FEDERAL COURT OF AUSTRALIA

SZKTI v Minister for Immigration and Citizenship

[2008] FCAFC 83

MIGRATION – Refugee Review Tribunal telephoned a person to obtain information about appellant – procedures for obtaining such information in ss 424(2), (3) and 424B of the *Migration Act 1958* (Cth) not followed – whether jurisdictional error.

MIGRATION – Refugee Review Tribunal telephoned a person to obtain information about appellant – whether telephone call raised new "issues arising in relation to the decision under review" under s 425(1) of the *Migration Act 1958* (Cth) – whether tribunal therefore required to invite appellant to a new hearing.

Migration Act 1958 (Cth) ss 91R(3), 420, 422B, 424C, 423, 424(1), 424(2), 424(3), 424A, 424B, 424C , 425(1), 427(1), 427(3), 429A, 441A

Federal Court Rules O 80, r 4

SZKTI v Minister for Immigration and Citizenship [2008] FCA 328 related
SZKTI v Minister for Immigration and Citizenship [2007] FMCA 1904 related
Abedi v Minister for Immigration and Multicultural Affairs (2001) 114 FCR 186 considered
Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1 considered
Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88 considered
ASIC v DB Management Pty Limited (2000) 199 CLR 321 considered
Coulton v Holcombe (1986) 162 CLR 1 cited
David Grant & Co Pty Limited v Westpac Banking Corporation (1995) 184 CLR 265 cited
Reg v Home Secretary; Ex parte Bugdaycay [1987] AC 514 cited
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294 considered
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152 considered
SZGBI v Minister for Immigration and Citizenship [2008] FCA 599 distinguished
SZILQ v Minister for Immigration and Citizenship (2007) 163 FCR 304 considered
Win v Minister for Immigration and Multicultural Affairs (2001) 105 FCR 212 considered

SZKTI v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL

NSD 2223 OF 2007

TAMBERLIN, GOLDBERG AND RARES JJ
28 MAY 2008
SYDNEY

CATCHWORDS

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 2223 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZKTI**
Appellant

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

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **TAMBERLIN, GOLDBERG AND RARES JJ**

DATE OF ORDER: **28 MAY 2008**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed with costs.

2. Orders 2 and 3 made by the Federal Magistrates Court on 22 October 2007 be set aside, and in lieu thereof orders be granted:

   (a) in the nature of an order absolute in the first instance for a writ of certorari to quash the decision of the second respondent signed on 30 April 2007 and handed down on 15 May 2007 to affirm the decision of the first respondent not to grant the applicant a protection visa;

   (b) in the nature of a writ of mandamus directing the second respondent to hear and determine the application for review according to law; and

   (c) that the first respondent pay the applicant's costs, if any.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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JUDGES: **TAMBERLIN, GOLDBERG AND RARES JJ**
DATE: **28 MAY 2008**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

THE COURT

1 The Refugee Review Tribunal was given power to "get any information that it considers relevant" pursuant to s 424(1) of the *Migration Act 1958* (Cth) ("the Act"). In addition, s 424(2) provided that without limiting the power in s 424(1), the tribunal "may invite a person to give additional information", but if it did so it must first make the invitation in writing.

2 Here the tribunal conducted a hearing under s 425(1) of the Act in October 2006 at which the appellant gave evidence. Three months later in late January 2007, the tribunal wrote two letters to him asking the appellant respectively to comment on certain information under s 424A and to provide additional information under s 424(2). One item of additional information he provided was a letter dated 5 February 2007 from two elders of the Local Church in Sydney which gave a mobile telephone number for one of them, Tony Cheah.

3 The tribunal did not invite Mr Cheah to provide it with information under s 424(2) of the Act. Instead, two months later, in early April 2007, it simply telephoned Mr Cheah on his mobile phone and questioned him about the appellant, thus obtaining information additional to that in the letter Mr Cheah signed on 5 February 2007. The tribunal relied on that information in deciding to affirm the decision of the Minister's delegate to refuse the appellant a protection visa.

4 The question of statutory construction raised in this appeal is whether, when the tribunal telephoned Mr Cheah on his mobile phone, it invited him to give additional information. If it did, it is common ground that the mandatory requirements of s 424(3) were not followed because he had not been invited in writing to do so by the tribunal sending him a letter, fax, email or using other electronic means to transmit the writing (ss 424(3)(a), 441A(5)). This point was not raised by the appellant before the trial judge but was raised as a possible issue by Rares J when the appeal was originally listed for hearing. He ordered that counsel be appointed under O 80 r 4 of the Federal Court Rules and noted that the matter may be heard by a Full Court: *SZKTI v Minister for Immigration and Citizenship* [2008] FCA 328. The Minister did not object to the appellant, by her counsel, relying on an amended notice of appeal which was later filed pursuant to leave which raised the new issues argued before us.

5 Accordingly, since the Minister raised no objection and the new ground concerns a pure question of law which raises no new facts and is of importance in the operations of the tribunal, it is in the interests of justice to decide it: *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8 per Gibbs CJ, Wilson, Brennan and Dawson JJ. Apart from the new issues raised, no error has been suggested in the trial judge's reasoning (*SZKTI v Minister for Immigration and Citizenship* [2007] FMCA 1904).

FACTUAL BACKGROUND

6 The appellant is a citizen of the People's Republic of China. He was born in 1983 and arrived in Australia in April 2006 on a passport not in his real name. He applied for a protection visa a month later, which was supported by a statutory declaration in which he described his past conduct and the fear of persecution from Chinese authorities he claimed. Essentially, he claimed that he was suspected of having organised the distribution of illegal

religious propaganda materials to coal miners and their families in a province of China. It is not necessary to describe in detail the circumstances of his claims because the issues with which this appeal is concerned arise out of events in Australia.

7 It suffices to say that following the death of his father in 2004, the appellant claimed that he and his family became involved with a Christian church known as the "Local Church". The church is commonly known as "The Shouters". The appellant claimed that his mother, sister and he were baptised in April 2005 and that after that he became involved in activities with the Local Church. He claimed he and others were arrested by Public Security Bureau police in November 2005 and interrogated about organising an illegal meeting of members of the church. He claimed he was detained for a month, forced to do punitive jobs and mistreated in the detention centre. After being released in December 2005 he said the police often came to his home to make trouble. He claimed that by February 2006 church officers suggested that he move to another province to distribute religious propaganda materials. He claimed that he was accompanied by three experienced people who assisted him and that for the next two months they distributed propaganda material, including bibles, to coal miners and their families, spread the gospel and organised bible studies.

8 The appellant claimed that in early April 2006 two of his collaborators were arrested by the police and were made to confess as to the central role which he was said to have occupied in the distribution of the materials. The police searched for him both in the province where he was distributing religious material and at his home. He claimed he left China for Australia shortly afterwards on 19 April 2006 with the assistance of friends in the Local Church, using a passport in another person's name. He claimed that his mother had told him subsequently that the police had been to his home many times looking for him after that.

THE STATUTORY CONTEXT

9 The tribunal is required in carrying out its functions under the Act to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick (s 420(1)). In reviewing a decision the tribunal is not bound by technicalities, legal forms or rules of evidence and must act according to substantial justice and the merits of the case (s 420(2)).

10 The significant provisions for the determination of the appeal are found in Div 4 Pt 7 of the Act. First, s 422B(1) provides that Div 4 is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters that it deals with it. Next, s 423 provides that an applicant for review by the tribunal may provide its registrar with a statutory declaration in relation to any matter of fact that the applicant wishes the tribunal to consider and written arguments relating to the issues arising in relation to the decision under review. Also, the secretary of the Department of Immigration and Citizenship may give the registrar written argument relating to the issues arising in relation to the decision under review (s 423(2)). Critically, s 424 provides:

> "**424 Tribunal may seek additional 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 a person to give additional information.
>
> (3) The invitation 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."

11 Relevantly, s 441A enabled the tribunal to provide a document by hand (s 441A(2)), by taking it to the last residential or business address of the person and providing it to a person at that address who appeared to live or work there and be at least 16 years of age (s 441A(3)); by prepaid post to the last address for service provided to the tribunal by the recipient or to the last residential address provided to it (s 441A(4)); or by another method such as transmission by fax, email or other electronic means to an address provided to the tribunal by the recipient in connection with the review (s 441A(5)).

12 If a person were invited under s 424 to give additional information, the invitation had to specify the way in which the additional information may be given, being the way which the tribunal considered was appropriate in the circumstances. The invitation also had to

specify a particular period for that to occur, or if no period were specified, then the tribunal had to give the person a reasonable period (s 424B(1) and (2)). If the invitation was to give information or comments at an interview, the invitation had to specify the time and place at which the interview was to occur, being a time within the prescribed period or, if no period was prescribed, a reasonable period (s 424B(3)). The tribunal had powers to extend the time in which the person could respond to the invitation and to vary the time of any interview (s 424B(4) and (5)). If a person invited under s 424 to give additional information failed to do so within the time allowed, the tribunal was authorised by s 424C(1) to make a decision on the review without taking any further action to obtain that additional information.

13 The tribunal had to invite the applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review unless it was authorised not to do so (s 425(1) and (2)). Relevantly, the tribunal did not have to give an applicant such an invitation if s 424C(1) applied to him or her. Thus, if the applicant had been invited under s 424 to give additional information and did not do so within the time provided in the invitation, then s 425 would not operate to require the tribunal to invite the applicant to give evidence or present arguments. The tribunal had power to take evidence on oath or affirmation for the purposes of the review and to summons persons to appear before it to give evidence or to produce documents (ss 427(1)(a), (3)(a) and (b)). And, s 429A authorised the tribunal, for the purposes of the review of a decision, to allow the appearance by the applicant or the giving of evidence by the applicant or any other person, to be by telephone, closed-circuit television or any other means of communication. Thus, a mobile phone could be an authorised means of communication of evidence.

14 The explanatory memorandum for the *Migration Legislation Amendment Bill (No 1) 1998* (Cth) which introduced ss 424, 424A, 424B and 424C stated at [117] that those sections "provide a code of procedure which the Tribunal is to follow in conducting its review". The explanatory memorandum for the *Migration Legislation Amendment (Electronic Transactions and Methods of Notification Bill 2001* (Cth) at [121] discussed the present provisions of s 424(3) as providing that an invitation for a person to give additional information to the tribunal be given by one of the methods specified in s 441A unless the person was in immigration detention.

THE DELEGATE'S DECISION

15 The delegate rejected the appellant's application for a protection visa. After interviewing the appellant, the delegate found that she was not satisfied that he had substantiated his claim of having organised bible studies. While he was able to provide a basic description of a meeting where hymns were sung and bible passages read, she found that he was not able to provide a level of detail which would support his claims to an alleged profile of a church leader. The delegate also found that the appellant was able to provide the names of the founders of the Local Church, but could not go beyond basic information in regard to its history of the founders. She did say that whilst he demonstrated a broad understanding of the basic concepts of Christianity, he was not able to identify the principles of the Shouters' faith, nor to identify the belief that was central to the Shouters' movement. She found that his responses at the interview were characteristic of a person who had been coached to give rehearsed answers. The delegate also found that the appellant had come from the Province of Fujian in which unregistered churches were illegal but prayer meetings and bible study groups held among friends and family at homes were legal.

16 The delegate did not accept that the appellant was a committed Shouter and accordingly she did not accept that he would be persecuted on return to China. She considered that this claim had been fabricated to support his application for refugee status. The delegate did not consider that the appellant had obtained the passport because of his fear of persecution for a convention reason.

THE APPLICATION TO THE TRIBUNAL

17 With the assistance of his migration agent, the appellant made an application for review to the tribunal in late August 2006. In late September 2006 the tribunal wrote to the appellant advising him that it had considered the material before it in relation to his application but was unable to make a decision in his favour on that information alone. It invited him to a hearing on 25 October 2006. The appellant attended the hearing and gave evidence. The tribunal's decision record referred to the appellant's claims and set out the detail of the evidence which he gave during the course of the hearing.

18 The tribunal asked the appellant to compare Local Church practices in China and Australia. It recorded that he had described slight differences, the most important one being

that in Australia the church was free. He told the tribunal that in Sydney he had participated in a group, the most senior person of which was "Tony". He said that he did not have further details about that person and that his church in Australia did not have a name but rented premises from Blacktown Council, which were part of a kindergarten close to some large shops. He said that was not part of a fixed arrangement and the next meeting had been planned for Baulkham Hills. He said he also knew of Local Church activities in other suburbs of Sydney. The appellant said that he had last spoken to "Tony" the previous Sunday when they were discussing preparations for Christmas, and that he did not have more details about the particular meeting because he had been busy preparing food. He told the tribunal that he always arrived early at the Blacktown meetings to set up tables and chairs and prepare food. He said the group sang songs and shared bread.

19 The appellant told the tribunal that the distinction between Shouters and other Christians was that the Shouters shouted the Lord's name so as to be saved in accordance with the bible. He gave an example. The tribunal then asked him for examples of the stories he told when promoting Christianity. He referred to the Old Testament story of Noah's Ark, to Genesis as the First Book of the Old Testament and mentioned one of the miracles that Jesus had performed. The tribunal recorded in its decision record that it had asked him if he had spoken to Tony or anyone else in connection with his review application. The tribunal's decision record continued:

> "… [t]he applicant responded that he told Tony about his application and asked him to pray for him. He said that Tony could give evidence "if you like".
>
> The Tribunal observed that the applicant's evidence regarding his practice appeared vague and lacking detail, and he did not appear to have turned his mind to supporting his claim with witnesses or documentary materials such as photographs. He said that on Wednesdays, there was a meeting at James's house; on Friday in Auburn there was discussion of the Local Church book; on Saturday, there was a youth gathering at James's house; and on Sunday there was sharing of the bread in Blacktown."

20 In late January 2007, three months after the hearing, the tribunal sent two letters to the appellant. The first invited him to comment on information pursuant to s 424A of the Act. It commenced by informing the appellant that the tribunal had information that, subject to any comments he made, would be the reason or part of the reason for deciding that he was not

entitled to a protection visa. The first letter referred to differences between what he had written in his visa application and what he had said at the hearing concerning his activities in China and the resources of the Local Church.

21 The second letter was sent as an invitation to provide information under s 424(2) of the Act. The letter referred to evidence the appellant had given at the hearing about his religious practice in China and his connection with the Local Church in Australia. It referred to his mention of the names of suburbs where church members met, general descriptions of some of the activities he had participated in and his naming a few contact persons by first name, the most prominent of whom was "Tony". The tribunal said that the information that the appellant had given it "… was extremely vague, and you did not provide details of witnesses or other material that might reasonably be expected to support your claims". The tribunal requested the appellant to provide the following additional information:

- details of the locations and events he had attended or regularly attends in connection with the Local Church and his activities at those functions;
- the names, positions and further details of the persons with whom he undertook those religious activities, including "Tony"; and
- statements from any persons who held official positions within the church.

22 The tribunal then suggested that, if he wished, he could provide any other evidence to assist his case. The second letter continued: "The tribunal advises that it may verify any information you provide in response to this letter." It gave the appellant two weeks to respond in writing.

23 On 7 February 2007 the appellant's migration agent provided a response, dealing with both letters. It addressed the s 424A letter with three detailed responses to each of the three issues that had been raised. The response then addressed the s 424 letter saying that the appellant worshiped regularly on Sunday at the church at Blacktown, giving its address. It said he attended bible study and small group gatherings during weekdays such as Tuesday, Wednesday and Friday. It named two elders of the Local Church, who had provided a letter which was enclosed, and said:

> "Please kindly contact them should you have any questions about my religious

activities in Sydney."

24 Enclosed with the response was a letter dated 5 February 2007 from the Local Church in Sydney. It was headed "To Whom it may Concern" and said:

> "This is to confirm that [the appellant] has been meeting regularly with the church for the past nine months.
>
> Please do not hesitate to contact Tony Cheah on [a mobile telephone number] should you have any further enquiry."

The letter was signed by both Mr Cheah and another elder.

25 On the next day, the appellant's migration agent sent a further letter to the tribunal signed by eleven members of the Local Church in Sydney each giving a phone number against his or her name and signature. They said that they had known the appellant since May 2006 and found that he was a devoted Christian and a member of their church. They referred to the unregistered status of the church in China and to its being regarded as an illegal anti-government church by the Chinese Government. They said that they believed that a devout Christian like the appellant who was a genuine member of the Local Church would be subjected to persecution when he returned to China.

26 The next event occurred on 4 April 2007, some two months after the correspondence above, when the tribunal contacted Mr Cheah on the mobile telephone number he had given in the letter of 5 February 2007. After that, on 11 April 2007 the tribunal wrote to the appellant's migration agent pursuant to s 424A of the Act saying that it had information that, subject to any comments he made, would be the reason or part of the reason for deciding that he was not entitled to a protection visa. The information was that the tribunal had spoken to Mr Cheah on 4 April 2007 "… to follow up the letter that he and [the other elder] wrote on 5 February 2007" in which they had confirmed that the appellant had been meeting regularly with the church. The tribunal recorded that:

> "Mr Cheah confirmed the following
>
> - He knows you personally;
> - He believes you came from Fuquing, Fujian;
> - **He 'understands'** that you were a Christian in China;
> - you attend the Local Church in Blacktown, and are involved in

> learning scripture, ‘training’ to assist in services and in setting up the meeting place.
>
> However, Mr Cheah said that **he did not know** whether you were a member of any Local Church in China; where you had lived and worked in China; or whether you had experienced any problems there.” (emphasis added)

27 The tribunal then said that that information was relevant because it appeared that Mr Cheah’s knowledge of the appellant was “superficial”. The tribunal expressed surprise that the appellant had not had occasion to inform Mr Cheah of any association with the Local Church in China and his alleged experiences there. It asserted that that may suggest that he had become involved in the Local Church only in Australia, depending on the tribunal’s assessment of his claims in respect to China. The tribunal also said that Mr Cheah’s statements that the appellant was learning scripture, training to assist with services and helping to set up meeting rooms might also indicate that he was a newcomer to the church and possibility Christianity, and not a longer term Christian as he claimed. The tribunal said that it was required by s 91R(3) of the Act to disregard any conduct in which he had engaged in Australia in respect of the appellant’s fear of persecution unless it was satisfied it was other than for the purpose of strengthening his claim to be a refugee. The tribunal said that factors that could influence whether it was so satisfied might include the credibility of the appellant’s claimed experiences in China and the nature of his activities in Australia. The appellant was required to provide his comments on the information in writing by 26 April 2007.

28 On 26 April 2007, the appellant’s migration agent sent a letter to the tribunal together with a statutory declaration by the appellant, a document in Chinese handwriting together with an English translation headed “Testimony”, and a certified copy of an envelope evidencing that the latter document had been sent to the appellant from China. The statutory declaration recorded that the reason the appellant had not informed Mr Cheah of his association with the Local Church in China or his suffering and experiences there was that he was afraid of being misunderstood. He said that he did not like to be regarded as a person who used the Local Church as a vehicle for seeking protection in Australia. He said that as a member of the Local Church he was required to continue learning scripture every day because studying the bible was particularly important for such a person. He said that he was also obliged to contribute to the church and that it was quite normal that he accepted having to train to assist with services or setting up meeting rooms.

29 The appellant said he submitted the "Testimony" document from four members of a church in Fuquing City. Those people said that they were Christians in the Local Church and that the appellant was one of their church brothers. The document recorded that the appellant had been baptised into the church in April 2005, and said that he and his mother had been arrested by the Public Security Bureau police in November 2005 while attending a church gathering, jailed for a month and severely persecuted. It also said that the church community had put money together to get the appellant and his mother released but that he had subsequently been harassed and deprived of freedom by the Public Security Bureau police. It confirmed that he had been sent to another province to promote the gospel among coal miners and that his activities had caught the attention of the Chinese communist party authorities. It said that he had fled China in April 2006 to escape persecution.

TRIBUNAL'S DECISION

30 The tribunal did not accept that the appellant was in fact involved in the Local Church or any other Christian denomination in China. It outlined four reasons for this finding and elaborated on those. It then said that it found that the appellant's documentary and witness evidence shed little light on his claimed Christian practice in China, continuing:

> "As noted in the Tribunal's letter of 11 April 2007, Mr Cheah's and [the other elder's] written and **oral advice** to the Tribunal **revealed only a superficial knowledge** of the [appellant's] profile in China, indicating an 'understanding' that he had been a Christian there. **The absence of any reference to the** [appellant's] activities in China, let alone his claimed past harm and future concerns, **amounts to weak support for the [appellant's] claims**. The [appellant] commented that he did not wish the church to view him as a person who was using them to advance his refugee application. This contrasts markedly with the [appellant's] reliance on the church in China, for financial, logistic and other assistance, in circumstances where the church itself faces considerable risks." (emphasis added)

31 The tribunal said that whatever the reason for the Local Church in Sydney knowing very little about the appellant, it found that that provided scant support for his claim to have been an active Christian in China. It then said that the petition signed by members of the Local Church in Sydney contained only names and mobile telephone numbers, but accepted that it was prepared by persons who considered themselves to be members of the church. It then said that the letter stated only that the appellant was a devoted Christian but gave no insight as to his activities in China and whether he did or did not arrive at the Local Church in

Sydney as a person who was already a committed Christian. It placed no weight on the petition as evidence of the appellant's Christian involvement in China. It then said that it had examined the photocopied letter ("Testimony") of 15 April 2007 and accepted that it had been authored on that date and sent in the envelope forwarded to the tribunal. Then, somewhat incongruously having regard to the tribunal's insistence that the appellant provide further material, it said that the timing of the letter "… strongly suggests that the [appellant] requested and arranged for it immediately upon receipt of its 11 April 2007 letter". It said that regardless of whether the letter was arranged at very short notice or had been the subject of an earlier request from the appellant, the four authors were contactable and sufficiently confident to meet together and put in writing the nature of their illegal support for the appellant.

32 The tribunal then said that although the appellant had provided it with the envelope in which the letter had been sent from China, thus addressing its postal history, "there remain questions as to the identity of the authors and the circumstances in which the letter was written". The tribunal said it was unable to place any weight on the letter as evidence of the appellant's Christian practice in China or his alleged treatment as a Christian. (We note that the letter contained what were apparently telephone numbers for each of the four authors of the letter).

33 The tribunal found that the appellant was not a practising Christian at the time of his departure from China. It then set out further reasons to support that finding. The tribunal then turned to the appellant's conduct in Australia. It accepted, on the basis of the appellant's oral evidence, the signed petition, the letter from the two elders, and Mr Cheah's telephone advice that the appellant attended Local Church groups in Sydney. However, the tribunal commented that the appellant's oral evidence as to the nature of those activities was limited. He had named several locations of the Local Church's gathering places which the tribunal regarded as generalised descriptions. The tribunal made allowances for the appellant's difficulties in familiarising himself with English place names. The tribunal then said that it was unsettled by the appellant's evident focus on helping to set up meetings and preparing the food rather than on the substance of key meetings such as preparations for Christmas. It noted that his description of communal activities was very general and then said:

> "This, together with the content and tenor of **the superficial comments from**

> **Mr Cheah** (put to the [appellant] in post-hearing correspondence) and the non-specific nature of the petition, suggests that the [appellant's] exposure to Christianity is recent, superficial and limited." (emphasis added)

34 The tribunal referred to all its findings and in particular to the findings that the appellant was not a Christian in China and that his involvement in the Local Church in Sydney was limited, and said that it was not satisfied that his activities in Australia were conducted otherwise than for the purpose of strengthening his claim to be a refugee. It applied s 91R(3) of the Act and disregarded those activities. The tribunal then found that the appellant did not have a well founded fear of persecution and affirmed the delegate's refusal to grant a protection visa.

THE ISSUES

35 From the above account it can be seen that the tribunal's telephone conversation with Mr Cheah was part of the reason for its rejection of the appellant's claim for a protection visa. The critical issue is whether the tribunal could simply telephone Mr Cheah and ask him questions without having followed the procedures in ss 424(2), (3) and 424B of the Act. The appellant also argued that the matters of concern to the tribunal arising from its mobile phone call with Mr Cheah were new "issues arising in relation to the decision under review" and s 425(1) required him to be invited to a further hearing to give evidence and present arguments on those new issues.

COULD THE TRIBUNAL SIMPLY TELEPHONE MR CHEAH WITHOUT COMPLYING WITH S 424(2) AND (3)?

36 The Minister argued that there was a general power for the tribunal to "get any information that it considers relevant" in s 424(1). He contended that the tribunal could seek information from a person such as Mr Cheah either directly, as it did, or using, as an alternative, the method provided under s 424(2). He relied on the introductory words of s 424(2) as showing that the mechanism which that provision afforded was additional to any method available to the tribunal under s 424(1).

37 The tribunal can obtain information from a number of sources in addition to evidence or anything else given to it at a hearing under s 425(1). First (without seeking to be exhaustive), there are those sources of information referred to in s 424A(3), namely what is

commonly referred to as "country information", namely information not specifically about the applicant for review or another person but about a class of persons of which the applicant for review or the other person was a member. Secondly, information which the applicant gave to the tribunal for the purpose of the application (such as material included with the application for review) information which the tribunal obtains from its own investigations, such as reading in libraries or searching the internet. Thirdly, there may be cases where people provide information to the tribunal in an unsolicited manner.

38 In *Win v Minister for Immigration and Multicultural Affairs* (2001) 105 FCR 212 at 217 [14]-[16] Whitlam, Tamberlin and Sackville JJ observed that s 424(1) appeared to be directed to enabling the tribunal to take the initiative in obtaining material it considers to be relevant but the section did not limit the tribunal from receiving information provided to it by others, such as an unsolicited letter: see e.g. *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88.

39 In *Abedi v Minister for Immigration and Multicultural Affairs* (2001) 114 FCR 186 at 192 [20]-[21] Merkel J held that s 424(1) dealt with information which the tribunal obtained on its own initiative, and did not extend to information given by an applicant to the tribunal for the purposes of the application. It is not necessary to decide whether, when the tribunal obtains country information or other information provided by the applicant for review, it "gets that information" within the meaning of s 424(1). When s 424(2) applies, the Minister accepted that the tribunal was then bound to follow the procedure in ss 424(3) and 424B.

40 In our opinion, the tribunal's telephone call to Mr Cheah on 4 April 2007 amounted to an invitation to him to give additional information to the tribunal. The tribunal's decision record and second letter (sent pursuant to s 424A)recited what it said it had obtained during the telephone conversation with Mr Cheah. That showed that he did provide information additional to that contained in his letter of 5 February 2007. It follows that s 424(2) was engaged when the tribunal decided to seek that information from Mr Cheah. On this point, the Minister argued that s 424(1) authorised the tribunal to act in this way, and that s 424(2) was an alternative method by which the tribunal may proceed, which it did not need to follow.

41 In our opinion that argument should be rejected. The tribunal invited Mr Cheah to provide new information additional to that in his letter. In speaking to Mr Cheah on the telephone the tribunal was not acting under its powers under s 427(3)(a), since it did not summons Mr Cheah to give evidence before it. In other words Mr Cheah was being invited to volunteer information, as opposed to being summonsed, under compulsory process, to give evidence. That does not mean that when the tribunal received the information from Mr Cheah it could not treat it as evidence or material before it. But in responding to the tribunal, Mr Cheah was responding to its invitation to give additional information to that in his letter of 5 February 2007, not complying with a legally binding requirement to do so.

42 The appellant argued that s 424(2) was a specific provision dealing with an invitation to a person to give additional information which attracted the principle in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 where Gavan Duffy CJ and Dixon J said (see also *David Grant & Co Pty Limited v Westpac Banking Corporation* (1995) 184 CLR 265 at 276 per Gummow J with whom Brennan CJ, Dawson, Gaudron and McHugh JJ agreed):

> "When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power."

43 In our opinion in its natural and ordinary meaning s 424(2) provides a means by which a person may be "invited" to give additional information to the tribunal, that is, information which that person has not already provided to the tribunal or which the tribunal has not obtained in another way, such as pursuant to the use of its powers under s 427(3) to summons a person to give evidence. The introductory words to s 424(2), namely "without limiting subsection (1)", identify one of the means available under s 424(1) which the tribunal may employ to get information, but then s 424(2) prescribes the mode and limitations governing how it may invite a person to give it additional information. The Parliament provided a code in ss 424, 424A, 424B and 424C which made extensive provision for the tribunal to obtain information including by means of an invitation to a person to provide it. Those provisions specified the means by which the information was to be sought, and the consequences for its non-provision. We are of opinion that the Parliament did not authorise

the tribunal to get additional information from a person pursuant to its general power under s 424(1) without complying with the code of procedure set out in ss 424(2) and (3).

44 Moreover, s 422B(1) made the intention of the Parliament manifest that the nature and extent of the natural justice hearing rule, where, relevantly, a person was invited to give information, was exhaustively set out in Div 4 of Pt 7 of the Act. There is nothing in the text or structure of Div 4 of Pt 7 which supports a construction permitting the tribunal to invite a person to give it additional information without complying with the requirements of ss 424(3) and 424B. In *ASIC v DB Management Pty Limited* (2000) 199 CLR 321 at 338 [34]-[35] Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ said:

> " [34] In *Project Blue Sky Inc v Australian Broadcasting Authority* ((1998) 194 CLR 355 at 384, per McHugh, Gummow, Kirby and Hayne JJ), after pointing out that the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have, the majority said:
>
> > "Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."
>
> [35] It may be added that, if a party contends that a provision, by reason of such considerations, should not be given its literal meaning, then such a contention may lack force unless accompanied by some plausible formulation of an alternative legal meaning."

45 In our opinion, the Minister failed to provide any plausible alternative legal meaning to ss 424(1) and (2) which allowed the tribunal to act as it did when inviting Mr Cheah to provide additional information without complying with ss 424(3) and 424B. Here, the tribunal's obligations under s 424(3) were enlivened. Since those obligations were not complied with, the tribunal failed to follow the procedure specified in the Act for the provision by a person invited to give additional information of that information and committed a jurisdictional error.

46 There are important consequences which might flow from such a failure, illustrated by the facts of the present case. First, there is no clear material to identify what Mr Cheah

was asked by or told the tribunal. One reason for the requirement laid down in s 424B is that where the information is to be provided in writing, there is a record of a writing. If it is to be provided at an interview, the interview is to occur on a particular occasion at a particular place and time. The tribunal is likely to make a record in that event, although it does not have to do so. But, more significantly, the person from whom the information is being sought will be given a fair opportunity to prepare himself or herself to provide that information with the consideration and degree of accuracy that a fair hearing of the application for review application demands. After all, one of the tribunal's most important functions is to consider whether Australia owes protection obligations to an applicant for review. An erroneous finding could have very significant consequences for that person, who may be returned to a country in which he or she is actually persecuted or put to death, as he or she may claim to fear (cf: *Reg v Home Secretary; Ex parte Bugdaycay* [1987] AC 514 at 531F-G per Lord Bridge of Harwich).

47 An impromptu telephone call received by a person who can provide the tribunal with information could be regarded by the recipient with suspicion or reserve. Unless he or she is assured he or she is speaking to the tribunal itself, as opposed to an unidentified person claiming to be a member of the tribunal (or an officer authorised by it to collect information), the recipient of the call may not give a full and frank or even a considered and accurate response. Moreover, in the present case, Mr Cheah was contacted in a telephone call two months after he wrote his letter. Whether he accurately recalled to mind in the telephone conversation all the details he knew of the appellant, in circumstances where he may not have been fully prepared to discuss the appellant's circumstances or to give a fair account of his knowledge in respect of the information being sought, is not known. That is one reason why Div 4 of Pt 7 of the Act provides a detailed procedure for seeking such information which a person is invited to provide.

48 The tribunal drew an adverse inference against the appellant based on what it said was Mr Cheah's "superficial knowledge" of his profile in China and his "understanding" that the appellant had been a Christian there. In one sense, all Mr Cheah could say with accuracy is that he understood that the appellant was a Christian in China because Mr Cheah had not been in China observing the appellant. The tribunal's implied criticism of the appellant because of Mr Cheah's "understanding" is odd but may have been open to it had it

undertaken a fair procedure. It would be open to a person in Mr Cheah's position to say, when telephoned some two months after he had written a letter about a person, who may have been one of many with whom Mr Cheah had dealings, that he had an "understanding" about the person. Indeed, that could be a natural response in the circumstances of being asked the question without prior warning. He could have been caught on the run, he may not have been able to focus his mind fully on what was happening, he may have been suspicious about who was asking him for the information, or he may not have been sure that it was appropriate that he provide it in the circumstances in which it was sought. That is why the Act provides a procedure for seeking that information from a person in Mr Cheah's position.

49 The formality of compliance with ss 424(3) and 424B, ensures that the information that the tribunal receives from such a person is given by him or her in the knowledge that he or she has been formally invited to give it. One reason why a person may want such a formal invitation is that he or she may have an adverse comment to make about the applicant for review and wish to have the protection of an occasion of a formal statutory enquiry, as opposed to a casual telephone call.

50 While the tribunal was at liberty to choose among the methods provided in Div 4 of Pt 7 by which it might obtain the information sought from Mr Cheah, it was not at liberty simply to telephone him, without warning, and ask him questions. In *Applicant VEAL* (2006) 225 CLR at 96 [16], Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ said that the principles of natural justice, or procedural fairness, were not concerned with the merits of a particular exercise of power but with the procedure that must be observed in its exercise. They said that because the principles of procedural fairness focus upon procedures, rather than outcomes, it was evident that they are principles that govern what a decision-maker must do *in the course of* deciding how the particular power given to the decision-maker is to be exercised. They said that they are to be applied to the processes by which the decision would be reached.

51 After judgment was reserved, the Minister drew our attention to the decision of Middleton J given the following day: *SZGBI v Minister for Immigration and Citizenship* [2008] FCA 599. He held that s 424(2) did not apply where the tribunal had acted on a request by the applicants for review that it obtain oral evidence from two persons named by

them as persons from whom they wished it to obtain evidence under s 426(2). In those circumstances we do not find that decision of assistance.

52 The Minister also argued that there was a potential for tribunal proceedings to become protracted unduly if the steps set out in ss 424(2) and (3) needed to be used whenever a person was asked for any information. He argued that it was possible that a result of information provided by the applicant for review or another person in response to enquiries made or to invitations to the applicant to comment under s 424A arose, the tribunal could be exposed to a continuing cycle of obtaining information under ss 424(2) and (3) and 424B.

53 In our opinion, if the tribunal requires additional information to be provided by a person it must follow the procedures that the Parliament has laid down to obtain that information. One mechanism that the tribunal can use is to invite the applicant or the person to a hearing and obtain evidence from them on oath. It can then invite the applicant to provide further information. The procedure is, after all, inquisitorial. It is not an unusual feature of inquisitorial procedures, that proper enquiry takes time and care. The tribunal will naturally seek to contain the extent of its enquiries, consistently with its performance of its duties having regard to s 420.

54 The failure of the tribunal to follow, with Mr Cheah, the procedures in ss 424(2), (3) and 424B was a jurisdictional error.

SHOULD THE TRIBUNAL HAVE INVITED THE APPELLANT TO A FURTHER HEARING UNDER S 425 AFTER ITS TELEPHONE CONVERSATION WITH MR CHEAH

55 The appellant argued that although the tribunal had complied with s 424A in relation to the information provided by Mr Cheah by sending its letter of 11 April 2007, offering an invitation to comment, it was still obliged by s 425(1) to issue a further invitation to the appellant to appear before it to give evidence and present arguments. He contended that this was because the s 424A letter raised additional issues concerning the assertion that Mr Cheah's knowledge of the appellant's profile in China was superficial and that he only had "an understanding" about his activities as a Christian there. He relied on *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 165 [42], where Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ said that the applicant for review

was not put on notice that two new issues arose for the tribunal in relation to the decision under review, being how the SZBEL's ship's captain came to know of his interest in Christianity and his account of the captain's reaction to that knowledge.

56 The appellant argued that until the tribunal wrote its letter pursuant to s 424A on 11 April 2007 there was no issue in the review concerning Mr Cheah's communications with the tribunal concerning his knowledge of the appellant, since those were not issues at the time the appellant gave evidence before the tribunal, it had not challenged him about those matters or raised them as live issues at the hearing. The appellant had invited the tribunal to contact Mr Cheah and provided the tribunal with information from Mr Cheah. But once the tribunal took the further step of speaking with Mr Cheah and forming a view that there was an issue, adverse to the appellant, relating to what it described as the "content and tenor" of the superficial contents from Mr Cheah, there is some force in the appellant's argument that s 425(1) was again engaged.

57 In *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 321 [77] McHugh J said that it was not to the point that in some cases it might seem unnecessary to give an applicant for review written particulars of adverse information (for example, if the applicant were present when the tribunal received the adverse information as evidence from another person and the tribunal there and then invited the applicant orally to comment on it). He said that if the requirement to give written particulars were mandatory then failure to comply meant that the tribunal had not discharged its statutory function. Hayne J (with whom Kirby J agreed on this issue: see *SAAP* 228 CLR at 345-346 [173]) said that the imperative language of s 424A required the tribunal to provide the particulars referred to in writing and a failure to do so was a breach of the requirements of procedural fairness (see 228 CLR at 347 [183], 353-355 [204]-[209]).

58 In *SZILQ v Minister for Immigration and Citizenship* (2007) 163 FCR 304 at 315 [31]-[32] Buchanan J held that the requirements of s 425(1) were not fully met where a new issue emerged in a letter sent to the applicant for review under s 424A asking for comment after he or she had given evidence to the tribunal at a hearing under s 425(1).

59 In our opinion it is not necessary to decide this question since the appeal succeeds for the reasons we have given.

60 Finally, we should record our appreciation to counsel for the appellant who appeared pursuant to an order made under Order 80 (see *SZKTI v Minister for Immigration and Citizenship* [2008] FCA 328).

I certify that the preceding sixty (60) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Tamberlin, Goldberg and Rares.

Associate:

Dated: 28 May 2008

Counsel for the Appellant:	Mr R. Lancaster and Mr C. Cassimatis
Counsel for the Respondents:	Mr G. Johnson
Solicitor for the Respondents:	DLA Phillips Fox
Date of Hearing:	6 May 2008
Date of Judgment:	28 May 2008