GENERAL DISTRIBUTION

FEDERAL COURT OF AUSTRALIA

SZIOZ v Minister for Immigration and Citizenship [2007] FCA 1870

MIGRATION – appeal from Federal Magistrates Court – where delegate of first respondent refused application for protection visa – where second respondent affirmed decision of delegate – where Federal Magistrates Court dismissed application for constitutional writs – where appellant national of People's Republic of China – where delegate accepted appellant a Falun Gong practitioner in China – where delegate decided appellant not of interest to Chinese authorities – where second respondent decided appellant not a Falun Gong practitioner in China – where invitation to appear did not advise appellant that whether appellant a Falun Gong practitioner in China a fact in issue – where letter from second respondent sent to appellant after hearing – where letter provided particulars of information and invited appellant to comment – where appellant identifies alleged categories of information not properly raised by letter – whether question whether appellant a Falun Gong practitioner in China an issue arising in relation to the decision under review – whether second respondent obliged under s 425(1) *Migration Act 1958* (Cth) to give notice to appellant of that issue – whether letter sent after hearing can satisfy obligation – whether failure to comply with s 425(1) *Migration Act 1958* (Cth) – whether letter sent after hearing can satisfy s 424A *Migration Act 1958* (Cth) – whether failure to comply with s 424A *Migration Act 1958* (Cth).

Held: Whether appellant a Falun Gong practitioner in China an issue arising in relation to the decision under review – second respondent obliged under s 425(1) to give notice of issue where not apparent from delegate's decision – letter sent after hearing not capable of satisfying notice obligation – second respondent breached s 425(1) *Migration Act 1958* (Cth) – letter sent after hearing capable of satisfying s 424A – alleged categories of information not raised by letter not information within s 424A – no failure to comply with s 424A *Migration Act 1958* (Cth) – appeal allowed.

Federal Court of Australia Act 1976 (Cth) s 25(1AA), s 27
Migration Act 1958 (Cth) ss 91R(3), 91X, 422B, 424A, 425

Lee v Minister for Immigration and Citizenship (2007) 159 FCR 181 referred to
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 79 ALJR 1009 referred to
Sobey v Nicol and Davies, in the matter of Guiseppe Antonio Mercorella [2007] FCAFC 136 referred to
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 231 ALR 592 considered
SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609 considered
SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 150 FCR 214 referred to

SZIOZ v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL
NSD 203 OF 2007

BESANKO J
30 NOVEMBER 2007
ADELAIDE (HEARD IN SYDNEY)

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY **NSD 203 OF 2007**

BETWEEN: **SZIOZ**
Appellant

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

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **BESANKO J**
DATE OF ORDER: **30 NOVEMBER 2007**
WHERE MADE: **ADELAIDE (HEARD IN SYDNEY)**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by the Federal Magistrate on 25 January 2007 be set aside and in lieu of the first order there be orders that:

   (a) A writ of certiorari issue, directed to the second respondent, to quash the decision of the second respondent signed on 8 February 2006.

   (b) A writ of mandamus issue, directed to the second respondent, requiring the second respondent to determine according to law the application made on 18 November 2002 by the applicant for review of the decision of the delegate of the first respondent to refuse to grant the appellant a protection visa.

3. I will hear the parties as to the costs of the application before the Federal Magistrate and the costs of the appeal including the costs of the application to adduce further evidence on the appeal.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY **NSD 203 OF 2007**

BETWEEN:	**SZIOZ** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**BESANKO J**
DATE:	**30 NOVEMBER 2007**
PLACE:	**ADELAIDE (HEARD IN SYDNEY**

REASONS FOR JUDGMENT

1 This is an appeal from an order made by a Federal Magistrate and in determining the appeal I am exercising the appellate jurisdiction of this Court: s 25(1AA) *Federal Court of Australia Act 1976* (Cth). On 25 January 2007 a Federal Magistrate made an order dismissing the appellant's application for constitutional writs in relation to a decision of the Refugee Review Tribunal ("the Tribunal") signed on 8 February 2006.

2 The appellant is a national of the People's Republic of China. He arrived in Australia on 13 August 2002 and he applied for a protection visa on 27 August 2002. A delegate of the then Minister for Immigration and Multicultural and Indigenous Affairs refused the application on 24 October 2002. The appellant applied for a review of the delegate's decision. On 13 November 2003 the Tribunal affirmed the delegate's decision. I will refer to that decision as the first Tribunal decision. The appellant applied for constitutional writs in relation to the first Tribunal decision and on 25 October 2005 a Federal Magistrate set aside the decision and remitted the application for review to the Tribunal to be determined according to law.

3 The Tribunal reconsidered the application for review and by decision signed on 28 February 2006 it affirmed the decision of the delegate not to grant a protection visa to the appellant. That decision is the second Tribunal decision and the decision which is relevant for the purposes of this appeal. The appellant applied for constitutional writs in relation to the second Tribunal decision but the application was dismissed by a Federal Magistrate. The appellant now appeals from that order of the Federal Magistrate.

4 The grounds of appeal in the appellant's amended notice of appeal are as follows:

1. The learned Federal Magistrate erred in failing to conclude that the Second Respondent ("Tribunal") had made a jurisdictional error by failing to comply with s 425 of the Migration Act 1958 (Cth) ("Act").

   Particulars

   a. On 24 October 2002 a delegate of the First Respondent ("Minister") ("delegate") refused to grant the Appellant a protection visa.
   b. Nonetheless, the Delegate accepted the Appellant's claim to have been a Falun Gong practitioner in China.
   c. Based on what the Delegate had decided, and absent the matter being raised by the Tribunal, the Appellant was entitled to assume that his claim to have been (and to be) a Falun Gong practitioner was not an issue in relation to the decision under review.
   d. The Tribunal did not put the Appellant on notice that his claim to be a Falun Gong practitioner was an issue arising in relation to the decision under review.
   e. In fact the Tribunal asked the Appellant a series of basic questions about Falun Gong and found that the Appellant answered those questions correctly.
   f. Ultimately the Tribunal rejected the Appellant's claim to have been a Falun Gong practitioner in China.
   g. The Tribunal did not give the Appellant sufficient opportunity to give evidence, or make submissions, about what turned out to be one of the determinative issues arising in relation to the decision under review.
   h. The learned Federal Magistrate should have found that the Tribunal failed to comply with s 425 of the Act and/or failed to accord the Appellant procedural fairness.

2. The Federal Magistrate erred by failing to find that the Tribunal had failed to comply with the requirements of s 424A of the Act.

3. The Federal Magistrate erred in finding that the errors of fact committed by the Tribunal do not relate to jurisdictional facts. In particular, the Federal Magistrate should have found that the Tribunal

failed to have regard to evidence in support of the Appellant's claim to have been a Falun Gong practitioner in China.

Procedural issues

5 At the outset of the appeal, the appellant applied to amend his notice of appeal to add grounds 2 and 3 above. Ground 2 contains an allegation that the Federal Magistrate had erred in failing to conclude that the Tribunal had failed to comply with s 424A of the Act and ground 3 contains an allegation that the Federal Magistrate erred in failing to conclude that the Tribunal committed an error of jurisdictional fact in finding that the appellant had not been a Falun Gong practitioner in China.

6 The appellant had raised before the Federal Magistrate an allegation that the Tribunal had failed to comply with s 424A, although the particulars of this allegation on appeal to this Court were wider than they were before the Federal Magistrate. The appellant had also raised before the Federal Magistrate an allegation that the Tribunal had erred in failing to find he was a Falun Gong practitioner in China, although before this Court the character of this alleged error was put in terms different from those in which it was put to the Federal Magistrate. Other than a complaint that the application to amend was not made in a timely fashion, counsel for the Minister did not identify any prejudice which would flow if the amendments to the notice of appeal were allowed. Having regard to all the circumstances I allowed the amendment and indicated to the Minister that I would entertain an application for an adjournment so that she could have further time to address the additional allegations. As it happened, no such application was made and the Minister had sufficient time to address the additional allegations.

7 The appellant applied to tender on the hearing of the appeal a transcript of the hearing before the Tribunal. It was said by the appellant that this was relevant to the allegation that the Federal Magistrate erred in failing to conclude that the Tribunal had not complied with s 425(1) of the Act. The application was opposed by the Minister. If unsuccessful in that opposition, the Minister sought to tender what he said was an accurate copy of the transcript. I have read both copies of the transcript and although there are differences they are not material to the issues on the appeal. It seems to me that if the appellant is able to raise the allegation of non-compliance with s 425(1) of the Act in the way in which it is now put, the

discretion should be exercised to receive the transcript on the hearing of the appeal. It is strictly further evidence but it is, subject to the corrections, uncontroversial and it is clearly relevant or potentially relevant to the allegation of non-compliance with s 425(1). Furthermore, the appellant was unrepresented before the Federal Magistrate. There have been a number of decisions of this Court on the scope and effect of s 27 of the *Federal Court of Australia Act 1976* (Cth) and the differences between the discretion in s 27 and the common law procedures relating to the receipt of fresh or further evidence on an appeal. For present purposes it is sufficient for me to refer to the decision of the Full Court of this Court in *Sobey v Nicol and Davies, in the matter of Guiseppe Antonio Mercorella* [2007] FCAFC 136 at [36]-[80].

8 It seems to me that the real question on the application to adduce further evidence is whether the alleged non-compliance with s 425(1) of the Act can be raised on appeal in the way in which it is now sought to be raised. Although the appellant raised an allegation of non-compliance with s 425(1) before the Federal Magistrate the allegation was not developed in the way it is now sought to be developed and it is not suggested by the appellant that the Federal Magistrate erred in rejecting the allegation as it was put to him. Nevertheless, I think the appellant should be permitted to raise the alleged non-compliance with s 425(1) in the way it is now put bearing in mind the fact that the appellant was not represented before the Federal Magistrate, the fact that the Minister is unable to point to any prejudice if the appellant is permitted to raise the point on the appeal and the fact that at the time of the hearing before the Federal Magistrate the High Court had not delivered its decision in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 231 ALR 592 ("*SZBEL*"), a decision which discusses the scope of s 425(1).

9 In conclusion, the appellant is permitted to raise the matter in ground 1 of the amended notice of appeal, and I will receive as further evidence the transcript (both the appellant's copy and the Minister's copy) as further evidence on the appeal.

10 For reasons which will become clear, the alleged failure to comply with s 425(1) of the Act means it is necessary to consider the delegate's decision in some detail and it is to that subject that I now turn.

The delegate's decision

11 In his application for a protection visa, the appellant claimed that he injured his leg in the course of his work as a truck driver in 1995 and that at about that time he commenced practising the Falun Gong exercises. He found that they improved his health. He claimed that after the events of 1999 "we subsequently were being re-educated by the work unit". He claimed that he continued to practise his exercises but "in the surface". The appellant claimed that he was arrested for taking part in the preparation and broadcasting of a Falun Gong video "to tell the truth in a Changehun television station". The appellant claimed that he feared persecution if he returned to China.

12 The delegate found that the appellant was a national of the People's Republic of China.

13 The delegate was unable to accept that the appellant faced a real chance of persecution within the provisions of the Convention if he returned to China. The delegate noted that the appellant had provided very few details of his Falun Gong activities and that his application contained much material "which is of a generalised, narrative nature as opposed to claims specific to the applicant". The delegate said that she was unable to accept without evidence that the appellant had ever been involved in a leadership or organisational role in any Falun Gong group in either China or Australia. The delegate said that the appellant had provided no evidence of his involvement in Falun Gong either in China or in Australia and that he did not indicate that he would be able to do so in the future. The delegate said:

> I am therefore only able to conclude that, if he was involved in Falun Gong, he was at the most a practitioner of Falun Gong exercises only, and has no profile in China.

14 The delegate noted that the appellant did not claim to have been involved in any of the protests in China which led to the large number of arrests to which the appellant had referred in his statement. The delegate said that she concluded from his statement that not only did the appellant not take part in any protests "but that he was willing and able to practise his Falun Gong exercises in the privacy of his home".

15 The delegate noted the appellant's claim that he had been arrested in 2002 for taking part in the preparation and broadcasting of a video. The delegate said that she found it hard to accept that the appellant would involve himself in an activity which could draw the adverse interest of the authorities. She noted that the appellant had not provided any details of his involvement in the preparation and broadcasting of the video, nor was there anything to suggest that he brought any particular experience or skills to that enterprise. The delegate said that she was not convinced of the veracity of the appellant's story. She said:

> Even if the applicant had participated at some low level in the video and was arrested, the following points indicate that there is no reason to believe that he will be arrested or suffer any persecution for being a Falun Gong practitioner if he goes back to the PRC.

16 The delegate noted the appellant's claim to have been released by the police on payment of a bribe by his friends and family. The delegate noted that independent country information suggested that action taken by the Chinese authorities against Falun Gong had been directed against the leaders and organisers of the movement and that ordinary practitioners "such as the applicant" did not appear to have faced any real difficulties. The delegate said that if the appellant was arrested, she considered that the foregoing would be the circumstances and that a bribe could be enough to secure the immediate release of people such as the appellant who have been identified as ordinary practitioners. The delegate concluded that if the appellant wished "to practise Falun Gong exercises in the privacy of his own home in China, which he had been doing from 1999 until his departure from China in August 2002, there was no reason to believe that he would come to the adverse attention of the Chinese authorities".

17 The delegate noted that the appellant had obtained a passport in June 2002 and left China legally in August 2002. The delegate said that if the appellant was of concern to the authorities in China she could not accept that he could have legally departed China with a passport in his own name. After referring to independent country information, the delegate said that she did not accept that the appellant was of interest to the authorities in China when he left that country or that he may be of interest to them if he returned.

18 The delegate noted the appellant's claim to have obtained a passport with the help of his friends but, after referring to independent country information, the delegate concluded that there was nothing more than a remote chance that the authorities in China would take bribes or do favours to process exit documents of high profile dissidents or those wanted by the Public Security Bureau.

19 The delegate said that the appellant's claim that he feared persecution on the basis of his involvement in Falun Gong was unsupported by the information contained in his application and independent country information, and she said that she could not find that the appellant faced a real chance of Convention-based persecution should he return to the People's Republic of China at that time or within the reasonably foreseeable future. The delegate concluded that the appellant's fear of persecution was therefore not well-founded.

The Tribunal's reasons

20 The Tribunal had before it the Department's file, the material referred to in the delegate's decision and other material available to it including the first Tribunal decision. It had conducted a hearing including the taking of oral evidence on 19 January 2006.

21 The Tribunal's reasons may be divided into two sections: a summary of the claims and evidence before it and a statement of its findings and reasons.

22 The Tribunal member referred to the submissions made to the Department. She noted that the application for a protection visa was lodged in a name which I will identify by the letter "X" (see s 91X of the *Migration Act 1958* (Cth) ("the Act")) and that the appellant had stated in response to a question on the application form that he had not been known by any other names. The appellant submitted an uncertified copy of three pages from a PRC passport which had been issued in the name of "X" on 2 June 2002 and which contained a copy of his visa to enter Australia. She noted that in his application he gave his address in China from 1992 to August 2002 as one in Jilin City and that he gave his occupation as a driver. The appellant stated in his application that he was a farmer from 1992 to 1993, a driver for "Jilin Province Wenmao Cargo Transport Pty Co" from November 1993 to May 2001 and that from June 2001 to July 2002 he was unemployed. He also stated that he was divorced.

23 The appellant claimed that he had been persecuted by the authorities in China because he was a member of the Falun Gong movement. He said that after an injury he sustained in August 1995 he took up the Falun Gong exercises for health reasons. He referred to the fact that in 1999 the authorities banned the Falun Gong movement although he continued to practise it. He said that in March 2002 he was arrested for taking part in the preparation and broadcasting of a Falun Gong video on Changehun television station. He was "forced to study and reform" himself. He was released after the police took a bribe and he obtained a passport and visa through the help of a friend.

24 The Tribunal member then referred to the information placed before the first Tribunal. She noted that in a statutory declaration made on 26 May 2003, the appellant said that before coming to Australia he was a member of the People's Liberation Army ("PLA"). He submitted an original photograph of himself in uniform. He was firm practitioner of Falun Gong and in order to "flee overseas" he had had to change his name from a name which I will identify by the letter "Y" to X and obtain his passport. In support of his assertion that he had changed his name, he submitted a translation of a divorce certificate in the name of Y issued in Jilin City on 24 June 1999.

25 The appellant claimed that he had not disclosed his membership of the PLA or his other name in his application for a protection visa because he was scared. He explained how he had become a member of the Falun Gong movement. He outlined his contact with the authorities in July and August 1999 and said that although he signed a statement promising to give up the practice of Falun Gong he continued to practise it secretly. He said that in May 2000 he began to distribute Falun Gong "materials" for a friend who I will refer to as "A" using military trucks as no one checked them. He claimed that he did this for two years. He claimed that he was arrested in March 2002 and detained for seven weeks. A bribe was paid to the authorities and he and A were released from detention on 30 April 2002. He claimed that even if he did not have a problem in terms of his practice of Falun Gong, regulations in China meant that he could not go abroad because he was an army officer. Therefore, he had to change his name and he did so. With the help of friends he got a passport and visa and came to Australia with a tourist group on 13 August 2002. The appellant claimed that his friend was arrested by the authorities in China at about this time and that the authorities

became aware of the appellant's use of a military truck to transfer Falun Gong material. He claimed that he would face persecution if he returned to China.

26 The Tribunal member then summarised the evidence and documents that the appellant had presented at the hearing before the first Tribunal. She said that at the hearing before the first Tribunal the appellant had correctly answered basic questions about Falun Gong, "being the number of exercises (which he demonstrated), the Falungong slogan and the title of its main text".

27 The Tribunal member then summarised the evidence that the appellant had put before her. He had given oral evidence and he had called a Mr Ke Wei Liu as a witness. The Tribunal member noted that Mr Liu gave oral evidence to the effect that he first met the appellant in September or October 2002 at Darling Harbour when he was doing Falun Gong exercises. Mr Liu had not really noticed the appellant because there were several hundred people present. The Tribunal member asked Mr Liu how familiar the appellant appeared to be with the Falun Gong exercises. Mr Liu said that the appellant's knowledge was "not too basic and not too deep".

28 As far as the appellant's evidence was concerned, he described the extent of his "Falungong-related activities" in Australia.

29 The Tribunal member asked the appellant if he had any written confirmation from the Falun Dafa Association NSW Inc that he was a genuine Falun Gong practitioner or had participated in the activities he had previously described. The appellant produced a letter from Mr John Dellar, the president of the association. The letter is dated 17 January 2006 and it includes the following statement:

> As a Falun Dafa practitioner, Mr Liu clearly holds a well-founded fear of persecution if forced to return to China.

30 The letter then goes on to discuss in general terms the persecution of Falun Gong practitioners in China. The Tribunal member referred to these features of the letter and the appellant's answers to questions by her about his contact with Mr Dellar.

31 The appellant put before the Tribunal an original document which was described by the Tribunal member as a "household registration document". The appellant claimed that the document had been re-issued in 2004 to reflect the changed circumstance that his father had died. The Tribunal member noted that it had been issued on 3 August 2004 but that there was nothing on the document to indicate that it was a re-issue of a document which had been issued previously. The Tribunal member noted that the document referred to the name X and said that the name used before was Y.

32 The appellant put before the Tribunal a document which he said had arrived the night before the hearing from a senior officer in the PLA. He also submitted to the Tribunal the original of his divorce document issued to Y on 24 June 1999.

33 The Tribunal member referred to the appellant's explanation of the household registration document and of the letter from the senior officer in the PLA. She told the appellant that she had some doubts about the latter document in the sense of whether it was genuinely from the person he claimed it to be, and she noted that in response the appellant did not comment.

34 The Tribunal member then summarised the appellant's evidence and, in particular, the matters that she had raised with the appellant. These matters included the reason he had not referred to the fact that he was a member of the PLA in his application for a protection visa, his rank or position in the army, the circumstances surrounding his detention in 2002 and the circumstances surrounding his change of name and the obtaining of a passport in the name X.

35 The Tribunal member noted that the Tribunal had written to the appellant after the hearing on 19 January 2006. The issues on the appeal are such that it is necessary, subject to deleting references to the appellant's name, to set out the letter, which is dated 20 January 2006, in full:

> The Tribunal has information that would, subject to any comments you make, be the reason, or part of the reason, for deciding that you are not entitled to a protection visa.

The information is as follows:

Particulars of Information to be provided to the Applicant:

The following information was provided by you to the Department with the assistance of a registered migration agent:

Your name was X and you had never used any other name.
You left China legally.
You visited New Zealand for four days in August 2002, en route to Australia, but had not sought asylum in any country other than Australia.
You were a driver for "Jilin Province Wenmao Cargo Transport Pty Co" from November 1993 to May 2001, and from June 2001 to July 2002 were "unemployed".
You were arrested in March 2002 for preparing and broadcasting a Falungong-related video.
You did not refer to the arrest of […].

You have told the Refugee Review Tribunal the following:

You served in the PLA from 1993 until your departure from China.
You were detained in March 2002 because of your association with […], which had led to a suspicion that you were a Falungong practitioner.
Until 2002 your name was Y.
You left China using a passport obtained on the basis of fraudulent documents (in other words, not "legally").
Soon after you arrived in Australia in 2002 you heard that a Falungong practitioner, […] had been arrested and informed on you.

You do not claim to have sought asylum in New Zealand.

Why this information is relevant to the review:

These inconsistencies cast doubt on your claim to have been a Falungong adherent in China, or to have been suspected of this by the authorities. They also cast doubt on the plausibility of your claims to have participated in Falungong-related activities in Australia because you were a genuine adherent. The fact that you did not seek asylum in New Zealand en route to Australia is also not consistent with your claim that you left China in fear of being persecuted in China.

You are invited to comment on this information. Your comments are to be in writing and in English. They are to be received at the Tribunal by 3 February 2006.

IF YOU DO NOT GIVE COMMENTS BY 3 FEBRUARY 2006 THE TRIBUNAL MAY MAKE A DECISION ON THE REVIEW OF YOUR CASE WITHOUT FURTHER NOTICE.

36 In response to this letter the appellant made and delivered to the Tribunal a statutory declaration dated 31 January 2006.

37 The Tribunal member then referred to evidence from other sources as to the Falun Gong movement, to the treatment of Falun Gong adherents, to practitioners abroad and on return to China, and to the military.

38 The Tribunal member then turned to make her findings and explain her reasons. The Tribunal member found that the appellant was a national of the People's Republic of China. The Tribunal member found that the appellant served in the PLA at some point. She had some considerable doubt as to whether the appellant was on active service in the PLA at the time that he claimed to have been a Falun Gong activist within it. She said that even if she were wrong about that and the appellant remained in the PLA until his departure from China, she was not satisfied that he was a Falun Gong practitioner or activist before his departure from China.

39 The Tribunal member referred to the appellant's claims that he was a Falun Gong practitioner from 1995 onwards, that he was an activist within the movement and was under investigation as a result and that he continued to participate in "Falungong-related activities" in Australia. She said that as to the evidence regarding those claims she had regard to the following matters:

1. The Tribunal member was not impressed by the appellant's evidence as to the nature and extent of his contacts with Mr Dellar. She said that it was "internally contradictory" and she did not accept the appellant's claim that he gave Mr Dellar a written account of his activities in China, any investigation there into those activities, or the arrests of practitioner friends there. She inferred from the appellant's failure to tell Mr Dellar anything of his personal history that he did not want it scrutinised and said that that cast doubt on the truthfulness of his account. The Tribunal member said that Mr Dellar's letter "indicates no more than that Mr Dellar has been somehow made aware that the applicant is currently a Falungong practitioner".

2. The Tribunal member accepted that the appellant changed his name at some point from Y to X. However, she was not satisfied that he did that in 2002 or for the reasons he now claimed. She did not consider the letter from the senior officer in the PLA to

be "a reliable source of evidence for several reasons". The Tribunal member did not accept that the appellant left China in any name other than the name by which he served in the military and the name by which he would have been known to the Public Security Bureau. She did not accept that the appellant was wanted or feared that he was wanted by the authorities in China at the time he left that country.

3. The Tribunal member noted that the appellant was in New Zealand as a tourist for several days on his way to Australia, and yet he did not seek asylum in New Zealand. She did not consider the appellant's explanation as to why he did not seek asylum in New Zealand to be plausible. She said that his failure to seek asylum in New Zealand was not consistent with his claim to have fled China in fear of serious harm.

4. The Tribunal member said that there was no evidence at all that the appellant brought with him to Australia a level of knowledge about the practice of Falun Gong which was consistent with his claim to have been a practitioner for seven years or, indeed, at all, in China.

40 The Tribunal member said that for the above reasons she did not consider it plausible and did not accept that the appellant was a Falun Gong practitioner or activist in China or was suspected of being either by the authorities in China.

41 The Tribunal member also noted that a person can acquire refugee status sur place where he has a well-founded fear of persecution as a consequence of events that have happened since he left his country. She noted the provisions of s 91R(3) of the *Migration Act 1958* (Cth) ("the Act"). She noted that she had found that the appellant was not involved with Falun Gong before he left China and therefore she had not accepted his claim that incriminating evidence against him arising from that involvement had come to light since his departure. She said that she accepted that the appellant had participated in various Falun Gong related activities since his arrival in Australia. However, she was not satisfied that he did so "otherwise than for the purpose of strengthening his … claim to be a refugee within the meaning of the Convention".

42 The Tribunal member's conclusion was that the appellant did not have a well-founded fear of Convention-related persecution in China and she affirmed the decision not to grant a protection visa to the appellant.

The Federal Magistrate's reasons

43 The appellant was not represented at the hearing before the Federal Magistrate. He was represented before me. Mr S Prince appeared before me on a pro bono basis.

44 Before the Federal Magistrate, the appellant claimed that the Tribunal had failed to comply with s 424A(1) of the Act, had taken into account irrelevant information, namely, stale country information, had failed to comply with s 425 of the Act and had made incorrect findings of fact.

45 In relation to the alleged failure to comply with s 424A(1) of the Act, the appellant claimed that he should have been given notice by the Tribunal of its proposed approach to the letter from Mr Dellar and the letter from the senior officer in the PLA. The Federal Magistrate rejected that argument on the basis that that "information" fell within the terms of s 424A(3)(b) of the Act. The appellant claimed that certain country information should have been provided to him, but the Federal Magistrate rejected that claim on the basis that country information fell within the terms of s 424A(3)(a) of the Act. The appellant claimed that the Tribunal's finding that it was highly implausible that if he had been a soldier for many years he would have no reliable documentary evidence at all recording the name under which he had performed his military service was information within s 424A(1). The Federal Magistrate held that this conclusion was not "information" and referred to the decision of the Full Court of this Court in *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 ("*SZEEU*"). The appellant claimed that the Tribunal's finding that there was no evidence at all that he had brought with him to Australia a level of knowledge about the practice of Falun Gong consistent with his claim to have been a practitioner for seven years or, indeed, at all, in China was within s 424A(1) of the Act. The Federal Magistrate rejected that submission saying that it was "a conclusion drawn from the evidence and was not information comprehended by s 424A".

46 The Federal Magistrate rejected the submission that the Tribunal had taken into account irrelevant information, namely, stale independent country information. It is not necessary to set out the reasons of the Federal Magistrate with respect to that submission because it is not an issue on the appeal.

47 In relation to the Tribunal's alleged failure to comply with s 425 of the Act, the Federal Magistrate said that no evidence had been adduced by the appellant in support of his claim that the Tribunal had failed to provide him with a fair chance to give oral evidence and that on many occasions he was only required to answer the Tribunal's questions. The Federal Magistrate noted that no transcript of the hearing before the Tribunal had been put before him. The Federal Magistrate concluded that on the evidence before him it could not be said that there had been a failure to comply with s 425 of the Act.

48 The Federal Magistrate rejected the appellant's claim that the Tribunal member had committed a jurisdictional error by making wrong findings of fact and in particular that she had erred in finding that he was not a Falun Gong practitioner in China. He said that such a finding was open on the evidence before the Tribunal.

The issues on appeal to this Court

49 There are three issues on the appeal to this Court. They are as follows:

1. The appellant submits that the Federal Magistrate erred in failing to conclude that the Tribunal had not complied with the rules of procedural fairness or s 425(1) of the Act, or both. The submission was that the Tribunal member found that the appellant had not been involved with the Falun Gong movement in China whereas the delegate had found that he had been involved in the Falun Gong movement in China and that the Tribunal had not complied with its obligation said to arise in those circumstances to put the appellant on notice at or before the hearing that the question of whether he was a Falun Gong practitioner in China was an issue before it. The appellant referred to the recent decision of the High Court in *SZBEL*.

2. The appellant submits that the Federal Magistrate erred in failing to conclude that the Tribunal had not complied with the provisions of s 424A of the Act. There were two limbs to that submission. First, in relation to the matters referred to in the letter which was sent after the hearing (see [35] above) the Tribunal had not complied with the provisions of s 424A because it was aware of each of those matters before the hearing and should have given notice (that is, the letter) before the hearing. In the alternative, it was submitted that the letter was deficient because it did not contain any or any sufficient explanation as to why the information referred to in the letter was relevant

to the review. Secondly, it was submitted by the appellant that the information listed below (I have adopted the appellant's description of each piece of information) fell within the terms of s 424A(1) of the Act, and yet was not the subject of notice under that section.

(1) the Dellar information;

(2) the Liu information;

(3) the PLA information;

(4) the household registration information;

(5) the change of name information.

3. The appellant submits that the question whether he was a Falun Gong practitioner in China was a jurisdictional fact and that the finding of the Tribunal member that he was not was erroneous and was made in circumstances in which she overlooked material evidence. As the submission was developed, it seemed to me that the effect of the submission was that the Tribunal member had overlooked material evidence in terms of the alleged fact and had gone so far as to say (erroneously according to the appellant) that there was no evidence with respect to the alleged fact.

Procedural fairness and s 425 of the Act

50 Section 425 is in the following terms:

> 425 Tribunal must invite applicant to appear
>
> (1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.
>
> (2) Subsection (1) does not apply if:
>
> (a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or
>
> (b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or
>
> (c) subsection 424C(1) or (2) applies to the applicant.
>
> (3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.

Subsections (2) and (3) are not relevant in this case.

51 In *SZBEL* the High Court gave an example of how the obligation might arise in the context of the Act when it said (at 601 [37]):

> Suppose (as was the case here) the delegate concludes that the applicant for a protection visa is a national of a particular country (here, Iran). Absent any warning to the contrary from the tribunal, there would be no issue in the tribunal about nationality that could be described as an issue arising in relation to the decision under review. If the tribunal invited the applicant to appear, said nothing about any possible doubt about the applicant's nationality, and then decided the review on the basis that the applicant was not a national of the country claimed, there would not have been compliance with s 425(1); the applicant would not have been accorded procedural fairness.

52 The decision in *SZBEL* involved a consideration of the common law rules of procedural fairness and the provisions of s 425(1) of the Act. Although it seems to me the decision was based on a failure to comply with the common law rules of procedural fairness, the Court referred to the provisions of s 425(1) and in the example set out above said that not only would there have been a failure to accord procedural fairness, but also there would be non-compliance with s 425(1) of the Act.

53 In *SZBEL*, s 422B(1) did not apply to the appellant's application whereas it does apply to the appellant's application in this case. That section is in the following terms:

> (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.

54 In my opinion, s 422B means that the issue in this case must be decided by reference to, and only by reference to, s 425(1). The common law rules in relation to the particular obligation in issue have been excluded by the Act.

55 Section 425(1) refers to "the issues arising in relation to the decision under review" in the context of extending an invitation to the applicant to appear before the Tribunal, and sections which follow, namely, s 425A and s 426A of the Act deal with the notice of invitation to appear and the failure to appear in response to the invitation under s 425. It might be said that if the obligation to identify an issue arises it can be satisfied only at the invitation stage and not (assuming it is not done at the invitation stage) at the hearing before the Tribunal. It appears, conversely, that the analogous common law obligation can be

satisfied by the Tribunal at the hearing before it (*SZBEL* at 602 [47]. I do not need to determine the question whether the obligation under s 425(1) can, like the obligation at common law, also be satisfied by the Tribunal at the hearing before it because even if it can be so satisfied, having read the transcript of the hearing before the Tribunal, I am not convinced that it was.

56 As I understand the decision in *SZBEL* an obligation arises under s 425(1) to advise an applicant that a particular matter is in issue if that matter was not a reason the delegate relied on to decide to reject the application for a protection visa (*SZBEL* at [34]-[37]). I reject what I understood to be the Minister's submission that every matter in issue before the delegate, or every matter that must be established by an applicant to make out his claim for a protection visa, is taken to be in issue before the Tribunal and need not be the subject of notice by the Tribunal. That could be the case in a particular factual situation if, for example, the delegate rejected every aspect of an applicant's claim but it is not necessarily the case. An applicant is entitled to assume unless and until told otherwise that the issues are the matters decided adversely to him in a manner which is determinative of his claim.

57 The question in this case is whether on a fair reading of the delegate's reasons she decided that the appellant was a Falun Gong practitioner in China, albeit not one of interest to the authorities, but rejected his claim for a protection visa on other grounds. There can be no doubt the Tribunal rejected the claim by the appellant that he was Falun Gong practitioner in China (see [39], [40] and [41] above). For example, the Tribunal member said:

> In the present case, I have found that the applicant was not involved in Falun Gong before he left China … .

58 The delegate gave extensive reasons for her decision refusing to grant a protection visa to the appellant. The critical findings on this point are summarised in [13], [14] and [16] above).

59 I think reading the reasons of the delegate as a whole she did conclude and then proceeded on the basis that the appellant was a Falun Gong practitioner in China, albeit not one of interest to the authorities. The Tribunal did not advise the appellant at or before the hearing that that fact was in issue. The letter from the Tribunal sent after the hearing, it seems with its obligation in s 424A in mind, raises that issue but a letter after the hearing

cannot satisfy the provisions of s 425(1) of the Act. The Tribunal failed to comply with the obligation in s 425(1). It must be said that there may be circumstances where it will not be easy for the Tribunal to determine when the applicant for review should be given notice of an issue by reason of the provisions of s 425(1) of the Act. Those circumstances may arise if, on one view, the issue may be seen as but a part of a larger or more general issue which is clearly in dispute and which is not caught by the notice requirement in s 425(1). The difficulties will be exacerbated if (as happened in this case) the applicant for review makes considerable changes to his or her story after the delegate's decision and before the Tribunal hearing. I have given anxious consideration to the question whether the applicant's alleged practice of Falun Gong in China, albeit in a way that did not attract the attention of the authorities, was but part of a larger or more general issue which was clearly in dispute. I have decided that it was not because, absent any other relevant circumstances, the question is to be determined by reference to the reasons of the delegate and she drew a distinction between the two matters. This approach is consistent with that taken by the High Court in *SZBEL*. Finally, I note that it was not argued by the Minister that granting relief would be futile. It seems to me that in any event such an argument could not succeed. One might have some doubts as to whether the appellant has additional evidence but the onus to make out futility is much higher than that: *Lee v Minister for Immigration and Citizenship* (2007) 159 FCR 181.

60 In my opinion, there has been a failure to comply with s 425(1) of the Act and that constitutes jurisdictional error.

61 Although that conclusion means that it is not strictly necessary that I consider the other grounds of appeal, it is appropriate that I do so.

Section 424A of the Act

62 Section 424A provides as follows:

> 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 for review gave for the purpose of the application; 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.

63 The scope of s 424A of the Act has been considered on many occasions. The most recent consideration of the section by the High Court was in *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 ("*SZBYR*"). In that case, the Tribunal had found that the male applicant was not a reliable witness and one reason for that conclusion was the inconsistencies between a prior statutory declaration of the male applicant and his oral evidence. A question arose as to whether s 424A was engaged in relation to either the prior statutory declaration or the inconsistencies, or both.

64 The Court said that s 424A was not engaged. The prior statutory declaration could not constitute "the reason, or a part of the reason, for affirming the decision that is under review". The Court (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) said (at 615 [17]):

> When viewed in that light, it is difficult to see why the relevant passages in the appellants' statutory declaration would itself be "information that the tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review". Those portions of the statutory declaration

> did not contain in their terms a rejection, denial or undermining of the appellants' claims to be persons to whom Australia owed protection obligations. Indeed, if their contents were believed, they would, one might have thought, have been a relevant step towards rejecting, not affirming, the decision under review.

65 Nor were the inconsistencies "information" within s 424A. The Court said (at 616 [18]) (footnotes omitted):

> Thirdly and conversely, if the reason why the tribunal affirmed the decision under review was the tribunal's disbelief of the appellants' evidence arising from inconsistencies therein, it is difficult to see how such disbelief could be characterised as constituting "information" within the meaning of para (a) of s 424A(1). Again, if the tribunal affirmed the decision because even the best view of the appellants' evidence failed to disclose a Convention nexus, it is hard to see how such a failure can constitute "information". Finn and Stone JJ correctly observed in VAF v Minister for Immigration and Multicultural and Indigenous Affairs that the word "information":
>
> … does not encompass the tribunal's subjective appraisals, thought processes or determinations … nor does it extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the tribunal in weighing up the evidence by reference to those gaps, etc …
>
> If the contrary were true, s 424A would in effect oblige the tribunal to give advance written notice not merely of its reasons but of each step in its prospective reasoning process. However broadly "information" be defined, its meaning in this context is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence. The appellants were thus correct to concede that the relevant "information" was not to be found in inconsistencies or disbelief, as opposed to the text of the statutory declaration itself.

66 With these observations in mind, I turn now to consider the submissions advanced by the appellant.

1. Was the Tribunal's letter sent after the hearing adequate in relation to the matters with which it dealt?

67 The appellant submitted that the obligation in s 424A arose as soon as the Tribunal reached the state of satisfaction referred to in subs (1)(a) and was to be discharged immediately. As to the matters referred to in the letter sent after the hearing, it may be that the Tribunal had the inconsistencies in mind before the hearing on 19 January 2006, but it was not unreasonable for it to see if they were dealt with satisfactorily at the hearing. To my mind, there is nothing in s 424A that suggests the obligation created by the section is to be

discharged at any particular time prior to the Tribunal's decision. My conclusion is consistent with the approach taken by the High Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 1009 at 1021 [56] per McHugh J, at 1039 [164] per Kirby J, at 1045 [202] per Hayne J, although the Court in that case was addressing a different point.

68 It was also submitted by the appellant that the Tribunal's letter dated 20 January 2006 did not comply with s 424A(1)(b) in that it did not "ensure as far as is reasonably practicable, that the applicant understands why it is relevant to the review". That contention was not developed in oral submissions before me and, in any event, it must be rejected. It seems to me the letter makes clear the significance of the apparent inconsistencies to the issues on the review.

2. Were there other matters which fell within the terms of s 424A but which were not the subject of notice?

69 I will deal with each piece of information said by the appellant to fall within s 424A in turn. It is important to note that other than the Liu information, which was his oral evidence given to the Tribunal, in each case the information was in a document before the Tribunal. In three of the four cases, the document was provided to the Tribunal at the hearing. The change of name information was in a document provided to the Department by the appellant.

The Dellar information

70 The information in the letter from Mr Dellar is in the same category as the statutory declaration in *SZBYR* in that if its contents were accepted then that would be a reason for rejecting the decision under review, not affirming it. If the information is instead or, in addition, the Tribunal member's views of the letter's shortcomings that is not information within s 424A(1) because it is no more than a conclusion about a gap in the evidence.

71 In my opinion, there has been no breach of s 424A of the Act in relation to the Dellar information and it is not strictly necessary for me to consider the further argument advanced by the Minister to the effect that in any event the Dellar information was information the appellant gave for the purpose of the application and therefore within the exception in

s 424A(3)(b). The appellant challenged that proposition on the basis that the information was given by the author of the document and the appellant did no more than provide the document. I am inclined to think that the Minister's contention is correct (*SZEEU* (supra) at 52 [252] per Allsop J). In any event, the real thrust of the appellant's complaint are the views of the Tribunal member as to the shortcomings of the information contained in the letter and not the information itself.

72 One final matter in relation to the Dellar information is that the appellant suggested to the Tribunal member that she could contact Mr Dellar by telephone but it seems that she did not do so. It is suggested by the appellant that the Tribunal member erred in not contacting Mr Dellar. I reject that submission. The Tribunal member was not bound to do that and there is nothing that she said that created a legitimate or reasonable expectation in the appellant that she would contact Mr Dellar: *SZEEU* at 20 [59]-[61] per Moore J, 39 [171]-[172] Weinberg J, at 52 [251] per Allsop J.

The Liu information

73 The evidence of Mr Liu was significant because it dealt with the appellant's involvement in Falun Gong after his arrival in Australia. In general terms, it is fair to say that conduct was not in dispute, although the Tribunal member made a finding adverse to the appellant in terms of his motive for engaging in the conduct.

74 The real significance of Mr Liu's evidence lay in what inference (if any) could be drawn from it as to the appellant's involvement in Falun Gong in China. The appellant came to Australia on 13 August 2002 and Mr Liu met him in September or October 2002. Mr Liu's statement that the appellant's knowledge of Falun Gong was "not too basic and not too deep" is very general and, insofar as it suggests some knowledge of Falun Gong, may be explained by the appellant's attendance at Falun Gong exercises in Australia before he met the appellant.

75 The Tribunal member summarised Mr Liu's evidence but she did not make an express finding about it. She did find that there was "no evidence at all that the applicant brought with him to Australia a level of knowledge about Falun Gong practice consistent with his claim to have been a practitioner for seven years or, indeed, at all, in China". That finding implies a conclusion by the Tribunal that Mr Liu's evidence was entirely equivocal or neutral on the

question of the appellant's involvement in Falun Gong in China. It seems to me that such a conclusion was open to the Tribunal member.

76 In those circumstances, Mr Liu's evidence was not the reason or part of the reason for affirming the decision to refuse the appellant a protection visa within s 424A(1). Furthermore, there is no suggestion his evidence was rejected for reasons which themselves might fall within the terms of s 424(1) of the Act.

The PLA information

77 It seems to me that the same reasoning I have applied in the case of the Dellar information applies in the case of the PLA information. The information in the letter itself is highly supportive of the appellant and would not be the reason or part of the reason for affirming the decision under review.

78 As it happened, the Tribunal member said that the letter was not "a reliable source of evidence for several reasons". In effect, she rejected it as an authentic letter. She did so on the basis that:

1. it was unlikely a PLA officer would assist the appellant in this way;
2. it was unlikely it would be written on PLA letterhead if, as claimed, it was written in a personal capacity; and
3. its origins were unascertainable.

79 Those conclusions are conclusions as to deficiencies in information which would otherwise be a reason for rejecting the decision under review, not for affirming it. The conclusions themselves are not "information" within s 424A(1).

80 Again, it is not necessary for me to consider the question whether the PLA information was information the appellant gave for the purpose of the application within s 424A(3)(b) although on this point I do not see any reason to treat it differently from the Dellar information.

The household registration information

81 The document containing the household registration information, if genuine, supported the proposition that the appellant had previously used the name "Y". The Tribunal

member found that "at some point" the appellant changed his name from Y to X. The information in the household registration document was not the reason or part of the reason for affirming the decision to refuse the appellant a protection visa within s 424A(1).

The change of name information

82 The change of name information was a written statement to the Department that "according to the relevant regulation in China, I was not allowed to go [abroad] even if I did not have any problem, because I was an army officer … Therefore, I had to change my name …". This information might be taken to suggest that the real reason the applicant had changed his name was simply that he wanted to go abroad while still serving in the army. The Tribunal member found that the appellant had changed his name from Y to X but she was unable to be satisfied that he did this in 2002 or for the reasons he gave. Again, the information was not the reason or part of the reason for affirming the decision to refuse the appellant a protection visa within s 424A(1).

83 The appellant's submission that the Tribunal failed to comply with s 424A must be rejected.

Jurisdictional fact

84 The question whether the appellant was a Falun Gong practitioner in China was not a jurisdictional fact. The real thrust of the appellant's submission was that either the Tribunal member rejected, for example, Mr Liu's evidence for reasons in themselves engaging s 424A(1) of the Act, an argument I have already rejected, or she simply overlooked Mr Liu's evidence and other evidence that he had some knowledge of Falun Gong after arriving in Australia and said that there was no evidence when, in fact, quite clearly there was evidence. In my opinion this submission fails because it was open to the Tribunal member to conclude that Mr Liu's evidence and the appellant's knowledge of Falun Gong exercises was equivocal in terms of whether he was a Falun Gong practitioner in China and therefore to conclude that there was no evidence of the alleged fact. The appellant's submission that there was an error of jurisdictional fact must be rejected.

Conclusions

85 I would uphold the first ground of appeal but reject the second and third grounds.

86 The appeal must be allowed and the orders made by the Federal Magistrate on 25 January 2007 set aside. In lieu of the first order there should be orders that:

1. A writ of certiorari issue, directed to the second respondent, to quash the decision of the second respondent signed on 8 February 2006.
2. A writ of mandamus issue, directed to the second respondent, requiring the second respondent to determine according to law the application made on 18 November 2002 by the applicant for review of the decision of the delegate of the first respondent to refuse to grant the appellant a protection visa.

87 I will hear the parties as to the costs of the application before the Federal Magistrate and the costs of the appeal including the costs of the application to adduce further evidence on the appeal.

I certify that the preceding eighty-seven (87) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko.

Associate:

Dated: 30 November 2007

Counsel for the Appellant:	Mr S Prince
Solicitor for the Appellant:	Craddock Murray Neumann
Counsel for the First Respondent:	Ms S Sirtes
Solicitor for the First Respondent:	Clayton Utz
Date of Hearing:	30 April, 2, 3, 4 May 2007
Date of Judgment:	30 November 2007