Federal Court of Australia

DYI16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 612

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| Appeal from: | *DYI16 v Minister for Immigration & Anor* [2020] FCCA 1956 |
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| File number(s): | VID 541 of 2020 |
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| Judgment of: | **WHEELAHAN J** |
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| Date of judgment: | 11 June 2021 |
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| Catchwords: | **MIGRATION** – appeal from a decision of the Federal Circuit Court of Australia dismissing an application for judicial review of a decision of the Administrative Appeals Tribunal which affirmed a decision of a delegate of the Minister to refuse the appellant a Protection (subclass 866) visa – where leave sought to raise new grounds on appeal – leave to raise new grounds on appeal refused – appeal dismissed with costs.  **MIGRATION** – where the Tribunal gave no weight to submissions made by the appellant’s migration agent and solicitor regarding communications with the appellant’s former colleague in Pakistan – whether the Tribunal had a duty to inquire – whether the Tribunal fell into jurisdictional error by failing to make independent inquiries of the appellant’s former colleague regarding the content of the submissions – no obligation to inquire – no jurisdictional error.  **MIGRATION** – where the Tribunal received documents containing information, of which it gave a precis to the appellant under s 424A(1) of the *Migration Act 1958* (Cth) with an invitation to comment or respond – whether the Tribunal fell into jurisdictional error by contravening s 424A(1) – whether alternatively the Tribunal acted unreasonably by failing to give the appellant copies of the documents the subject of the s 424A invitation and so fell into jurisdictional error – no contravention of s 424A(1) – no legal unreasonableness – no jurisdictional errors. |
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| Legislation: | *Administrative Decisions (Judicial Review) Act* *1977* (Cth) ss 5(1)(e), 5(2)(g)  *Evidence Act 1995* (Cth) s 136  *Migration Act 1958* (Cth) ss 5J(1)(c), 36, 36(2)(aa), 36(2A), 36(2B), 57(2), 119 to 121, 414(1), 415, 415(1), 420(b), 422B(3), 423(1), 423A, 424, 424(1), 424A, 424A(1), (2), (2A) and (3), 424AA, 425, 426(1), 427(1), (3) and (4), 428(2)(a), 429A, 438, 438(1), 473DC, 476, 476A |
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| Cases cited: | *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34; 94 ALJR 928  *ARK16 v Minister for Immigration and Border Protection* [2018] FCA 825  *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223  *BXT17 v Minister for Home Affairs* [2021] FCAFC 9  *Cai v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 90  *CGA15 v Minister for Home Affairs and Another* [2019] FCAFC 46; 268 FCR 362  *Commonwealth v SCI Operations Pty Ltd* [1998] HCA 20; 192 CLR 285  *Coulton v Holcombe* [1986] HCA 33; 162 CLR 1  *Enichem Anic Srl v Anti-Dumping Authority* [1992] FCA 882; 39 FCR 458  *Fualau v Minister for Home Affairs* [2020] FCAFC 11  *Kaur v Minister for Immigration and Border Protection* [2017] FCAFC 184; 256 FCR 235  *Minister for Home Affairs v DUA16* [2020] HCA 46; 95 ALJR 54  *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421  *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541  *Minister for Immigration and Citizenship v Le* [2007] FCA 1318; 164 FCR 151  *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332  *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; 83 ALJR 1123  *Minister for Immigration and Citizenship v SZLFX* [2009] HCA 31; 238 CLR 507  *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; 183 CLR 27  *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17  *MZZGB v Minister for Immigration and Citizenship* [2014] FCA 1052  *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16; 264 CLR 217  *Plaintiff M7/2021 v Minister for Home Affairs* [2021] HCA 14  *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155  *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355  *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; 228 CLR 294  *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; 241 CLR 252  *Sun v Minister for Immigration and Border Protection* [2016] FCAFC 52; 243 FCR 220  *SXRB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 14  *SZBEL v Minister for Immigration and Multicultural Affairs* [2006] HCA 63; 228 CLR 152  *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; 81 ALJR 1190  *SZMTJ v Minister for Immigration and Citizenship (No 2)* [2009] FCA 486; 232 FCR 282  *SZNKO v Minister for Immigration and Citizenship* [2010] FCA 297; 184 FCR 505  *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158; 238 FCR 588  *Wang v Minister for Immigration and Citizenship* [2007] FCA 488  *Water Conservation and Irrigation Commission (NSW) v Browning* [1947] HCA 21; 74 CLR 492  *Wei v Minister for Immigration and Border Protection* [2015] HCA 51; 257 CLR 22  Australia, Senate, Migration Amendment (Review Provisions) Bill 2006, Explanatory Memorandum, Item 18 |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 84 |
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| Date of hearing: | 25 May 2021 |
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| Counsel for the Appellant: | Mr J Murphy |
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| Solicitor for the Appellant: | Carina Ford Immigration Lawyers |
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| Counsel for the Respondents: | Mr C McDermott |
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| Solicitor for the Respondents: | Australian Government Solicitor |

ORDERS

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|  | | VID 541 of 2020 |
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| BETWEEN: | DYI16  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| order made by: | WHEELAHAN J |
| DATE OF ORDER: | 11 June 2021 |

THE COURT ORDERS THAT:

1. Leave be granted to the appellant to file an amended notice of appeal.
2. Leave be granted to the appellant to tender:
   1. the transcript marked as annexure CF-1 to the affidavit of Carina Ford dated 17 May 2021; and
   2. the document marked as annexure CF-2 to the affidavit of Carina Ford dated 17 May 2021.
3. The appeal be dismissed.
4. The appellant pay the first respondent’s costs of the appeal to be taxed in default of agreement.

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

REASONS FOR JUDGMENT

WHEELAHAN J:

## Introduction

1. The appellant appeals a decision of the Federal Circuit Court of Australia which dismissed his application to that court under its jurisdiction conferred by s 476 of the *Migration Act 1958* (Cth). The appellant alleged jurisdictional error in a decision of the Administrative Appeals Tribunal which had affirmed a decision of a delegate of the Minister to refuse the appellant a Protection (Subclass 866) visa.

## Background

1. The appellant is a citizen of Pakistan who is aged 43. He is a Sunni Muslim and arrived in Australia on 16 May 2015 in Melbourne, having travelled by air from Islamabad, Pakistan. The appellant arrived in Australia holding a Business Visitor (Subclass 600) visa authorising him to remain in Australia for one month. The visa was granted to enable the appellant, as a member of a delegation, to visit Australia for the purpose of observing aspects of wool production as part of a study tour that was organised by his employer, the United Nations Food and Agricultural Organisation (**UNFAO**).
2. Before coming to Australia, the appellant was a resident in Pakistan of a city to which I will refer as the appellant’s home city. The appellant is university-educated, holding undergraduate and post-graduate degrees from universities in Pakistan. A resume of the appellant states that he reads, writes, and speaks Pashto, English, and Urdu. For many years, he worked as a team leader for the UNFAO in Pakistan. He is a husband, and father of four children who with their mother remain in Pakistan, as does his widowered father and all seven of his nine siblings, the other two of whom are deceased.
3. On 9 June 2015, the appellant applied for a protection visa. The appellant claimed that as a result of his employment as a team leader for the UNFAO, he had been accused by the Taliban of working against Islam and Sharia law, of working for Christian organisations, and that the Taliban had made threats against him. The appellant claimed that he feared that he would be harmed by the Taliban upon his return to Pakistan. In summary, the main elements of the appellant’s claims were that –
4. in recent years, in the area of Pakistan where he worked, there were instances of wounding, killing, and kidnapping of aid workers engaged by non-government organisations (**NGOs**);
5. amongst other instances, in 2012 a vehicle carrying UNFAO staff was attacked, and two of his colleagues lost their lives and one was seriously wounded;
6. on 21 February 2014, a member of the appellant’s team in Pakistan received a threatening telephone call, and he gave the telephone to the appellant whereupon the caller identified himself as a Taliban, and warned “you have to stop your work as your work is against Islam”;
7. on 22 March 2015, the appellant received a warning letter from the Taliban, stating that he was working for infidels, and demanding that he quit his job immediately, follow the Islamic pathway, and obey Sharia law;
8. on 24 May 2015, and after the appellant had arrived in Australia, a letter from the Taliban was sent to the appellant’s home, which stated that he had been warned, and which made a death threat against the appellant and his children;
9. the method of the Taliban was “to send two warning letters while third time they execute the person”; and
10. the appellant claimed that for the above reasons he had become a target of the Taliban, and feared for his own safety and that of his wife and children.
11. On 10 December 2015, a delegate of the Minister refused the appellant’s application. The delegate accepted that groups identified as coming under the Taliban umbrella had been responsible for attacks on persons working for NGOs such as the UNFAO in the province in Pakistan in which the appellant had worked. The delegate also accepted that the appellant may have been known in the area in which he had worked, and that this may have resulted in his team receiving the threatening telephone call in February 2014. In the absence of evidence to the contrary, the delegate was prepared to accept that the letter of 22 March 2015 was genuine, and that the appellant had been threatened as claimed. However, the delegate did not accept that the appellant had been sent the second letter in May 2015. Moreover, the delegate determined that the appellant could avoid harm by seeking alternative employment in another region of Pakistan and relocating. I will not refer in detail to the delegate’s consideration of every issue, but it is relevant that in considering whether to accept the appellant’s claim that he had been sent the second letter in May 2015, the delegate addressed answers that the appellant had given during the course of his interview in which he claimed that he had informed another member of the UNFAO, Mr Essa, of the second letter. The delegate recorded the following –

The applicant said that he informed Ahmed Jan Essa, Deputy Chief of the FAO project in Balochistan, of this letter. The applicant was informed by Essa that the matter would be discussed upon his return to Pakistan. He did not tell the people in his delegation in Australia about the letter because he did not want to worry them. Asked if he had any evidence of him having informed Ahmed Jan Essa, he said that he did not because his phone had a virus and he had refreshed everything. Asked if he ever sent a copy of the threat letter to Ahmed Jan Essa, he said that he did not. Asked why he would not have done so, he said that he did not want to go back to Pakistan and he only sent Essa the first letter. He said that he was not going to go back and do the job anymore. It was put to the applicant that Ahmed Jan Essa may have wanted the letter to show the security officials in Pakistan. He said that he was told that they would discuss it upon his return to Pakistan.

## The application to the Tribunal

1. On 22 December 2015, the appellant applied to the Tribunal to review the delegate’s decision. The appellant’s migration agent, who was a solicitor, made written submissions on his behalf to the Tribunal that were dated 17 October 2016. Attached to the written submissions were copies of a number of documents, which included contemporaneous email communications between staff of the UNFAO relating to the incident in 2012 when two members of the UNFAO were killed, and relating to the threatening calls and messages received from the Taliban in February 2014. The documents also included minutes of a meeting of an area security management team of the United Nations Department of Safety and Security (**UNDSS**) in February 2014, and another in March 2014, which recorded the receipt of threats by staff of the UNFAO. The representative also referred in the submission to an event a few days before 28 December 2015 (which was subsequent to the delegate’s decision), when two men who identified themselves as members of the Taliban visited the appellant’s family home in Pakistan and spoke to his wife, demanding to know of the appellant’s whereabouts, and threatening to kill his wife and children if she did not tell them.

### The hearing before the Tribunal

1. A hearing took place before the Tribunal on 19 October 2016 which was attended by the appellant and his representative. The appellant gave evidence before the Tribunal in the Urdu language with the assistance of an interpreter. The Tribunal raised with the appellant information that was subject to a certificate under s 438 of the *Migration Act*,and also an email that had been received by the Department on 26 June 2015 from a Mr Marcel Stallen, an international project manager of UNFAO. The Tribunal stated that in the email, Mr Stallen had said –

During the last two weeks, I’ve put lots of pressure on them [[DYI16] and [name redacted]] to return to Pakistan. They have taken the wrong decision, and tarnished the reputation of FAO, and jeopardise future missions.

1. The Tribunal stated to the appellant that this seemed puzzling, because Mr Stallen did not refer at all to the appellant being wanted by the Taliban, and indicated that he had put pressure on the appellant and the other person referred to in the email to return to Pakistan. The Tribunal asked the appellant at the hearing why Mr Stallen would put the appellant’s life in danger once again –

Why do [you] think he would do that? The UN, they’ve beforehand, showed a strong inclination to protecting their staff. They closed down the offices whenever there were threats. Why would they not want to protect staff if they were being threatened by the Taliban?

1. I will return to the email from Mr Stallen in the context of the post-hearing communications between the Tribunal and the appellant.
2. The Tribunal questioned the appellant as to why it would not be reasonable for him, his wife, and children, to relocate to another part of Pakistan, noting that he was well educated with an employment history, and a Sunni Muslim, which was the majority religion in Pakistan. The appellant responded by stating that he did not think that he would find a job that was appropriate to his level of education, and otherwise spoke about the Taliban targeting all Muslims, including Sunni Muslims.
3. The Tribunal informed the appellant that it would consider whether the letters on which he relied and other documents were genuine and foreshadowed that although the delegate had accepted some aspects of the appellant’s claims, the Tribunal may not accept them. Towards the end of the hearing the Tribunal foreshadowed that the appellant would be given an opportunity to comment in writing on some of the adverse information that had been raised with him.

### Post-hearing written exchanges

1. On 2 November 2016, the Tribunal wrote to the appellant’s migration agent inviting comment or a response on two items of information. The first item was treated by the Tribunal as being covered by a valid certificate issued under s 438 of the *Migration Act 1958* (Cth), and therefore the Tribunal disclosed only what it stated to be the substance of the information which came from an unidentified confidential source –

* A person who has worked with you has provided information to the Department that he knows you well.
* The person has stated that you have claimed protection in Australia for an economic advantage and you are not in any danger in […] your home town, and you should be returned.

1. The second item was also the subject of a certificate, purportedly given under s 438 of the *Migration Act*, but the Tribunal treated the certificate as being invalid. In relation to that information, the Tribunal stated as follows –

The Tribunal also has information before it which is covered by a non-valid s.438 certificate regarding the Disclosure of Certain Information. That information is as follows:

* Mr Marcel Stallen, the International Project Manager of the Food and Agriculture Organization of the United Nations (FAO) advised the Senior Migration Officer of the Australian High Commission in Islamabad that you and [name redacted] extended their visas and did not return from their Australian study tour. He states that you did not return for “medical reasons”. He also states that “during the last 2 weeks I have put a lot of pressure on them to return to Pakistan and that they take the wrong decision and tarnish the reputation of FAO and jeopardize future mission, etc. but without much effect. I will keep you updated on this unfortunate situation”.

The above information is relevant because the Tribunal may find that the comments by Mr Stallen indicate that you have not been sought by the Taliban and these claims have been manufactured. The Tribunal may also find that the evidence of the anonymous informant is consistent with Mr Stallen’s comments. The Tribunal may find, combined with other issues raised with you during the hearing, that there is evidence indicating that you have not been sought by the Taliban in [your home city] and your claims have been manufactured.

If the Tribunal makes these findings it may find that you do not have a well-founded fear of persecution for reasons of your race, religion, nationality, membership of a particular social group or your political opinion. The Tribunal may also find that you do not meet the Complementary Protection criterion which requires that there is a real risk that you will suffer significant harm, which includes arbitrary deprivation of life, torture, the death penalty, cruel or inhuman treatment or punishment or degrading treatment or punishment. If the Tribunal makes these findings it will find that you do not meet the criteria for the grant of a Protection visa.

1. On 16 November 2016, the appellant’s migration agent responded and addressed the allegations that the appellant was claiming protection in Australia for economic advantage, and that he was not in danger in his home city. The migration agent attached a copy of an email sent to her and dated 8 November 2016 from a Mr Ahmed Essa, who was described as a colleague and superior of the appellant at the UNFAO, and to whom the appellant had referred when his visa application was before the delegate. The email stated –

It was nice talking to you over the phone the other day. I am enclosing herewith a letter confirming that I have not written any letter to any authority within or outside Pakistan against the asylum applications of the persons who are your client.

1. The attached letter stated as follows –

To whom it may concern

This is to certify that I have not issued any letter/statement or sent an email to any authority/Judge, Jury or prosecution anywhere in the world with respect to the immigration application of [DYI16]. Ex-employees of the FAO of United Nations.

If anyone has produced such a letter/statement or an email to any authority/Judge, Jury or prosecution that is false, fabricated and I have the right to challenge it in any court of law within or outside our legal system.

1. The agent’s response also stated that Mr Essa had spoken to the agent by telephone on 8 November 2016 to provide supporting information. The response stated –

Mr Ahmed Essa, a colleague and superior of the Applicant in FAO, spoke to the Applicant’s agent, Cindy Zhao, by telephone on 8/11/2016 to provide supporting information. Mr Essa stated that as a FAO officer, he is not permitted to write an official letter in relation to the UN security or in support of the Applicant, in the stationary with the FAO letter head, as any such letter must be from his superior.

1. The agent then stated that, “[p]artially based on the information Mr Essa provided, we provide the following response”. The agent first addressed the information from the anonymous informer, and conveyed responses attributed to Mr Essa, and to a second person who was said to be a colleague of the appellant at the UNFAO and who had sent an email to the appellant stating that he did not know the identity of the anonymous informer, and otherwise declining to assist the appellant through his “official email” because he feared his job would be in jeopardy. In relation to the claimed telephone call in February 2014, and the further threatening letter that the appellant claimed that the Taliban had sent to his home while he was in Australia, the migration agent stated –

Mr Essa confirmed that the threatening phone calls to the Applicant and FAO in 2014 were received and the it [sic] was reported to the UNSSD. An official record can be found through official channels. Mr Essa also confirmed that he received a phone call from the Applicant, while the Applicant was in Australia, regarding the further threatening letter the Applicant received. Mr Essa advised that given the proper procedure is that the victim must file a written report to the UNSSD before the incident can be investigated and appropriate steps can be taken to remedy the breach, he advised the Applicant to wait until the Applicant comes back to Pakistan to file an official report before UNSSD takes appropriate steps.

1. The migration agent’s response also addressed the precis of the information attributed to Mr Stallen, stating as follows –

The Applicant disagrees with Mr Stallen’s statement that he did not return for medical reasons and believe it may be a communication error.

The Applicant states that he was in Canberra when Mr Stallen emailed him asking when he would be return. The Applicant was very stressed about the prospect of returning to Pakistan and became ill with irregular heart beats. He was treated in the Cooma Hospital for a day and while he was in the hospital, he informed Mr Stallen that he was in the hospital receiving medical treatments. After the Applicant applied for a protection visa, he advised Mr Stallen that he applied for a protection visa and wanted to resign from his [position]. The Applicant states that Mr Stallen never put on pressure on him to return and was concerned that the Applicant might be unlawful in Australia. Mr Stallen even advised the Applicant that he could extend his return airplane ticket for future use.

The Applicant understands the position of Mr Stallen in FAO in making such a statement but is [adamant] that Mr Stallen’s statement will [sic] alter the true facts of his claim.

## The Tribunal’s reasons

1. As I stated at the outset, the Tribunal affirmed the delegate’s decision. The Tribunal concluded that the appellant had arrived in Australia on a UN sponsored visit with the purpose of fabricating claims that he had been threatened and warned, and that he was wanted by the Taliban. There were a number of threads to the Tribunal’s reasons. The Tribunal expressed doubt about whether the appellant had any direct telephone communication with the Taliban in 2014 as he had claimed, and stated that the appellant had fabricated the claim that he had been specifically sought and targeted by the Taliban. The Tribunal referred to the contemporaneous UNFAO emails that had been produced to the Tribunal in support of the appellant’s claims, and stated that apart from one email (which I observe was not contemporaneous), they indicated that it was another UNFAO worker who had received the threatening messages, and that there was no reference in the emails to the appellant receiving the calls, and that the emails did not establish that the appellant was personally threatened in 2014. The Tribunal also found that other contemporaneous documents that were relied on, such as the minutes of meetings of the UNDSS in February and March 2014, did not refer specifically to threats to the appellant. Nevertheless, the Tribunal accepted as plausible that a member of the Taliban had telephoned another UNFAO worker and had asked to speak to his superior, as a result of which the appellant had received a warning that was directed to his team. The Tribunal found that the UNDSS took the telephone threats seriously and closed down the offices, and that the work of the UNFAO in the area was suspended for a period of time.
2. The Tribunal did not accept that the appellant had received the two warning letters from the Taliban which the appellant claimed he had received in 2015, either before or after he left Pakistan. The Tribunal found that the documents were not genuine, and that the appellant had fabricated these claims. The Tribunal referred to the absence of any contemporaneous written communications from the appellant about these letters. The Tribunal referred to the appellant’s account that he had taken the March 2015 letter to the main office of the UNFAO, and that there were no written communications such as correspondence or emails with his superiors in relation to the letter. As to the May 2015 letter, the Tribunal referred to the appellant’s account that when he was in Australia he had spoken by telephone to Mr Essa about the letter, and that he did not have any written correspondence with Mr Essa in relation to the letter. The Tribunal also referred to the appellant’s evidence that it was only after December 2015 that his wife and children moved to a different location, in circumstances where the second letter made a death threat against the appellant and his family members. The Tribunal held that the occurrence of the threats was not supported by any of the email communications between the appellant and his superiors.
3. The Tribunal did not accept that an Optus printout of telephone calls which contained an entry which the appellant claimed recorded a telephone call which he had with Mr Essa in May 2015 established that the appellant had received threats in 2015, or that the appellant had reported such threats to Mr Essa while he was in Australia. The Tribunal did not accept the submission that Mr Essa had informed the appellant’s representative of the threats by telephone, but for some reason was unwilling to report the threats in his written correspondence, and placed “no weight on statements made by the representative regarding what Mr Essa purportedly told her on the telephone”. This summary is based upon the conclusions in [58] of the Tribunal’s statement of reasons, the terms of which assumed some significance to the case presented on appeal –

58. The Tribunal also does not accept that the Optus records showing a telephone conversation which may be to Mr Essa for approximately one hour establish that he received telephone threats in May 2015 or he reported threats whilst he was in Australia. The Tribunal does not accept the submission that Mr Essa informed the representative of these threats by telephone, but for some reason was unwilling to report the threats in his written correspondence. The Tribunal places no weight on statements made by the representative regarding what Mr Essa purportedly told her on the telephone. Nor does the Tribunal accept that Mr Essa has stated that anyone “demonstrating their support” for the applicant will be prosecuted or that he has attempted to “cover up” what has happened. The documentation provided from Mr Essa indicates that he was asked to state that he did not write the letter to the Department and anyone producing such letters would be prosecuted. The list of names provided by a number of employees of the UNFAO also states that they did not write such letters.

1. As to the information from Mr Stallen, the Tribunal stated that the information indicated that Mr Stallen did not have any concerns for the appellant’s safety, and did not accept that, had the appellant been threatened in 2015 in the form of two warning letters, Mr Stallen would fail to provide supporting documentation or that his comments would indicate that the appellant was in fact not facing any threats or harm in Pakistan. Those conclusions were stated in [61] of the Tribunal’s reasons, the terms of which were also significant to the submissions that were advanced on appeal –

61. The Tribunal gives considerable weight to the information provided to the Tribunal by Mr Marcel Stallen. The information from Mr Stallen, which was put to the applicant during the hearing and pursuant to s 424A following the hearing, indicates that Mr Stallen does not have any concerns for the applicant’s safety. The comments from Mr Stallen indicate that he had asked the applicant to return to Pakistan. The Tribunal does not accept that had the applicant been threatened in 2015 in the form of two warning letters that Mr Stallen would fail to provide supporting documentation or that his comments would indicate that the applicant was in fact not facing any threats or harm in Pakistan. The Tribunal does not accept the applicant’s claims that Mr Stallen has made false comments or that the UNFAO is concerned more about its reputation than protecting its staff. The documentation provided by the applicant to the Tribunal, including the detailed risk assessment from the UNDSS, is contrary to these claims. It indicates that rather than attempting to cover up threats to its staff and security that it has taken considerable efforts to assess a range of potential risks and take actions to ensure the safety of its staff.

1. However, the Tribunal accepted that the appellant had been hospitalised in Australia, and that Mr Stallen was mistaken when he said that the appellant had remained in Australia for medical reasons.
2. The Tribunal also considered that the appellant’s evidence in relation to the reasons for allowing his wife and children to remain in the family home following the claimed threats was not credible. In addition, the Tribunal rejected as fabricated the appellant’s claim that two men had visited his family home on 28 December 2015 demanding his whereabouts, relying on some inconsistencies between a document purporting to be a translation of a formal police report of the incident, and the appellant’s evidence.
3. The Tribunal accepted that UNFAO staff would not be permitted to write letters in support of the appellant without the approval of their managers. However, prominent in the Tribunal’s statement of reasons was the consideration that the telephone threat in February 2014 had generated email communications, documentary records of meetings, and activity on the part of the UNFAO and the UNDSS which demonstrated that these organisations reacted to such threats, and were concerned for the safety of staff. In contrast, no documentation had been produced to support the legitimacy of the claimed threats in the letters of March and May 2015, and that the appellant had attempted to obfuscate and rely on documentation that did not reflect what he asserted was in the documentation. These considerations supported the conclusion that the appellant had fabricated his claims to have been issued with warnings from the Taliban in 2015.
4. The Tribunal considered at some length, and by reference to country information, the situation that the appellant would face upon his return to Pakistan. The Tribunal stated that it was not satisfied that there was a real chance that the appellant would suffer serious harm for reasons of his race, religion, nationality, membership of a particular social group, or his political opinion upon his return to his home city, or the surrounding regions. The Tribunal also made an alternative finding that it was satisfied that the appellant could live and work for an aid agency in any other part of the country, or obtain employment in another field if he chose to do so, including in a number of large cities in Pakistan which the Tribunal identified, without attracting any adverse interest from the Taliban. Therefore, the Tribunal considered for the purposes of s 5J(1)(c) of the *Migration Act* that there was not a real chance of serious harm in all areas of Pakistan. The Tribunal made corresponding findings in relation to the complementary protection provisions in s 36(2)(aa) and s 36(2A) and (2B) of the *Migration Act*. These findings included an alternative finding that it would be reasonable for the appellant to relocate to another area of the country where there would not be a real risk that he would suffer significant harm.

## The proceeding before the Federal Circuit Court

1. On 19 December 2016, the appellant filed an application in the Federal Circuit Court of Australia seeking judicial review of the Tribunal’s decision. Before the primary judge was an amended application that advanced two grounds alleging jurisdictional error by the Tribunal –

* The Tribunal denied the Applicant procedural fairness by not putting to him or his legal representative that the Tribunal did not accept the legal representative’s evidence about the contents of her telephone conversation with the Applicant’s supervisor at the United Nations Food and Agricultural Organisation (“UNFAO”) concerning the threats to the Applicant by the Taliban.
* In making adverse credibility findings against the Applicant, the Tribunal placed weight on correspondence from Marcel Stallen, international Project Manager at UNFAO. Mr Stallen made the comments in response to an enquiry from the First Respondent’s Delegate (“the primary decision-maker”) in relation to why the Applicant did not return to Pakistan. The comments caused the Tribunal to doubt the veracity of the Applicant’s claims because the Tribunal found that no mention was made of the threats from the Taliban. Although the Tribunal put the contents of that correspondence to the Applicant for comment, it failed to seek verification from Mr Stallen concerning Applicant’s response about the contents of his communications with Mr Stallen.

1. The primary judge rejected both grounds. In relation to the first ground, his Honour held that the appellant was on notice of the issues that were before the Tribunal. That was because the appellant had a copy of the delegate’s reasons, which had rejected the appellant’s claim that he had been sent a warning letter in May 2015, and also because the Tribunal had put the appellant on notice that it may not make the same findings as the delegate had. His Honour held that it was not the function of the Tribunal to accept uncritically any evidence or submissions that were made to it, and that it was an inescapable part of the inquisitorial process of a merits review that some evidence and some submissions may be accepted or rejected. His Honour held that the Tribunal had placed no weight on the evidence attributed to Mr Essa in circumstances where it was unsupported by independent documentary evidence, and that this was open to the Tribunal. Further, his Honour held that before reaching its decision, the Tribunal had no obligation to give a running commentary on its thought processes, or to give the appellant an opportunity to comment on the identification of gaps in the evidence and the weighing up of evidence by reference to those gaps, citing *SZBEL v Minister for Immigration and Multicultural Affairs* [2006] HCA 63; 228 CLR 152 at [48] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ), and *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; 81 ALJR 1190 at [18] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). Accordingly, the Tribunal was not required to advise the appellant that the account of Mr Essa might be rejected.
2. In relation to the second ground of review, the primary judge recorded that the appellant had submitted that the Tribunal was required to make further enquiries of Mr Stallen in light of the different complexion which the appellant claimed the Tribunal had placed upon his statements in support of the adverse credibility findings that were made. His Honour referred to authorities that supported the principles that the mere fact that it might have been reasonable to make an enquiry does not mean that the absence of an inquiry involved jurisdictional error, and that the Tribunal was not subject to a general obligation to make enquiries, or to make out, or to assist in making out, a review applicant’s case: *MZZGB v Minister for Immigration and Citizenship* [2014] FCA 1052 at [63] (White J); *Kaur v Minister for Immigration and Border Protection* [2017] FCAFC 184; 256 FCR 235 at [33] (Dowsett, Pagone and Burley JJ). His Honour concluded that Mr Stallen’s comments had been put to the appellant, and the opportunity to respond had been taken by the appellant, and that it was not incumbent on the Tribunal to revert to Mr Stallen to enquire as to the correctness of the appellant’s view as to what had been said.
3. Finally, under the heading “Materiality – relocation was available”, the primary judge referred to the Tribunal’s finding that the appellant could relocate to a variety of locations in Pakistan, and stated that the appellant’s grounds of review and submissions did not seek to impugn those findings. His Honour held that if either of the grounds of review had been made out, relief should be refused on discretionary grounds, namely that there was an independent basis for the Tribunal’s decision that was unchallenged.

## The appellant’s grounds of appeal to this Court

1. The grounds of appeal to this court do not relate to the grounds of review that were argued and determined at first instance by the primary judge in his Honour’s careful and comprehensive reasons. Rather, the grounds of appeal raise a new case that was not argued below. Counsel for the appellant accepted this to be the position.
2. At the commencement of the hearing of the appeal, counsel for the appellant sought leave to file an amended notice of appeal, and to adduce evidence before the court that was not before the court below. I gave leave to the appellant to file the amended notice of appeal so that the issues that the appellant sought to raise were before the court in a formal way. However, for reasons which I explain below, I reserved on the separate question whether the appellant should have leave to raise on appeal claims that were not raised below.
3. The amended notice of appeal raises two grounds, accompanied by particulars –

1. The learned primary judge erred by failing to find that the second respondent failed to determine the review application according to law and hence its decision is vitiated by jurisdictional error because:

(a) in its treatment of the legal representative’s evidence about the contents of her telephone conversation with the appellant’s supervisor (Ahmed Essa) at the United Nations Food and Agricultural Organisation (“UNFAO”), concerning the threats to the appellant by the Taliban, the second respondent constructively failed to exercise its jurisdiction by failing to make an obvious inquiry about a critical fact, the existence of which was easily ascertainable;

**Particulars**

A. The Appellant’s lawyer provided a detailed submission to the Tribunal in which she reported certain things that had been told to her over the phone by Mr Essa (AB 365-9).

B. the things said by Mr Essa, and documented by the Appellant’s lawyer for the Tribunal, included: ‘[Mr Essa] received a phone call from the Applicant while the Applicant was in Australia, regarding the further threatening letter the Applicant received.’ (AB 367) and ‘[Mr Essa] advised the Applicant to wait until the Applicant comes back to Pakistan to file an official report [in relation to the letter the Applicant received while in Australia]’ (AB 367).

C. The Tribunal said it placed ‘no weight’ on the lawyer’s account of what Mr Essa said (AB 608 [58]), which necessarily involved a conclusion that the Appellant’s lawyer was untruthful or unreliable, or Mr Essa was untruthful or unreliable.

D. The Tribunal had the email address and contact phone number of Mr Essa (AB 371, 275).

E. However, the Tribunal did not make any inquiry of Mr Essa before placing no weight on the Appellant’s lawyer’s reports of the phone call she had had with him.

(b) In making adverse credibility and other findings against the appellant, the second respondent placed considerable weight on correspondence from Marcell Stallen, International Project Manager at UNFAO. In doing so, the second respondent fell into jurisdictional error by:

i. Not complying with s 424A of the *Migration Act 1958* (Cth) by not providing clear particulars of the Stallen correspondence and not ensuring that the appellant understood the relevance of the Stallen correspondence to the review; and/or

ii. Failing to conduct the review in the manner required by the Act by unreasonably failing to fully disclose, or provide further information of, the Stallen correspondence.

**Particulars of ground 1(b)(i)**

A. The Stallen correspondence was the reason, or a part of the reason, for the second respondent’s affirmation of the decision under review. Indeed, the second respondent gave the Stallen correspondence ‘considerable weight’ (AB 561 [61]).

B. After the hearing, the second respondent purported to give the appellant an invitation under s 424A in relation to the Stallen correspondence (AB 356-9).

C. The s 424A invitation summarised the information in a three sentence bullet point (AB 358). That summary did not provide clear particulars of the Stallen correspondence because it omitted material aspects, including the circumstances in which the correspondence occurred and the way those circumstances gave rise to a motivation on the part of Mr Stallen to provide answers to the Department that were unfavourable to the appellant.

D. The s 424A invitation identified only one, highly general, way in which the Stallen correspondence was potentially relevant to the review: ‘the Tribunal may find that the comments by Mr Stallen indicate that you have not been sought by the Taliban and these claims have been manufactured.’ (AB 358) In fact, the second respondent went on to use the Stallen correspondence in much more targeted ways, namely: to find that Mr Stallen did not have concerns for the appellant’s safety and to find that Mr Stallen would have provided supporting documentation if the appellant had in fact being threatened by the Taliban in two warning letters in 2014 (AB 608 [61]). Thatpotential relevance of the Stallen correspondence was not explained to the appellant in the s 424A invitation.

**Particulars of ground 1(b)(ii)**

A. The second respondent had the power to disclose the Stallen correspondence to the appellant. While the Stallen correspondence was the subject of a purported certificate under s 438 (AB 175), both the first and second respondents have accepted that that certificate was invalid (AB 358, 620 [96], 656 [7]). Accordingly, s 427(1)(c) empowered the second respondent to disclose the Stallen correspondence (cf 438(3)(b)).

B. The second respondent did not disclose the Stallen correspondence to the appellant. Instead, the second respondent purported to summarise the Stallen correspondence in the s 424A invitation (AB 358). The terms of that invitation suggested that the Stallen correspondence and its circumstances had been fully disclosed. In fact, the s 424A invitation omitted material aspects of the Stallen correspondence, including the circumstances in which the correspondence occurred and the way those circumstances gave rise to a motivation on the part of Mr Stallen to provide answers to the Department that were unfavourable to the appellant.

C. The appellant responded briefly to the s 424A invitation in respect of the Stallen correspondence (AB 369). On receipt of that response, it was objectively apparent that the appellant was unaware of the material aspects of the Stallen correspondence that had been omitted from the s 424A invitation, including the circumstances in which the correspondence occurred and the way those circumstances gave rise to a motivation on the part of Mr Stallen to provide answers to the Department that were unfavourable to the appellant.

D. Whether or not the s 424A invitation satisfied the requirements of s 424A, it was at that point legally unreasonable for the second respondent not to exercise its power in s 427(1)(c) to fully disclose the Stallen correspondence.

1. As to the evidence, counsel for the appellant sought to tender a transcript of the hearing before the Tribunal. This was not opposed by counsel for the Minister, and I received the transcript into evidence. The appellant’s contentious application was to seek leave to tender on appeal a recent email exchange between the appellant’s current solicitors and Mr Essa, in which Mr Essa was asked to and then gave an account of a telephone conversation with the appellant in May 2015 while the appellant was in Australia. I determined to receive the further evidence on the ground that it was relevant to a fact in issue that was arguably material to ground 1(a) of the amended notice appeal having regard to an issue identified in the joint judgment in *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; 83 ALJR 1123 at [26], namely whether any enquiry by the Tribunal of Mr Essa could have yielded a useful result. In allowing the Minister’s appeal in *SZIAI*, the absence of such evidence was central, with the plurality stating at [26] that “[t]here was nothing before the Federal Magistrates Court or the Federal Court to indicate what information might be elicited if the Tribunal were to undertake the inquiry which was said to be critical to the validity of its decision”. In the alternative, I accepted that the email exchange might be relevant to the question of materiality more broadly in the sense essayed in the majority reasons in *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17 at [27]-[60]. As these purposes related to claims that the appellant sought leave to raise for the first time on appeal, the question whether the evidence could with reasonable diligence have been adduced below had little significance to the exercise of the discretion in this case whether to admit the evidence. Counsel for the parties accepted that having regard to the court’s function on appeal the purposes for which the evidence was received were necessarily limited, and that in the circumstances it was unnecessary that I make an order under s 136 of the *Evidence Act 1995* (Cth) spelling out those purposes. I also indicated to the parties that whether the evidence was admissible was a different question to whether, as a matter of substance, the evidence was material to the disposition of the appeal, to which I would give separate consideration.

## Leave to raise new grounds alleging jurisdictional error

1. This case is an instance of an appellant presenting on appeal a case that is fundamentally different from the case presented below. There are good reasons why the court requires a party seeking to agitate new grounds to obtain leave. The scheme established by the *Migration Act* for the judicial review of the Tribunal’s decisions confers original jurisdiction on the Federal Circuit Court of Australia, and an appellate function on this court: see ss 476 and 476A. Accordingly, to allow new grounds to be raised in this court’s exercise of the appellate function may reduce proceedings in the Federal Circuit Court “to little more than a preliminary skirmish”: *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158; 238 FCR 588 (***VUAX***)at [47] (Kiefel, Weinberg and Stone JJ) citing *Coulton v Holcombe* [1986] HCA 33; 162 CLR 1 at 7 (Gibbs CJ, Wilson, Brennan and Dawson JJ).
2. Leave to raise new grounds on appeal may be granted if it is expedient in the interests of justice to do so. This may occur where the proposed new claim clearly has merit and there is no real prejudice to the respondent in permitting it to be agitated. Where there is no adequate explanation for failing to raise the claim before the primary judge, and it seems to be of doubtful merit, leave should generally be refused: *VUAX* at [46]-[48].
3. There are two further considerations which colour the approach to new grounds. *First*, and as was alluded to by counsel for the Minister, “[t]here is a particular sensitivity to whether the interests of justice favour a grant of leave in refugee cases, because an adverse decision may have very serious consequences for an appellant”: *CGA15 v Minister for Home Affairs and Another* [2019] FCAFC 46; 268 FCR 362 at [36] (Murphy, Mortimer and O’Callaghan JJ). The merits of a proposed new ground is therefore important because it is likely to be in the interests of justice to ensure that an administrative decision affected by jurisdictional error and capable of depriving a person of liberty is not carried into effect: *Fualau v Minister for Home Affairs* [2020] FCAFC 11 at [16] (Murphy, Davies and O’Bryan JJ), citing *ARK16 v Minister for Immigration and Border Protection* [2018] FCA 825 at [25]. *Second*, the approach should not have the collateral effect of encouraging parties to persist in this court with poor arguments which failed to persuade the primary judge, in order to masquerade new claims as ones already raised. To his credit, counsel for the appellant did not persist with the arguments which failed before the primary judge.
4. Counsel for the appellant explained that he, as new counsel, was briefed in the matter following the primary judge’s decision, and considered that these points were worthy of argument. Whilst this is an understandable explanation, it is relevant, as was accepted by counsel, that the appellant was represented by experienced counsel before the primary judge: see also *BXT17 v Minister for Home Affairs* [2021] FCAFC 9 at [24] (Markovic, O’Callaghan and Anastassiou JJ); *Sun v Minister for Immigration and Border Protection* [2016] FCAFC 52; 243 FCR 220 at [92] (Logan, Flick and Rangiah JJ).
5. Counsel for the Minister submitted that, upon the new grounds being raised, prejudice to the Minister would be limited to there being no right of appeal open to the Minister. No evidentiary prejudice was claimed. To the extent that any additional costs would be incurred by the Minister in responding to new claims, this can be ameliorated by the making of costs orders.
6. Given the likely significance of the merits of the new grounds upon the question whether to grant the appellant leave, I reserved on that question and heard full argument on the new grounds raised by the appellant.
7. For the reasons that follow, I have determined to refuse leave to raise on appeal the new grounds alleging jurisdictional error. It follows that the appeal will be dismissed.

## Consideration of the grounds of appeal

1. The appellant framed the issues arising from the grounds of appeal under three topics –
2. Was the Tribunal obliged to make its own inquiries of Mr Essa?
3. Did the Tribunal comply with s 424A of the *Migration Act* in relation to the information received by the Department from Mr Stallen of the UNFAO?
4. Was it legally unreasonable for the Tribunal not to have provided the appellant with copies of the email correspondence with Mr Stallen to which the invitation under s 424A related?

### Issue (1) - Was the Tribunal obliged to make its own inquiries of Mr Essa?

1. The circumstances in which the Tribunal would fall into jurisdictional error in failing to initiate its own inquiries must depend upon whether the alleged failure was a material breach of an express or implied condition of the valid exercise of the review function conferred on the Tribunal by s 414(1) of the *Migration Act*.
2. In undertaking its review function, the Tribunal was subject to the exhortations in s 420(b) and s 422B(3) of the *Migration Act* to act according to the substantial justice and merits of the case, and to act in a way that was just and fair. The Act expressly conferred a range of powers, discretions and obligations on the Tribunal in respect of the appellant. Under s 423(1), the appellant was entitled to give to the Tribunal a statutory declaration and written arguments. The Tribunal had a duty under s 424A to give to the appellant particulars of potentially adverse information and an opportunity to comment on or respond to the information. The Tribunal had a qualified duty under s 425 to invite the appellant to appear before the Tribunal to give evidence and to present arguments, and it did so in this case. There was also a duty under s 426(1) to notify the appellant that he could give the Tribunal written notice that he wanted the Tribunal to obtain oral evidence from a person named in the notice. But there was no express duty to initiate inquiries. Section 424(1) provided that the Tribunal *may* get information that it considers relevant, including by inviting a person to give information either orally (including by telephone) or in writing. By its use of the word “may”, s 424(1) conferred a discretion on the Tribunal to get information: *Acts Interpretation Act 1901* (Cth), s 33(2A), which commenced prior to the *Migration Legislation Amendment Act (No 1) 1998* (Cth) which introduced s 424(1) in its current form; cf, *Commonwealth v SCI Operations Pty Ltd* [1998] HCA 20; 192 CLR 285 at [62] (McHugh and Gummow JJ). The discretionary power of the Tribunal under s 424(1) broadly corresponds to the Minister’s power under s 56 of the Act to get any information that the Minister considers relevant. The Minister’s powers are picked up by s 415(1) which provides that the Tribunal may exercise all the powers and discretions that are conferred on the person who made the decision, which is another source of the Tribunal’s discretionary power to make inquiries. Under s 427(1), the Tribunal had other powers, including the power to take evidence on oath or affirmation, and the power to require the Secretary to arrange for the making of any investigation that the Tribunal thought necessary with respect to the review and to give the Tribunal a report with respect to that investigation. Under s 428(2)(a), the power to take evidence could be exercised inside or outside Australia, and under s 429A the Tribunal could take evidence by telephone. Under s 427(3) and (4), the Tribunal had power to summon a person to give evidence, but only if the person was in Australia.
3. In *Prasad v Minister for Immigration and Ethnic Affairs* [1985] FCA 46; 6 FCR 155, which was an application for judicial review under the *Administrative Decisions (Judicial Review) Act* *1977* (Cth) (**ADJR Act**), Wilcox J recorded what his Honour described as tentative views relating to the circumstances in which a decision will be invalid because the decision-maker failed to make inquiries. His Honour referred to s 5(1)(e) and s 5(2)(g) of the ADJR Act which when read together provide for review on the ground of improper exercise of power where the exercise of power “is so unreasonable that no reasonable person could have so exercised the power”. His Honour stated that this was concerned with the *manner* of exercise of the power, stating at 169 –

Under s 5(l)(e) and s 5(2)(g) the court is concerned with the *manner* of exercise of the power. A power is exercised in an improper manner if, upon the material before the decision-maker, it is a decision to which no reasonable person could come. Equally, it is exercised in an improper manner if the decision-maker makes his decision – which perhaps in itself, reasonably reflects the material before him – in a manner so devoid of any plausible justification that no reasonable person could have taken this course, for example by unreasonably failing to ascertain relevant facts which he knew to be readily available to him. The circumstances under which a decision will be invalid for failure to inquire are, I think, strictly limited. It is no part of the duty of the decision-maker to make the applicant’s case for him. It is not enough that the court find that the sounder course would have been to make inquiries. But, in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised it. It would follow that the court, on judicial review, should receive evidence as to the existence and nature of that information.

(Emphasis in original.)

1. The observations of Wilcox J in *Prasad* were referred to in *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; 83 ALJR 1123 in the joint judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [21], who noted that Wilcox J was dealing with grounds of review provided for by the ADJR Act, and that the observations were tentative and unnecessary for the decision. Nonetheless, in the context of the appeal in *SZIAI*, which concerned the question whether there had been jurisdictional error by the Refugee Review Tribunal in failing to initiate an inquiry, their Honours stated at [25] as considered *obiter*, but in notably cautious language –

The duty imposed upon the Tribunal by the *Migration Act* is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. …

(Footnote omitted.)

1. Their Honours found it unnecessary to explore the above questions of principle, because at [26] it was held that there was nothing on the record to indicate that any further inquiry by the Tribunal in relation to the issue in contention could have yielded a useful result. For that reason, there was no factual basis for the conclusion that the failure to inquire constituted a failure to undertake the statutory duty of review or that it was otherwise so unreasonable as to support a finding that the Tribunal’s decision was infected by jurisdictional error.
2. In *Wei v Minister for Immigration and Border Protection* [2015] HCA 51; 257 CLR 22, a delegate of the Minister had acted upon incorrect information contained in a database maintained under the *Education Services for Overseas Students Act 2000* (Cth) (**ESOS Act**)in cancelling the visa of the plaintiff, who was a university student, on the factually erroneous ground that the plaintiff was no longer enrolled. A full court comprising Gageler, Keane and Nettle JJ sitting in the court’s original jurisdiction held that there had been a jurisdictional error and quashed the decision. In their joint reasons, Gageler and Keane JJ held that there had been a breach by the university of its obligation under the ESOS Act to upload the plaintiff’s confirmation of enrolment, which resulted in an invalid exercise of power to cancel the visa. Nettle J did not agree with these reasons, but joined in the orders on the independent ground that the failure of the delegate to make an inquiry of the plaintiff’s university was a jurisdictional error. In arriving at this conclusion, Nettle J cited (*inter alia*) *Prasad* and *SZIAI*, and held that in the circumstances that presented themselves to the delegate, it was more than usually important for the delegate to be “as certain as reasonably possible” that the proposed ground of cancellation existed. Those circumstances were that correspondence from the delegate to the plaintiff had been returned as unclaimed, and therefore the delegate knew that the plaintiff did not know of the proposal to cancel the visa, and did not have the opportunity to respond to the proposal as ss 119-121 of the *Migration Act* contemplated. Nettle J held that one obvious way of ensuring, or at least being more certain, that the plaintiff had ceased to be enrolled at the university was to make a telephone inquiry of the university, and the failure to do so was a constructive failure to exercise jurisdiction.
3. *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16; 264 CLR 217 concerned a decision of the Immigration Assessment Authority and, among other claims, an allegation that the Authority acted unreasonably in failing to get new information under s 473DC of the *Migration Act*. The nature of the duty to review that is imposed on the Authority under Part 7AA of the *Migration Act* differs from that imposed on the Tribunal under Part 7 of the Act. For one thing, the power of the Authority to consider new information is constrained in a way that the power of the Tribunal is not, although s 423A in Part 7 requires the Tribunal to draw an unfavourable inference if it is satisfied that the applicant does not have a reasonable explanation for failing to make a claim or to present evidence before the primary decision-maker. Nonetheless, like the Tribunal, the Authority is given discretionary powers to getinformation. In *Plaintiff M174/2016* at [21], Gageler, Keane and Nettle JJ (with whose reasons Edelman J agreed) stated that the various powers conferred on the Authority by Div 3 of Part 7AA of the *Migration Act* are conferred on the implied condition that they are to be exercised within the bounds of reasonableness, citing *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332. In *Li,* Gageler J stated at [91] that the implied statutory condition of reasonableness is not confined to why a decision is made; it extends to how a statutory decision is made. This is a reference to the *manner* in which a decision is made, which is apparent from Gageler J’s citation of *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; 183 CLR 273 at 290, where Mason CJ and Deane J stated –

Just as a power is exercised in an improper manner if it is, upon the material before the decision-maker, a decision to which no reasonable person could come, so it is exercised in an improper manner if the decision-maker makes his or her decision in a *manner* so devoid of plausible justification that no reasonable person could have taken that course.

(Emphasis added.)

1. What is significant for present purposes is that the above passage in the reasons of Mason CJ and Deane J in *Teoh* was preceded by their Honours’ citation of the reasons of Wilcox J in *Prasad*, in the context of a claim made in *Teoh* that there had been a failure of the decision-maker to initiate inquiries. The reasons of Gageler J in *Li* at [91], including the passage cited from *Teoh* at 290, were cited by Kiefel CJ, Bell, Gageler and Keane JJ in another case involving a decision of the Immigration Assessment Authority, *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34; 94 ALJR 928 at [19], following which their Honours stated at [20] –

Compliance with the implied condition of reasonableness in the performance by the Authority of its duty to review the decision of the delegate necessitates not only that the decision to which the Authority comes on the review has an “intelligible justification” but also that the Authority comes to that decision through an intelligible decision-making process. …

1. In *ABT17*,Kiefel CJ, Bell, Gageler and Keane JJ stated at [3] that the powers of the Authority to get and consider new information were conferred on the implied condition that the powers must be considered and where appropriate exercised within the bounds of reasonableness. In that case, the implied condition was held not have been complied with. That was because the Authority did not act reasonably in performing its duty to review the decision of a delegate of the Minister when it rejected the appellant’s account in an interview before the delegate on demeanour grounds, without using powers at its disposal to get new information by inviting the appellant to a further interview so as to see him, thereby placing itself in as good a position as the delegate.
2. The Tribunal is also subject to an implied condition of reasonableness in the discharge of its review function. Its review function is undertaken with the various powers that are at its disposal, described at [44] above, including the powers of the Minister that are picked up by s 415, and the powers under s 424 to get information that it considers relevant. The implied conditions on the duty to review that are imposed on the Tribunal include that it act within the bounds of reasonableness in considering whether to exercise any of the powers that are available to it to get any information that it considers relevant.
3. Importantly, there is a further implication. The further implication is that the required threshold of unreasonableness is usually high: *Minister for Home Affairs v DUA16* [2020] HCA 46; 95 ALJR 54 at [26] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ), citing *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541 at [11] (Kiefel CJ), [52] (Gageler J), [89] (Nettle and Gordon JJ), and [135] (Edelman J). The high threshold of unreasonableness has a number of dimensions to it which are informed by the subject matter, scope, and purpose of the statute in question: *Water Conservation and Irrigation Commission (NSW) v Browning* [1947] HCA 21; 74 CLR 492 at 505 (Dixon J); *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [90] (Gageler J). The subject matter, scope, and purpose of those provisions of the *Migration Act* providing for administrative review by the Tribunal have the consequence that it is not usually the duty of the Tribunal to make out a case on the applicant’s behalf. And the review function undertaken by the Tribunal attracts the kind of considerations referred to by Hill J (with whom Gummow J and O’Connor J agreed) in *Enichem Anic Srl v Anti-Dumping Authority* [1992] FCA 882; 39 FCR 458 at 469 –

Decision-making is a function of the real world. A decision-maker is not bound to investigate each avenue that may be suggested to him by a party interested. Ultimately, a decision-maker must do the best on the material available after giving interested parties the right to be heard on the question.

1. The high threshold of unreasonableness has been recognised by the guidance that the authorities give in relation to when the failure of an administrative decision-maker, such as the Tribunal, to inquire might breach the implied duty to act reasonably so as to amount to jurisdictional error. In *SZIAI*, the joint judgment referred at [25] to the failure to make an obvious inquiry about a critical fact the existence of which is easily ascertained, which alludes to the types of considerations referred to in reasons of Wilcox J in *Prasad* to which I referred at [45] above. In *Prasad,* Wilcox J, in the context of s 5(1)(e) and s 5(2)(g) of the ADJR Act with which his Honour was concerned, spoke of a decision-maker making a decision in a manner “so devoid of any plausible justification that no reasonable person could have taken this course”, and of exercising a decision-making power “in a manner so unreasonable that no reasonable person would have so exercised it”. In *Minister for Immigration and Citizenship v Le* [2007] FCA 1318; 164 FCR 151 at [60], Kenny J catalogued a series of cases stretching over the life of the Tribunal that established that the Tribunal has no general obligation to initiate inquiries or to make out a case on an applicant’s behalf. In referring to certain rare or exceptional circumstances where the Tribunal’s failure to inquire might ground a finding of jurisdictional error, Kenny J invoked *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 and the reference by Lord Greene MR at 230 to a decision that is “so unreasonable that no reasonable authority could ever have come to it”. That formulation is to be understood in the way explained by Hayne, Kiefel and Bell JJ in *Li* at [68]-[73] as not being confined to irrational or bizarre decisions. However, the threshold of unreasonableness remains a stringent one that invokes the criterion that no reasonable tribunal could have done what the Tribunal did while heeding the applicable provisions of the *Migration Act*, such as the exhortations in s 420(b) and s 422B(3) to act in accordance with the substantial justice and merits of the case, and to act in a way that is fair and just: *Li* at [98] (Gageler J). Finally, it is worth emphasising that the mere fact that it may have been reasonable for a Tribunal to make an inquiry does not mean that the failure to make an inquiry amounts to jurisdictional error: *Kaur v Minister for Immigration and Border Protection* [2017] FCAFC 184; 256 FCR 235 at [33] (Dowsett, Pagone and Burley JJ).
2. Counsel for the appellant submitted that the question whether the appellant had reported his receipt of the May 2015 letter to his employer was a critical fact. The appellant had claimed before the delegate that he had told Mr Essa of the letter, and had maintained this account before the Tribunal, claiming that he had told Mr Essa of the letter by telephone. The appellant confirmed to the Tribunal that he did not have any written correspondence between himself and Mr Essa in relation to the warning letters. The appellant had produced to the Tribunal the Optus telephone record that he claimed was corroborative of the fact that he had spoken to Mr Essa, as was the account of the appellant’s migration agent of her conversation with Mr Essa. Counsel for the appellant submitted that the fact that the migration agent’s submission was accompanied by a copy of an email from Mr Essa which recorded his email address made an email enquiry obvious, and submitted that a telephone enquiry would also have been obvious. Counsel submitted that this was a rare and exceptional case where the failure to make an inquiry of Mr Essa amounted to jurisdictional error because the Tribunal had concluded, in effect, that the appellant’s migration agent (who was a solicitor) had been untruthful or unreliable in documenting a significant conversation that had occurred between her and Mr Essa, and that this was an extremely serious conclusion that should not have been drawn lightly, or before making obvious and easy inquiries. Counsel for the appellant placed particular reliance on the text of [58] of the Tribunal’s reasons, and its reference to the Tribunal placing no weight on “statements made by the representative regarding what Mr Essa *purportedly* told her on the telephone” (emphasis added).
3. It was an important element of the submissions made on behalf of the appellant that the Tribunal had cast doubt on the solicitor’s account of what Mr Essa had told her, as opposed to the underlying information, and that it was for this reason that the reasonable discharge of its duty to review required that further inquiries of Mr Essa be made. Counsel for the appellant relied on this feature as making the present case a rare and exceptional one.
4. The characterisation of a case as rare and exceptional is not the basis on which jurisdictional error is to be evaluated. Rather, any statement that circumstances where the Tribunal should initiate an inquiry will be rare and exceptional is an observation about the outcome of the application of the stringent threshold for jurisdictional error on this ground. It remains for an applicant alleging jurisdictional error to engage with any features of the case that would establish that the Tribunal’s conduct of the review was unreasonable in the sense that no reasonable tribunal could have done what the Tribunal did consistently with the subject matter, scope, and purpose of the *Migration Act* and its conferral of review jurisdiction on the Tribunal. Those features might in an appropriate case include those specifically identified in the joint judgment in *SZIAI* at [25], but I do not understand [25] of *SZIAI* to define or to state exhaustively the circumstances in which a tribunal might act unreasonably in failing to initiate an inquiry.
5. I do not accept the appellant’s submission that, by its findings at [58], the Tribunal cast doubt on the truthfulness or the reliability of the appellant’s migration agent. I agree with the conclusion of the primary judge at [108], where his Honour rejected a similar submission made below in support of a different claim and stated, “[t]he complaint that the [appellant’s] lawyer had been the subject of the implicit finding that she was not a reliable or truthful witness misstates the effect of the Tribunal’s reasoning”. The primary judge held, and I agree, that no finding of the kind suggested was made, and nor was it implicit.
6. I accept the submission made on behalf of the appellant that a finding that the appellant’s migration agent was not reliable or was untruthful would be a serious finding. If the Tribunal had made such a finding, then I would expect that the Tribunal would have used direct language, as it did in describing some of the appellant’s claims as having been “fabricated”. I would also expect such a finding, if it had been made, to be accompanied by at least some supporting reasons. I take account of the fact that there are some aspects of [58] of the Tribunal’s reasons that are not felicitously expressed. It is also possible that the Tribunal at [58] may have misunderstood some of the material before it. By this, I have in mind the Tribunal’s interpretation of a submission by the appellant’s migration agent that anybody demonstrating their support for the appellant would be prosecuted, which interpretation did not accord with the submission actually made, but which the Tribunal rejected in any event. A principal element of the Tribunal’s reasons for rejecting the appellant’s claims was that there appeared to be no written communication from the appellant to his employer relating to either of the two letters from the Taliban that he claimed to have received. In this context, the relevant substance of the Tribunal’s reasons at [58] was to place no weight on a hearsay account conveyed by a telephone communication from Mr Essa to the appellant’s migration agent when Mr Essa had not committed that account to writing, and where there was otherwise no independent documentary support. This understanding of [58] of the Tribunal’s reasons is supported by other aspects of the reasons of the Tribunal such as those at [47]. There, in a similar way, the Tribunal referred to a submission of the appellant’s migration agent that Mr Essa had confirmed the threatening phone calls were received by the appellant and the UNFAO in 2014, and were reported to the UNSSD. In the Tribunal’s view, this was not reflected in any written communications from Mr Essa, and which despite the claim attributed to Mr Essa, was not supported by relevant documents such as minutes of meetings of the UNDSS that were before the Tribunal because they did not refer specifically to threats to the appellant. A similar point was made by the Tribunal at [71] in a different context where it stated, “[a]s indicated above, the Tribunal gives no weight to assertions made by the representative as to what Mr Essa told her on the telephone, which is not reflected in the documentation written by Mr Essa provided to the Tribunal”. The points that the Tribunal made at [47], [58], and [71] were directed to the absence of documentary support for the information attributed to Mr Essa which led it to give the information no weight. The Tribunal did not make any finding about the truthfulness or the reliability of the migration agent who conveyed the information.
7. The rejection of the appellant’s submissions that there had been a finding as to solicitor’s truthfulness is significant, because the appellant’s submission reduces to an argument that it was unreasonable for the Tribunal not to double-check with Mr Essa directly and of its own initiative before giving no weight to the migration agent’s account of her conversation with him.
8. I am not persuaded that it was unreasonable for the Tribunal to proceed to determine the review without making the further inquiries that are now suggested. The Tribunal had a duty to give the appellant an opportunity to appear and to present arguments, and an opportunity to give notice that he wished the Tribunal to obtain oral evidence. The Tribunal also had a duty to give the appellant particulars of information that it considered would be the reason or part of the reason for affirming the decision under review, and an opportunity to respond to or comment on that information, which the appellant took up. If anybody was in a position to adduce information from Mr Essa that was capable of carrying more weight than a hearsay account derived from a telephone conversation with him, it was the appellant and his migration agent. These are the circumstances in which the Tribunal’s duty to review fell to be performed. Upon complying with the duties referred to above, the Tribunal does not ordinarily act outside the bounds of reasonableness by failing to initiate the pursuit of every avenue of inquiry that might reveal information that may improve the weight of the evidentiary basis for an applicant’s claim. The appellant’s submissions rise no higher than pointing to features of the review that may have invited further investigation into the information that the appellant’s migration agent had attributed to Mr Essa.
9. However, as I have mentioned, there were many threads to the Tribunal’s reasons which contributed to its rejection of the appellant’s claims. In this regard, counsel for the appellant accepted that the Tribunal was not under a duty to make inquiries of the appellant’s wife before rejecting the claim that two men had visited her home in December 2015 seeking to know the appellant’s whereabouts. In this case, the Tribunal did not exceed the bounds of reasonableness by failing to make its own inquires so as to double-check every element of the appellant’s claims that it proposed to reject, or every piece of evidence upon which it proposed to place no weight. Having regard to all the material that was before the Tribunal, it was open to the Tribunal acting reasonably to give the information attributed to Mr Essa no weight having regard to the form in which it was presented, and having regard to the matrix of circumstantial facts to which the Tribunal referred in its reasons as supporting its conclusion that the appellant’s claims were fabricated.
10. In arriving at the above conclusions, I have treated as irrelevant the recent communications between the appellant’s current solicitors and Mr Essa which were received into evidence. The question whether it was unreasonable not to make the inquiry that is alleged is anterior to the outcome of that inquiry, and the evidence of recent communications with Mr Essa does not speak to that issue: *Cai v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 90 at [50]. If the failure to inquire was unreasonable, then for there to be a jurisdictional error the failure must be material in the sense that without the failure there would have been a realistic possibility of a different outcome on the review. For that purpose, the identification of what material the Tribunal might have obtained had it initiated further inquiries may be relevant.

### Issue (2) – compliance with s 424A of the Migration Act.

1. Section 424A(1) of the *Migration Act* requires the Tribunal to give to an applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision under review, to ensure as far as is reasonably practicable that the applicant understands why that information is relevant to the review, and to invite the applicant to comment on it. There is a corresponding duty on the Minister under s 57(2) of the Act. The text of s 424A(1) 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.

1. Section 424A(2) provides that the information and invitation are to be given to an applicant by one of the methods specified, all of which involve giving the particulars of the information and the invitation in writing: *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; 81 ALJR 1190 at [12] and [14] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). Section 424A does not apply to all information in the possession of the Tribunal. It does not apply to information that an applicant gave for the purpose of the application for review, or to at least some of the information that an applicant gave during the process that led to the decision under review, or to “non-disclosable information”: s 424A(3). In addition, s 424A(2A) provides for an exception if the Tribunal has given clear particulars of the information, and has invited an applicant to comment or respond to the information pursuant to s 424AA upon the applicant appearing before the Tribunal because of an invitation under s 425: cf, *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; 228 CLR 294, which was decided prior to the insertion of s 424AA, and see Australia, Senate, Migration Amendment (Review Provisions) Bill 2006, Explanatory Memorandum, Item 18.
2. In *SZBYR*, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ stated at [15] that s 424A does not require notice to be given of every matter the Tribunal might think relevant to the decision under review: see also, *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421 at [10] (Bell, Gageler and Keane JJ). Rather, the Tribunal’s obligation is limited to the written provision of “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” (emphasis added). The statutory condition in s 424A(1) directs attention to the criteria for making the decision that are found elsewhere in the Act: *SZBYR* at [17]. The use of the conditional tense in s 424A(1)(a) (would be) rather than the indicative strongly suggests that the operation of the provision is to be determined in advance – and independently – of the Tribunal’s particular reasoning on the facts of the case: *SZBYR* at [17]; *Plaintiff M174/2016* at [9] (Gageler, Keane and Nettle JJ). The information in question “should in its terms contain a ‘rejection, denial or undermining’ of the review applicant’s claim”: *Minister for Immigration and Citizenship v SZLFX* [2009] HCA 31; 238 CLR 507at [22] (French CJ, Heydon, Crennan, Kiefel and Bell JJ), citing *SZBYR* at [17]. The information must in its terms be of such significance as to lead the Tribunal to consider in advance of reasoning on the facts of the case that the information of itself “would”, as distinct from “could”, or “might”, be the reason or part of the reason for affirming the decision under review: *SZLFX* at [25]; *Plaintiff M174/2016* at [9].
3. In *SAAP*, it was held that compliance by the Tribunal with s 424A(1) is a condition of the valid performance of the duty to review, with the consequence that non-compliance renders a decision to affirm the decision under review invalid in the sense that the decision is ineffective in law to achieve that result: see *SAAP* at [77] (McHugh J), [173] (Kirby J), [206]-[208] (Hayne J). These passages were cited in *Plaintiff M174/2016* at [11], which in turn was cited by Gordon J sitting in the court’s original jurisdiction in *Plaintiff M7/2021 v Minister for Home Affairs* [2021] HCA 14 at [49]. The statements in *SAAP* address the question of construction that arises as to whether non-compliance with s 424A(1) leads to invalidity without regard to the additional consideration of materiality, or whether non-compliance with s 424A(1) is necessarily material: see, *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17 at [30]-[33] (Kiefel CJ, Gageler, Keane and Gleeson JJ); and see also, *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [92] (McHugh, Gummow, Kirby and Hayne JJ). It follows from what was said in *SAAP* by McHugh J at [77], and by Hayne J at [208], with Kirby J agreeing at [173], that non-compliance with s 424A(1) is necessarily material, because the provision prescribes the content of an imperative obligation to accord procedural fairness, compliance with which is a necessary condition of the validity of the review.
4. The requirement in s 424A(1)(b) that the Tribunal must *ensure*, as far as reasonably practicable, that the applicant understands why the information is relevant to the review requires that the importance of the information and its potential impact upon the applicant’s case be identified, and that the information be communicated in a way which promotes that understanding as far as is possible: *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; 241 CLR 252 at [20] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), relating to the corresponding provision in s 57(2)(b) of the Act.
5. Counsel for the appellant submitted in writing that, when engaged, “the obligations imposed by s … 424A … must be performed to the maximum extent permitted by the reasonable exercise of that discretion”, citing *SZMTA* at [24]. However, in the submission, the proposition cited from *SZMTA* was stripped from its context. The discretion to which Bell, Gageler and Keane JJ referred in *SZMTA* at [24] was the discretion under s 438(3)(b) to disclose any matter contained in a document to which a notification under s 438(1) applied, and not a discretion arising under s 424A which, as their Honours indicated, imposes obligations.
6. The terms of s 424A(1) of the Act do not require the Tribunal to do other than give “clear particulars” of information, and therefore do not in terms *require* the Tribunal to give the documents from which the information is derived: *SXRB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 14 at [9] (Kiefel, Kenny and Graham JJ). The degree of clarity of the particulars may affect the extent to which the Tribunal may separately be required to convey the relevance of the information to the review, and the consequences of it being relied upon: *SZMTJ v Minister for Immigration and Citizenship (No 2)* [2009] FCA 486; 232 FCR 282 at [52] (Flick J). In some cases, the relevance of the information may be self-evident from the particulars provided: *Wang v Minister for Immigration and Citizenship* [2007] FCA 488 at [29] (Besanko J). In other cases, compliance with the obligations under s 424A(1) may require that actual documents be given to the applicant so that there is an opportunity for a *meaningful* comment or response: *Plaintiff M7/2021* at [44] (Gordon J). Therefore, in some cases in order for the Tribunal to comply with s 424A(1), the information may not be capable of being clinically divorced from the context in which it appears, and it may be necessary to identify the source from which the information has been obtained. How much has to be disclosed and in what form must depend upon the facts and circumstances of each case: *SZNKO v Minister for Immigration and Citizenship* [2010] FCA 297; 184 FCR 505 at [23] (Flick J).
7. I have referred to and set out the Tribunal’s written disclosure of particulars of information attributed to Mr Stallen at [13] above, and to the Tribunal’s reliance on that information in [61] of its statement of reasons, which I have set out at [22] above. Counsel for the Minister did not seek to rely upon any oral disclosures by the Tribunal at the hearing as complying with, or as contributing to compliance with the duty under s 424A of the Act to give written particulars of information. The Tribunal gave the appellant particulars of information attributed to Mr Stallen by giving the appellant a precis of the information, but not the document from which the information was derived. A copy of the relevant email communication from Mr Stallen to the Senior Migration Officer at the Australian High Commission was in evidence before the primary judge because the email, which was dated 26 June 2015, was annexed to an affidavit dated 6 May 2020 and filed on behalf of the Minister. The affidavit also annexed the other documents that had been the subject of the invalid certificate purportedly given under s 438 of the Act, which included emails between Mr Stallen and Mr Essa and the Australian High Commission in late April 2015 relating to the processing of applications for visas for the appellant and the others on the mission. With reference to those communications, on 26 June 2015 the Senior Migration Officer at the Australian High Commission in Islamabad sent an email to Mr Stallen requesting his advice as to whether all members of the delegation had returned to Pakistan at the end of their authorised period of stay. Mr Stallen’s response dated 26 June 2015 is the source of the information which was the subject of the particulars that were given to the appellant by the Tribunal, in which Mr Stallen stated (inter alia) –

I still remember this and - by coincidence - I have made my apologies on this issue to Kate Chamley who was in the FAO office this morning.

I have put Kate in the CC because unfortunately two of our FAO staff members ([name redacted] and [DYI16]) have extended their visa and have not yet returned from the Australia study tour ([DYI16] for medical reasons). Kate might check with you on the status of these 2 guys.

During the last 2 weeks I have put lots of pressure on them to return to Pakistan and that they take the wrong decision and tarnish the reputation of FAO and jeopardize future mission etc. , but without much effect. I will keep you updated on this unfortunate situation.

Please do not hesitate to contact me in case you need more information

1. The Senior Migration Officer responded on 26 June 2015 as follows –

Thank you for following up on this, yes and steps you can take to ensure that all members of the group return to Pakistan would be helpful. In our experience convincing applicant to return is difficult or impossible once people are in Australia, but any efforts to obtain this outcome would assist and provide us with confidence in relation to future groups, which at this point would be difficult to facilitate on the same terms as this group.

As you would recall we had assessed three other members of the group to be high risk or to be of concern for various reasons and did not accept their applications, so the numbers who did not return are less than we suspect they would have been had we granted the whole group, but still this is an undesirable result.

Any information you obtain through your channels about how this was planned would also assist us to manage this type of risk in future. (for example: was it opportunistic, or planned, [if] planned, how long had it been planned for)

Thanks again for following up and please get in touch if you have any success in arranging the return of these two persons

1. Counsel for the appellant submitted that a full appreciation of the correspondence with Mr Stallen revealed that Mr Stallen had a reason to, and in fact did, hold feelings of enmity towards the appellant, because Mr Stallen considered the appellant’s actions in overstaying his visa to tarnish the reputation of UNFAO in Pakistan and to jeopardise future UNFAO missions to Australia. Counsel further submitted that Mr Stallen had reason to, and in fact did exaggerate his efforts to encourage the appellant to return to Pakistan.
2. Counsel submitted that in these circumstances there were two ways in which the Tribunal’s invitation to the appellant dated 2 November 2016 to comment on or to respond to the information was inadequate. *First*, it was submitted that the Tribunal failed to give sufficient particulars of the information because it failed to provide clear particulars of the “Stallen correspondence”, which was a reference by counsel to all of the correspondence with Mr Stallen that was the subject of the invalid certificate purportedly issued under s 438 of the *Migration Act*. Counsel submitted that the particulars that the Tribunal gave in its invitation represented that the information that was disclosed covered completely the information that was the subject of the invalid certificate, when that was not the case. Counsel submitted that the precis in the invitation omitted material aspects of the correspondence, including the circumstances in which the correspondence occurred, and the way in which those circumstances pointed to a motivation on the part of Mr Stallen to give a response that was unfavourable to the appellant.
3. The *second* submission advanced by counsel for the appellant was that the Tribunal had failed by its invitation to ensure that the appellant had understood the relevance of the information to the review and the consequences of it being relied on in affirming the decision under review. Counsel submitted that at [61] of its statement of reasons the Tribunal had relied on the information to find: (1) that Mr Stallen did not have concerns for the appellant’s safety; and (2)  that Mr Stallen would have provided supporting documentation if the appellant had been threatened by the Taliban by the two warning letters that the appellant claimed had been sent to him. Counsel submitted that neither of these uses of the information was addressed on behalf of the appellant in the response to the Tribunal’s invitation, which confirmed that the Tribunal did not do enough to ensure that the appellant understood the potential relevance of the information in order to equip him to respond meaningfully.
4. In this case, the reason or a part of the reason for affirming the decision under review that was stated by the Tribunal in its invitation under s 424A(1) of the Act was that there was evidence indicating that the appellant had not been sought by the Taliban, and that his claims had been manufactured. The Tribunal stated that if it made these findings it might find that the appellant did not have a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion, and that the appellant did not meet the complementary protection criterion, reflecting the criteria for a protection visa in s 36 of the Act. Those reasons were to be fairly understood in the context of the information that was disclosed.
5. I do not accept the first submission advanced on behalf of the appellant that the Tribunal had failed to give clear particulars of the information. The starting point is that in discharging the obligation under s 424A(1)(a) of the Act the Tribunal was required only to give clear particulars of information that it considered *would* be the reason or part of the reason for affirming the decision under review. The Tribunal’s consideration of what information fell within that criterion may be inferred from the conduct of the hearing, from the terms of the invitation, and from the Tribunal’s statement of reasons for its decision. The plain inference is that the Tribunal thought that the information undermined the appellant’s claims that in March and May 2015 he had received letters containing threats from the Taliban. In my view, the Tribunal distilled from the email communications with Mr Stallen those aspects of what Mr Stallen had said in his email of 26 June 2015 that would be a circumstance tending to support an inference that the appellant did not receive the threats, including by the quotation of the key passages of the email. The anterior and subsequent email correspondence did not contain information that the Tribunal considered would be the reason or part of the reason for affirming the decision under review, and they did not on that account have to be the subject of the particulars. Nor do I consider that it was necessary in order to comply with s 424A(1) to give particulars of the surrounding email correspondence so as not to mislead the appellant. It was readily apparent from the particulars that the Tribunal provided to the appellant that Mr Stallen was disapproving of the appellant’s situation, that he deprecated the appellant’s decision to remain in Australia, and that he thought that the appellant had tarnished the reputation of his organisation.
6. As to the second submission, I am not persuaded that the Tribunal failed to ensure, as far as reasonably practicable, that the appellant understood why the information was relevant to the review, and the consequences of it being relied upon. As to relevance, the Tribunal stated that the information indicated that the appellant had not been sought by the Taliban, and that was the use to which the Tribunal put the information in its statement of reasons. There were intermediate steps in the reasoning process, being that instead of Mr Stallen stating that he was concerned about any threats by the Taliban against the appellant, he stated that he had placed pressure on the appellant to return to Pakistan and expressed the view that the appellant had “made the wrong decision”. That intermediate step was an obvious step available to the Tribunal. As to the Tribunal’s statement at [61] of its reasons that Mr Stallen had failed to provide supporting documentation, this is really the same point, because it is a corollary of the statements that Mr Stallen had made. These intermediate steps in the Tribunal’s reasoning process as set out in its published reasons did not need to be disclosed so as to ensure that the appellant understood why the information was relevant to the review, and the use to which it might be put: see *SZBYR* at [18].
7. It is necessary to evaluate the whole of the invitation to the appellant from the Tribunal which related also to the information from the undisclosed source (see [12] above), which the Tribunal stated may be consistent with the comments of Mr Stallen. There is no sufficient reason to doubt that the Tribunal ensured, as far as reasonably practicable, that it conveyed to the appellant that each item of information, when combined with other facts, undermined the credibility of the appellant’s claims to have been threatened by the Taliban to the point that the Tribunal foreshadowed it might find the appellant’s claims had been manufactured.

### Issue (3) – Legal unreasonableness.

1. Counsel for the appellant submitted that even if the Tribunal had complied with s 424A(1), it was unreasonable for the Tribunal to fail to exercise its discretionary power under s 427(1)(c) of the Act to give information to the appellant by providing copies of all of the correspondence with Mr Stallen. In support of this claim, counsel submitted that given the extensive, complex and potentially significant nature of the correspondence, there was no good reason not to disclose it.
2. It might be possible to conceive of cases where a tribunal complies with the procedural fairness obligations in s 424A(1), but acts unreasonably in failing to give additional information to an applicant. This is not such a case. The submissions advanced on behalf of the appellant go no further than to suggest that it might have been reasonable for the Tribunal to give copies of the correspondence to the appellant. The submissions do not go anywhere near supporting a conclusion that the high threshold of unreasonableness has been reached in this case, namely that in not giving the documents to the appellant the Tribunal discharged its review function in a manner that no reasonable tribunal could while heeding the applicable provisions of the *Migration Act*, such as the exhortations in s 420(b) and s 422B(3) to act in accordance with the substantial justice and merits of the case, and to act in a way that is fair and just.

### Materiality

1. Having regard to the above conclusions, it is unnecessary to address the Minister’s submissions as to materiality or the primary judge’s findings on that issue (see [30] above), save to point to the consideration to which I referred at [67] above, namely that a failure to comply with s 424A(1), if established, would necessarily have been material.

## Conclusions

1. I refuse leave to the appellant to raise the new arguments on appeal. I do so because the weight of the discretionary considerations that I consider to be relevant, including especially the merits of the new grounds, point against leave being given. The grounds on which jurisdictional error was alleged that were raised on appeal should have been raised before the primary judge, and my refusal of leave is to reflect this fact. None of this should be interpreted as a criticism of counsel for the appellant, who together with counsel for the Minister, argued the appeal skilfully.
2. The appeal will be dismissed. I will hear the parties on the question of costs.

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| I certify that the preceding eighty-four (84) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wheelahan. |

Associate:

Dated: 11 June 2021