FEDERAL COURT OF AUSTRALIA

SZVCB v Minister for Immigration and Border Protection [2017] FCA 479

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| Appeal from: | *SZVCB & Anor v Minister for Immigration & Anor* [2015] FCCA 1172 |
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| File number: | NSD 603 of 2015 |
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| Judge: | **MARKOVIC J** |
|  |  |
| Date of judgment: | 11 May 2017 |
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| Catchwords: | **MIGRATION** – appeal from a decision of the Federal Circuit Court of Australia – whether Tribunal gave appellant clear particulars of information the Tribunal considered would be the reason or part of the reason for affirming the decision under review – whether Tribunal invited appellant to give evidence and present arguments relating to the issues arising in relation to the decision under review – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) ss 424A, 424AA, 425 |
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| Cases cited: | *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152  *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609  *SZLPO v Minister for Immigration and Citizenship (No 2)* (2009) 177 FCR 29  *SZNKO v Minister for Immigration and Citizenship and Another* (2010) 184 FCR 505 |
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| Date of hearing: | 21 February 2017 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 49 |
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| Counsel for the Appellants: | Mr R Chia |
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| Solicitor for the First Respondent: | Ms L Buchanan, Australian Government Solicitor |
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| Counsel for the Second Respondent: | The second respondent filed a submitting notice, save as to costs |

ORDERS

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|  | | NSD 603 of 2015 |
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| BETWEEN: | SZVCB  First Appellant  SZVCC  Second Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  REFUGEE REVIEW TRIBUNAL  Second Respondent | |

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| JUDGE: | MARKOVIC J |
| DATE OF ORDER: | 11 MAY 2017 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The first appellant pay the first respondent’s costs as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MARKOVIC J:

1. This is an appeal from orders made by the Federal Circuit Court of Australia on 8 May 2015 dismissing an application for judicial review under s 476 of the *Migration Act 1958* (Cth) (**Act**) of a decision of the Refugee Review Tribunal, as it then was (now the Administrative Appeals Tribunal (**Tribunal**)), made on 26 August 2014. The Tribunal had affirmed an earlier decision made by a delegate of the first respondent (**Minister**) not to grant the appellants Protection (Class XA) visas.
2. The first and second appellants are mother and daughter respectively and citizens of the People’s Republic of China (**China**). On 9 November 2016 Collier J made orders by consent in relation to the second appellant, allowing her appeal, quashing the Tribunal’s decision insofar as it affirmed the decision not to grant her a Protection (Class XA) visa and remitting her application for review of the Minister’s decision to the Tribunal for determination according to law. At that time her Honour also made orders for the first appellant’s appeal to be fixed for final hearing and set a timetable for the filing of submissions. This appeal proceeds pursuant to those orders.

# background

1. The first appellant (**Appellant**) arrived in Australia on 26 June 2007. At that time her daughter, who was then a minor, was the holder of a student visa and the Appellant was the holder of a student guardian visa. The Appellant’s student guardian visa expired on 31 December 2008. She thereafter remained in Australia as an unlawful non-citizen.
2. On 29 October 2013 the Appellant made an application for a Protection (Class XA) visa which included her de facto partner and her daughter. In her protection visa application the Appellant claimed to fear harm from her husband, who she said had physically, mentally and sexually abused her, forced her to have children and who would prevent her from continuing to work. She had four children with her husband and, as a result, claimed that she had to go into hiding to avoid the authorities, who she feared would perform tubal ligation on her. She also claimed that she would be pursued by debt collectors who have connections to the authorities.
3. On 15 April 2014 a delegate of the Minister refused the Appellant’s protection visa application. The delegate found that the Appellant’s claims were not credible and considered that she did not hold a genuine fear of return to China on account of her stated claims.
4. On 30 April 2014 the Appellant applied to the Tribunal for review of the delegate’s decision. She appeared before the Tribunal to give evidence and present arguments. On 26 August 2014 the Tribunal affirmed the decision under review.

# the Tribunal decision

1. The Tribunal found the Appellant not to be a credible witness. It noted that there were inconsistencies in her evidence, that some of her claims were implausible and found that the Appellant was not convincing or persuasive. The Tribunal’s concerns were as follows:
2. the Appellant gave evidence at the hearing that she was almost 50 years old and was no longer able to bear children. The Tribunal was of the view that it was therefore highly unlikely that the Chinese authorities would force her to undergo tubal ligation;
3. the Appellant claimed in her visa application that her husband had physically, mentally and sexually abused her; that she feared being physically, mentally and sexually harmed; and that the Chinese authorities regard sexual offences in a marriage as domestic matters and will not become involved. At the hearing the Appellant gave evidence that she separated from her husband when she left China and came to Australia in June 2007; that she had had no contact with her husband since 2009; and that she wishes to divorce him. She also said that if her husband did not agree to the divorce he would beat her to death. The Tribunal was of the view that if the Appellant and her husband had been separated since June 2007 and had had no contact since 2009 then it was highly unlikely that her husband would oppose their divorce, let alone “beat her to death”;
4. the Appellant claimed that her husband was controlling: he stalked her; opposed her taking a job as a masseuse or otherwise; and restricted her from doing as she wished. The Tribunal found that those claims were inconsistent with the husband permitting the Appellant to travel to Australia with her daughter, where he would have no control over what she did. The Tribunal also found that the Appellant’s claim that her husband prevented her from taking a job was inconsistent with the evidence she gave at the hearing that she did not have a job in China because she had to stay home with her four children;
5. the Appellant claimed that she would be harmed by debt collectors as a result of her husband borrowing money from loan sharks at high interest rates for his business ventures, fish farming and coal mining, because he could not borrow from a bank. The Tribunal found that this claim was inconsistent with the fact that the Appellant had provided evidence of a bank loan to her husband to support her student guardian visa application. Relevantly, at [32]-[34] of its decision record the Tribunal said:

32. The Tribunal asked the second named applicant why her husband did not borrow the money from a bank rather than from a loan shark at high interest rates. She responded that they had nothing they would provide as security for a loan and that people from villages are unable to get bank loans. In her application for a Student Guardian visa, the second named applicant provided the Department with a number of documents including a letter from her husband's employer. It stated that he had worked as a manager of a Decoration Store since February 2000. When the Tribunal put this information to the second named applicant, pursuant to s.424AA of the Act, she responded that this was the job she referred to earlier where he made posters and advertising signs. The Tribunal does not accept this response as being a manager of a store is very different from making posters and advertising signs.

33. In her application for a Student Guardian visa, the second named applicant provided the Department with a document from the CITIC Industrial Bank in relation to a study loan to her husband. She also provided the Department with a letter from her agent in China stating that her husband had borrowed 650,000 RMB from the bank to support her and their daughter in Australia. When the Tribunal put this information to the second named applicant, pursuant to s.424AA of the Act, she responded that the money her husband borrowed from the bank had to be repaid and he borrowed money from the loan shark to repay the bank. When the Tribunal noted that this was inconsistent with her earlier evidence, she responded that her husband looked after their financial affairs and she only had a rough idea about their finances.

34. The documentary evidence that the second named applicant provided to the Department in support of her application for a Student Guardian visa indicates that her husband had obtained a loan from the bank which is inconsistent with her evidence to the Tribunal that they had no security, were unable to get a bank loan and that people from villages are unable to get bank loans. Her evidence that her husband borrowed money from a loan shark to invest in a fish farm and coal mining is inconsistent with her subsequent evidence that her husband borrowed money from a loan shark in order to repay the bank loan. These inconsistencies in the second named applicant’s evidence raise concerns in relation to her credibility and the veracity of her claims.

1. the Appellant had waited over six years after her arrival in Australia before lodging her protection visa application. The Tribunal was of the view that if the Appellant had genuine fears she would have taken steps to lodge her protection visa application prior to the expiry of her student guardian visa in 2008. The Tribunal did not accept the Appellant’s response for not doing so, namely, that she did not know how to apply and had poor English, finding that she was a very resourceful person; and
2. the Tribunal found that the Appellant was “prepared to say anything to obtain a Protection visa without any regard for the truth” and that she had fabricated her claims for the purpose of obtaining a protection visa.
3. The Tribunal concluded, having considered all of the Appellant’s claims singularly and cumulatively, that there was no real chance that the Appellant would be at risk of persecution if she returned to China now or in the reasonably foreseeable future. The Tribunal found that the Appellant did not have a well-founded fear of harm for a Convention reason and that she did not meet the complementary protection criteria.

# Federal Circuit Court proceeding

1. In her application for judicial review filed in the Federal Circuit Court of Australia the Appellant, with her daughter, raised one ground of review which was in the following terms:

The decision of the Tribunal:

(a) is affected by the procedural unfairness.

(b) failed to take into account relevant considerations.

1. The ground was not particularised. However, in his reasons for decision, the primary judge noted that the Appellant and her daughter made a number of oral submissions at the hearing. They both submitted that the procedure that the Tribunal adopted was not fair because it failed to consider the seriousness of the material that was before it. Insofar as the Appellant was concerned, the primary judge noted that she submitted that the Tribunal did not consider what happened to her daughter or the domestic violence to which she was subjected.
2. In relation to the ground that was included in the Appellant’s application for judicial review, the primary judge found that there was nothing in the Tribunal’s reasons for decision that indicated that it did not comply with s 425 of the *Migration Act 1958* (Cth) (**Act**) or any other provision of Div 4 of Pt 7 of the Act or otherwise did not afford procedural fairness to the Appellant and her daughter. The primary judge noted that the Appellant was invited to appear before the Tribunal to give evidence and make submissions pursuant to s 425(1) of the Act and that she appeared before the Tribunal in response to that invitation. The primary judge also noted that the Tribunal complied with s 424AA of the Act in relation to two particular items of information, the first concerning her husband’s job and the second concerning the loan obtained from a bank by her husband. The primary judge found that there was nothing in the Tribunal’s reasons that suggested that it failed to consider any aspect of the Appellant’s and her daughter’s claims: *SZVCB* *& Anor v Minister for Immigration & Anor* [2015] FCCA 1172 (***SZVCB***)at [17]-[18].
3. The primary judge then considered the oral submissions made by the Appellant. His Honour noted that the Tribunal did not consider what would happen to the Appellant’s daughter. But his Honour observed that, if by that submission the Appellant intended to submit that the Tribunal did not consider her daughter, then the Tribunal’s failure would not amount to any error because the Appellant’s daughter did not make a claim for a protection visa in her own right. Rather, the Appellant’s daughter had applied for a protection visa as a dependent of the Appellant. The primary judge also noted that if, alternatively, the Appellant intended by her submission to refer to any other daughters she has, the Tribunal similarly made no error by not considering their situation because there was nothing before it that indicated that the Appellant relied on the present or future situation of her other daughters: *SZVCB* at [19].

# the appeal

1. The Appellant’s amended notice of appeal, which she was given leave to file at the hearing of the appeal, raises four grounds of appeal as follows:

1. His Honour erred in finding at [17] that the Second Respondent complied with section 424AA of the *Migration Act* 1958 ("**Act**") and therefore did not fail to accord procedural fairness to the First Appellant.

2. His Honour ought to have found that the Second Respondent failed to comply with section 424AA and therefore did not comply with the mandatory requirements of section 424A of the Act:

a. the Second Respondent failed to give clear particulars and/or comply with the requirements of subsection 424AA(1)(b) in respect of "a letter from [the First Appellant's] agent in China stating that her husband had borrowed 650,000 RMB from the bank to support her and their daughter in Australia"; and

b. further or in the alternative, the Second Respondent failed to ensure the First Appellant understood why the following information was relevant to the review:

i. the letter from the First Appellant's husband's employer; and/or

ii. the document from the CITIC Industrial Bank in China.

3. Further or in the alternative, his Honour erred in finding at [17] that there was nothing to indicate the Second Respondent did not comply with section 425 of the Act.

4. His Honour ought to have found that the Second Respondent failed to invite the First Appellant to give evidence and present arguments relating to the issues arising in relation to the decision under review.

# legislative framework

1. The Appellant’s grounds of appeal concern ss 424A, 424AA and 425 of the Act. Those sections relevantly provide 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.

…

(2A) The Tribunal is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 424AA.

(3) This section does not apply to information:

(a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or

(b) that the applicant gave for the purpose of the application for review; or

(ba) that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department; or

(c) that is non‑disclosable information.

…

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

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

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

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

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

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

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

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

…

**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.

…

# Grounds 1 and 2 of the amended notice of appeal

## The Appellant’s submissions

1. By grounds 1 and 2 the Appellant alleges that the primary judge erred in finding that the Tribunal complied with s 424AA of the Act and that it therefore did not fail to accord procedural fairness to her. The Appellant alleges that the primary judge ought to have found that the Tribunal failed to comply with s 424AA and that it therefore did not comply with the mandatory requirements of s 424A of the Act. The Appellant says this is because the Tribunal failed to give clear particulars of and/or comply with the requirements of s 424AA(1)(b) in relation to the letter from the Appellant’s agent in China and, further or in the alternative, because the Tribunal failed to ensure that the Appellant understood why the letter from her husband’s employer and the document from CITIC Industrial Bank in China were relevant to the review.
2. This ground concerns three documents which were obtained from the Appellant’s application for the student guardian visa. They are:
3. a certificate dated 29 January 2007 from Pingtan County Chengguan Shiwen Decoration Store (**Employer’s Letter**) which included, among other things, that the Appellant’s husband “works in Pingtan County Chengguan Shiwen Decoration Store from Feb., 2000 to current and works as the manager in our store”;
4. a letter dated 5 February 2007 from Fujian Jianan Overseas Study Service Centre addressed to Offshore Processing Centre (**Agent’s Letter**) which provided:

This is regarding the application of student [second appellant] and her mother [Appellant]. The student is going to apply for the student visa and the mother is going to apply for the guardian visa (she will live with the student in Australia until her child turns to 18 years old). The father has been approved a bank loan of RMB 650,000 to support both the student and the mother for their stay in Australia.

Please find the attached photocopy of the loan certificate of RMB 650,000. The original certificate is included in the student’s application documents.

1. a letter dated 2 February 2007 from CITIC Industrial Bank headed “Advice for study abroad loans” (**Bank Document**), which was enclosed with the Agent’s Letter and provided, among other things:

In accordance with the stipulations and methods for study abroad loans of our bank, we hereby give our assent that [the Appellant and her husband] can formally carry out the procedures of the RMB650,000.00 loan for his/her child’s study abroad, the term of which is preliminarily set to three years, at our bank after his/her child i.e. [the Appellant’s daughter] has acquired the preliminary visa of your country.

(original emphasis)

1. The Appellant submitted that each of the Employer’s Letter, the Bank Document and the Agent’s Letter was “information that the Tribunal considered would be … part of the reason” for affirming the decision under review. She further submitted that those documents constituted “information” because they were items of documentary evidence and not inconsistencies in the Appellant’s own evidence. She contended that the Tribunal considered that each of those documents would be part of the reason for affirming the decision under review for two reasons. First, the Tribunal expressly said at the hearing that the information it would refer to would be the reason or part of the reason for affirming the delegate’s decision. Secondly, it could be inferred to be the case from the Tribunal’s reference to and reliance upon each of those documents in its reasons at [32]-[33].
2. The Appellant also submitted that none of the documents fell within the exception provided in s 424A(3). Each of the documents was specifically about the Appellant’s husband and had not been given to the Tribunal or the Department during the protection visa application process. The Appellant had given the documents to the Department in support of her prior application for a student guardian visa.
3. The Appellant contended that there was no written invitation given to her in accordance with s 424A(1) of the Act but that at [32]-[33] of its reasons the Tribunal purported to have put to the Appellant at the hearing the Employer’s Letter, the Bank Document and the Agent’s Letter pursuant to s 424AA. Notwithstanding that, the Appellant further contended that, based on the transcript, the Tribunal did not refer to the Agent’s Letter and therefore did not give clear particulars of that information to the Appellant orally in accordance with s 424AA(1)(a). The Appellant contended that the Tribunal therefore failed to comply with s 424A(1).
4. Further, the Appellant contended that, contrary to what the Tribunal said, the Bank Document did not, in its terms, say that the Appellant’s husband had borrowed RMB650,000 to support the Appellant and her daughter in Australia or that he had borrowed any money at all. Rather, that document only “confirmed that the [husband] meets the requirements of [the] bank for study abroad loans” and gave its “assent that [the husband] can formally carry out the procedures of the RMB650,000 loan … after [the daughter] has acquired the preliminary [Australian] visa…”. That is, the Appellant contended that the Bank Document was merely a certificate seeking to prove to the Department that she had access to funds from an acceptable source as required by the student guardian visa criteria. The assertion that the husband had in fact taken out the loan and done so “to support both the student and the mother for their stay in Australia” were embellishments or inferences made in the Agent’s Letter and accepted by the Tribunal.
5. The Appellant also submitted that the Tribunal did not ensure that she understood the relevance of the Bank Document as required by s 424AA(1)(b)(i) and made no attempt to explain with what evidence and claims the Bank Document was inconsistent and how that inconsistency was relevant to the review. Similarly, the Appellant submitted that the Tribunal did not explain how the Employer’s Letter was inconsistent with her evidence and claims and the relevance of that inconsistency. She further submitted that by not identifying how the Bank Document and the Employer’s Letter were inconsistent with her evidence and claims and not explaining how the inconsistencies were relevant to the review the Tribunal failed to comply with s 424AA(1)(b)(i) of the Act.

## Consideration

1. In order to consider the Appellant’s submissions it is of assistance to first set out the relevant extracts from the transcript of the Tribunal hearing, which was included in the appeal book, including an extract in which the Tribunal member took steps to comply with s 424AA of the Act. Relevantly, the following exchanges took place:

Tribunal: What work does your husband do?

Appellant: Like a poster or – the word postmaster – postmaster – a person with a sign.

Tribunal: He makes posters and signs.

Appellant: Yes. Then he tries to do fish – fish farming. And then coal – he mines matter – in coal all day.

And later:

Tribunal: Who was this person our husband borrowed money from?

Appellant: A local – a loan shark.

Tribunal: Why didn’t he borrow money from the bank?

Appellant: Nothing can be a mortgage at home. Normally people from village are not able to get their loan – loan back.

Tribunal: And what was the money borrowed for?

Appellant: To do the investment in this business.

Tribunal: How much is borrowed?

Appellant: I’m not sure. The first loan is about 600,000 and the second one dozens of thousand.

Tribunal: RMB?

Appellant: Yes.

And later:

Tribunal: I want to talk to both of you now about something important. I’m going to first explain to you why it’s important and then we can talk about it. So I need you to please listen carefully. Now, I have information before me which would be the reason or part of the reason for affirming the decision made by the Department of Immigration. This information is important because it could lead to me forming the view that none of you are entitled to a protection visa. If I came to – sorry. If I came to this conclusion then I would have to make the same decision the department made. And what this would mean is that your application to the tribunal would not be successful, and you would not be entitled to the protection visas.

So you understand why this is important. Now, I’m going to tell you what the information is and then give you an opportunity to comment on or respond to that information. You are not obliged to do so immediately. You can seek additional time to do so. If you seek additional time I will consider whether or not I should adjourn this review to give you the additional time. This is a legal requirement that I have to comply with to ensure that you have a fair hearing. This does not mean that I have already reached – made up my mind and reached a decision in your case. ...

…

Tribunal: [Appellant], this information relates to you. I have before me the department’s file in relation to your application for a student guardian visa. That file contains documents that you provided to the Department of Immigration. One of those documents is a letter from your husband’s employer. It states that he worked as the manager of a decoration store since February 2000. This is inconsistent with the evidence you gave today and your case - - -

Appellant: That’s the one – decoration one. What I said is that one.

Tribunal: You said you worked in posters and signs.

Appellant: That’s the one I was talking about but I don’t know how to say it – the proper – I did not …

Tribunal: This also relates to you, [Appellant]. Your file from the department in relation to the student guardian visa contains a document from the CITIC Industrial Bank in China. It says that your husband borrowed 650,000 RMB from the bank to support you and your daughter in Australia. This is inconsistent with your evidence today and with your claims.

Appellant: The money needed to be repaid. There is the monthly repayment – interest. So gets the money from loan shark and then pay it back to the bank.

Tribunal: That’s not what you said earlier today. You said that he had borrowed money from the loan shark to invest in the coal mining and the fish farming.

…

Tribunal: Do either of you want to say anything else?

Appellant: Whatever more I want to add you don’t believe me.

1. The first issue that arises for consideration is whether the content of the Agent’s Letter and the Bank Document was information for the purposes of s 424A(1) of the Act. The Agent’s Letter informed the Department that the Appellant’s husband had “been approved a bank loan of RMB 650,000 to support both the student and the mother for their stay in Australia”. The Bank Document confirmed that the Appellant’s husband “[met] the requirements” of the bank for “study abroad loans” and that he could “formally carry out the procedures” of the loan for a three year period.
2. In *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 (***SZBYR***) a majority of the High Court (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) said at [17]-[18]:

17. Secondly, the appellants assumed, but did not demonstrate, that the statutory declaration "would be the reason, or a part of the reason, for affirming the decision that is under review". The statutory criterion does not, for example, turn on "the reasoning process of the tribunal", or "the tribunal's published reasons". The reason for affirming the decision that is under review is a matter that depends upon the criteria for the making of that decision in the first place. The tribunal does not operate in a statutory vacuum, and its role is dependent upon the making of administrative decisions upon criteria to be found elsewhere in the Act. The use of the future conditional tense (would be) rather than the indicative strongly suggests that the operation of s 424A(1)(a) is to be determined in advance – and independently – of the tribunal's particular reasoning on the facts of the case. Here, the appropriate criterion was to be found in s 36(1) of the Act, being the provision under which the appellants sought their protection visa. The "reason, or a part of the reason, for affirming the decision that is under review" was therefore that the appellants were not persons to whom Australia owed protection obligations under the Convention. 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.

18. 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.

(footnotes omitted)

1. The Minister submitted that there was nothing in the material in the student guardian visa file which itself constituted a rejection, denial or undermining of the Appellant’s claims. He submitted that the Agent’s Letter and the Bank Document only became relevant after the Appellant gave evidence at the Tribunal hearing that the Tribunal found to be inconsistent with the contents of the documents, which led to a finding regarding her credibility. The Minister contended that it was the inconsistencies (or the process of comparison between the Appellant’s evidence and the evidence with which it was compared by the Tribunal) that was the information and that such inconsistencies or comparative processes did not constitute “information” for the purposes of s 424A(1) of the Act.
2. In my opinion, the Agent’s Letter and the Bank Document contain information that would be the reason or part of the reason for affirming the decision under review, namely, the decision not to grant the Appellant a protection visa. The contents of those documents was information for the purposes of s 424A(1) of the Act.
3. The Tribunal’s disbelief of the Appellant’s evidence arose from the inconsistencies revealed by the Appellant’s evidence given at the Tribunal hearing on the one hand and the contents of the Agent’s Letter and the Bank Document on the other. It may be the case, as the Minister submitted, that the Agent’s Letter and the Bank Document only became relevant when, at the hearing, the Appellant gave evidence that was inconsistent with their contents. As the Minister submitted, those inconsistencies were not themselves information for the purposes of s 424A(1) of the Act. But the contents of the Agent’s Letter and the Bank Document was information for the purposes of s 424A(1) of the Act because it formed part of the basis upon which the Tribunal was concerned about the veracity of the Appellant’s claims and, ultimately, her credibility.
4. In *SZNKO* *v Minister for Immigration and Citizenship and Another* (2010) 184 FCR 505 (***SZNKO***)the tribunal had before it a letter from the applicant in support of his claim that he was a Christian. The tribunal member found that the applicant’s letter was substantially the same as another letter he had come across in an unrelated proceeding and the member’s concern was whether the letter relied upon by the applicant was a letter “made to order”. Flick J noted that the tribunal’s reasons for decision exposed its conclusion that it did not find the applicant to have given a “truthful and credible account of his past experiences” and that the concern as to the reliability of the letter only “fuelled the reservations that the Tribunal Member had formed about the present appellant’s credibility”: at [14]. His Honour held that the details not disclosed to the applicant about the person who wrote the other letter, the Union Council from which it had come, and its date constituted “information” for the purposes of s 424A of the Act: at [19]. The letter found on the other applicant’s file was clearly material which undermined the claim made by SZNKO that he was a Christian. It undermined the applicant’s claim because it was the basis upon which the tribunal in that case was concerned about the authenticity of the applicant’s evidence of his Christianity.
5. In the Appellant’s casethe contents of the Agent’s Letter and the Bank Document was evidentiary material which undermined the Appellant’s claim to fear harm from debt collectors. It was the existence of that material which exposed the inconsistencies in her evidence and was a basis upon which the Tribunal was concerned about the veracity of her claims, which in turn led to the Tribunal’s credibility finding.
6. As the contents of the Agent’s Letter and the Bank Document was information for the purposes of s 424A(1), the Tribunal was obliged to give that information to the Appellant pursuant to s 424A(1)(a).
7. That being the case, the next issue which arises is whether the Tribunal gave the Appellant clear particulars of the information comprised in the Agent’s Letter and the Bank Document, namely, that a bank loan to the Appellant’s husband of RMB650,000 had been approved to support the Appellant and her daughter in Australia.
8. I accept the Minister’s submission that the Tribunal put to the Appellant clear particulars of the information comprised in those documents. That is so despite the Tribunal not expressly referring to the Agent’s Letter in its exchanges with the Appellant. Notwithstanding that, it clearly put the substance of the Agent’s Letter, which summarised the effect of the Bank Document, to the Appellant when it said “[i]t says that your husband borrowed 650,000 RMB from the bank to support you and your daughter in Australia”. There was no relevant distinction between the information in the Agent’s Letter and that in the Bank Document. The Tribunal’s summary put the substance of both documents to the Appellant.
9. In my opinion, the fact that the Tribunal incorrectly described the effect of the Agent’s Letter and the Bank Document as the husband having “borrowed” RMB650,000 rather than having been “approved” a bank loan for that amount does not change the outcome. That misdescription was immaterial to the substance of what was being put to the Appellant. Whether the husband had “borrowed” RMB650,000 or merely been approved a loan for that amount, the information comprised in the Agent’s Letter and the Bank Document was inconsistent with the Appellant’s evidence to the Tribunal that her husband was unable to get a bank loan and that people from villages are unable to get bank loans.
10. The Appellant relied on *SZLPO v Minister for Immigration and Citizenship (No 2)* (2009) 177 FCR 29, a decision of a Full Court of this Court (Lindgren, Stone and Bennett JJ). That case concerned the issue of whether the sources included in a letter from the Department of Foreign Affairs and Trade to the Tribunal should have been provided to the applicant together with the conclusions included in the letter. The Full Court found at [31] that:

In our respectful opinion, it is to be inferred from the terms of the Tribunal’s request of DFAT and the terms of the Tribunal’s reasons for decision to which we have referred that following receipt of the information from DFAT on 1 or 2 August 2007, the Tribunal thought that the nature of the sources that had been consulted by the Office of the National Ameer would itself be part of the reason for affirming the decision under review.

1. The Full Court concluded that the sources should have been provided because they formed part of the reason for affirming the decision under review. A failure to provide particulars of the sources to the applicant constituted a breach of s 424A of the Act. In reaching that conclusion the Full Court found that it was not clear from the applicant’s response to the s 424A letter that “he appreciated that Mr Bhuiyan had said that he had not signed the letter of introduction or that inquiries had been made locally of the Jama’at at Sreemangal, Moulvibazar in relation to [the applicant’s] membership”. The Full Court found that the applicant’s response “could well have been different had he known the source of the information”. But the Appellant’s case is different. The Tribunal did not have before it sources of information and a conclusion derived from those sources. It had only one category of information, being primary sources of information, the Agent’s Letter and the Bank Document. It put the information comprised in those documents to the Appellant for comment at the hearing, including by express reference to the Bank Document.
2. Further, the Tribunal clearly explained to the Appellant the relevance of the documents when it said “[i]t says that your husband borrowed 650,000 RMB from the bank to support you and your daughter in Australia. This is inconsistent with your evidence today and with your claims” and “[t]hat’s not what you said earlier today. You said that he had borrowed money from the loan shark to invest in the coal mining and the fish farming”. There was no failure to comply with s 424AA(1) of the Act.
3. I turn then to the Employer’s Letter. The Appellant’s submission that there was a failure to comply with s 424AA(1)(b)(i) of the Act because the Tribunal failed to clearly explain the relevance of the Employer’s Letter to the review must also be rejected. In my opinion, for the same reasons as set out at [23] to [30] above, the Employer’s Letter was information for the purposes of s 424A of the Act. But the Tribunal clearly put the information to her. It informed the Appellant that the Employer’s Letter “states that [your husband] worked as the manager of a decoration store since February 2000. This is inconsistent with the evidence you gave today and your case” and “[y]ou said [he] worked in posters and signs”. The Appellant tried to explain this saying “[t]hat’s the one – decoration one. What I said is that one”.
4. The Appellant submitted that the Tribunal failed to say with what the Employer’s Letter was inconsistent and how it was inconsistent. I do not think that is so. It is clear that the Tribunal was putting to the Appellant that the Employer’s Letter was inconsistent with evidence she had already given and that the Appellant understood what the Tribunal was putting to her.
5. It follows from the matters set out above that grounds 1 and 2 should be dismissed.

# Grounds 3 and 4 of the amended notice of appeal

## The Appellant’s submissions

1. These grounds concern s 425 of the Act. The Appellant alleges that the primary judge erred in finding that there was nothing to indicate that the Tribunal did not comply with s 425 of the Act and that his Honour ought to have found that the Tribunal failed to invite the Appellant to give evidence and present arguments relating to the issues arising in relation to the decision under review.
2. The Appellant submitted, based on the decision of the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 (***SZBEL***), that unless a tribunal tells an applicant otherwise, he or she would be entitled to expect that the “issues arising in relation to the decision under review” are the same issues that the delegate had considered to be dispositive. In that regard the Appellant submitted that the delegate’s reasoning was that she had claimed that her husband in China would “treat her badly”, yet she had never sought help from the police or any agency; that, given her time apart from her husband, the delegate did not accept that the dangers still persisted; and that her husband would not be motivated to mistreat her because of his business debts in circumstances where she had no legal connection with the businesses and he had never asked her for financial support while she was in Australia.
3. The Appellant further submitted that one aspect of her claims that was rejected by the Tribunal was her claim that she would not only be harmed by her husband but by villagers and the authorities because she wanted to work as a masseuse and be a financially independent woman. The Appellant contended that this issue only received cursory treatment at the Tribunal hearing. The Tribunal did not ask her to elaborate upon why it was “very hard” to find a job in China and whether this was due to fear of harm from villagers or the authorities or challenge her evidence on the issue. The Appellant submitted that as a result she was not put on notice by the Tribunal that this was an issue that it may decide against her and, in failing to do so, the Tribunal failed to comply with the requirement of s 425 to invite her to give evidence and present arguments relating to the issues arising in relation to the decision under review.

## Consideration

1. In *SZBEL* the High Court (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ) held that, unless a tribunal tells an applicant something different, he or she would be entitled to assume that the reasons given by the delegate for refusing to grant an application would identify the issues that arise in relation to that decision: at [36]. Their Honours said at [47] that:

First, there may well be cases, perhaps many cases, where either the delegate’s decision, or the Tribunal’s statements or questions during a hearing, sufficiently indicate to an applicant that everything he or she says in support of the application is in issue. That indication may be given in many ways. … The proceedings are not adversarial and the Tribunal is not, and is not to adopt the position of, a contradictor. But where, as here, there are specific aspects of an applicant’s account, that the Tribunal considers *may* be important to the decision and may be open to doubt, the Tribunal must at least ask the applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted.

1. In the present case the delegate did not regard the Appellant’s claims as credible and considered that the Appellant did not hold “a genuine fear of return on account of her stated claims”. The delegate also found that the Appellant’s written claims were “vague”; that the Appellant “provided no convincing detail when outlining [her] claims at interview”; and that, on the basis of the written and oral information and evidence supplied with her application, she could not be satisfied that the Appellant was “in genuine danger and would not be protected by the Chinese authorities”. That is, the delegate rejected the entirety of the Appellant’s claims made in her protection visa application and made adverse findings as to her credibility. That included her claim to fear “being unable to continue to work in the massage industry” and her fear of being mistreated by other villagers and the authorities if she did continue with that work. In my opinion the Appellant was on notice that one of the issues dispositive of the review was whether there was any credibility to her claim to fear harm on the basis that she wished to continue to work in her chosen field.
2. In any event the Tribunal questioned the Appellant at the hearing in relation to the work she carried out in China and in Australia. The following exchanges took place:

Tribunal: Did you do any paid work?

Appellant: No. I – the kids are small and I had a lot of the kids.

…

Tribunal: What was the first job that you did in Australia?

Appellant: Curtains.

Tribunal: How long did you do that job?

Appellant: Two or three years.

Tribunal: And what did you do after that?

Appellant: Clothes.

Tribunal: Clothes – what did you do with clothes?

Appellant: Clothes and fashion.

Tribunal: That doesn’t tell me what you did.

Appellant: The clothes that where we are wearing – what we are wearing.

Tribunal: What does that mean? Did you make them, did you sell them, did you buy them? What did you do with the clothes?

Appellant: Sewing clothes.

Tribunal: Sorry.

Appellant: Sewing.

Tribunal: Sewing clothes.

Appellant: A sewing machine. She’s…

Tribunal: Sewing clothes.

Appellant: Make – make – make clothes.

Tribunal: Making clothes.

Appellant: Yes.

Tribunal: Did you do this for – you worked for someone else or for yourself?

Appellant: Work for someone else.

Tribunal: How long did you do that?

Appellant: Around one year. Sometimes I did – sometimes no job.

Tribunal: What was your next job?

Appellant: Massage.

Tribunal: When did you start doing that?

Appellant: I do not have a record.

Tribunal: Was it a few months ago, was it a few years ago?

Appellant: About two or three years ago.

Tribunal: That is the current job you’re doing now

Appellant: Yes.

And:

Tribunal: … Have you ever worked in China?

Appellant: After marriage I only looked after my children.

…

Tribunal: I will talk about the money shortly. Would you want to work if you returned to China?

Appellant: Of course I want to.

Tribunal: What kind of work would you do?

Appellant: It’s very hard to find a job in China.

1. The Appellant was also asked at the conclusion of the hearing if there was anything else she wished to tell the Tribunal. However, she declined to provide any further information saying that “[w]hatever more I want to add you don’t believe me”. The Appellant did not provide any further information about her claim to fear harm from the villagers and authorities and clearly exhibited an understanding that her credibility was an issue.
2. The Tribunal rejected the Appellant’s claim to fear harm in relation to her desire to work as a masseuse. As a result of its questioning of the Appellant the Tribunal made the following finding at [38] of its decision record:

The Tribunal does not accept that the second named applicant’s husband opposed her taking a job as a masseuse and intimidated and threatened her if she took up any kind of job. The Tribunal does not accept that she will be harmed by her husband and mistreated by other villagers and authorities if she works as a masseuse. The Tribunal does not accept that the second named applicant has no other skill than as a masseuse. Her evidence to the Tribunal is that she has 2 to 3 years work experience in Australia making curtains and also has experience making clothes for the fashion industry in addition to her work experience as a masseuse.

1. There was no breach by the Tribunal of s 425 of the Act. The Appellant was clearly on notice that the veracity all of her claims and her credibility were in issue. There was no error in the finding by the primary judge at [17] of his Honour’s reasons that “[t]here is nothing in the Tribunal’s reasons for decision that indicates the Tribunal did not comply with s.425 or any other provision of Division 4 of Part 7 of the Act, or otherwise did not accord procedural fairness to the applicants”.

# conclusion

1. The appeal should be dismissed with costs. I will make orders accordingly.

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| --- |
| I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Markovic. |

Associate:

Dated: 11 May 2017