FEDERAL COURT OF AUSTRALIA

ATC15 v Minister for Immigration and Border Protection [2016] FCA 1420

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| Appeal from: | *ATC15 v Minister for Immigration and Border Protection* [2015] FCCA 2589 |
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| File number: |  |
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| Judge: | **CHARLESWORTH J** |
|  |  |
| Date of judgment: | 28 November 2016 |
|  |  |
| Catchwords: | **MIGRATION** – protection visa – whether appellants denied procedural fairness by primary judge on judicial review application – whether decision of primary judge affected by apprehended bias – whether open to decision-maker to find delay in making protection visa application affected credibility of visa applicant’s claims – whether factual findings open to decision-maker |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth), s 37AF  *Migration Act 1958* (Cth), ss 36, 65, 91R, 91S, 422B(1), 424A, 476  *Migration Regulations 1994* (Cth), cl 866.221 |
|  |  |
| Cases cited: | *BAX15 v Minister for Immigration and Border Protection* [2016] FCA 491  *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337  *Michael Wilson & Partners Limited v Nicholls* (2011) 244 CLR 427  *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323  *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152  *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26, (2007) 235 ALR 609  *SZOPX v Minister for Immigration and Citizenship* [2011] FCA 552  *Thuraisamy v Minister for Immigration and Multicultural Affairs* [1999] FCA 1632  *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 236 FCR 549 |
|  |  |
| Date of hearing: | 12 May 2016 |
|  |  |
| Date of last submissions: | 1 July 2016 |
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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: | 77 |
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| Counsel for the First Appellant: | The First Appellant appeared in person |
|  |  |
| Counsel for the Second Appellant: | The Second Appellant appeared in person |
|  |  |
| Counsel for the Third, Fourth and Fifth Appellants: | The Third, Fourth and Fifth Appellants appeared by their litigation guardians, the First and Second Appellants |
|  |  |
| Counsel for the First Respondent: | Mr R French |
|  |  |
| Solicitor for the First Respondent: | Australian Government Solicitor |
|  |  |
| Counsel for the Second Respondent: | The Second Respondent filed a submitting appearance |
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ORDERS

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|  | | WAD 586 of 2015 |
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| BETWEEN: | ATC15  First Appellant  ATD15  Second Appellant  ATE15 (and others named in the Schedule)  Third Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | CHARLESWORTH J |
| DATE OF ORDER: | 28 NOVEMBER 2016 |

THE COURT ORDERS THAT:

1. Pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) any reference to the names of the appellants made in these proceedings be prohibited from publication.
2. The appeal is dismissed.

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

REASONS FOR JUDGMENT

CHARLESWORTH J:

1. This is an appeal against a judgment of the Federal Circuit Court (FCC) dismissing an application for judicial review made by the appellants.
2. The appellants are all citizens of Pakistan. The first appellant is the wife of the second appellant. Their three children are the third, fourth and fifth appellants.
3. The second appellant entered Australia on a student visa on 28 September 2009. His wife and their three children joined him in Australia as dependents on his student visa on 9 July 2012. The second appellant’s student visa was cancelled on 13 March 2013. Two days later, the appellants made an application under s 65 of the *Migration Act 1958* (Cth) (Act) for a Protection (Class XA) Visa.
4. A delegate of the first respondent (Delegate) refused the appellants’ visa applications. On 1 August 2014, the appellants lodged an application for review of the Delegate’s decision with the then-named Refugee Review Tribunal (Tribunal). The Tribunal affirmed the decision of the Delegate. The appellants then made an application for judicial review of the Tribunal’s decision to the FCC. The primary judge dismissed the application at the conclusion of the hearing: *ATC15 v Minister for Immigration and Border Protection* [2015] FCCA 2589. That is the judgment now appealed against.
5. For the reasons given below, the appeal should be dismissed.

# THE VISA APPLICATIONS

1. A primary applicant for a protection visa must satisfy (among other things) at least one of the criteria prescribed in s 36(2)(a) or (aa) of the Act. Subsection 36(2) relevantly provides:

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or

1. For the purposes of s 36(2)(a), the first appellant would satisfy the definition of a refugee under Article 1A(2) of the Refugees Convention as amended by the 1967 Refugees Protocol if she could demonstrate that she (relevantly):

.. owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country…

1. Section 91R and s 91S of the Act qualify some aspects of that definition although, on this appeal, nothing material turns on those qualifications.
2. If the first appellant was entitled to the Visa, s 36(2)(a) and (b) of the Act and cl 866.221 of Sch 2 to the *Migration Regulations 1994* (Cth) (Regulations) provided for the grant of protection visas to the remaining appellants, being members of the same family unit.

# THE APPELLANTS’ CLAIMS

1. In support of her application for the Visa, the first appellant claimed that she was at risk of being kidnapped and murdered by persons involved in the narcotics trade in Pakistan. She claimed that there had been three separate attempts on her life in Pakistan in 2012. She also claimed that her brother had been approached in the street, threatened and asked about her family’s whereabouts. She further claimed that she had received a threatening letter in 2012 and that for a period of about two months in 2012, unknown persons knocked on her front door threatening to kill her and her family.
2. The first appellant said that the second appellant had worked part-time for 20 years for an anti-drug welfare organisation prior to coming to Australia in 2009. The organisation had been established by his father, who also worked in the organisation until his death in 2009. The first appellant said that she believed that the persons who had threatened her and her brother were involved in the narcotics trade who sought to harm her as an act of revenge for the activities of her husband and her father-in-law. She claimed that she had come to Australia to live with her husband as a result of these attempts on her life. She provided the Delegate with about 200 documents in support of her claims.

# The delegate’s decision

1. The Delegate rejected the first appellant’s claim that she had been the target of threats and attempts on her life as a result of the work of her husband and father-in-law. He found that given the length of time for which her husband had worked for the anti-drug organisation there would have been ample opportunity for any aggrieved drug dealer to harm her as an act of revenge. He found it implausible that attempts on the first appellant’s life would be made five years after her husband had ceased working for the organisation. He found that the activities of the organisation were based primarily on campaigning against drug use, drug education and assisting drug addicts, rather than on the enforcement of the law against crime figures or drug dealers. The Delegate was not satisfied that the first appellant’s husband had a profile that would be of any significant interest to drug dealers in Pakistan, whether now or in the past. In rejecting the appellants’ claims, the Delegate noted that neither the second appellant nor his father had been harmed or threatened in any way in the 20 years for which they had worked for the organisation. He further remarked that there were inconsistencies in the versions of events presented by the first appellant.
2. The Delegate was also critical of the delay between the first appellant’s arrival in Australia in July 2012 and the application for the protection visas made in March 2013. He remarked that the timing of the application seemed “highly coincidental” in light of the cancellation of the second appellant’s student visa two days before the protection visa applications were made.
3. The Delegate referred to documents relied on by the first appellant to evidence her claims. The documents included copies of reports that the first appellant had made to the police in Pakistan, a newspaper article relating to the threats made against her brother and a copy of a threatening letter that she claimed had been left at her family home in 2012. The Delegate found that the documents contained information that was inconsistent with the version of events given by the first appellant in her interview with the Delegate. The Delegate said that “[g]iven the newspaper, threat letter and police reports cannot be authenticated” he placed “little weight” on that evidence “in light of the aforementioned plausibility and credibility concerns”. In relation to the police reports, the Delegate stated that “it is open to anyone to lodge a report at a police station, however this does not necessarily substantiate that a particular event occurred”.
4. Notwithstanding his remarks about the inconsistencies, implausibility and lack of authentication of documents, the Delegate nonetheless concluded that the first appellant may well have been the victim of violence and threats. On that topic, the Delegate said:

I am prepared to accept that the applicant may have been the victim of generalised crime/violence and perhaps threatened, and that her brother may have also been threatened by people on a motorcycle and had shots fired at his home, however, I do not accept that these incidents are related to the welfare work previously undertaken by the applicant’s husband.

…

I find that the applicant may have been the subject of several attacks and/or threats as claimed, however I am more inclined to attribute these incidents to generalised violence/crime in Pakistan, rather than the previous employment of the applicant’s husband, particularly in light of the fact that he has not worked for the welfare agency for approximately five years.

1. On the question of whether the first appellant had a well-founded fear of persecution in Pakistan, the Delegate found that she did not fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion and that she did not, therefore, satisfy the criterion in s 36(2)(a) of the Act. The claims of the other family members were rejected by the Delegate because they depended upon the acceptance of the claims made by the first appellant.

# THE TRIBUNAL’S REASONS

1. In her correspondence to the Tribunal, the first appellant provided more information about the anti-drug organisation with which her husband and father-in-law were involved. She claimed that the organisation had (to use the Tribunal’s words) “worked against a lot of drug mafias” in the area where she lived, and that persons involved in the narcotics trade had been given prison sentences “ranging from a few days to a few years”. The first and second appellants further claimed that the second appellant’s father had been threatened whilst working for the drug organisation. The Tribunal rejected that claim as having been “concocted” as a result of the Delegate’s finding that the father-in-law had never been harmed. Although the Tribunal accepted that the second appellant’s father indeed had set up a drug welfare organisation and that the second appellant had worked for the organisation in a part-time voluntary capacity, it found (as did the Delegate) that the organisation’s activities were limited to campaigning against drug use, providing drug education and rendering assistance to drug addicts. It did not accept that the organisation was involved in bringing criminals involved in the drug trade to justice, nor did it accept that the organisation had a high profile in Pakistan. It held that the claim that the second appellant’s father had assisted police to capture significant drug criminals “to have been invented for the purposes of a protection claim”.
2. The Tribunal considered the threatening letter said to have been received by the first appellant in 2012. The letter stated “because of you people we suffered a lot and now we are out of jail you and your family will face the consequences.” The Tribunal held that it was implausible that persons wishing to seek revenge would wait a significant period to be released from jail and then leave a written note threatening action some time in the future. In relation to the first appellant’s claim that she had experienced a two-month period of threatening doorknocking behaviour, the Tribunal did not accept that any person or group wishing to harm the first appellant and her family would simply continue to knock on the door, threaten the family and then walk away to return at a later time to repeat the same conduct. In dealing with that issue, the Tribunal referred to the claimed doorknocking occurring over a period of 12 months, rather than a period of two months as the first appellant had claimed.
3. The Tribunal otherwise rejected the first appellant’s claims that she had been subjected to threats of harm or actual harm in any way at all. It did not accept that the documentary materials relied upon by the appellants in support of their claims were authentic.
4. Like the Delegate, the Tribunal found that the appellants’ credibility was undermined by the delay between the arrival of the first appellant and her children in Australia and the making of the protection claims some six months later. I deal with the detail of the Tribunal’s reasons on that topic later in these reasons.

# The proceedings in the federal circuit court

1. The FCC has original jurisdiction under s 476 of the Act to hear and determine an application for judicial review of the Tribunal’s decision. The FCC’s jurisdiction is equivalent to that conferred on the High Court under s 75(v) of the Constitution: see s 476(1). Accordingly, in order to succeed on their application for judicial review, it was necessary that the appellants show that the Tribunal committed jurisdictional error: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.
2. There were four grounds for judicial review before the FCC. Given that it is alleged on this appeal that the primary judge failed to properly consider the grounds of review, it is appropriate that I set them out in full:

1. Failure to Afford Procedural Fairness:

Particulars

a. Failure to give the Applicants the opportunity to comment on adverse credibility findings.

b. Failure to give the Applicants the opportunity to comment on the following:

i. finding the attacks on the Second Applicant’s father were ‘concocted’ [52].

ii. findings the Second Applicant’s father was involved in hunting criminals and assisting the police to capture significant drug criminals to have been ‘invented for the purposes of a protection claim’ [54]; and

iii. inference that the Police reports were fraudulent documents [41].

c. Failure to inform the applicants that the police reports were potentially fraudulent thereby depriving the Applicants of the opportunity to seek information and an update with respect to the Police investigation/outcome with respect to the reports.

d. Making adverse credibility findings based on erroneous factual findings:

i. knocking on the door of the First Applicant’s door over a 12 month period and making threats [23], [56] and [59] when it was in fact 2 months: [39] see p28CB;

ii. Police Reports were found to be letters written by the First Applicant and her Brother [40] and [41] when a closer examination of the documents at p31 and 32 ought to have indicated to the decision maker the handwriting was different and could not have been letters the First Applicant wrote; and

iii. Father assisted the Police when he in fact assisted the Anti-Narcotic Force [54].

2. Failing to Take into Account Relevant Considerations:

Particulars

a. Medical evidence at p385 – p389 of the Court Book [CB].

b. Existence of Hunter Force [35] and [47].

c. The Second Applicant’s father’s passion to eradicate drugs from society.

d. Relationship between the Police and drug dealers and the drug mafia in Pakistan [43].

e. Independent evidenced found at p134 and p135 of the CB being independent witness statements of … with respect to the shooting at the First Applicant’s brother’s house in July 2012.

f. Pakistan culture where revenge lasts generations.

g. Period in which a strange person came 3 – 4 times to the First Applicant’s shouse [sic] and knocked on the door threatening to kill the First Applicant and the children at p28 of the CB.

h. Police Reports p28 – p33 of the CB including:

i. immediate reporting of incidents; and

ii. the possibility that Pakistani Police stations may not be computerised; and

iii. [First Investigation Reports] may not be issued because of the Police relationship with the drug barons.

i. First Applicant and the children’s relocation immediately following the kidnapping incident.

j. The First Applicant and the children’s visa which allowed them to travel to Australia in May 12.

k. Anti-drug organisations were a threat to the drug mafia.

l. reason for the delay in submitting the Protection Visa Application.

3. Taking into Account Irrelevant Considerations:

Particulars

a. Delay in submitting the Protection Visa Application.

b. Threats received by the First Applicant was over a 12 month period (p28 of the CB).

c. With passing of time the desire for revenge of anyone imprisoned would cease.

4. The Decision was Unreasonable/Illogical/Irrational

Particulars

a. Reliance on the incorrect findings and/or assumptions:

i. led the decision maker to take an illogically adverse view of the Applicant’s credibility; and

ii. rendered the decision unreasonable and irrational.

b. Upon the correct finding of fact no reasonable decision maker would have come to the same conclusion.

1. The appellants filed written submissions in the FCC proceedings and were represented by Counsel at an oral hearing conducted on 18 September 2015. The written submissions relied upon in the FCC were not before this Court on appeal.
2. At the commencement of the FCC hearing, the primary judge noted that an affidavit of the second appellant had been filed in the proceedings. Counsel for the appellants then acknowledged that five of the documents annexed to the affidavit were not before the Tribunal. Counsel then asked the Court to “make a decision” about one of those documents, being an exhibit marked MA10, after she had completed her oral submissions.
3. Exhibit MA10 is a printout of text messages passing between the first appellant and a migration agent that tended to show that the appellants had provided their supporting documents to their migration agent and instructed the migration agent to lodge protection visa applications by no later than 28 October 2012 and that they had then persisted with their reminders and queries of the migration agent until March 2013 when their applications were filed. The primary judge asked Counsel to explain how that document was potentially relevant on the application for judicial review. Counsel submitted:

So basically we say that the Tribunal made findings of adverse credibility in relation to the applicants’ delay in lodging the application for protection, and that was in fact as a result of the migration agent’s delay. So MA10 basically substantiates what our client’s saying.

1. The primary judge then asked Counsel to explain why the FCC should receive the affidavit “in relation to allegations of fact in respect of any of the matters that are relevant before this court?” Counsel’s submissions in response to that question were interrupted by the primary judge who turned to seek the respondent’s attitude to the affidavit and its exhibits. Upon hearing the respondent’s submissions, and without hearing further from the appellants’ Counsel, the learned primary judge received and read the affidavit “subject to relevance” but rejected the tender of MA10. The following exchange then occurred:

MS HEMACHANDRA: Your Honour, sorry, may I make a submission.

HIS HONOUR: I understand the argument you want to make in relation to [Exhibit MA10]. You can make it on the decision of the Tribunal and you can try and explain why it’s irrelevant that there’s delay in lodging a protection application as a relevant factor in respect of jurisdictional error.

MS HEMACHANDRA: Your Honour - - -

HIS HONOUR: You’re not precluded from putting that proposition.

MS HEMACHANDRA: Sorry, your Honour?

HIS HONOUR: You’re not precluded from putting that proposition. I’m simply rejecting the material that was the communication to the agent.

1. Shortly after the commencement of the hearing, the following exchange occurred:

MS HEMACHANDRA: Right. I assume, your Honour, you have read the written submissions, and I wanted to inquire whether you had any queries in relation to the written submissions filed, or questions.

HIS HONOUR: Ms Hemachandra, that’s very kind of you. There is a very eminent jurist who I think is currently the Chief Justice of the High Court who said, ‘It’s not the role of counsel to test whether the pudding is done’. I’m happy to hear your submissions.

1. Immediately after the conclusion of the appellants’ oral submissions, the primary judge made an order dismissing the application for judicial review. He did so without hearing any oral submissions from Counsel for the first respondent (Minister). Reasons for judgment were given *ex tempore*.

## The FCC reasons

1. Counsel for the respondent on this appeal correctly describes the reasons of the primary judge as “relatively brief”. The reasons comprise just 14 paragraphs, three of which are introductory and two of which extract lengthy passages from the Tribunal’s reasons. The reasons for dismissing the application for judicial review comprise just eight paragraphs.
2. The primary judge first dealt with the allegation made in para 1(d)(i) of the grounds of review (at reasons [7]). His Honour held that it was clear that the Tribunal was aware that the claimed doorknocking occurred over two months rather than 12, and that any error in that regard would not in any event have materiality altered the adverse credibility findings the Tribunal had made.
3. The primary judge then held (at reasons [8]) that the allegation raised in para 3(a) of the grounds of review amounted to an impermissible challenge to the Tribunal’s findings of fact. His Honour summarised the appellants’ submissions as an attempt to “explain away” the delay by pointing to submissions made before the Tribunal to the effect that the appellants had provided their migration agent with documents and instructions in connection with their protection visa applications as early as 4 September 2012. His Honour rejected the submission that the Tribunal’s conclusions in relation to the delay lacked logical foundation.
4. As to the matters alleged in para 1(b)(iii) and (c) of the grounds of review, the primary judge held (at reasons [11]) that the Tribunal was under no obligation to put the appellants on notice that it may find that the documents relied upon by them in support of their protection claims were not authentic. His Honour said that the issue of the authenticity of the police reports relied upon by the appellants was “obviously open as an issue in the review” in that the Delegate had said that those reports could not be authenticated. It was, his Honour held, open to the Tribunal to make adverse findings as to the authenticity of the police reports, the threatening letter and the newspaper reports. His Honour held that the documents “are not of a kind that fall within s 424A” of the Act.
5. The primary judge then turned to address each ground of review. The allegations in para 1(a) and (b) of the grounds of review were shortly rejected (at reasons [10]) without any further elaboration. In rejecting the allegations in para 1(c) and (d), his Honour stated “there is no obligation on the Tribunal to inform the applicants of the potential credibility findings in terms of the reasoning process of the Tribunal”. Paragraph 1(d) was rejected on the basis that it “fails to make out any denial of procedural fairness”.
6. Grounds 2(a) to (l) were rejected on the basis that they were “in substance, impermissible challenges to the adverse findings of fact”. His Honour said (at reasons [12]):

There is no jurisdictional fact that was identified which the Tribunal failed to take into account and the mere allegation of a failure to take into account does not give rise to jurisdictional error. I do not accept that the Tribunal failed to take into account the evidence before the Tribunal.

1. The allegation that the Tribunal had taken into account irrelevant considerations was also rejected. The allegation in para 3(b) of the grounds of review was rejected for the same reasons already given by his Honour, namely that it was clear that the Tribunal had not misunderstood the first appellant’s claim as one involving doorknocking over a two month rather than a 12 month period. Ground 3 was otherwise rejected (at reasons [13]) on the basis that the considerations there referred to were not irrelevant considerations as alleged.
2. In relation to ground 4, his Honour said “the adverse findings of fact made by the Tribunal were open on the material and cannot be said to lack … evident and intelligible justification”. No reference is made to the material upon which it was, in his Honour’s view, open to the Tribunal to make the adverse findings of fact.

# ISSUES ARISING ON THE APPEAL

1. There are eight grounds of appeal. Four grounds (namely, grounds 1, 2, 3 and 4) allege that the primary judge failed to accord the appellants procedural fairness, including by virtue of the primary judge presenting “the appearance of bias” (grounds 3 and 4(a)). Grounds 6 to 8 allege that the FCC made errors of law. Although ground 5 is expressed in terms of a want of procedural fairness, it is better understood as raising an allegation that the primary judge himself erred in law by taking into account an irrelevant consideration or otherwise misapprehended one of the grounds for judicial review. It is convenient to deal with the grounds of review in the three categories I have just described: those alleging apprehended bias as a particular breach of procedural fairness (grounds 3 and 4(a)), those alleging a want of procedural fairness in respect of the conduct of the proceedings (grounds 1, 2 and 4), and those alleging errors of law (grounds 5 to 8).

# THE APPREHENDED BIAS ISSUE

1. The apprehended bias issue is raised in para 3 and 4(a) of the notice of appeal. The grounds are expressed as follows:

3. The primary judge did not accord the Appellants procedural fairness in that he presented the appearance of bias.

Particulars

a. His Honour presented the appearance of bias in that he did not allow counsel for the Appellants to make submissions as to the relevance of evidence before ruling on it.

b. His Honour presented the appearance of pre-judgment in that he did not retire to consider his decision before delivery, in circumstances where counsel for the Appellants had made extensive oral submissions on both the facts and the relevant law and His Honour had demonstrated a lack of familiarity with the written material.

c. His Honour presented the appearance of bias and pre-judgment in that he did not hear from counsel for the Respondents before delivering his judgement.

4. The primary judge did not accord the Appellants procedural fairness in that he did not afford counsel for the Appellants a reasonable opportunity to address the issues of law on which he relied in dismissing the application.

Particulars

a. His Honour responded to counsel for the Appellant’s enquiry as to whether he had any questions about counsel’s written submissions with words that a reasonable observer would take to mean that counsel’s enquiry was an inappropriate attempt to test whether the written submissions had already persuaded His Honour.

1. The test for apprehended bias is that expressed by the High Court in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ):

Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial.

(footnotes omitted)

1. The allegation in para 3(a) concerns the manner in which the primary judge ruled on the admissibility of Exhibit MA10. In my opinion, this allegation is not supported by a fair reading of the transcript of the proceedings before the FCC. The appellants’ Counsel in the FCC proceedings was afforded a fair opportunity to make submissions as to the relevance of the material contained in the exhibit. Counsel’s submission on the relevance of that material is extracted at [25] of these reasons. That submission is to be understood in light of Counsel’s earlier acknowledgment that the material sought to be adduced in evidence on the application for judicial review had not been put before the Tribunal. It was open to the appellants’ Counsel to make a more elaborate submission explaining the relevance of the material, but she did not do so at the time that the admissibility of the material was under consideration by the primary judge. Later in the hearing, Counsel did seek to elaborate on the relevance of the material, claiming that the Tribunal had erred in failing to warn the appellants that their explanation for the delay in making the protection visa applications might be rejected. It was submitted that had the appellants and their migration agent been given notice that the explanation for the delay would be rejected as unsatisfactory, they could have and would have furnished the Tribunal with the material in Exhibit MA10 to further support their case. The submissions on that topic concluded as follows:

MS HEMACHANDRA: .. and basically that has led to this adverse credibility finding, and had she put it to them, ‘I’m not satisfied with that explanation you have given,’ he would have handed up those SMS messages that he had with him. Your Honour, would you like an opportunity to just have a look at MA10?

HIS HONOUR: No. I have rejected it and you shouldn’t actually be referring to it. It’s not in evidence.

MS HEMACHANDRA: Sorry, I didn’t realise you had rejected it, your Honour.

HIS HONOUR: It’s rejected.

1. It is apparent from that exchange that Counsel did not appreciate that she had already been afforded an opportunity to explain the relevance of Exhibit MA10 earlier in the course of the hearing, and that she had been unsuccessful in persuading the primary judge that the material was relevant on the application for judicial review. If Counsel laboured under that misapprehension, it was not a misapprehension caused by the manner in which the proceedings were conducted by the primary judge. Counsel ought to have appreciated, at the time that submissions were sought about the relevance of the document, that sufficiently detailed and forceful submissions should be made at that stage of the proceedings. Although it was Counsel’s stated preference that the primary judge’s ruling on the admissibility of the document be delayed until she had made submissions on the substantive issues, the primary judge did nothing to encourage Counsel to assume that he would follow Counsel’s preferred course. The circumstances as I have described them do not give rise to a reasonable apprehension of bias on the part of the primary judge.
2. I have had regard to his Honour’s comments to the appellants’ Counsel, extracted at [26] above, in which his Honour appeared to proceed on the incorrect assumption that the appellants were seeking to adduce that material only in support of the grounds of review alleged in para 2(l) and 3(a) of their application (relevant and irrelevant considerations) and not also in support of the ground alleged in para 1(a) (alleged want of procedural fairness in connection with credibility findings). However, to the extent (if any) that his Honour’s remarks represented a misunderstanding of the grounds of judicial review at that stage of the proceedings, that, in my opinion, is hardly surprising. The application for judicial review before the primary judge included no particulars of ground 1. It was incumbent upon Counsel to make the basis for the tender of the new material in Exhibit MA10 clear by reference to the grounds for judicial review and to clearly explain how the material might bear on the outcome of the proceedings in the FCC in circumstances where it had not been adduced before the Tribunal. Counsel’s submissions were ineffective on that issue. Whether or not his Honour ultimately erred in determining the substantive question of admissibility is a different issue. For present purposes, however, I am not satisfied that the *manner* in which his Honour made the evidentiary ruling gave rise to a reasonable apprehension of bias. This ground of appeal is not made out.
3. The allegation in para 4(a) should also be rejected. The remarks complained of are set out at [27] of these reasons. The remarks were made in response to Counsel’s query as to whether his Honour had any questions about the written submissions upon which the appellants relied. As alleged in para 4(a) of the notice of appeal, the response of the primary judge was indeed to the effect that it was inappropriate that Counsel should seek to test whether the primary judge was persuaded by the written submissions. His Honour was not wrong to construe Counsel’s question as inviting the Court to disclose its current state of thinking, even if that was not Counsel’s subjective intention in posing her question. In the circumstances, the remarks of the primary judge do not give rise to a reasonable apprehension of bias, notwithstanding that they may have been perceived by Counsel to be unnecessary or intemperate.
4. There is an alternative reason why the allegations in para 3(a) and 4(a) of the notice of appeal should be rejected. As the High Court stated in *Michael Wilson & Partners Limited v Nicholls* (2011) 244 CLR 427 at [76] (Gummow A-CJ, Hayne, Crennan and Bell JJ):

It is well established that a party to civil proceedings may waive an objection to a judge who would otherwise be disqualified on the ground of actual bias or reasonable apprehension of bias … If a party to civil proceedings, or the legal representative of that party, knows of the circumstances that give rise to the disqualification but acquiesces in the proceedings by not taking objection, it will likely be held that the party has waived the objection.

(footnotes omitted)

1. That well established principle is one that may require a party’s legal representative to be as bold as he or she is quit-witted. In its practical application the principle no doubt involves some degree of professional discomfort and the making of a fine judgment in difficult and fast-moving circumstances as a proceeding unfolds. The appellants were legally represented in the FCC proceedings and there appear to be no other circumstances that might justify a departure from the usual principle. Thus, if I am wrong in finding that the remarks of the learned primary judge do not give rise to a reasonable apprehension of bias, I would find in any event that the appellants have waived their right to object to the resulting judgment on this appeal.
2. The allegations in para 3(b) and 3(c) may be considered together. They amount to an allegation that the primary judge moved so swiftly to judgment (and without hearing submissions from the respondent) that a fair-minded lay observer might reasonably apprehend that his Honour had not brought an impartial mind to the resolution of the questions falling for determination before him. The allegation that the learned primary judge demonstrated “a lack of familiarity with the written material” was not elaborated upon before this Court.
3. The transcript of the proceedings below, when read as a whole, does not support the more general allegations of apprehended bias made in para 3(b) and 3(c). Counsel for the appellant relied upon detailed written submissions. It was for Counsel to determine the detail to which she descended in her oral submissions. The appellants’ entitlement to make oral submissions through their Counsel was not curtailed by the primary judge in such a way that would give rise to a reasonable apprehension of bias. The fact that his Honour proceeded to give judgment without hearing argument from the respondent would, in my view, cause a fair-minded lay observer to reasonably apprehend no more than that his Honour, having heard the appellants’ submissions, was not persuaded that the alleged grounds of review were established. It has not been demonstrated before this Court that his Honour had not read the parties’ written submissions in fact, or that his Honour had not read and understood the reasons of the Delegate or the reasons of the Tribunal.
4. In my opinion, a fair-minded lay observer would conclude from the conduct of the FCC proceedings that the appellants’ Counsel was given a fair opportunity to persuade the primary judge that the grounds for judicial review had merit, but was unable to do so. Whether or not the primary judge erred in determining the substantive issues arising on the application for judicial review is, of course, a separate question.

# WANT OF PROCEDURAL FAIRNESS

1. This issue is raised on the notice of appeal in various ways, expressed as follows:

Procedural Fairness

1. The primary judge did not accord the Appellants procedural fairness in that he failed to give reasonable consideration to the submissions of the Appellants and the grounds of appeal.

Particulars

a. His Honour did not give reasonable consideration to the oral submissions made by counsel for the Appellants at the final hearing.

b. His Honour did not give reasonable consideration to the written submissions of the Appellants, filed on 11 September 2015.

c. His Honour misunderstood the particulars of the grounds of appeal, and such misunderstanding was not supported by the drafting of the grounds of appeal and the submissions of the Appellants.

2. The primary judge did not accord the appellants procedural fairness in that he did not consider the whole of the evidence presented by counsel for the Appellants.

Particulars

a. His Honour did not give reasonable consideration to the transcripts of the Tribunal hearings, but instead relied on the Tribunal’s account of proceedings.

b. His Honour reached a conclusion on the reasonableness of the Tribunal’s reasons for decision without regard to the transcripts of proceedings before the Tribunal and the evidence contained therein.

c. His Honour did not give reasonable consideration to the submissions of counsel for the Appellants as to the nature and implications of the evidence contained in the transcripts of the Tribunal hearings.

4. The primary judge did not accord the Appellants procedural fairness in that he did not afford counsel for the Appellants a reasonable opportunity to address the issues of law on which he relied in dismissing the application.

Particulars

a. …

b. His Honour failed to give counsel for the Appellants an opportunity to address his conclusions as to the scope of application of s.424A of the *Migration Act 1958* (Migration Act) apparently arising from counsel’s written submissions.

c. His Honour failed to give counsel for the Appellants an opportunity to address his conclusions as to the scope of application of s.424A of the Migration Act during or after counsel’s oral submissions.

1. Grounds in 1 and 2 are, in essence, a complaint that the appellants’ submissions were not given “reasonable consideration” by the primary judge.
2. In the course of her oral submissions, Counsel drew the attention of the primary judge to those portions of the transcript of the Tribunal proceedings that she considered to be relevant. She did not make any submission to the effect that the account of the Tribunal hearing given in the Tribunal’s own reasons was inaccurate in any particular respect. She made no submission to the primary judge to the effect that it would be necessary for him to read the whole of the transcript of the Tribunal hearing in order to determine any one or more of the grounds for judicial review. Notably, Counsel’s oral submissions concluded with the following exchange:

MS HEMACHANDRA: … Your Honour, those are my submissions. Now, I’m happy to answer any questions that you may have for me.

HIS HONOUR: Yes. Thank you, Ms Hemachandra. Is there anything else you wish to put?

MS HEMACHANDRA: No, your Honour.

1. Counsel for the appellants had every opportunity to make elaborate and effective oral submissions. The mere fact that the submissions were perfunctorily rejected by the learned primary judge at the time of giving reasons for judgment does not, of itself, demonstrate that meaningful consideration was not given to the submissions prior to judgment being delivered.
2. The appellants in this Court did not point to any other fact, evidence or circumstance such that would permit this Court to conclude on appeal that the learned primary judge failed to afford them procedural fairness in respect of their oral and written submissions in the proceedings below. In my view, the grounds do no more than to raise a complaint that the primary judge should not have rejected the submissions on their merits.
3. The allegations in para 4(b) and 4(c) of the notice of appeal fail for the same reason. The meaning and operation of s 424A of the Act was squarely raised in the grounds of review relied upon by the appellants in the proceedings below. Section 424A is extracted at [68] of these reasons.
4. It was for the appellants to establish that the Tribunal erred in the manner they alleged: see *SZOPX v Minister for Immigration and Citizenship* [2011] FCA 552 at [11] and the cases cited therein. In relation to s 424A of the Act, it was the appellants who alleged in their grounds of review that the Tribunal had failed to comply with the rules of procedural fairness. In order to make out that ground of review, it was necessary for Counsel to deal comprehensively with the meaning and effect of s 424A of the Act. The primary judge concluded that s 424A of the Act did not operate in the manner contended for by the appellants. The rules of procedural fairness did not oblige his Honour to forecast that adverse conclusion during the course of oral submissions so as to enable Counsel for the appellants to consider and comment upon his proposed course. The same considerations inform my rejection of para 4(a) of the notice of appeal.

# ALLEGED ERRORS OF LAW

## Grounds 5 and 6

1. Grounds 5 and 6 make allegations to the overall effect that the primary judge erred in failing to determine that the Tribunal committed jurisdictional error in finding that the appellants’ delay in making their protection visa applications reflected adversely on their credibility. The grounds are expressed as follows:

5. The primary judge failed to afford procedural fairness in that his judgment was based on irrelevant considerations.

Particulars

a. His Honour’s judgment was based in part on his contention that ‘the applicant sought to advance that the delay that the Tribunal focussed on in the lodging of a protection application could in some way be explained away,’ and his conclusion that ‘the delay was a finding of fact that was open to the Tribunal’ (paragraph 8 of the Reasons for Judgement [sic] dated 24 September 2015)

b. It was not correct that the Appellants relied on the delay being ‘explained away’, and this interpretation of the written or oral submissions was not open to His Honour given the language used in the submissions. There was no dispute as to the length of the delay in lodging the protection application between the Tribunal and the Appellants.

c. The written and oral submissions of the Appellants expounded the proposition that the delay in lodging a protection application did not reasonably support a conclusion that the Appellants were not afraid because the Appellants were demonstrably not responsible for the delay and/or took reasonable steps to try and avoid the delay.

d. It was not relevant that the delay was a finding of fact open to the Tribunal, and therefore it was not open to His Honour to conclude that this aspect of the appeal was ‘an impermissible challenge to the findings of fact’ (paragraph 8 of the Reasons for Judgement [sic] dated 24 September 2015).

Errors of Law

6. The primary judge made an error of law in determining that the material contained in MA 10 was not relevant and excluding it from consideration.

Particulars

a. His Honour rejected the tender of MA10 on the grounds that ‘it was not relevant to the determination of whether there was a jurisdictional error’ (paragraph 14 of the Reasons for Judgment dated 24 September 2015).

b. The material contained in MA10 was relevant to whether or not a properly conducted hearing could have yielded a different result. Had the Tribunal made known to the Appellants that it placed significant weight on the failure of the Appellants to bring an application in a timely fashion as an indicia that the Appellants were not genuinely afraid, and made known to the Appellants that it was not satisfied by the oral evidence of the migration agent that he was responsible for the delay, the Appellants contend that they would have made that additional evidence available to the Tribunal.

1. These complaints are to be assessed giving due consideration to the manner in which the grounds for judicial review were framed in the FCC proceedings. By para 2(l) of the application (extracted at [22] above) it was alleged that the reason for the delay in making the protection visa applications was a relevant consideration that the Tribunal had failed to take into account. By para 3(a), it was alleged that the delay in making the protection visa applications was an irrelevant consideration. It is then alleged that the appellants were denied procedural fairness before the Tribunal in relation to the topic of the delay and that, had procedural fairness been afforded, they would have relied on the material contained in Exhibit MA10.
2. The claim that the appellants were denied procedural fairness in relation to the delay should be rejected. The reasons of the Delegate contained clear statements to the effect that the delay bore adversely on the credibility of the appellants’ claims to have a well-founded fear of persecution. The Delegate remarked that the timing of the protection visa applications was highly coincidental in that the second appellant’s student visa had been cancelled just two days prior. That finding formed an important part of the decision “under review” by the Tribunal. The Tribunal had no obligation to expressly notify the appellants that it would consider the issue of the delay: compare *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 (*SZBEL*) at [33] – [35]. Indeed, the appellants did in fact proffer explanations to the Tribunal for the delay, both in their written materials and in their oral submissions. They could have furnished Exhibit MA10 to the Tribunal at any time before or during the Tribunal’s hearing, but they did not. More than that, the Tribunal provided the appellants with an opportunity to furnish further written materials relating to the delay after the conclusion of its oral hearing, and yet the appellants did not provide the material contained in Exhibit MA10 in response to that invitation either. The learned primary judge did not err in determining that the appellants had not been denied procedural fairness in connection with that issue, nor did the primary judge err in rejecting the tender of Exhibit MA10.
3. The principles concerning the relevance of a delay in lodging an application for a protection visa were recently considered and applied by Perry J in *BAX15 v Minister for Immigration and Border Protection* [2016] FCA 491 (*BAX 15*) at [37] – [43]. Her Honour said (at [41] – [43]):

41 In my view, **the appellant’s delay in applying for a visa is not an irrelevant consideration. Rather, in line with the principles identified in the joint judgment in *Yusuf*, the significance attributed to that delay constitutes a part of the Tribunal’s process of making a particular finding of fact upon which the Tribunal has acted, namely, in reaching a view as to whether it was satisfied that the appellant has a subjective fear of persecution and otherwise in assessing his credibility.**

42 Nor do I consider that the Tribunal in having regard to this delay in reaching a view on these matters was acting unreasonably or irrationally. For example in *Selvadurai v Minister for Immigration and Ethnic Affairs* (1994) 34 ALD 347 at 349, Heerey J said with respect to a similar line of reasoning:

…the applicant complained of the tribunal’s taking into account the fact that the applicant did not lodge his application for refugee status until some 20 months after he had arrived in Australia and just prior to the expiration of his visa. In my opinion, this was a legitimate factual argument and an obvious one to take into account in assessing the genuineness, or at least the depth, of the applicants alleged fear of persecution. It is a rational consideration open on the material.

43 While the delay in making the protection visa application in this case was shorter than that in *Selvadurai*, namely, two months as opposed to 20 months, I accept the Minister’s submission that in this case it was not unreasonable or irrational for the Tribunal to have regard to the appellant’s delay in the manner explained. In so saying, **I acknowledge that the situation might be different in other cases depending upon the circumstances if, for example, the delay were for a very brief period of time. Further, the Tribunal did not treat the existence of the delay as the end of its enquiry but considered the genuineness of the explanation put forward by the appellant**: *Thuraisamy v Minister for Immigration and Multicultural Affairs* [1999] FCA 1632 (Wilcox, Einfeld and Tamberlin JJ). The fact that the Tribunal did not consider that explanation to be genuine is a matter that was open to the Tribunal on the evidence for the reasons that it gave, as the primary judge held. There is no merit in my view in ground two of the notice of appeal.

(emphasis added)

1. In the present case, the fact of the appellants’ delay in making their protection visa applications was a relevant issue for enquiry by the Tribunal. However, as *BAX15* and the authorities cited therein confirm, the determination of a mere existence of a delay does not end the enquiry. As the Full Court said in *Thuraisamy v Minister for Immigration and Multicultural Affairs* [1999] FCA 1632 at [10] (Wilcox, Einfeld and Tamberlin JJ), “there may be a good reason for the delay, notwithstanding genuine and deep fears of persecution”. In that sense, it is not correct to say *without qualification* (as the primary judge did) that delay in making a protection visa application is a relevant consideration.
2. In the circumstances of the present case, a proper and complete enquiry in respect of the delay required that the Tribunal:
3. consider of all of the facts alleged by the appellants by way of explanation for the delay;
4. decide whether the facts alleged by the appellants were to be believed; and
5. in light of any believed explanation, determine whether the delay bore upon the credibility of the appellants’ claims that they feared persecution if returned to Pakistan.
6. The Tribunal’s substantive findings in respect of the delay are expressed as follows:

64 The Tribunal indicated to the applicants its concern that the first named applicant claims to have arrived in Australia in July 2012 fearful for her safety, especially after recent attempts to harm the family, yet did not apply for protection until March 2013, shortly after her husband’s visa was cancelled. The Tribunal indicated that the delay was significant. In response the Tribunal was told that when the first named applicant arrived in Australia, she was quite upset and concerned. Her family was reunited after being apart for some time. They discussed the matter and her husband was concerned about what was happening to her so his first priority was sorting out his attendance at College. When a classmate found out why he was missing classes, they told him to apply for protection so they went to a lawyer who told them they needed evidence. They had to get the documents from Pakistan then arrange to have them translated.

65 Both the first and second named applicant told the Tribunal that the second named applicant had provided documents, including the police reports to his counsellor at his education institution. The first named applicant indicates in her letter to the Tribunal that this was in August 2012. Their representative told the Tribunal that in early September 2012 they started giving him documents. Yet they did not apply for protection until March 2013, after the second named applicant’s student visa was cancelled. The Tribunal considers that if the applicants’ were so fearful of returning to Pakistan, they would have taken steps to lodge their application for protection at a much earlier stage. The Tribunal finds that the applicants’ delay in applying for protection undermines their credibility in fearing harm on return to Pakistan.

1. It is apparent from those passages that the Tribunal took into account the facts alleged by the appellants by way of explanation for the delay. The Tribunal did not reject the facts as untrue or disingenuous. On a fair reading of the Tribunal’s reasons, the facts asserted by the appellants were believed: they had sought advice in August 2012 and had followed that advice by obtaining evidence from Pakistan in support of their protection claims and then arranging to have the evidence translated into English. Some documents were provided to their migration agent in September 2012. The Tribunal’s reasons indicate that the Tribunal was critical of the delay occurring at least between the provision of documents to the migration agent and the lodgement of the applications for protection visas some six months later. It was open to the Tribunal to find that such a delay undermined the appellants’ claims to fear persecution or significant harm if they returned to Pakistan. As I have said, the appellants were not prevented from furnishing further information and evidence to the Tribunal so as to further explain the delay, including by demonstrating, if they so desired, that their migration agent was deleterious in carrying out their instructions, as the material contained in Exhibit MA10 appears to suggest. But they did not do so.
2. I accept that the reasons of the primary judge in connection with the grounds of review concerning the explanation for the appellants’ delay in making their Visa applications are unsatisfactorily scant in that they do not permit the appellants, or this Court on appeal, to identify and scrutinise the reasoning behind his Honour’s conclusions. Indeed, the reasons indicate that his Honour proceeded on the simplistic and wrong footing that delay *per se* is a relevant consideration in all cases, and that the grounds of review before the FCC did not require any considered scrutiny of the Tribunal’s reasoning in connection with the explanation the appellants had given for the delay.
3. However, even if the reasoning of the learned primary judge proceeded on the wrong footing that delay *per se* is a relevant consideration, the same outcome on the application for judicial review would have followed in any event had the proceedings before the Tribunal been scrutinised by the primary judge in accordance with the correct legal principles. I therefore reject grounds 5 and 6 of the amended notice of appeal.

## Grounds 7 and 8

1. These grounds are expressed as follows:

7. The primary judge made an error of law in determining that the Tribunal had complied with the requirements of s.424A of the Migration Act.

Particulars

a. The Appellants submitted that the Tribunal failed to comply with the requirements of s.424A of the Migration Act in that it:

i. failed to give the Appellants the opportunity to comment on adverse credibility findings;

ii failed to give the Appellants an opportunity to comment on the finding that the attacks on the Second Appellant’s father were ‘concocted’ and the finding that the Second Appellant’s father was involved in hunting criminals was ‘invented for the purposes of a protection claim’; and

iii. failed to give the Appellants’ an opportunity to comment on the finding that the Police reports were fraudulent.

b. His Honour’s basis for rejecting the Appellants’ submissions as to the fraudulent documents was that ‘the documents are not of a kind that fall within s.424A’ by virtue of not being documents that the Tribunal ‘should have considered would be the reason or part of the reason for affirming the decision under review’. The language of section 424A 1 (a) of the Migration Act does not support His Honour’s finding in respect of written documents (paragraph 9 of the Reasons for Judgment).

c. His Honour did not provide reasons for rejecting the balance of the submissions.

8. The primary judge made an error of law in determining that there was no denial of procedural fairness by the Tribunal in not identifying in advance its credibility findings and inviting the Appellants to comment.

Particulars

a. With regards to Ground 1 of the application, it was not open to His Honour to find that documents upon which both the Tribunal and the Appellants relied as evidence but which the Tribunal had determined were likely to be fraudulent did not fall within s 424A of the Migration Act.

b. His Honour failed to consider the effect of *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63, and in particular the finding at paragraph 37 that where ‘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.’

c. With specific regards to ground 1(b) of the Amended Application, His Honour did not provide reasons for his finding that ‘the matters identified are not ones in which there was a denial of procedural fairness by reason of the Tribunal not inviting the applicants to comment on the same’ (paragraph 10 of the Reasons for Judgement).[sic] Such a finding does not appear open on the evidence.

1. Division 4 of Pt 7 of the Act prescribes the Tribunal’s obligations to accord an applicant for review procedural fairness. Subject to some exceptions that do not presently apply, the 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: s 422B(1) of the Act.
2. Section 424A of the Act relevantly provides:

**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.

…

(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.

…

1. Section 424A of the Act is concerned with the provision of “information” to a review applicant. In *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; (2007) ALR 609 the majority (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) held that the possibility of the Tribunal disbelieving the facts claimed by a visa applicant is not “information” within the meaning of s 424A. Their Honours said (at [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.

(footnote omitted)

1. See also VAF v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 236 FCR 549 at [24] (Finn and Stone JJ).
2. As I have mentioned, the decision of the Delegate (being the decision under review by the Tribunal) made it abundantly clear that the credibility of the appellants and the inherent plausibility of their factual claims concerning the history of their involvement with an alleged anti-drug force were in issue. The Delegate had rejected their claims that criminals in Pakistan sought to exact revenge upon them for the activities of the second appellant’s father. The Delegate’s reasons included a statement to the effect that the documents relied upon by the appellants could not be authenticated. The documents in question were materials that the appellants themselves had given during the process that led to the decision under review and otherwise for the purpose of the review.
3. In the circumstances, nothing in s 424A of the Act obliged the Tribunal to give notice to the appellants, whether at or before its hearing, that the credibility of all of the factual allegations made by the appellants would be in issue. The primary judge did not err in rejecting the grounds of review insofar as they turned on the proper construction of s 424A of the Act. Although brief, I do not accept that the reasons of the primary judge were insufficient in that respect.
4. The Tribunal in any event put to the appellants its concerns about the appellants’ claims concerning the activities of the second appellant and his father. The Tribunal expressed to the appellants that it had concerns that the information before it suggested that the organisation “is more of an organisation to promote anti-drugs”. The Tribunal stated its concerns that the organisation “doesn’t actually get involved in arresting people or dobbing in people”. It put to the appellants several times that it could not find any information about the second appellant’s father’s involvement in any anti-drug activities at all. On a fair reading of the transcript of the proceedings before the Tribunal, it is clear that the Tribunal had concerns about the appellants’ claim that the second appellant’s father had any history of involvement with criminal targets who might now seek revenge. That history was a linchpin of the appellants’ claims. The Tribunal invited the appellants to amplify those aspects of the account it considered to be of importance and that the Tribunal later found to be implausible or concocted. In conducting the hearing in that fashion, the Tribunal put the appellants on notice that everything they had claimed about their experiences in Pakistan was in issue.
5. The Tribunal also put to the appellants its concerns about the delay in making their Visa applications. The Tribunal member said “I find the delay quite significant. You claim to have experienced acts against you in June 2012. You arrived in July 2012, and yet you don’t apply for visa – for this visa for some time afterwards. So why the significant delay?”
6. The appellants were put on notice, either by way of the Delegate’s reasons or by way of the Tribunal’s comments during its hearing, or both, as to all of the aspects of their claims that the Tribunal ultimately found to be of importance to its decision.
7. For the reasons I have given, I do not accept that the Tribunal failed to comply with those rules of procedural fairness that applied in the proceedings before it, nor do I accept that the Tribunal failed to comply with the principles stated by the High Court in SZBEL.
8. For the reasons given above, the appeal should be dismissed. I will hear the parties as to costs.

|  |
| --- |
| I certify that the preceding seventy-seven (77) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Charlesworth. |

Associate:

Dated: 28 November 2016

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  | WAD 586 of 2015 |
| Appellants |  |
| Fourth Appellant: | ATF15 |
| Fifth Appellant: | ATG15 |