SZMCD v Minister for Immigration and Citizenship* (2008) 219 FLR 141, [2008] FMCA 1039). Before the Federal Magistrate, the appellant sought judicial review of a decision of the Refugee Review Tribunal (**the Tribunal**) which was dated 22 February 2008 and which was handed down on 4 March 2008. The Tribunal had affirmed a decision of a delegate of the Minister for Immigration and Citizenship (**the delegate**) to refuse to grant a Protection (Class XA) visa to the appellant.

5 In this Court, the appellant claims a declaration that the Tribunal's decision was made in excess of jurisdiction and was invalid. He also claims writs of certiorari, prohibition and mandamus in order to have the Tribunal's decision quashed and the matter remitted to the Tribunal to be decided according to law.

6 The appellant is a national of Pakistan. The appellant arrived in Australia on 27 August 2007 when the ship upon which he was employed docked at the port of Adelaide. He had been working as a seaman on international voyages for more than nine years when he arrived in Australia in August 2007. He sought asylum here on 6 September 2007.

7 The basis of the appellant's claim for protection is set out at [3] to [6] of the reasons for judgment of the Federal Magistrate (**the Magistrate's reasons**). The appellant asserted that he had been attacked by religious extremists in his home area of Swat in the North West Frontier Province (**the NWFP**) of Pakistan after he had refused to accede to the demands of these extremists. The demands made upon him included joining a jihad and removing his daughters from school. He claimed that he had been attacked and threatened by members of the Movement for the Enforcement of Islamic Laws in the NWFP (**the TNSM**). He said that the TNSM had also targeted him because he was an ordinary member of the ANP Party and because of his community work. The events which were said to constitute persecution of the appellant allegedly occurred in early 2007.

8 The appellant's application for a protection visa was refused by the delegate on 6 November 2007. On 26 November 2007, the appellant applied to the Tribunal for a review of the delegate's decision.

THE TRIBUNAL HEARING

9 The appellant attended a hearing of the Tribunal on 24 January 2008 and gave evidence in the Pashto language with the assistance of an interpreter. He also gave some evidence in English. Towards the end of the Tribunal hearing, the following exchange took place between the appellant (with the assistance of the interpreter) and the Tribunal member:

> Tribunal — Some of the evidence you've given me is inconsistent with the country information on Pakistan. 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 a not a (indistinct) 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.

> There is a lot of country information on the TNSM. The country information indicates that there they have a lot of influence and power in the Malakand area. So if you were to be moving within that area, then you would still be under their influence. However, if you were to move out of that area, then their power and their influence is minimum. 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.

Interpreter	Which answer?
Tribunal	Sorry, I've just given you some information which is inconsistent with the evidence you've given and I've explained to you why that's important. Now, would you like to make any comment on that or respond to that? And, again, you don't have to do that immediately. Would you like to respond to that?
Interpreter	I can't say anything now.
Tribunal	You can't say anything at all or you can't say anything now?
Interpreter	I'm sorry but what should I say in this regard? I don't know.
Tribunal	I'm trying to be fair to you to give you a chance to have your say. You don't have to say anything if you don't want to but it is an opportunity for you.
Interpreter	That's a (indistinct) proof you mean.
Tribunal	No, I've made a comment to you. Do you want to say anything about that?
Interpreter	No, I don't have anything.

10 Although not stated explicitly by the Tribunal, the parties accept that, in embarking upon the above exchange, the Tribunal member thought that she was exercising the power afforded to the Tribunal by s 424AA of the *Migration Act 1958* (Cth) (**the Act**) to provide oral particulars of certain information to the appellant.

THE TRIBUNAL DECISION

11 The Tribunal ultimately found that the appellant was not a person to whom Australia owed protection obligations. The Tribunal found that there was no real basis for the appellant's claims to fear persecution. The Tribunal was therefore satisfied that there was no real chance that the appellant would be at risk of persecution should he return to Pakistan.

12 After referring to a number of difficulties with the evidence which the appellant had given, the Tribunal found that the appellant's claims of persecution lacked credibility and could not be accepted (the Tribunal's reasons at p 14.6). The Tribunal did not accept that the appellant had been attacked by the TNSM in 2007 as he had claimed. Although the Tribunal accepted that the appellant might have been an ordinary member of the ANP Party, it did not accept that his membership of that party had resulted in his having problems with the TNSM. Nor did the Tribunal accept that there was a real chance of harm to the appellant if he continued to be an ANP member and continued to engage in the same kinds of activities in which he had engaged in the past.

13 The Tribunal also went on to consider whether, if the findings made by it which led to its ultimate conclusion that the appellant did not reasonably fear persecution for a Convention reason were incorrect, the appellant would be able to obtain effective state protection in Pakistan. It concluded that it was not satisfied that the appellant would be able to access effective state protection if he continued to reside in the NWFP. However, in light of country information regarding the activities of the TNSM, the Tribunal concluded that:

> there is no real chance that that Maulana Fazalullah or his followers would pursue the location and persecution of an individual outside of the North West Frontier Province who is of little importance to the overall agenda of the TNSM.
> (the Tribunal's reasons at p 16.4)

14 The Tribunal thought that it was very unlikely that the TNSM would be sufficiently interested in the appellant to pursue, locate and persecute him in Karachi or in some other part of Pakistan not in or near the NWFP.

15 It also considered whether the appellant's particular circumstances would permit relocation elsewhere in Pakistan. After weighing in the balance the appellant's occupation as a seaman, the fact that he had not indicated that he had had difficulties with any group other than the TNSM, and the possible risk to the appellant if he were to continue his association with the ANP Party and to continue his community work, the Tribunal held that it was satisfied that domestic relocation of the appellant to a city such as Karachi was a reasonable and viable proposition.

16 Accordingly, the Tribunal refused the appellant's application for a protection visa.

THE DECISION OF THE FEDERAL MAGISTRATE

17 In his application for judicial review before the Federal Magistrate, the appellant raised two claims in support of his contention that the decision of the delegate should be set aside and reconsidered. These were that the Tribunal had committed jurisdictional error by:

(1) Not complying with the detailed requirements found in s 424AA of the Act; and

(2) Making incorrect findings in relation to the appellant's capacity to relocate within Pakistan.

18 In relation to the first claim, the appellant submitted that the exchange between the appellant and the Tribunal which we have extracted at [9] above did not amount to the giving of clear particulars of information which the Tribunal considered would be the reason, or part of the reason, for affirming the decision under review. Therefore, it was submitted that the Tribunal had not complied with the provisions of s 424AA(a). This was said to constitute jurisdictional error.

19 The appellant also argued that the decision of the Tribunal was affected by jurisdictional error in that, having chosen to give to the appellant adverse information orally at the hearing before the Tribunal pursuant to s 424AA(a) of the Act, the Tribunal had failed to ensure, as far as was reasonably practicable, that the appellant understood why the information was relevant to the review and had also failed to ensure that the appellant understood the consequences of the information being relied upon in affirming the decision under review as required by s 424AA(b)(i).

20 The information in question was country information concerning the TNSM's operations outside the NWFP.

21 The Tribunal was also said to have breached s 424AA(b)(iii) by failing to inform the appellant of his right to seek an adjournment in order to consider his response.

22 The appellant also contended before the Federal Magistrate that the Tribunal had committed jurisdictional error when considering relocation within Pakistan.

23 The Federal Magistrate held that the purported failure to comply with s 424AA did not result in jurisdictional error on the part of the Tribunal. Indeed, in his view, it could not do so. After considering the structure of the Act and the Explanatory Memorandum which accompanied the amending legislation which inserted s 424AA into Div 4 of Pt 7 of the Act, his Honour concluded that s 424AA affords to the Tribunal a discretion to give oral particulars of information to an applicant at a hearing. If it chooses to provide such particulars, then it must do so in the manner set out in s 424AA(a) and (b). The only consequence of a failure to provide adequate particulars in conformity with the requirements of s 424AA(a) and (b) is that s 424A(2A) will not be engaged. A failure to comply with s 424AA does not, of itself, constitute jurisdictional error. The Tribunal's obligation to provide particulars of information in writing in accordance with the requirements of s 424A(1) continues to subsist. A failure to comply with s 424AA may or may not mean that the Tribunal has failed to comply with s 424A(1).

24 The Federal Magistrate was satisfied that, in the present case, the Tribunal had provided the appellant with sufficient opportunity to comment on the information provided orally at the Tribunal hearing.

25 The Federal Magistrate also held that, even if there had been a failure to comply with s 424AA, the Tribunal was not in any event obliged to provide the appellant with particulars of the information in question under s 424A(1) as it was covered by the exclusionary provision in s 424A(3)(a) because it was country information (see the Magistrate's reasons at [72]).

26 His Honour further held that no error arose from the Tribunal's consideration of relocation within Pakistan. After discussing *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 and other relevant authorities on this issue, the Federal Magistrate concluded at [82] that:

> 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* (1989) 91 ALR 39 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.

27 The Federal Magistrate held that there was no obligation on the part of the Tribunal to investigate further any reasons not raised by the appellant which might have prevented him from safely relocating within Pakistan. His Honour held that the Tribunal's decision on relocation was logically independent of its primary reasons for dismissing the review application. This was because the Tribunal's central finding that the appellant's claims lacked credibility and should be rejected was not attended by any real doubt on the Tribunal's part.

THE PRESENT APPEAL

28 In his Notice of Appeal the appellant advanced seven grounds of appeal.

29 The issues raised by the appellant in his appeal to this Court are substantially the same as those raised on his behalf before the Federal Magistrate. They may be considered in three groups: first, the issues raised in respect of the interpretation of s 424AA of the Act and the application of that section in the circumstances of the present case (Grounds 1 to 4); second, the issues relevant to the Tribunal's relocation findings (Grounds 5 and 6); and, third, those involved in the Court's exercise of discretion in respect of relief (Ground 7).

The Grounds Concerning Section 424AA of the Act

Ground 1

30 First of all, the appellant contended that the learned Federal Magistrate erred in law in holding that, even though the Tribunal had elected to use the method of orally disclosing and seeking comment on adverse information made available by s 424AA(a) of the Act, a failure to comply with the obligations set out in s 424AA(b) did not constitute jurisdictional error. The appellant further explained this contention by submitting that the Federal Magistrate erred:

(a) In holding that the only consequence of electing to use the procedure in s 424AA(a) in circumstances where there is a failure to comply with the requirements set out in s 424AA(b) is that the Tribunal does not acquire the protection afforded to it by s 424A(2A); and

(b) In holding that the obligations imposed upon the Tribunal by s 424AA(b) do not apply to country information because of the operation of s 424A(3)(a).

Ground 2

31 The appellant also contended that the Federal Magistrate erred in fact and in law in finding that the Tribunal:

(a) Had given the appellant clear particulars of the information it considered would be the reason, or part of the reason, for affirming the decision under review as required by s 424AA(a); and

(b) Had ensured, as far as was reasonably practicable, that the appellant understood why the information was relevant to the review and the consequences of the information being relied upon in affirming the decision under review as required by s 424AA(b)(i).

32 The appellant further developed this contention by submitting that what may be sufficient to constitute clear particulars in a written communication for the purposes of s 424A(1)(a) will usually not be sufficient to constitute clear particulars in an oral communication for the purposes of s 424AA(a).

Ground 3

33 The appellant also contended that the Federal Magistrate erred in fact and in law in finding that the Tribunal had advised the appellant that he could seek additional time to comment on, or to respond to, the remarks made by the Tribunal as required by s 424AA(b)(iii).

Ground 4

34 In the alternative to Ground 3, the appellant argued that the Federal Magistrate erred in fact and in law in finding that the appellant had not asked for an adjournment at the Tribunal hearing and in failing to consider whether the Tribunal had fulfilled its obligation under s 424AA(b)(iv) to consider whether the appellant reasonably needed additional time to comment on, or to respond to, the information disclosed under s 424AA(a).

The Tribunal's Relocation Findings

Ground 5

35 The appellant contended that the learned Federal Magistrate erred in fact in finding that the Tribunal had considered the information before it which was relevant to the question of whether it would be reasonable to expect the appellant to relocate to another part of Pakistan outside the NWFP.

Ground 6

36 The appellant also contended that the Federal Magistrate erred in fact and in law by not finding that the Tribunal had fallen into jurisdictional error by failing to consider whether, if the appellant were to relocate within Pakistan, he would continue to behave in a way which might attract similar persecution from different Islamic fundamentalists.

Discretion

Ground 7

37 The final ground relied upon by the appellant was that the Federal Magistrate erred in the exercise of his discretion when he held that he would have withheld relief from the appellant in any event because, in his view, the exercise of any discretion in favour of the appellant would be futile. This ground was amplified by the further contention that the Federal Magistrate had erred in fact in finding that the Tribunal's relocation findings formed an independent (rather than a cumulative) basis for its decision to affirm the decision under review.

THE PARTIES' SUBMISSIONS

The Appellant's Submissions

Ground 1

38 The submissions made on behalf of the appellant in support of this ground were as follows:

(a) The Federal Magistrate erred and committed jurisdictional error when he held that:

> 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).
> (the Magistrate's reasons at [68])

(b) The correct interpretation of the relevant statutory provisions is that, when the Tribunal elects to embark upon a course of oral disclosure at a hearing pursuant to s 424AA, there are resultant obligations imposed upon the Tribunal being those obligations set out in s 424AA(b)(i), (ii), (iii) and (iv). Failure to satisfy each and every one of the requirements set out in subpars (i) to (iv) of s 424AA(b) constitutes jurisdictional error; and

(c) This interpretation flows from an orthodox interpretation of the plain language of the relevant provisions. There was no reason to depart from the plain language, especially given that it would have been a simple matter for the Parliament to spell out the interpretation which the Federal Magistrate placed upon the provisions yet it had not done so. This interpretation was also supported by reasoning adopted by this Court when interpreting s 424 of the Act (see, for example, *SZKCQ v Minister for Immigration and Citizenship* (2008) 170 FCR 236) which was said to provide an appropriate analogy.

Ground 2

39 Counsel for the appellant submitted that, in most cases, the content of oral communications which will meet the exigencies of s 424AA(a) and (b) will be different from the contents of a communication in writing that will be required to be made pursuant to s 424A of the Act in relation to the same subject matter. Counsel for the appellant further submitted that, in the circumstances of the present case:

> The Tribunal member's statement was concise, concentrated and dense with information. The appellant clearly expressed his incomprehension. Yet the Tribunal member made no effort to repeat, simplify or explain [her] statement or to explore the reasons for the appellant's incomprehension. In the circumstances, the trial judge erred in finding that the Tribunal complied with its obligations to give clear oral particulars of the information and to ensure that the appellant understood its relevance and importance.

40 It was ultimately submitted on behalf of the appellant that a further and simpler explanation should have been given by the Tribunal member to the appellant when the appellant's lack of understanding became apparent.

Ground 3

41 In support of Ground 3, Counsel for the appellant repeated the submission which he had made on behalf of the appellant in respect of Ground 2. For similar reasons, it was submitted that the content of the statements made by the Tribunal to the appellant fell short of advising the appellant that he might seek additional time to comment on, or to respond to, the information.

Ground 4

42 Ground 4 was advanced in the alternative to Ground 3.

43 It was submitted on behalf of the appellant that part of the exchange which we have extracted at [9] above included a request for additional time to comment on, or to respond to, the information. The portion relied upon was the answer given through the interpreter:

> I can't say anything now.

44 We were then referred to the exchange which occurred at the Tribunal hearing subsequent to that remark made by the appellant. The following submissions were then made:

> The appellant's confused and non-responsive answers to that and subsequent questions should not be read as a positive disavowal of the implication from the appellant's earlier statement that he might be able to say something later.
> …
> Consequently, the Tribunal was obliged under s 424AA(b)(iv) to consider whether the appellant reasonably needed additional time to comment on or [to] respond to the information and, if it considered that he did need such time, to adjourn the review. There is nothing in the transcript of the hearing or any of the other materials before the Court to indicate that the Tribunal considered this issue at all. The Tribunal fell into jurisdictional error and the trial judge erred in failing to so find.

Ground 5

45 In support of this ground, it was submitted on behalf of the appellant:

(a) The principle of relocation will not operate to deny the appellant refugee status if, in all the circumstances, it would be unreasonable to expect him to relocate to another part of Pakistan: *Randhawa* 52 FCR 437 at 440–442;

(b) It was incumbent upon the Tribunal to consider whether it would have been reasonable for the appellant to relocate to another area of Pakistan;

(c) The issue identified in (b) above was never squarely raised with the appellant;

(d) Various factual matters proven in evidence before the Tribunal suggested that it would not be reasonable to expect the appellant to relocate to another area of Pakistan; and

(e) There is no indication in the Tribunal's reasons that it ever addressed any of these concerns and its failure to do so constituted jurisdictional error.

Ground 6

46 Counsel for the appellant submitted that:

(a) The Tribunal had failed to consider whether the appellant's unwillingness to obey the demands of the TNSM would provoke other fundamentalists in other areas of Pakistan to persecute him for an imputed religious or political opinion;

(b) There is no obligation on refugees to modify their behaviour to avoid persecution for a Convention reason on their return to their home country, whether to their home region or to a new one;

(c) The Tribunal fell into jurisdictional error by either asking itself the wrong question or by failing to consider relevant material which it was required to consider; and

(d) In rejecting these arguments, the Federal Magistrate likewise committed jurisdictional error.

Ground 7

47 In support of this ground, it was submitted on behalf of the appellant that the Tribunal's findings on the issue of relocation and its findings on the credibility of the appellant's persecution claims were not independent each of the other but rather were sufficiently connected to found a valid claim that the whole decision of the Tribunal was

infected by jurisdictional error if, as was submitted by the appellant, the findings in respect of relocation were flawed.

The First Respondent's Submissions

Grounds 1 to 4

48 Counsel for the first respondent submitted that the only consequence of non-compliance with the specific requirements of s 424AA is that the Tribunal does not get the benefit of the provisions of s 424A(2A). It was submitted on behalf of the first respondent that this interpretation of the relevant statutory provisions was supported by five cases in this Court, namely: *SZLQD v Minister for Immigration and Citizenship* [2008] FCA 739 at [12]; *SZLXI v Minister for Immigration and Citizenship* (2008) 103 ALD 589, [2008] FCA 1270 at [27]; and *SZLWI v Minister for Immigration and Citizenship* (2008) 171 FCR 134 at [19]; *SZMAE v Minister for Immigration and Citizenship* [2008] FCA 1701 at [23]; and *SZITH v Minister for Immigration and Citizenship* (2008) 105 ALD 541, [2008] FCA 1866 at [56]–[60]. Each of those cases was decided by a single judge sitting on appeal from a Federal Magistrate. The decisions contain the views of five judges of this Court. Each authority is recent. They constitute a consistent body of recent authority.

49 It was submitted on behalf of the first respondent that the single consequence of non-compliance with s 424AA on the part of the Tribunal for which the first respondent contends may or may not result in further consequences by reason of the operation of s 424A. This is because s 424A(1) applies only to *information* as interpreted in *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609, (2007) 81 ALJR 1190 at [17] being information which is not excluded from consideration by s 424A(3). In the present case, so it was submitted, it is well established that s 424A(3)(a) excludes country information from the requirements of s 424A(1): *Minister for Immigration and Multicultural and Indigenous Affairs v NAMW* (2004) 140 FCR 572 at [64]–[74] and at [112]–[138]; *WAJW v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 330 at [44]–[46]; *QAAC of 2004 v Refugee Review Tribunal* [2005] FCAFC 92 at [7]–[30]; and *VJAF v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 178 at [11]–[16].

50 It was submitted that, for the above reasons, it is irrelevant whether the Tribunal actually complied with the requirements of s 424AA when it raised country information with the appellant because such information was not required to be the subject of notice in accordance with s 424A(1) of the Act. Indeed, there was a question as to whether or not country information could ever be the subject of s 424AA oral communications (because it was exempt under s 424A(3)(a)).

51 Counsel for the first respondent also submitted that the interpretation of s 424AA urged upon the Court by the appellant would lead to absurd results. It would mean that the Tribunal would be better advised to remain silent than raise matters with an applicant during the course of a hearing. In that way, s 422B of the Act would ensure that an applicant had no cause for complaint. Such an approach would most likely lead to visa applicants being denied information and indications from the Tribunal which s 424AA contemplated should be given to them.

52 It was also submitted on behalf of the first respondent that, even if the appellant's construction of s 424AA were correct, no breach of that section occurred in the present case. The country information which was the subject of the exchange extracted at [9] above does not meet the test for *information* laid down in *SZBYR* 235 ALR 609, 81 ALJR 1190 at [17] as, in its terms, it says nothing about the appellant or his claims for protection. Its only relevance is that it ultimately formed part of the Tribunal's reasoning process as to why it was reasonable for the appellant to relocate. The fact that particular information is used by the Tribunal as part of a reasoning process does not mean that it thereby falls within s 424A(1) or s 424AA(a). What is required is that the information would be the reason, or a part of the reason, for affirming the decision under review. That requirement is not satisfied in the present case.

53 Finally, Counsel for the first respondent submitted that, in any event, the Tribunal adequately complied with s 424AA in the present case for the reasons given by the Federal Magistrate at [70] in his reasons. Counsel for the first respondent submitted that a fair reading of the exchange extracted at [9] above supports this conclusion.

Grounds 5 and 6

54 It was submitted on behalf of the first respondent that, in essence, the appellant's argument is that the Tribunal was obliged to consider and determine objections to relocation which the appellant himself never raised. Such an approach would be unworkable and is not the law. For this reason, Grounds 5 and 6 must fail.

Ground 7

55 It was submitted on behalf of the first respondent in relation to this ground that a fair reading of the Tribunal's decision does not indicate any real doubt on the part of the Tribunal about its primary conclusions concerning the appellant's alleged fear of persecution. If this be correct, the Tribunal was not obliged to consider whether those conclusions may be wrong: *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 at [64]–[67]. It was submitted that the Tribunal's conclusions as to relocation were simply another and further basis for its decision rather than part of its primary reasoning process. It was said that the question of relocation was not discussed for the reason that the Tribunal was uncertain about the correctness of its primary conclusions. Accordingly, so it was submitted, the Tribunal's conclusions as to relocation were independent of the Tribunal's primary conclusions and relief should properly be withheld on discretionary grounds even if one of the first six grounds of appeal were made out.

CONSIDERATION

Ground 1

56 Part 7 of the Act is headed: ***Review of protection visa decisions***. Section 411 of the Act, which is found in Div 2 of Pt 7 of the Act, provides that a decision to refuse to grant a protection visa or a decision to cancel such a visa is reviewable by the Tribunal. Protection visas are dealt with in s 36 of the Act.

57 Division 4 of Pt 7 of the Act contains detailed provisions as to the way in which the Tribunal is to conduct reviews under Pt 7.

58 Section 422B, which is the first section appearing in Div 4 of Pt 7, is in the following terms:

422B Exhaustive statement of natural justice hearing rule

(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.

59 Sections 424, 424AA and 424A appear in Div 4 in the order in which we have just listed them and they provide as follows:

424 Tribunal may seek information

(1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.

(2) Without limiting subsection (1), the Tribunal may invite, either orally (including by telephone) or in writing, a person to give information.

(3) A written invitation under subsection (2) must be given to the person:

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

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

424AA Information and invitation given orally by Tribunal while applicant appearing

If an applicant is appearing before the Tribunal because of an invitation under section 425:

(a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) if the Tribunal does so—the Tribunal must:

(i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and

(ii) orally invite the applicant to comment on or respond to the information; and

(iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and

(iv) if the applicant seeks additional time to comment on or respond to the information—adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.

424A Information and invitation given in writing by Tribunal

(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.

60 Section 424B provides that certain specific matters must be addressed by the Tribunal if it seeks information or responses to information pursuant to either s 424 or s 424A of the Act. Section 424C stipulates the consequences of a failure on the part of an applicant for a visa to provide information or responses when invited to do so pursuant to s 424 or s 424A of the Act. Section 425 requires that an applicant be invited to appear before the Tribunal when it is conducting a review and s 425A sets out the matters that must be included in any s 425 notice.

61 The remaining provisions of Div 4 of Pt 7 of the Act regulate in specific ways the conduct of review hearings. We need not refer to them in detail for present purposes.

62 Therefore, for the purposes of Tribunal reviews of protection visa decisions, *the natural justice hearing rule* is embodied exhaustively in the provisions which comprise Div 4 of Pt 7 of the Act. In the present case, as will be already apparent, we are particularly concerned with s 424AA and s 424A.

63 Section 424A was introduced into the Act by s 3 of Sch 3 of Pt 1 of the *Migration Legislation Amendment Act (No 1) 1998* (Cth) on 11 December 1998. That section has subsequently been amended on two occasions: once in 2001 and again in 2007.

64 The 2007 amendments were effected by the *Migration Amendment (Review Provisions) Act 2007* (Cth) (Act No 100 of 2007) (**the 2007 amendments**).

65 The 2007 amendments came into force on 28 June 2007.

66 In addition to effecting amendments to s 424A of the Act, the 2007 amendments introduced s 424AA into the Act.

67 Section 424AA has not subsequently been amended.

68 For present purposes, it is important to understand the nature of the amendments made to s 424A by the 2007 amendments. Those amendments were:

(a) The first few introductory words in subs (1) were altered so as to read: *Subject to subsections (2A) and (3),*;

(b) The word *clear* was inserted into subs (1)(a) between the word *circumstances* and the word *particulars* in the second line of that section;

(c) Subsection (1)(b) was amended so as to bring that subsection into line with the language of s 424AA(b)(i);

(d) The words *or respond to* were inserted into subs (1)(c);

(e) Subsection (2A) was introduced into s 424A in the form in which it presently exists; and

(f) Other minor amendments were made to subs (3) of s 424A.

69 In addition, the heading of s 424A was changed from *Applicant must be given certain information* to *Information and invitation given in writing by Tribunal*.

70 Thus, it is quite clear that:

(a) The setting in which s 424AA was introduced into the Act included the fact that s 424A had been in the Act for approximately nine years before the introduction of s 424AA;

(b) Section 424A was amended in a number of significant respects in order to complement s 424AA. In particular, the whole of the operation of subs (1) of s 424A was made subject to subs (2A) and subs (3); the language of s 424A(1)(a) was brought into line with the language of s 424AA(a); the language of s 424A(1)(b) was brought into line with the language of s 424AA(b)(i); the language of s 424A(1)(c) was brought into line with the language of s 424AA(b)(ii); and, most importantly of all, subs (2A) was introduced into s 424A; and

(c) The subject matter of s 424AA(a) is the same as the subject matter of s 424A(1)(a) and the subject matter of s 424AA(b)(i) is the same as the subject matter of s 424A(1)(b). Similarly, the requirement set out in s 424AA(b)(ii) is the same as that set out in s 424A(1)(c) with the exception that the former involves an invitation given orally whereas the latter involves a written invitation.

71 The policy and purpose reflected in s 424A is that the Tribunal should be compelled:

(a) To put the visa applicant on fair notice in writing of critical matters of concern to the Tribunal;

(b) To ensure that the visa applicant understands the significance of those matters to the decision under review; and

(c) To give the applicant a reasonable opportunity to comment on or to respond to those matters of concern.

72 It is evident that the same policy and purpose underpin s 424AA.

73 Section 424A is obligatory. Non-compliance with its provisions will very often amount to jurisdictional error. Section 424AA is discretionary. Non-compliance with its

provisions will result in the Tribunal not having the benefit of s 424A(2A). In that event, it must strictly comply with s 424A.

74 The first question in this appeal is whether non-compliance by the Tribunal with the provisions of s 424AA (in the present case, by allegedly failing to do that which was required by s 424AA having chosen to go down the path of engaging s 424AA) also constitutes jurisdictional error.

75 We think not.

76 In *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at [73], McHugh J held that it was necessary to have regard to "*the language of the relevant provision and the scope and object of the whole statute*" in determining whether a failure to observe a procedural requirement of an enactment results in jurisdictional error.

77 The immediate effect of a failure properly to comply with s 424AA is that the Tribunal will have purported to exercise a procedural discretion but will have in fact failed to do so in the manner required by the statute. The relevant sections when read together in their context suggest that the overriding obligation to provide the applicant with clear particulars of relevant information subsists and will be required to be discharged by other means (ie through s 424A(1)).

78 In *SAAP* 228 CLR 294, McHugh J also cited the observation made by his Honour and Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [91] to the effect that whether an act done in breach of a condition regulating a statutory power is invalid:

> … depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and consequences for the parties of holding every act done in breach of the condition.

79 In the present case, these tests for jurisdictional error laid down by the High Court when applied to s 424AA lead to the conclusion that a failure on the part of the Tribunal to comply with s 424AA in every respect will not amount to jurisdictional error.

80 In our view, the legislature must be taken to have intended that the provisions of s 424A and s 424AA would operate in a coherent and complementary fashion. The two sections should be construed in a manner which gives effect to that intention.

81 Subject to subs (2A) and subs (3) of s 424A, the Tribunal is obliged to comply with the requirements of s 424A(1). No discretion is involved.

82 Subsection 424A(3) exempts from the obligations imposed upon the Tribunal by s 424A(1) certain kinds of information. One of the types of information exempted from the requirements of s 424A(1) is 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.

83 This type of information is generally called *country information* (see the discussion as to this in *NAMW* 140 FCR 572 at [64]–[74]).

84 Section 424A(2A) provides a further exemption from the requirements of s 424A(1):

> … 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.

85 This latter exemption is not so much an exemption in respect of a type or kind of information (as is the case in respect of the subject matter of subs (3)) but is rather an exemption afforded to the Tribunal if it embarks upon a course of action which engages the provisions of s 424AA and if it complies with the requirements of that section.

86 The decision to engage the provisions of s 424AA is discretionary in the sense that the Tribunal is not obliged to take a course which engages those provisions but *may* do so if it considers such a course of action to be appropriate.

87 In our view, the Tribunal must always comply with the provisions of s 424A. However, the Tribunal has a choice as to whether it will invoke the provisions of s 424AA.

88 If the information under consideration by the Tribunal is the type of information covered by subs (3) of s 424A or if the Tribunal has engaged the provisions of s 424AA and

complied with the requirements of that section, it need not meet the requirements of s 424A(1). This is because s 424A(2A) relieves the Tribunal of the obligation to do so if s 424AA has been complied with and s 424A(3) relieves the Tribunal of the obligation to do so if the information is of a kind covered by that subsection.

89 The provisions are designed to facilitate the conduct of reviews contemplated by Pt 7 of the Act. If s 424A were triggered during the run of a review hearing and s 424AA had not been enacted, the hearing would have had to be adjourned in order to enable the s 424A(1) written particulars to be given. Such an outcome would be disruptive and inconvenient. If, as is now the case since the introduction of s 424AA into the Act, clear particulars of the relevant information are given at the hearing orally and the Tribunal otherwise complies with s 424AA(b) in its entirety, then the obligations imposed upon the Tribunal by s 424A(1) will be satisfied in substance during the course of the review hearing by the giving of those oral particulars. In that way, the objects sought to be achieved by s 424A(1) will be met.

90 Section 424A(1) prescribes what ***must*** be done. What must be done is subject to the exceptions in subs (2A) and subs (3). Section 424AA is thus facultative—it is one way by which the Tribunal can satisfy the substance of what is required of it under s 424A(1). If it elects to invoke s 424AA, it may do so expediently and by way of oral communication rather than by written communication. Given the primacy of s 424A(1) and the exceptions to it, it would be absurd to interpret the section in a way which exempted country information from the s 424A(1) requirements but did not do so in respect of the s 424AA requirements.

91 In our view, the *information* covered by each section must be the same. Under s 424AA, country information simply need not be mentioned at all either because it is not *information* within the meaning of that term in s 424AA or because, if it is *information* within s 424AA, it:

(1) Will be the subject of appropriate particulars as contemplated by s 424AA(a) and the Tribunal will comply with s 424AA(b)(i) to (iv); or

(2) The Tribunal will not comply with some part of s 424AA.

92 Compliance with s 424AA will lead to the benefit afforded to the Tribunal by s 424A(2A). Non-compliance will cast the Tribunal back into s 424A. Upon being forced

back into the s 424A requirements as a result of non-compliance with one or more of the requirements of s 424AA, the Tribunal will get the benefit of s 424A(3)(a) in respect of country information.

93 Thus, one way or another, in respect of country information, failure to comply with all of the conditions laid down in s 424AA will not constitute jurisdictional error.

94 This interpretation of the relevant legislative provisions is supported by the authorities to which the first respondent referred in the submissions made on his behalf and also by a further authority which was decided after the conclusion of the hearing of the present appeal but before the delivery of these reasons.

95 That further authority is *SZMMP v Minister for Immigration and Citizenship* [2009] FCA 233, a decision of Lander J. In *SZMMP*, his Honour considered the interpretation of s 424AA when assessing the merits of a prospective appeal for the purpose of deciding whether or not he would grant an extension of the time within which the applicant in that case might file a notice of appeal. In that case, after considering the legislative context and reviewing the relevant provisions, his Honour said (*SZMMP* [2009] FCA 233 at [55]–[59]):

> 55 A failure to comply with s 424AA merely means that s 424A(2A) is not engaged and the Tribunal is not excused from compliance with s 424A. That then means the Tribunal must comply with s 424A. If the Tribunal is obliged to comply with s 424A it does not have to give the information in s 424A(3). Whichever way the Tribunal proceeds, whether under s 424A or s 424AA, the Tribunal does not have to give the information in s 424A(3). When the sections are understood that way, it can be seen that there was no reason to include the equivalent of s 424A(3) in s 424AA.
>
> 56 Moreover, why would Parliament require the Tribunal to give the information in s 424A(3) if the Tribunal were giving information orally pursuant to s 424A(a), but not give the information in s 424A(3) if the Tribunal were proceeding to give the information in writing in compliance with s 424A(1) utilising s 424A(2)? There is no reason for the distinction.
>
> 57 The applicant's counsel, Mr Crossland, put as an alternative construction that the Tribunal when proceeding under s 424AA did not have to provide s 424A(3) information but if it so chose and then did not comply with s 424AA(b), that would amount to jurisdictional error.
>
> 58 That contention must be rejected for the reasons already given. A failure to comply with a section which permits the Tribunal to give information such as s 424AA cannot amount to jurisdictional error. A failure to comply with s 424AA merely means that the Tribunal must ensure that it complies with s 424A because s 424A(2A) cannot be relied upon to excuse compliance with s 424A(1) and (2).

> 59 Jurisdictional error will be demonstrated where the Tribunal does not comply with s 424A and that will occur if it does not give clear particulars of any information of the kind in s 424A(1)(a), ensuring as far as is reasonably practicable the applicant has the understanding addressed in s 424A(1)(b) and inviting the applicant to comment or respond to the information (s 424A(1)(c)), and in the manner prescribed in s 424A(2). However, the Tribunal's obligation to proceed in that way ceases if the Tribunal proceeds in accordance with s 424AA.

96 We respectfully agree with his Honour's conclusions and the reasons which his Honour gave for those conclusions.

97 His Honour's ultimate conclusion was stated at [62] as follows:

> In my opinion, s 424AA does not oblige the Tribunal to provide any of the information in s 424A(3) if the Tribunal proceeds in accordance with s 424AA(a) even if it considers that information to be the reason or part of the reason for affirming the decision under review.

98 At [63] of his Honour's reasons, his Honour noted that his Honour's decision was consistent with decisions of other judges of this Court in *SZLXI* [2008] FCA 1270 (Cowdroy J), *SZMAE* [2008] FCA 1701 (Edmonds J), *SZITH* 105 ALD 541, [2008] FCA 1866 (Middleton J), *SZLWI* 171 FCR 134 (Gilmour J) and *SZLML v Minister for Immigration and Citizenship* [2009] FCA 83 (Jagot J).

99 When the decision of Marshall J in *SZLQD* [2008] FCA 739 is added to the list compiled by his Honour, and his Honour's decision is taken into account, there are now decisions of seven judges of this Court all to the same effect and all contrary to the submissions made on behalf of the appellant in this case.

100 The only decision to which the appellant in the present case can point in support of his construction of the relevant legislative provisions is the decision of Driver FM in *SZLTC v Minister for Immigration and Citizenship* [2008] FMCA 384. But Driver FM actually held at [18] in that case that s 424AA had not been engaged because the information relied upon by the Tribunal was not *information* for the purposes of s 424AA(a). The observations made by Driver FM at [15] to [17] to the effect that non-compliance with s 424AA by the Tribunal constitutes jurisdictional error were *obiter dicta*.

101 For the reasons which we have explained, in our judgment, the observations made by Driver FM at [16] do not constitute a correct statement of the law and should not be followed.

102 Pursuant to s 15AB(2)(e) of the *Acts Interpretation Act 1901* (Cth), for the purposes set out in s 15AB(1), we may give consideration to the Explanatory Memorandum relating to the 2007 amendments laid before the Commonwealth Parliament. The relevant Explanatory Memorandum contained the following paragraphs:

> 47. Currently, section 424A provides that the Refugee Review Tribunal ("the RRT") must give applicants for review particulars of any information that the RRT considers would be the reason, or a part of the reason, for affirming the decision under review. This must be done either by a prescribed method for an applicant in detention or by one of the methods specified in section 379A. As a consequence of the High Court decision in *SAAP*, section 424A requires that the RRT must always provide the particulars of the information and the invitation to comment to the applicant in writing even if the information has already been covered at hearing.
>
> 48. 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.
>
> 49. Where a review applicant is appearing before the RRT pursuant to an invitation issued under section 425, new paragraph 424AA(a) provides the RRT with a discretion to give to the review applicant orally, clear particulars of the information that the RRT considers would be the reason, or part of the reason, for affirming the decision under review.
>
> 50. Section 425 provides that, unless the RRT considers that it will find in the applicant's favour or the applicant consents to not appear before the RRT, the RRT must invite the applicant to appear before the RRT to give evidence and present arguments relating to the issues arising in relation to the decision under review. Section 429A provides that the RRT may allow the applicant to appear or to give oral evidence before it by telephone, closed-circuit television or any other means of communication. The RRT is required to appoint an interpreter if the applicant is not sufficiently proficient in English.
>
> 51. New paragraph 424AA(b) provides that if the RRT exercises its discretion to orally provide clear particulars of the information that it considers would be the reason, or part of the reason, for affirming the decision under review, then the RRT is obliged to ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision. The RRT is also obliged to orally invite the applicant to comment on or respond to the information and to advise the applicant that he or she may

> seek additional time to comment or respond. If the applicant seeks additional time to comment or respond, the RRT must adjourn the review, if it considers that the applicant reasonably needs additional time to comment or respond.
>
> 52. In inviting the applicant to comment on or respond to information while the applicant is appearing before it, the RRT must clearly set out what the information is and why it is relevant. The applicant can seek clarification and make additional comments. It will enable the RRT to give clear particulars of information orally at a hearing without also being required, as is presently the case, to give the same particulars in writing to the applicant after the hearing. The amendment will facilitate the more efficient conduct of reviews by improving their quality, timeliness and will reduce the cost of reviews.
>
> The amendments will also ensure that applicants are not taken by surprise and are given time, if necessary, to provide their comments or response.
>
> …
>
> 62. [Item 23] inserts new subsection 424A(2A).
>
> 63. New subsection 424A(2A) complements new section 424AA which provides a discretion for the RRT to give procedural fairness orally to the applicant at the time that the applicant is appearing before it.
>
> 64. Subsection 424A(1) (as amended by items 19, 20, 21 and 22) provides that the RRT is required to give to the applicant clear particulars of the information that the RRT considers would be the reason, or part of the reason, for affirming the decision under review; 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 upon; and invite the applicant to comment on or respond to the information. Subsection 424A(2) sets out how the information and invitation are to be given.
>
> 65. New subsection 424A(2A) provides that the RRT is not obliged, under section 424A, to give particulars of the information to an applicant, nor invite the applicant to comment on or respond to the information if, at the time the applicant appeared before it, the RRT exercised its discretion under new section 424AA (inserted by item 18) to orally give clear particulars f the information and orally invited the applicant to comment on or respond to the information.
>
> 66. If the RRT has exercised its discretion under new section 424AA to provide clear particulars of the information to the applicant orally, the RRT may still choose to provide the particulars, or part of the particulars, and the invitation to comment on or respond to them, to the applicant in writing, under section 424A.

103 We think that the paragraphs which we have set out in [102] above support the interpretation of s 424A and s 424AA which we have placed upon those sections. Paragraph 65, in particular, makes clear that:

(a) The Tribunal has a discretion as to whether it will go down the path of providing oral particulars as contemplated by s 424AA;

(b) Once the Tribunal invokes s 424AA, it is required to comply with the whole of the section (both sub-pars (a) and (b) of s 424AA);

(c) The only consequence of non-compliance with all of the requirements of s 424AA is that the Tribunal does not get the benefit of s 424A(2A);

(d) In that event, the Tribunal must then comply with the provisions of s 424A(1), compliance with which is still subject to subs (3); and

(e) Subsection (3) exempts the Tribunal from having to comply with s 424A(1) if the relevant information is country information.

104 In this way, as we have concluded, s 424AA and s 424A work in a complementary manner—s 424A containing the obligatory requirements (subject to the stated exceptions) with which the Tribunal is bound to comply and s 424AA making available to the Tribunal a means of not having to comply with those requirements provided that it elects to invoke s 424AA and it complies with the various conditions specified in that section.

105 We reject the notion that the principles developed in this Court in respect of s 424 can be applied by analogy to s 424AA. The subject matter and purpose of s 424 are very different from the subject matter and purpose of s 424AA.

106 The information which was the subject of the exchange extracted at [9] above was country information and was therefore either not *information* for the purposes of s 424AA or was covered by the provisions of s 424A(3)(a). That information was not required to be given to the appellant in accordance with s 424A(1). Accordingly, even if the Tribunal failed to comply with the requirements of s 424AA in the present case, such non-compliance would not assist the appellant. This is because, in that event, the only consequence of that non-compliance would be that the Tribunal did not get the benefit of s 424A(2A). This would leave the Tribunal in the position where it would need to comply with the provisions of s 424A. In respect of country information, the Tribunal would have been exempted from compliance with s 424A(1) by reason of the operation of s 424A(3)(a).

107 These reasons are sufficient to dispose of Ground 1. We do not think that Ground 1 has been made out.

Grounds 2, 3 and 4

108 Grounds 2, 3 and 4 only have significance if the appellant is completely successful in respect of Ground 1. We have already held that the appellant has failed to make out Ground 1. Accordingly, Grounds 2, 3 and 4 do not arise.

109 We will, however, briefly express our views in relation to these grounds.

110 We think that the following may be observed in respect of the exchange extracted at [9] above:

(a) The Tribunal made clear to the appellant that the Tribunal had a concern that some of the evidence which he had given to the Tribunal was inconsistent with country information in the possession of the Tribunal;

(b) The Tribunal then explained to the appellant that the particular matter giving rise to that concern was the fact that the TNSM was not influential in Pakistan other than in the NWFP;

(c) The Tribunal explained to the appellant that, if the Tribunal should ultimately conclude that the information he had given was inconsistent with the country information, it could lead the Tribunal to forming the view that he was not truly a refugee which, in turn, might lead to the decision of the delegate being affirmed;

(d) The appellant was told that he had an opportunity to comment on or respond to what was said by the Tribunal and that, if he chose, he could ask for more time if he wanted to; and

(e) The appellant did not take up the opportunity either to respond or to seek an adjournment and the Tribunal did not consider that the appellant needed more time in order to respond to the Tribunal member's remarks.

111 We think that the matters of substance summarised in [110] above adequately address the requirements of s 424AA had the Tribunal put itself in the position where it was obliged to meet those requirements or suffer the consequences of failing to do so. In truth, the only submission of substance advanced on behalf of the appellant against that conclusion was that, in light of the terms of the exchange, it must have been apparent to the Tribunal that the appellant did not understand what was being put to him. If that were so, there would be good

reason for thinking that a further and different explanation should have been offered and a further opportunity to seek an adjournment should have been offered. However, we do not think that a fair reading of that exchange discloses a lack of comprehension on the part of the appellant which could fairly require the Tribunal to do more than it did. It seems to us that the appellant simply chose not to respond because he had nothing to say.

Grounds 5, 6 and 7

112 The third paragraph under the heading ***Findings and Reasons*** in the Tribunal's reasons for decision is in the following terms:

> The Tribunal must bear in mind that if it makes an adverse finding in relation to a material claim made by an applicant but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that it might possibly be true (see *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220).

113 The next paragraph in those reasons contains references to other general statements directed to setting out the Tribunal's understanding of the correct approach to be taken in matters of this kind, especially in relation to the claims and evidence advanced on behalf of an applicant.

114 The paragraphs to which we have just referred in the Tribunal's reasons seem to us to be part of a general introductory section which sets the scene for more specific and focused findings and reasons referable to the appellant's case.

115 The Tribunal was quite definite in rejecting the appellant's claims—the Tribunal held that those claims lacked credibility and could not be accepted. The Tribunal also rejected the proposition advanced by the appellant to the effect that ordinary members of the ANP Party were persecuted by the TNSM. The Tribunal also quite specifically found that there was no real chance that the appellant would be at risk of persecution if he returned to Pakistan.

116 In our view, a fair reading of these findings and reasons does not disclose uncertainty or lack of confidence in the conclusions to which the Tribunal came in respect of those matters. To the contrary, the Tribunal appears to have been quite definite in the conclusions which it reached.

117 It was only after expressing those conclusions that the Tribunal moved on to consider the question of relocation. It seems to us that, in doing so, it was looking at a separate and independent reason for declining to overturn the delegate's decision.

118 In *Rajalingam* 93 FCR 220, Sackville J at [67] said:

> In general, however, the question of whether the RRT should have considered the possibility that its findings of fact might not have been correct is to be determined by reference to the RRT's own reasons. If a fair reading of the reasons as a whole shows that the RRT itself had "no real doubt" (to use the language in *Guo*) that claimed events had not occurred, there is no warrant for holding that it should have considered the possibility that its findings were wrong. Reasonable speculation as to whether the applicant had a well-founded fear of persecution does not require a possibility inconsistent with the RRT's own findings to be pursued. A "fair reading" of the reasons incorporates the principle that the RRT's reasons should receive a "beneficial construction" and should not be "construed minutely and finely with an eye keenly attuned to the perception of error": *Wu Shan Liang*, at 271-272, quoting *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 (FC), at 287. Only if a fair reading of the reasons allows the conclusion that the RRT had a real doubt that its findings on material questions of fact were correct, might error be revealed by the RRT's failure to take account of the possibility that the alleged events might have occurred (or the possibility that an event said not to have occurred did not in fact occur). If the fair reading allows of such a conclusion, the failure to consider the possibilities might demonstrate that the RRT had not undertaken the required speculation about the chances of future persecution.

119 In our view, there was no warrant for requiring the Tribunal to consider the possibility that its findings were wrong. It did not appear to have any real doubt that the appellant lacked credibility and that, as a consequence, he did not have a well-founded fear of Convention-related persecution in Pakistan on the basis which he had claimed. Strictly speaking, there was no need for the Tribunal to consider the possibility of relocation once this finding was made.

120 In these circumstances, any error which the Tribunal might have committed in making this finding did not go to its jurisdiction. In *Craig v State of South Australia* (1995) 184 CLR 163, the High Court said at 179 that:

> If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

121 The Tribunal's discussion of relocation in the present case did not affect the Tribunal's exercise of power in the sense discussed in the above extract from *Craig* 184 CLR 163. Having found that the appellant was not a person to whom Australia owed protection obligations and having done so in definite terms, it had no choice other than to affirm the delegate's decision.

122 In truth, the relocation findings provided an alternative and independent ground for affirming the delegate's decision.

123 The Tribunal considered relocation in a framework dictated by the evidence and claims advanced to it by the appellant. It was not obliged to consider all theoretical possibilities including the question of whether or not the appellant would continue to behave in a way which might attract persecution from different Islamic fundamentalists.

124 The test for relocation is whether it is practicable in the particular circumstances of the particular applicant (*SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at [24]; and *SZFDV v Minister for Immigration and Citizenship* (2007) 233 CLR 51). The answer to that question in turn depends upon the framework set by the particular objections raised to relocation: *Randhawa* 52 FCR 437 at 442–443, especially at 443C–D.

125 We do not think that the decision of Stone J in *SZCBT v Minister for Immigration and Multicultural Affairs* [2007] FCA 9 dictates any different result. In our view, the result in that case turned on its own facts. Of particular importance in that case was the acceptance by the Tribunal that the applicant had been harassed in the past as he had alleged.

126 In the present case, the Tribunal rejected all of the appellant's claims of past harm and there was no basis for the Tribunal to speculate that the appellant may be harmed if he relocated.

127 For these reasons, we think that the appellant has failed to make out Grounds 5 and 6.

128 In our view, Ground 7 does not arise. However, because we are of the view that the Tribunal's decision in respect of relocation was an independent and separate basis for

rejecting the appellant's claims, had the appellant succeeded in respect of Grounds 1 to 4, and failed in respect of Grounds 5 and 6, there may well have been good reason to withhold relief.

A POINT OF PRECEDENT

129 In Written Submissions filed and served on behalf of the first respondent before the hearing of the present appeal, the first respondent submitted that, unless we were satisfied that the decisions of the various judges sitting alone but in the appellate jurisdiction of the Court upon which the first respondent was relying (as to which see [48] above) were clearly wrong, we were bound to follow them in the correct application of the relevant principles concerning the precedent status and value of decisions of this Court in its appellate jurisdiction. In submissions made to us at the hearing itself, Counsel for the first respondent submitted that decisions of single judges exercising the appellate jurisdiction of this Court should be accorded the same weight and status as decisions of a Full Bench comprising three judges exercising the same jurisdiction. Counsel went on to submit that, for that reason, we were bound to follow the single judge decisions to which we have referred at [48] above unless we thought that those decisions were clearly wrong.

130 These submissions made on behalf of the first respondent led to a good deal of discussion during the hearing of this appeal.

131 At the conclusion of the hearing, leave was granted to the appellant to file and serve further Written Submissions addressing this question.

132 Written Submissions on behalf of the appellant pursuant to that leave were filed and served on 24 November 2008. Subsequently, the first respondent withdrew the submissions which had been made on his behalf on this point.

133 In light of the withdrawal of the submissions made on behalf of the first respondent on this point we are now not required to consider the submission originally made on behalf of the first respondent directed to this issue. We would wish to observe, however, that we are of the view that the judges who decided the cases which ended with *SZMMP* [2009] FCA 233 correctly interpreted s 424AA. We would not, therefore, have been persuaded that each of

them was wrong. Indeed, we have explained why we think those cases were correctly decided. Therefore, the point at issue would not have arisen in any event.

134 Because the first respondent withdrew his submission after 24 November 2008, Counsel for the appellant has sought a special order for costs, namely, that the appellant should have his costs of preparing the additional Written Submissions filed and served on his behalf subsequent to the hearing of this appeal pursuant to the leave which we granted.

135 We think that this submission advanced on behalf of the appellant is correct. There would have been no occasion for the further Written Submissions to have been prepared had the precedent submission made on behalf of the first respondent both in its Written Submissions before trial and at the hearing been withdrawn earlier.

136 We propose to reflect this view in the orders which we make.

CONCLUSIONS

137 The appellant has failed to make out any of his grounds of appeal. The appeal must therefore be dismissed with costs. The costs of the first respondent shall not include any costs incurred after the hearing of the appeal in relation to the point concerning the appropriate principles governing the weight and status to be accorded to decisions of single judges of this Court exercising its appellate jurisdiction. Furthermore, we propose to make a special order for costs in favour of the appellant in respect of the further Written Submissions filed on his behalf on 24 November 2008, after the hearing of the appeal.

I certify that the preceding one hundred and thirty-four (134) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Tracey and Foster.

Associate:

Dated: 9 April 2009

Counsel for the Appellant:	Mr B O'Donnell
Solicitor for the Appellant:	Legal Aid Commission of NSW
Counsel for the First Respondent:	Mr T Reilly
Solicitor for the First Respondent:	Sparke Helmore
Counsel for the Second Respondent:	The Second Respondent submitted
Date of Hearing:	13 November 2008
Date of Last Submissions:	22 December 2008
Date of Judgment:	15 April 2009