HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND HAYNE JJ

SAAP & ANOR APPELLANTS

AND

MINISTER FOR IMMIGRATION AND MULTICULTURAL
AND INDIGENOUS AFFAIRS & ANOR RESPONDENTS

SAAP v Minister for Immigration and Multicultural and Indigenous Affairs
[2005] HCA 24
18 May 2005
A28/2004

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the order of the Full Court of the Federal Court of Australia made on 11 December 2002 and, in its place, order:*

   (a) appeal allowed with costs;

   (b) set aside the orders of Mansfield J made on 10 May 2002 and, in their place, order that:

      (i) there be an order in the nature of certiorari to quash the decision of the Refugee Review Tribunal ("the Tribunal") made on 18 October 2001;

      (ii) there be an order in the nature of mandamus requiring the Tribunal to review according to law the decision made by a delegate of the Minister on 19 June 2001 to refuse protection visas sought by the applicants;

      (iii) the respondent pay the applicants' costs.

On appeal from the Federal Court of Australia

Representation:

B R M Hayes QC with M S Blumberg for the appellants (instructed by Bourne Lawyers)

J Basten QC with S J Maharaj for the first respondent (instructed by Sparke Helmore)

No appearance for the second respondent

CATCHWORDS

SAAP & Anor v Minister for Immigration and Multicultural and Indigenous Affairs

Immigration – Refugees – Decision of Refugee Review Tribunal ("Tribunal") – Tribunal invited the first appellant to appear to give evidence and present arguments under *Migration Act* 1958 (Cth), s 425 – Evidence was later taken from first appellant's daughter in absence of first appellant – Tribunal affirmed decision under review by relying on information obtained from first appellant's daughter – Tribunal failed to give the first appellant particulars in writing of information – Tribunal failed to invite the first appellant in writing to comment on information – Whether Tribunal breached *Migration Act*, s 424A.

Immigration – Construction of *Migration Act*, s 424A – Whether the provisions of Pt 7 Div 4 have sequential or ambulatory operation – Relevance of Refugee Convention in case of ambiguity.

Immigration – Jurisdictional error – Whether a breach of *Migration Act*, s 424A amounts to jurisdictional error that invalidates the decision.

Immigration – Procedural fairness – General law – Whether Tribunal breached rules of procedural fairness.

Administrative Law (Cth) – Certiorari – Mandamus – Jurisdictional error – Whether grant of relief should be withheld on discretionary grounds – Relevant factors – *Judiciary Act* 1903 (Cth), s 39B.

Practice – Joinder of party – Tribunal was not named as a party for the relief sought under *Judiciary Act*, s 39B – Whether the Tribunal was a necessary party to the proceedings – "officer or officers of the Commonwealth" – *Judiciary Act*, s 39B.

Judiciary Act 1903 (Cth), s 39B.
Migration Act 1958 (Cth), ss 424A, 425.

1 GLEESON CJ. Part 7 of the *Migration Act* 1958 (Cth) ("the Act") provides for administrative review of protection visa decisions by the second respondent, the Refugee Review Tribunal ("the Tribunal")[1]. The decisions subject to potential review, which include a refusal to grant a protection visa on the ground that a non-citizen is not a refugee within the meaning of the Act and the international instruments by reference to which the Act operates, are commonly made by a delegate of the first respondent, the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister"). Section 414, which is in Div 2 of Pt 7, provides that, if a valid application for review of a decision is made, the Tribunal must review the decision. Pursuant to s 415, the Tribunal may affirm the decision, vary it, remit it for re-consideration, or set it aside and substitute a new decision. Section 420, which is in Div 3 of Pt 7, deals with the Tribunal's "way of operating", which is to be fair, just, economical, informal and quick. The Tribunal is not bound by legal technicalities and forms, and is to act according to substantial justice and the merits of the case.

2 Division 4 of Pt 7 deals with the conduct of a review. Section 423 prescribes the procedure to be followed after an application for review has been lodged. As a result of the lodging of the application, the Registrar of the Tribunal will have been furnished with the findings of the original decision-maker, a statement of the evidence on which the findings were based, and a statement of the reasons for the decision (s 418). Under s 423, the applicant may provide the Registrar with a statutory declaration in relation to any matter of fact that the applicant wishes the Tribunal to consider, and written argument about the issues. The Secretary of the Minister's Department may give the Registrar written argument about the issues. Section 425 obliges the Tribunal to invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues. That requirement is subject to certain exceptions that did not apply in the present case, but that are relevant to a question of construction that arises. Section 429 provides that what it describes as the hearing of an application for review must be in private. Division 5 of Pt 7 deals with the manner in which the Tribunal is to record and publish its decisions.

3 Within that framework, Div 4 of Pt 7 contains certain other provisions relating to the conduct of the review. It has been noted that s 423 provides for the applicant to submit evidence as to matters of fact, and written argument, and also for the Secretary to submit written argument, and s 425 provides for the applicant to be invited to appear before the Tribunal, give evidence, and present argument. Between ss 423 and 425 there are four sections dealing with "information" and "comments on information".

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1 References are to the form of the Act in September 2001, when the Tribunal hearing in the present case occurred.

4 Section 424 confers on the Tribunal a general power to "get any information that it considers relevant". If the Tribunal gets such information, it must have regard to it. In particular, the Tribunal may invite a person to give "additional information", which must mean information additional to that already obtained under s 418, or provided under s 423.

5 Section 424A obliges the Tribunal to give the applicant, in the way the Tribunal considers appropriate, particulars of any information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision under review, to ensure, as far as reasonably practicable, that the applicant understands why it is relevant, and to invite the applicant to comment on it (s 424A(1)). The information and invitation must be given by a prescribed method, involving handing, or sending, to the applicant, by post or other specified form of communication, a document (s 424A(2)). Section 424A does not apply to certain kinds of information, being information that is not specifically about an applicant, or information that the applicant gave for the purpose of the application, or non-disclosable information (s 424A(3)). There have been some uncertainties about the precise scope of that qualification, but they are not presently relevant. It is s 424A(2) that is of particular relevance in this case.

6 Section 424B deals further with the manner and form of inviting additional information under s 424, or comment on information under s 424A. Those provisions are relatively flexible. The invitee, who may or may not be the applicant, may or may not be invited to give the information, or make the comments, at an interview, and a procedure for fixing time limits is established. Section 424C deals with the consequences of failure to comply with the time limits. It empowers the Tribunal to proceed with its decision-making process without the information or the comments. Section 425 requires the Tribunal to invite the applicant to appear before the Tribunal. That requirement is subject to exceptions. One exception is where the applicant consents to the decision being made without the applicant appearing before the Tribunal (s 425(2)(b)). Another is where s 424C applies to the applicant. There is also an exception if the Tribunal considers that it should find in favour of the applicant on the material before it. It will be necessary to return to those exceptions.

7 Section 426 entitles the applicant to notify the Tribunal that the applicant wants the Tribunal to obtain evidence from some other person or persons. The Tribunal is empowered, by s 427, to take evidence on oath or affirmation, adjourn the review from time to time, and summon witnesses. Another person may be authorised by the Tribunal to take evidence (s 428). Oral evidence for the purposes of a review may be taken by telephone, closed circuit television, or any other means of communication (s 429A). As already noted, the hearing of an application for review must be in private (s 429).

8 What is described in s 429 as the hearing is to be understood in the wider statutory context. The prescribed procedure is not that of adversarial litigation, with evidence taken and issues debated at a climactic trial. Indeed, in many cases there will not be a hearing. The procedure is administrative and inquisitorial. Even so, the statutory references to appearance and hearing, adjournment, summoning witnesses, taking evidence, and proceeding to decision in default of appearance, show that this is a form of administrative decision-making which, having the capacity to affect human rights, borrows from judicial procedure. While it is true that fairness in administrative decision-making is not measured by reference to a judicial paradigm, judicial procedure ought to be an example of fairness in action, and it is not surprising to find some aspects of that procedure taken up for some administrative purposes.

9 The problem in the present appeal arises out of an alleged failure on the part of the Tribunal to comply with the requirements of s 424A, in particular, s 424A(2).

10 The essential facts may be stated briefly. The first appellant, who at different times was represented by a solicitor and a migration adviser, applied to the Tribunal for review of an unfavourable decision by a delegate. She was in immigration detention. A hearing of her application took place on 5 September 2001. The proceedings were conducted by video-link between Sydney and Woomera Hospital. The Tribunal Member was in Sydney, together with the first appellant's migration adviser, an interpreter, one of the first appellant's daughters, and other witnesses. The first appellant was at Woomera. Since the issue in the case is procedural, it is unnecessary to go into the substance of the first appellant's claims for refugee status. At one point in the proceedings, the Tribunal Member took evidence in Sydney from the first appellant's daughter. After the daughter's evidence was given, the Tribunal Member raised with the first appellant, for her comment, three particular matters about which the daughter had given evidence. For reasons that need not be examined, those matters were potentially adverse to the first appellant's case. The first appellant made her response to each matter. The first appellant's migration adviser heard the daughter's evidence, the Tribunal Member's questions to the first appellant, and the first appellant's responses. The Tribunal Member then brought the hearing to a close, leaving it open to the first appellant or her migration adviser to make further oral or written submissions. No further submissions were made, but the migration adviser wrote to the Tribunal asking for a prompt decision because of the state of the first appellant's health. A decision was then given. It was unfavourable to the first appellant.

11 The alleged failure to comply with s 424A arose from the circumstance that the Tribunal Member did not give the first appellant written notification of the three matters on which he invited comment, but dealt with the matter orally, at the hearing, in the manner described above. Two things should be noted. The first is that the first appellant is illiterate. For her, writing is not a useful medium

of communication, especially if it is in the English language, unless she is given the opportunity to have someone orally explain the writing to her. Furthermore, the first appellant's migration adviser evidently considered that there was nothing more that could usefully be said by way of comment on the matters raised by the Tribunal Member following the daughter's evidence.

12 In the Federal Court, Mansfield J held that there had been no failure to accord procedural fairness to the first appellant. He said that the first appellant was made aware of the nature and possible significance of her daughter's evidence and had a fair opportunity to comment on it, both during the hearing or later by further submissions had that been desired. He held that there had been a failure to comply with s 424A because the Tribunal had not given the first appellant written particulars of the information obtained from the daughter, but the failure had not deprived the first appellant of any opportunity to learn of material adverse to her claim, or comment on it. He therefore, in the exercise of what he saw as his discretion, declined to grant relief[2]. The Full Court of the Federal Court (Heerey, Moore and Kiefel JJ) dismissed an appeal[3].

13 In the Full Court, the principal issue was whether non-compliance with s 424A involved jurisdictional error. The Full Court's decision was given before the decision of this Court in *Plaintiff S157/2002 v Commonwealth*[4]. In this Court the main focus of attention in argument was whether, on the true construction of the Act, s 424A established an inviolable procedural requirement, compliance with which was essential to the validity of a Tribunal decision. If it was, the first appellant argued, it was beside the point to say that there was no procedural unfairness, and the primary judge had no discretion to decline relief.

14 The reasons given by Mansfield J for concluding that there was no want of procedural fairness are compelling. No successful challenge has been made to that aspect of his Honour's decision, which was accepted by the Full Court. However, in this Court the first respondent challenged the acceptance, both by Mansfield J and the Full Court, of the proposition that there had been a contravention of a requirement of s 424A. The basis of this challenge was that s 424A did not speak to the circumstances that existed at the hearing, and it was the rules of procedural fairness, not s 424A, that governed the conduct of the Tribunal Member in those circumstances. The competing view, accepted by

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2 *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 577.

3 *SAAP of 2001 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 411.

4 (2003) 211 CLR 476.

Mansfield J and the Full Court, is that s 424A operates before, during and after a hearing, and must be complied with if the situation it addresses arises at any time from the making of the application for review up to the final decision.

15 It is common ground between the parties that the rules of procedural fairness apply to the conduct of a hearing by the Tribunal. As to whether s 424A also applies, the first respondent submits that the structure of Div 4 of Pt 7 supports a view that s 424A(2) was not intended to operate during the hearing.

16 The very inflexibility of s 424A, upon which the appellants rely, and the mandatory terms in which s 424A(2) is cast, at least give reason to pause before concluding that the section applies to information that emerges during the hearing contemplated by ss 425, 425A, 427, 429 and 429A, being information upon which, as part of the process of hearing, the applicant can be, and is, fairly invited to comment.

17 While what is contemplated by s 425 is not a trial, it is a proceeding for the purpose of allowing the applicant to give evidence and present arguments. It is governed by the rules of procedural fairness. Applicants may be represented by lawyers or advisers, or they may be unrepresented. Witnesses may be called and examined. The applicant and the decision-maker are in direct communication. Provided fairness is observed, why would there be imposed, at that stage, as an inflexible requirement, that the Tribunal hand or deliver to the applicant a document containing a written invitation to comment on potentially adverse information? Provided fairness is observed, why should not the Tribunal orally invite comment then and there? Suppose, for example, that an applicant's case is that he fled from a certain country because he was being persecuted for political reasons. Suppose that, at the hearing, a witness gives evidence that the applicant told the witness he had never been to that country in his life. Obviously, fairness requires that the Tribunal give the applicant an opportunity to comment on that evidence. Why would there be an inflexible requirement to hand the applicant, at the hearing, a piece of paper referring to the evidence and inviting him to comment, even if the applicant is represented by a lawyer, clearly understands what is involved, and is able to deal with the issue then and there? Of course, there may be circumstances where fairness would require an adjournment, an explanation (perhaps a written explanation) of what is involved, and an opportunity to seek advice, or obtain rebutting evidence. That is not the point. The question is whether, regardless of whether fairness requires it, s 424A operates at that stage.

18 The structure of Div 4 of Pt 7 supports the first respondent's argument. Section 424A is one of a series of provisions located between the initial presentation of written evidence and argument by the applicant and written argument by the Secretary, and the hearing (s 425). It follows s 424, which empowers the Tribunal to seek additional information. It relates to inviting comment from the applicant on potentially adverse information. If the applicant

fails to comment, the Tribunal may proceed to make a decision (s 424C). The way in which the Tribunal does that is governed by s 425 and the following provisions, which, in cases where a hearing is required by the legislation, deal with the hearing.

19 The question whether there is to be a hearing pursuant to s 425 is likely to be affected by what has already occurred under s 424A. No hearing is necessary if the Tribunal is in favour of the applicant on the basis of the material before it (s 425(2)(a)). That material may include comments provided in response to the s 424A invitation. Nor is a hearing necessary if the applicant, having been invited to comment under s 424A, fails to make the comment within the stipulated time (s 425(2)(c)). The need for a hearing under s 425 will be governed in many cases by whether or not the applicant has responded within time to the s 424A invitation, and by the substance of any response. Furthermore, the purpose of the s 425 hearing is to receive evidence and arguments relating to the issues arising in relation to the decision under review. Those issues will often be influenced by the applicant's comments in response to a s 424A invitation.

20 Further support for the first respondent's argument comes from a consideration of the detail of s 424A(2). Although the present case concerns an applicant who was in immigration detention, an applicant might be present at the hearing room, face to face with the Tribunal, perhaps accompanied by a lawyer or a migration adviser. Section 424A(2) requires that the information and invitation of which it speaks must be given to the applicant by one of the methods specified in s 441A. Section 441A specifies four methods of giving documents: first, by handing the document to the recipient; secondly, by handing a document to a person, apparently over the age of 16, at the applicant's last residential or business address; thirdly, by dispatch by prepaid post; fourthly, by electronic transmission. Plainly, the second, third and fourth of those methods would be absurd during a hearing at which the applicant was present. An inflexible requirement for the Tribunal to prepare and hand-deliver a document to an applicant at a hearing appears surprising. Where s 424A operates, the invitation to comment must specify the time, place and form of the comment. Presumably, where there is no unfairness involved, the Tribunal could invite comment, orally, at the hearing. Why should such an invitation be in writing? Provided the invitation is given fairly and clearly, the requirement of writing appears superfluous, especially in cases where fairness does not require an adjournment of the hearing. All this is occurring in the context of a mechanism for review that is supposed to be fair, just, economical, informal and quick, before a Tribunal which is not bound by technicalities or legal forms (s 420).

21 It is agreed on all sides that the hearing contemplated by s 425 is not a trial. Subject always to the overriding requirement of procedural fairness, the object of the occasion is to hear evidence and receive arguments in the most useful and efficient manner. This will often involve flexibility in the order of

proceedings. There seems to be an incongruity in the intrusion of an inflexible requirement for written communication at a "hearing". The incongruity is heightened in a case such as the present where any such written communication would require oral translation and explanation. Such a case would not be unusual. No doubt many applicants who can read and write in a language other than English cannot read English. Presumably, on the appellants' argument, what the Tribunal should have done was prepare a letter to the first appellant, fax it to Woomera, then have it translated orally by the interpreter. Having done that, on the findings in the Federal Court about fairness, the Tribunal could then have proceeded as it did. On those findings, the letter would have been pointless. That, indeed, is why the Federal Court decided the case as it did. But there is a less complicated path to the same conclusion.

22 The above considerations, in combination, lead me to the conclusion that s 424A did not speak to the circumstances that arose in the present case, and that the case was governed by the rules of procedural fairness, not by s 424A.

23 The appeal should be dismissed with costs.

24 McHUGH J. This is an appeal against an order of the Full Court of the Federal Court of Australia (Heerey, Moore and Kiefel JJ)[5] upholding an order of a judge of that Court declaring that the Refugee Review Tribunal ("the Tribunal") had not erred in dismissing the appellants' claim for protection visas. The first issue in the appeal is whether the Tribunal breached s 424A of the *Migration Act* 1958 (Cth) ("the Act"). That section requires the Tribunal to give an applicant particulars in writing 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. It also requires the Tribunal to ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review and to invite the applicant to comment on it. Alternatively to the s 424A issue is a second issue. Did the Tribunal breach the rules of procedural fairness? If a breach of s 424A or the rules of procedural fairness occurred, a third issue is whether the breach gave rise to a jurisdictional error on the part of the Tribunal, such that the decision of the Tribunal is invalid. A final issue is whether there are any grounds for withholding discretionary relief under s 39B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act").

25 In my opinion, the Tribunal failed to comply with s 424A of the Act in the circumstances of the case. That breach gave rise to jurisdictional error on the part of the Tribunal, with the result that the decision of the Tribunal was invalid. Further, there is no reason to withhold discretionary relief under s 39B of the Judiciary Act.

Statement of the case

26 The appellants lodged applications under the Act for protection visas. The second appellant sought a protection visa solely because she is a member of the family of the first appellant. She did not herself have a claim to be a refugee. The first appellant claimed to have suffered persecution in Iran at the hands of the Muslim majority, including the police. However, a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs, the first respondent, refused to grant protection visas. The appellants applied to the Tribunal for a review of the decision of the delegate. But their application was refused by the Tribunal which affirmed the decision of the Minister's delegate not to grant the protection visas. The Tribunal made adverse findings about the first appellant's credibility and rejected the key elements of her claims. The Tribunal declared that it was not satisfied that the harm, discrimination and harassment that she and her family had experienced in Iran, either individually or cumulatively, were sufficiently serious to amount to persecution under the Convention relating to the

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5 *SAAP of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 411.

Status of Refugees[6] as amended by the Protocol relating to the Status of Refugees[7].

27 The appellants then applied to the Federal Court for a review of the Tribunal decision. Mansfield J, who heard the application[8], found that the Tribunal had failed to comply with s 424A of the Act on two grounds. First, it failed to give the first appellant particulars in writing of the information obtained from her eldest daughter, information which it considered would be part of the reason for affirming the decision of the Minister's delegate. Secondly, it failed to invite the first appellant to comment on that information[9]. However, his Honour held that the failure to comply with s 424A did not deprive the first appellant of the opportunity to learn of material adverse to her claim or to comment upon it. This was because, "[i]n practical terms, [the first appellant] has had the opportunity which s 424A is intended to provide."[10] The first appellant learnt of her eldest daughter's evidence because her migration agent was present when the daughter gave her evidence and also because the Tribunal member asked the first appellant about certain aspects of that evidence and invited her response. The first appellant was also given the opportunity to make submissions about that information.

28 Mansfield J also found that the Tribunal had not breached the common law rules of procedural fairness. He said the first appellant "had an opportunity to put her case, and was aware of the matters which were of significance to her case which emerged from the evidence of her eldest daughter. She also had an opportunity of responding to those matters, partly by what was put to her during the hearing and partly by being able to make submissions about those matters following the hearing"[11].

29 The appellants appealed to the Full Court of the Federal Court. Before the Full Court, the Minister did not dispute Mansfield J's finding that the Tribunal failed to comply with s 424A. But in a unanimous decision delivered in

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6 Done at Geneva, on 28 July 1951 (1954 ATS 5).

7 Done at New York, on 31 January 1967 (1973 ATS 37).

8 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 577.

9 *SAAP* [2002] FCA 577 at [32]-[33], [45].

10 *SAAP* [2002] FCA 577 at [46].

11 *SAAP* [2002] FCA 577 at [43].

December 2002, Heerey, Moore and Kiefel JJ dismissed the appeal[12]. Their Honours rejected the argument that the procedural step contemplated by s 424A preceded, and was essential to, the exercise by the Tribunal of the statutory power to determine the application for review[13]. Accordingly, they found that no jurisdictional error had occurred.

30 Subsequently, this Court granted the appellants special leave to appeal.

The material facts

31 The appellants are Iranian citizens. The first appellant is the mother of the second appellant. The appellants arrived in Australia from Iran in March 2001. The first appellant left her husband, two sons and another daughter in Iran. The first appellant's eldest daughter had arrived in Australia before her mother and sister and was granted a protection visa. The appellants are followers of the ancient, pre-Christian Sabian-Mandean faith. Sabian-Mandeans form one of the smallest religious minorities in Iran. It is estimated that there are between 5,000 and 25,000 adherents in that country. The first appellant is illiterate and speaks very little English.

32 A migration adviser represented the first appellant at the Tribunal hearing. While the first appellant was in Woomera Hospital, the migration adviser, the interpreter and the Tribunal member were in Sydney. Based upon the submissions of the migration agent, the Tribunal identified three incidents that the first appellant relied on to support her claim that Sabian-Mandeans are subject to harassment and discrimination in Iran. She said that her husband lost the sight of an eye when he was struck by a rock thrown by a group of Muslims during a religious ceremony. On another occasion, the Iranian authorities had attempted to abduct her eldest daughter with a view to forcibly converting her to Islam. Her children were refused admission to school and the second appellant was expelled from school after only six months. When the authorities discovered that the appellant was working as a hairdresser, she was dismissed from that employment and the hairdressing salon was burnt down. She claimed that Sabian-Mandeans were not allowed to work as hairdressers because they might come in contact with Muslims and would be suspected of spying on Muslim clients.

33 When the hearing commenced, the Tribunal member said that he would advise the first appellant of information that he considered might be adverse to her claim and would give her an opportunity to comment on it. The first

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12 *SAAP of 2001* [2002] FCAFC 411.

13 *SAAP of 2001* [2002] FCAFC 411 at [22].

appellant then called two witnesses to give evidence. Ms Susan Naghdi, the eldest daughter of the first appellant, was present at the hearing in Sydney. The first appellant did not propose to call her to give evidence. After the witnesses had given evidence, the Tribunal member decided to take evidence from the eldest daughter, in the absence of the first appellant. He asked the first appellant to leave the room in Woomera while he took this evidence. The migration adviser and the first appellant did not object to Ms Naghdi giving evidence. At this point, the first appellant had not given evidence but the Tribunal had before it earlier interviews with her. The migration adviser remained in the hearing room in Sydney while Ms Naghdi gave evidence.

34 When the first appellant returned to the video hook-up room in Woomera, the Tribunal member put three aspects of Ms Naghdi's evidence to her. These related to the date when the first appellant's husband lost the sight of his eye, the circumstances of the attempt or attempts to abduct and convert Ms Naghdi to Islam and the attendance of the first appellant's children at school. In relation to the first and third matters (the timing of the incident when the first appellant's husband lost the sight of his eye and the children's attendance at school), the Tribunal member told the first appellant what Ms Naghdi had said and asked for a response. The Tribunal member did not tell the first appellant what Ms Naghdi had said in relation to the attempted abduction, although he questioned her about the matter. The Tribunal member did not explain the relevance to the review of the aspects of Ms Naghdi's evidence that he raised with the first appellant. Indeed, the interpreter suggested at one point that the first appellant would not be able to cope with the Tribunal member's statement that he had just taken evidence from Ms Naghdi and there were "three incidents that have been raised on [the first appellant's] behalf as bases for [her] claim for protection." The Tribunal member's response was: "All right. I'll summarise it. Your daughter has just given evidence to me. There are three matters I wanted to raise with you."

35 At the conclusion of the hearing, the Tribunal member said:

> "I won't ask you any further questions about that but I may ask your adviser to inform me further. We do have to close the hearing now. Doctor, in view of the time, we have to adjourn now because the room is being used by another client. I have no further questions. Could I suggest that we adjourn the matter. I'm prepared to close the hearing now and receive written submissions, unless you want especially to make oral submissions. I'm happy to arrange another hearing time to receive oral submissions but in the circumstances I would prefer written submissions and I'd write to you indicating what matters I'd like to hear first.
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> … I will be giving close consideration to everything you've raised and I'll be talking with your adviser about other aspects of your case I need to hear about. I know it's been very stressful for you and you're going

through a difficult time. I'll be trying to make a decision quickly in your case."

36 The first appellant did not seek to make any further oral submissions at the hearing. After the hearing had concluded the Tribunal member did not issue a written invitation to the first appellant to make further written submissions.

37 The Tribunal relied on the information obtained from the evidence given by the eldest daughter at the hearing as a reason to affirm the decision under review. In particular, the Tribunal found that the first appellant had not established her claim that her eldest daughter and her other children had been refused admission to a school and deprived of an education. The Tribunal accepted the evidence of Ms Naghdi that the children had attended school, but had not progressed to higher education because they would have been required to study Islam. The Tribunal was also not satisfied that the problems experienced by the first appellant were sufficiently serious to amount to persecution. For example, the Tribunal was not satisfied that the first appellant had a genuine fear of persecution because of her religion or any imputed political opinion arising from her employment as a hairdresser, or that there was a real chance she would suffer persecution for those reasons if she returned to Iran[14].

The issues before this Court

38 This appeal raises four specific issues:

1. Whether the Tribunal was obliged under s 424A to give the first appellant written particulars of the information it had obtained from the evidence of the eldest daughter in circumstances where the Tribunal considered that the information would be the reason or part of the reason for affirming the decision under review.

2. If no breach of s 424A is established, whether the Tribunal failed to accord the appellants procedural fairness under the general law.

3. Whether, if breach of either s 424A or the general law obligation to accord procedural fairness is established, the decision of the Tribunal is affected by jurisdictional error such as to invalidate the decision and to permit the grant of relief.

4. Whether the grant of relief under s 39B of the Judiciary Act should be withheld on discretionary grounds.

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14 See *SAAP of 2001* [2002] FCAFC 411 at [7]-[8].

The parties' contentions

39 The appellants submit that the failure to comply with s 424A of the Act constitutes jurisdictional error. In particular, the appellants submit that s 424A imposes an inviolable limitation or restraint upon the exercise of jurisdiction by the Tribunal. The appellants allege that in the circumstances of the case the Tribunal failed to observe the requirements of s 424A that written notice be provided to the appellants in respect of the evidence given by Ms Naghdi. This failure entailed jurisdictional error with the result that an application for constitutional writs was said to lie under s 39B of the Judiciary Act.

40 In the alternative, the appellants submit that the Tribunal failed to observe the common law requirements of procedural fairness. Such failure, according to their submission, necessarily entailed jurisdictional error and thus attracted s 39B of the Judiciary Act.

41 The Minister submits that s 424A does not require the Tribunal to give information and an invitation in writing in all circumstances. Alternatively, she contends that s 424A does not apply in relation to information obtained by the Tribunal when the applicant has been invited to appear before the Tribunal to give evidence and present arguments. If it is found that s 424A operates at such a time and in fact requires the giving of the information in writing, she contends that the failure to do so in this case does not amount to jurisdictional error. On the Minister's submission, there is no reason to infer a legislative intention that the failure to give written notice leads to a decision that is made without any statutory basis. Even if there was such a procedural defect, she asserts that the operation of s 474 removes any implied intention that a procedural step may be a condition of validity, with the result that no jurisdictional error arises if there is a failure to comply with s 424A. The Minister submits that, if jurisdictional error is found, discretionary relief can and should be withheld for the reasons that the first appellant was not in fact deprived of the opportunity to learn of and comment on material adverse to the appellants' claim. The Minister also claims that relief should be withheld because the breach of s 424A did not affect the outcome of the appellants' claim.

The procedural issue: joinder of the Tribunal

42 In addition to the substantive issues to which I have referred, the appeal also gives rise to a preliminary issue concerning parties. That issue is whether the proceedings before the Federal Court and this Court were correctly constituted and sufficient, given that the Tribunal was omitted as a party for the relief sought under s 39B of the Judiciary Act.

43 Where a person claims that he or she is affected by a decision of an officer of the Commonwealth that was made without jurisdiction, the Constitution empowers this Court to issue a constitutional writ under s 75(v) of the

Constitution. That writ must be directed to the officer of the Commonwealth who made the decision. Section 39B of the Judiciary Act also vests in the Federal Court the jurisdiction of this Court with respect to any matter in which a constitutional writ is sought against an officer of the Commonwealth. The appellants seek the quashing of the decision of the Tribunal (certiorari) and an order compelling the Tribunal to conduct, according to law, a review of the decision of the Minister's delegate. The Tribunal is the relevant "officer of the Commonwealth" for the purposes of this appeal. Accordingly, it is necessary that the Tribunal be joined as a party to this appeal.

Was there a failure to comply with s 424A? The s 424A issue

44 Determining whether the Tribunal breached s 424A in this case and, if so, whether such a breach amounted to jurisdictional error turns on the construction of that section in the context of Div 4 of Pt 7 of the Act[15]. The exercise of construction involves the ascertainment of the legislative intention with respect to s 424A, both as to its application and the effect of failing to comply with it. Breach of the provision will lead to invalidity only if that is the legislative intention[16]. First, however, it is necessary to consider the operation of s 424A in the context of Div 4 of Pt 7 of the Act and to determine whether there was a failure to comply with that section in the circumstances of the case.

Construction of the Division

45 Division 4 of Pt 7 of the Act (ss 423-429A) is entitled "Conduct of review". It deals with the conduct of the review by the Tribunal of a decision of a delegate of the Minister that precedes the recording of the Tribunal's decision. The Division deals with:

1. the giving of documents to the Tribunal (s 423);

2. the powers of the Tribunal to seek additional information (s 424);

3. the Tribunal's obligation to give the applicant for review certain information and to invite the applicant to comment on it (s 424A);

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15 Part 7 of the Act is applicable in the form it took after the commencement of the *Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act* 2001 (Cth).

16 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-389 [91] per McHugh, Gummow, Kirby and Hayne JJ.

4. the means by which an applicant may respond to an invitation to give additional information or comment upon information (s 424B);

5. the consequences of a failure by the applicant to give additional information or comment upon information if invited to do so (s 424C);

6. the Tribunal's obligation to invite the applicant to appear before the Tribunal "to give evidence and present arguments relating to the issues arising in relation to the decision under review" (s 425);

7. the means by which the Tribunal must notify the applicant if the Tribunal invites the applicant to appear before it (s 425A);

8. the applicant's entitlement to request the Tribunal to call witnesses (s 426);

9. the consequences of a failure by the applicant to appear before the Tribunal if invited to do so (s 426A);

10. the powers of the Tribunal for the purpose of the review, including its powers in relation to the conduct of a hearing (s 427);

11. the powers of the Tribunal to authorise another person to take evidence on behalf of the Tribunal (s 428);

12. the obligation to conduct the hearing in private (s 429); and

13. the methods by which an applicant may give oral evidence before the Tribunal at a hearing (s 429A).

46 In essence, then, the Division deals with the steps leading up to an appearance before the Tribunal (where the applicant may appear before the Tribunal to give evidence and present arguments) and the appearance itself. The Division distinguishes between an appearance before the Tribunal to give evidence and present arguments and an interview. The Division also distinguishes between providing additional information or making comments at an interview under s 424B and giving evidence at an appearance before the Tribunal under s 425.

47 Section 424A obliges the Tribunal in certain circumstances to give the applicant "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". The section provides:

"**424A Applicant must be given certain information**

(1) Subject to subsection (3), the Tribunal must:

(a) give to the 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 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

(c) invite the applicant to comment on it.

(2) The information and invitation must be given to the applicant:

(a) except where paragraph (b) applies – by one of the methods specified in section 441A; or

(b) if the applicant is in immigration detention – by a method prescribed for the purposes of giving documents to such a person[17].

(3) This section does not apply to information:

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

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

(c) that is non-disclosable information."

48 Regulation 5.02 of the Migration Regulations (Cth) states:

"For the purposes of the Act and these Regulations, a document to be served on a person in immigration detention may be served by giving it to the person himself or herself, or to another person authorised by him or her to receive documents on his or her behalf."

49 Regulation 5.01 states:

"In this Division:

'***document***' includes:

(a) a letter; and

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17 See reg 5.02 of the Migration Regulations (Cth).

(b) an invitation, notice, notification, statement or summons, if it is in writing."

50 The obligation on the Tribunal to give the invitation and to invite comment on the information is expressed in broad and general terms. The obligation does not apply to information that the applicant gives, regardless of when that information is given (see s 424A(3)(b)). It applies to information received by the Tribunal from sources other than the applicant. It also does not apply to all information that the Tribunal receives. It only applies to information that the Tribunal considers "would form part of its reason for refusing the application for review"[18]. Nevertheless, the object of the section must be to provide procedural fairness to the applicant by alerting the applicant to material that the Tribunal considers to be adverse to the applicant's case and affording the applicant the opportunity to comment upon it.

51 Unfortunately, the section does not state how the obligation to give the applicant information and to invite comment on it applies to information that the Tribunal receives in a case like the present. It does not state how the obligation is performed, or whether it is required to be performed, when the applicant (or the applicant's representative) is present while the Tribunal receives evidence from a person. It is appropriate to consider the second question first.

Does s 424A apply when the s 425 procedure is engaged?

52 Section 425 provides that the Tribunal need not invite the applicant to appear to give evidence and present arguments in certain circumstances. It need not do so if the Tribunal has earlier invited the applicant to comment on adverse information and the applicant fails to do so within the stipulated time (see s 425(2)(c), read with s 424C(2) and s 424A). Section 425 contemplates that the Tribunal will have given the applicant adverse material and invited comments upon it before the applicant is invited under s 425 to appear before the Tribunal or the Tribunal exercises its discretion not to invite the applicant to appear.

53 However, it is by no means certain that s 424A is exhausted at the time when the Tribunal has invited the applicant to appear before it to give evidence and present arguments. Under s 425(2), the Tribunal is not required to invite the applicant to appear before it if the applicant has been invited to give additional information under s 424 but fails to do so within the stipulated time so that s 424C(1) or (2) applies. But the Tribunal is not required to invite the applicant

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18 See *Minister for Immigration and Multicultural Affairs v Al Shamry* (2001) 110 FCR 27 at 40 [39] per Merkel J, Ryan and Conti JJ agreeing.

to appear before it even if a third person has been invited to give additional information under s 424 and fails to do so within the stipulated time[19].

54 If the Minister's construction of the Division were accepted, there would be no need to distinguish between obtaining additional information from the applicant and obtaining additional information from a third person. The Tribunal would be obliged to request, obtain and invite comment on any and all additional information before invoking s 425 (and either inviting the applicant to appear or exercising its discretion to invite the applicant to appear if s 425(2) applies). If the Tribunal were not required to give the applicant adverse material that emerged when a third person gave evidence to the Tribunal (at a time when the applicant had appeared or had been invited to appear under s 425), then it would not matter whether s 424C(1) applied to the applicant or not. The Tribunal would not be able to obtain additional information from the applicant or from a third person. As the time to obtain additional information would have passed, the Tribunal would not be entitled to pursue any matter that arose once an invitation to appear had been given or the applicant had appeared before the Tribunal. This would be so even if, for example, a third person gave evidence about a matter which was relevant to the decision under review and about which the Tribunal would otherwise have sought additional information. If the Minister's construction of the Division were accepted, therefore, the Tribunal's powers to review decisions of the Minister's delegate would be substantially circumscribed. For example, if, either shortly before or at a hearing under s 425, the Tribunal learned of or realised the potential implications of certain information caught by s 424A, the Tribunal would be required "to cancel or adjourn the hearing without then exploring the significance of the information."[20]

55 The main purpose of the Division is to accord procedural fairness to applicants in determining whether a decision of the Minister or the Minister's delegate should be affirmed. The Tribunal is the vehicle through which this purpose is effected. The Tribunal is empowered to use an inquisitorial process to conduct the review of the decision. The Division does not provide for an adversarial contest that culminates in a trial of issues joined between the parties. It is inconsistent with the inquisitorial nature of the review to require the Tribunal to obtain all information relevant to the decision under review before invoking the s 425 procedure. This is particularly the case if subsequent information emerges that affects the decision under review. Such information may emerge at any time. Given that the Tribunal exercises all the powers of the Minister or the

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19 See s 425(2)(c), read with s 424C(1) and (2).

20 *SRFB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 252 at [36].

Minister's delegate when conducting the review[21], there is no reason to confine the exercise of the Tribunal's power to "get any information that it considers relevant"[22] to a particular point in time.

56 In addition, s 424A "is enlivened only at the point at which the RRT has information and has determined that the information would be the reason or part of the reason for affirming the decision" under review[23]. The Tribunal may not realise that information it has obtained from a third person will form the reason or part of the reason for affirming the decision until after the applicant has appeared before it. Information obtained before the hearing may become the reason or part of the reason for affirming the decision only after an applicant has responded to questions at the hearing. It would seem to be contrary to the requirements of procedural fairness if the Tribunal were not required to invite the applicant to comment on such information (that is found to be adverse to the applicant) simply because the Tribunal has already invited the applicant to appear before it.

57 No doubt there is a tension between different elements of the review process. There is the obligation to accord procedural fairness to the applicant by advising the applicant of adverse material and inviting the applicant's response. But the object of the Division is also to facilitate the quick and efficient determination of applications for review[24]. The second object can be achieved, however, by the Tribunal using its broad powers to obtain documentary evidence before invoking s 425 and, in some cases, enabling the Tribunal to decide the application in favour of the applicant without needing to conduct a hearing under s 425.

58 In determining an application for review, the Tribunal may also exercise all the powers and discretions conferred by the Act on the Minister or her delegate[25]. Those powers are set out in a subdivision entitled "Code of procedure for dealing *fairly*, efficiently and quickly with visa applications"[26]. The

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21 Section 415 of the Act.

22 Section 424(1) of the Act.

23 *SRFB* [2004] FCAFC 252 at [48], referring to *VEAJ of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 291 at 301 [31] per Gray J; *Nader v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 352 at 366 [59] per Hill J.

24 See s 420(1) of the Act.

25 Section 415(1) of the Act.

26 Part 2 Div 3 subdiv AB of the Act (emphasis added).

legislative object of dealing with visa applications and applications for review efficiently and quickly should not be interpreted to detract from the obligation to deal with them fairly. Indeed, the powers of the Tribunal to determine applications for review on the available documentation – without having to obtain information or comment from the applicant or inviting the applicant to appear before the Tribunal – is limited to circumstances where that information is favourable to the applicant. If the Tribunal obtains any adverse material, it must put that material to the applicant and invite comment on it[27]. If the Tribunal summons a person to give evidence and that evidence discloses adverse material, it would be anomalous if the Tribunal were not required to put that material to the applicant. The Tribunal may only dismiss an application for review without inviting the applicant to appear before it if the Tribunal has invited the applicant to give additional information or to comment on adverse material and the applicant has not done so within the time stipulated[28].

59 Sections 424, 424A, 424B and 424C enable the Tribunal to obtain information, to ensure that the applicant has the opportunity to respond to adverse material (or to provide additional information) and to facilitate the making of a decision without the need to conduct a hearing. The purpose of those sections is also to improve the efficiency of the Tribunal's procedures. The sections effectively compel the Tribunal to obtain the maximum amount of information that may be available before engaging s 425. The information is not limited to documentary information. A person might give additional information in an interview. The point is that the Tribunal has the power to determine the application without having to invoke the s 425 procedure.

60 But this does not mean that s 424A is spent because s 425 is engaged. In other words, the Division does not necessarily compel a sequential process, so that once the s 425 procedure has commenced or is in progress, s 424A no longer has any role to play. The obligation to deal *fairly* with applications for review must continue throughout the Tribunal's review. One aspect of that obligation is that the applicant be given the opportunity to comment upon adverse material. Because that is so, the Division should be interpreted so as to require the Tribunal to give the applicant the opportunity to comment on adverse material obtained at a hearing before the Tribunal (when the applicant or another person gives evidence). No doubt, this reasoning is open to the criticism that it is circular. It assumes that one aspect of the Tribunal's obligation in conducting the review is to give the applicant the opportunity to comment upon adverse material. Such a result only obtains if the Division is construed to that effect – which begs the question. But given the rule that the principles of procedural

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27 Section 424A of the Act.

28 Section 425(2)(c), read with s 424C of the Act.

fairness apply unless excluded by express words or necessary implication, the assumption seems sound.

61 Another argument that favours a construction of the Division for which the appellants contend is that there is nothing in the Division to suggest that the Division is to have a strict sequential operation. If it were, the exercise by the Tribunal of its powers of review would be substantially confined. In the context of the otherwise broad powers of the Tribunal in the conduct of the review, such a result could hardly have been intended by the Parliament.

62 But is there a legislative intention that s 424A is spent when the Tribunal has invoked the s 425 procedure and obtained adverse material during a s 425 "hearing" *in which the applicant is present to give evidence and present arguments*? The extrinsic materials are inconclusive on this issue, but they do not compel a construction of the Division in which s 424A is spent at the time when s 425 is engaged. The Explanatory Memorandum to the Migration Legislation Amendment Bill (No 1) 1998 (Cth), which inserted the relevant sections into the Act, is neutral. So is the Second Reading speech for that Bill.

63 Arguably, it is unnecessary to require the Tribunal to provide adverse material to the applicant in writing when the applicant is present to hear the information given by another person that the Tribunal receives as evidence. However, an applicant may not understand the significance of that information. So it is in the interests of fairness that the applicant should have the information in writing and should be given an opportunity to comment on it. For that reason, s 424A should not be regarded as spent because the applicant is present at the hearing.

If s 424A applies when the s 425 procedure is engaged, what is the content of the obligation?

64 What obligation does s 424A(1) impose? Is the obligation to give the information in writing mandatory in the sense that failure to do so results in a breach of the section? Is the obligation (to provide adverse information) limited or qualified in some way simply because of the way in which the information is to be provided to the applicant?

65 Section 424A "makes no provision for an invitation to be given to an applicant in the course of the hearing."[29] On the one hand, there is no express limitation that the Tribunal may not depart from the statutory requirements of s 424A by, for example, inviting the applicant to respond orally during a s 425 hearing. However, s 424A(2) is expressed in imperative terms. If the applicant

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29 *SRFB* [2004] FCAFC 252 at [50], citing *Al Shamry* (2001) 110 FCR 27 at 37 [30].

is in immigration detention, the Tribunal "must" give the information to the applicant "by a method prescribed for the purposes of giving documents to such a person." The section contemplates that the information is in the form of a document and that there is a method prescribed for giving documents to the applicant. The section gives the Tribunal a discretion as to *which* method to use for giving documents to an applicant in immigration detention, but requires the Tribunal to use one of those methods.

66 As the Full Federal Court (Ryan, Jacobson and Lander JJ) observed in *SRFB v Minister for Immigration and Multicultural and Indigenous Affairs*[30], s 424A "is a statutory enactment of the basic rules of natural justice." Gray J in *VEAJ of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[31] also made observations to similar effect, that is, that the section is "a statutory expression of the content of the rules of procedural fairness".

67 In *NAHV of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[32], the Full Federal Court said that, where the applicant was not in immigration detention, "s 424A (and in particular s 424A(2)) contemplates the person being told of the matters in s 424A(1) *in writing*."[33] This reasoning also applies to an applicant who is in immigration detention. Section 424A(2)(b) refers to a method for "giving documents" to the person and, hence, contemplates that the information will be in writing. These statements suggest that a breach of s 424A occurs by any failure to provide to the applicant in writing the adverse material and the invitation to comment on it.

68 In *SRFB*, the Full Court held that "the only implied limitation [on s 424A] can be one of fairness in the way in which the statutory obligations are observed."[34] The Court held that each case turns on its own facts. "[I]t is impossible to spell out the content of this limitation in more precise terms."[35]

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30 [2004] FCAFC 252 at [52], citing *Al Shamry* (2001) 110 FCR 27 at 40 [39]-[40].

31 (2003) 132 FCR 291 at 305 [46].

32 (2003) 129 FCR 214 at 218 [18] (emphasis in original).

33 This was because s 424A(2) obliges the Tribunal (at 218 [18]) "to provide the particulars and information called for by s 424A(1) *and* the invitation to respond to those matters by one of the methods referred to in s 441A. All the methods referred to in s 441A involve the sending or giving of a document." (emphasis in original)

34 [2004] FCAFC 252 at [52], citing *Al Shamry* (2001) 110 FCR 27 at 40 [39]-[40].

35 *SRFB* [2004] FCAFC 252 at [53].

However, the Court observed that "[a]n example of procedural unfairness would be if an interviewing officer were to inform an applicant at the hearing that, although the requisite statutory notice would be given after the hearing, the applicant would be treated more favourably if he or she responded orally without waiting for the notice."[36] In *SRFB*, the Full Court found that the Tribunal formed the view at a s 425 hearing that certain information in an application for a tourist visa was a reason or part of a reason for affirming the decision[37]. The "interviewing officer gave the [applicants] a choice as to whether to respond immediately or to await receipt of the statutory notice before providing a response."[38] The Tribunal gave the applicants a s 424A notice after the hearing. The Court held that in these circumstances the applicants had not been denied procedural fairness. However, the assumption that no breach of s 424A occurs if the applicant has otherwise been given procedural fairness overlooks the imperative nature of the section. Nothing in the section suggests that fairness in the way in which the Tribunal observes its statutory obligations is an implied limitation on its operation. The section describes a procedural step that, if enlivened by the circumstances of the case, the Tribunal is required to take in every case. Further, the mandatory nature of the obligation in s 424A(2)(b) points to the conclusion that the failure to provide in writing to the applicant particulars of the adverse material and the invitation to comment upon it amounts to a breach of s 424A.

69 Before the primary judge, the Minister accepted that there was no written notification given under s 424A[39]. Mansfield J found that s 424A applied and that the Tribunal failed to comply with the obligation to give the first appellant in writing particulars of the adverse information obtained from her daughter's evidence[40]. The Minister did not seek to challenge the finding before the Full Federal Court[41] or before this Court[42] that a technical breach of s 424A had occurred. However, the Minister contended that the word "must" in s 424A(1) did not impose a mandatory obligation on the Tribunal "in all circumstances" to

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36 *SRFB* [2004] FCAFC 252 at [53].

37 *SRFB* [2004] FCAFC 252 at [54].

38 *SRFB* [2004] FCAFC 252 at [55].

39 *SAAP* [2002] FCA 577 at [33] per Mansfield J.

40 *SAAP* [2002] FCA 577 at [45].

41 *SAAP of 2001* [2002] FCAFC 411 at [14].

42 Transcript [2004] HCATrans 284 at [2075]-[2080].

provide the adverse information in writing[43]. The Minister also contended that, even if there was a failure to comply with s 424A, such failure did not amount to jurisdictional error with the result that the Tribunal's decision was invalid[44].

70 Because the language of s 424A is imperative, failure to comply with the obligation to provide the applicant with particulars of adverse information in writing constitutes a breach of that section. Gray J remarked in *VEAJ* that[45]:

> "It is clear from sub-s (2) [of s 424A] that the Tribunal cannot discharge its obligation by giving to an applicant oral particulars of the information in the course of a hearing. The obligation of the Tribunal to give both the particulars and an indication of the relevance of the information by one of the means specified in s 441A, or by the prescribed means of giving documents to persons in detention, makes it clear that the particulars and the explanation of relevance must be reduced to writing. Even in the case of relatively simple, and perhaps uncontroversial, items of information, the Tribunal is not given the option of raising them with an applicant in the course of a hearing and giving an oral explanation of its view as to their relevance. The Tribunal must give written particulars and a written explanation."

71 His Honour's approach should be followed. There was some debate before this Court as to whether the term "must" in s 424(1) necessarily imposed a "mandatory" requirement to provide the information in writing in all circumstances. However, in the absence of any qualifying terms, the natural meaning of the section is that the Tribunal is compelled in all circumstances to provide the information in writing. This is so, even if the Tribunal puts the information to the applicant at an interview or when the applicant appears before the Tribunal to give evidence and present arguments. Such a construction is consistent with the purpose of the section to accord the applicant procedural fairness in the conduct of the review.

The effect of the failure to comply with s 424A: the jurisdictional error issue

72 Jurisdictional error may arise where a decision-maker fails to discharge "imperative duties" or to observe "inviolable limitations or restraints" found in the Act[46]. To determine whether a decision under the Act involves a

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43 Transcript [2004] HCATrans 284 at [2381]-[2385].

44 Transcript [2004] HCATrans 284 at [2400]-[2410].

45 (2003) 132 FCR 291 at 301-302 [34].

46 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 1001 [49]; 207 ALR 12 at 23-24.

jurisdictional error, it is necessary to take two steps. First, it is necessary to determine the limitations and restraints found in the Act. Secondly, it is necessary to attempt, through statutory construction, to reconcile them with s 474 of the Act to ascertain whether failure to observe any particular procedural or other requirement in the Act constitutes an error which has resulted in the decision-maker failing to exercise or exceeding its jurisdiction.

73 Section 424A is a statutory formulation of the obligation to accord procedural fairness in the conduct of a review. The question is whether failure to comply with that section gives rise to jurisdictional error such that the decision of the Tribunal is invalidated. To answer this question, it is necessary to have regard to "the language of the relevant provision and the scope and object of the whole statute" in order to ascertain whether the Parliament intended that an act done in breach of s 424A is invalid[47]. The question is not easy to answer. In the joint judgment in *Project Blue Sky Inc v Australian Broadcasting Authority*, Gummow, Kirby and Hayne JJ and I said that whether an act done in breach of a condition regulating the exercise of a statutory power is invalid[48]:

> "depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.
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> … A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. … In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'." (footnotes omitted)

74 Failure to accord procedural fairness may give rise to jurisdictional error. In *NAHV*, the Full Federal Court held that failure to observe the requirement in s 424A(2) did not amount to jurisdictional error by the Tribunal (ie, a failure to

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47 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-391 [93] per McHugh, Gummow, Kirby and Hayne JJ, quoting *Tasker v Fullwood* [1978] 1 NSWLR 20 at 24.

48 (1998) 194 CLR 355 at 389-391 [91], [93].

exercise jurisdiction or an exceeding of jurisdiction), *in circumstances where there was no unfairness or failure to accord procedural fairness*. That was because the failure to comply with s 424A(2) was not one of substance. It went only to the procedural question of communicating the information referred to in s 424A(1)[49]. The Full Court held that Parliament did not intend that a breach of the condition as to the manner of delivery of the information should necessarily result in the invalidity of the Tribunal's decision even in circumstances where the important substantive requirement of s 424A(1) was otherwise satisfied[50]. Accordingly, the Court held that the failure to convey the information by the correct method did not constitute jurisdictional error[51]. The Full Court said[52]:

> "The 'mandatory' language (the word 'must' is used in s 424A(2)) is relevant to, but not decisive of, this inquiry. In our view, it cannot be concluded that invalidity of the Tribunal's decision is the necessary consequence of any failure to comply with s 424A(2), irrespective of the absence of any unfairness, whether of a substantive or procedural kind."

75 However, this statement was made in the context where it was common ground that the Tribunal had complied with s 424A(1). The Court acknowledged that "[q]uite different considerations might attend the analysis had there been a breach of s 424A(1)."[53] On this view s 424A operates:

1. when the s 425 procedure has been invoked;

2. when the Tribunal obtains adverse material during a s 425 hearing; and

3. when the Tribunal fails to give to the applicant *in writing* that information, the explanation of its relevance and the invitation to comment on it.

The failure is a breach of s 424A and may amount to jurisdictional error.

76 In *NAHV*, the Court accepted that no unfairness or failure to accord procedural fairness had occurred in circumstances where the Tribunal advised the

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49 (2003) 129 FCR 214 at 219 [22], referring to Emmett J's judgment in *Paul v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 396.

50 *NAHV of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 214 at 219-220 [23].

51 *NAHV* (2003) 129 FCR 214 at 219-220 [23].

52 *NAHV* (2003) 129 FCR 214 at 219-220 [23].

53 *NAHV* (2003) 129 FCR 214 at 220 [23].

applicant that it had certain information (an anonymous letter) that was potentially adverse to the applicant. The Tribunal conducted an interview with the applicant to discuss the letter. Apparently, it gave the applicant particulars of the adverse material and implicitly invited the applicant to comment on it. But it did not give the applicant those particulars or the invitation to respond in writing. The applicant did not complain about this aspect of the Tribunal's hearing (that is, the applicant did not assert that there was any failure to give him that information or invite his comment), so the Full Court proceeded on the basis that no such failure had occurred.

77 However, because the Act compels the Tribunal in the conduct of the review to take certain steps in order to accord procedural fairness to the applicant for review, before recording a decision, it would be an anomalous result if the Tribunal's decision were found to be valid, notwithstanding that the Tribunal has failed to discharge that obligation. It is not to the point that the Tribunal may have given the applicant particulars of the adverse information orally. It is also not to the point that in some cases it might seem unnecessary to give the applicant written particulars of adverse information (for example, if the applicant is present when the Tribunal receives the adverse information as evidence from another person and the Tribunal there and then invites the applicant orally to comment on it). If the requirement to give written particulars is mandatory, then failure to comply means that the Tribunal has not discharged its statutory function. There can be no "partial compliance" with a statutory obligation to accord procedural fairness. Either there has been compliance or there has not. Given the significance of the obligation in the context of the review process (the obligation is mandated in every case), it is difficult to accept the proposition that a decision made despite the lack of strict compliance is a valid decision under the Act. Any suggestion by the Full Federal Court in *NAHV* to the contrary should not be accepted. Parliament has made the provisions of s 424A one of the centrepieces of its regime of statutory procedural fairness. Because that is so, the best view of the section is that failure to comply with it goes to the heart of the decision-making process. Consequently, a decision made after a breach of s 424A is invalid.

Breach of general law requirements of procedural fairness

78 If it is accepted that a breach of s 424A gives rise to jurisdictional error, it is not necessary to consider whether that breach also resulted in a failure to accord procedural fairness under the general law.

Discretionary relief

79 Since the decisions of this Court in *Plaintiff S157/2002 v The Commonwealth*[54], *SGLB*[55] and *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002*[56], a decision that involves the failure to comply with the principles of natural justice is not a privative clause decision[57]. As a result, s 474 of the Act (the privative clause section) does not prevent the judicial review of such decisions that involve jurisdictional error. (Decisions of such a character are not "privative clause decisions" and immune from judicial review because they are not decisions made "under" the Act.) A decision made in breach of the requirement to accord procedural fairness may be the subject of constitutional writs[58].

80 The issuing of writs under s 75(v) of the Constitution and s 39B of the Judiciary Act is discretionary[59]. Discretionary relief may be refused under s 39B if the conduct of the party is inconsistent with the application for relief. It may be inconsistent, for example, if there is delay on the part of the applicant or the applicant has waived or acquiesced in the invalidity of the decision or does not come with clean hands[60]. Discretionary relief may also be refused if the applicant has in fact suffered no injustice, for example, because the statutory law compels a particular outcome[61].

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54 (2003) 211 CLR 476.

55 (2004) 78 ALJR 992; 207 ALR 12.

56 (2003) 211 CLR 441.

57 *Plaintiff S157* (2003) 211 CLR 476 at 508 [83].

58 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Miah* (2001) 206 CLR 57.

59 *Aala* (2000) 204 CLR 82 at 108-109 [57]-[58] per Gaudron and Gummow JJ, Gleeson CJ agreeing.

60 See *Aala* (2000) 204 CLR 82 at 108 [57] per Gaudron and Gummow JJ, citing *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 320 per Lord Denning MR.

61 See *Aala* (2000) 204 CLR 82 at 109 [58] per Gaudron and Gummow JJ, citing *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board* [1994] 1 SCR 202 at 228.

81 The Minister contends that, where relief is sought for breach of the obligation to accord procedural fairness, relief should only be withheld where the Court is positively satisfied that compliance with the obligation "could not have made any difference"[62]. The Minister notes the conclusion of Mansfield J that[63]:

> "The [Tribunal's] failure to comply with s 424A, in the circumstances, has not in fact deprived the [first appellant] of the opportunity to learn of material adverse to her claim or to comment upon it. In practical terms, she has had the opportunity which s 424A is intended to provide. The breach of s 424A is, in my view, not one which affected or which might have affected the outcome of her claim."

82 The Minister submits that the first appellant in fact had the opportunity to learn of the information given by her eldest daughter that was adverse to her claim and had the opportunity to comment upon it. She was aware – through her migration agent – of what her eldest daughter said and had sufficient opportunity to respond. The Minister contends that, because the first appellant was not deprived of a relevant opportunity to respond to the adverse material, no unfairness occurred. In *VCAT of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[64], the Full Federal Court held that in some circumstances it was appropriate to refuse relief under s 39B if the applicant was not in fact disadvantaged or had an opportunity to address the information in s 424A. In relation to s 359A (the equivalent of s 424A in relation to the Migration Review Tribunal), the Full Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Awan*[65] also accepted that a breach of that section constitutes jurisdictional error. But it said that whether a breach of that section was merely technical and did not affect the outcome or could make no difference was relevant to whether relief should be granted.

83 However, where the relevant breach is the failure to observe fair decision-making procedures, the bearing of the breach upon the ultimate decision should not itself determine whether the constitutional writs of certiorari and mandamus should be granted. If there has been a breach of the obligation to accord procedural fairness, there is jurisdictional error for the purposes of s 75(v) of the Constitution. There is no reason to rewrite the limitation ordinarily implied on

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62 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145.

63 *SAAP* [2002] FCA 577 at [46].

64 [2003] FCAFC 141 at [45], [52].

65 (2003) 131 FCR 1 at 7 [15], 10 [24]-[27] per Gray ACJ, 15 [58]-[59] per Marshall J, 27 [106]-[107] per Merkel J.

the statutory power to deny jurisdictional error for "trivial" breaches of the requirements of procedural fairness[66].

84 If the decision of the Tribunal is invalid for want of procedural fairness, there is no reason to withhold discretionary relief. There is nothing to suggest that the conduct of the appellants warrants the refusal to exercise the discretion. There is no suggestion of delay, waiver, acquiescence or unclean hands. Whether the first appellant was in fact deprived of a relevant opportunity to deal with the adverse material received by the Tribunal from her eldest daughter should not affect the discretion to grant relief.

Orders

85 I agree with the orders proposed by Hayne J.

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66 *Aala* (2000) 204 CLR 82 at 109 [59] per Gaudron and Gummow JJ.

86 GUMMOW J. The appellants are mother and daughter and are Iranian citizens. They applied to the Federal Court of Australia under s 39B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") to set aside a decision of the Refugee Review Tribunal ("the RRT") given on 18 October 2001. The RRT affirmed decisions of a delegate of the first respondent ("the Minister") refusing to grant to the appellants protection visas under the *Migration Act* 1958 (Cth) ("the Act"). The visas had been sought shortly after the arrival of the appellants in Australia on 24 March 2001 by boat from Indonesia.

The facts

87 The first appellant was born in Iran in 1956. She is not literate in any language and has little familiarity with spoken English. The second appellant is one of five children. She was born in Iran in 1993 and a protection visa was sought for her as a member of the family of the first appellant. Accordingly, in the RRT, the Federal Court and this Court, it has been sufficient to address the contentions of the first appellant.

88 An elder daughter, Ms Susan Naghdi, had preceded her mother and sister to Australia and was granted a protection visa. She had married, when aged 18, while she was living in Iran. The first appellant's husband and other three children remained in Iran.

89 The first appellant is an adherent of the ancient Sabian-Mandean religion, of which up to 25,000 adherents live in Iran. She complained of persecution by reason of her religious belief, suffered at the hands of the Muslim majority in Iran. However, the RRT rejected key elements of her claims and was not satisfied that the difficulties she had experienced in Iran were sufficiently serious to amount to persecution in the necessary sense.

The Federal Court proceedings

90 Although it was dealt with as an application under s 39B of the Judiciary Act, the application made to the Federal Court did not join the RRT as a party. Leave to do so was sought and granted in this Court. The Amended Notice of Appeal joins the RRT as second respondent and seeks orders for certiorari and mandamus.

91 It was suggested in argument that the joinder of the RRT would be unnecessary and, indeed, that the RRT was neither a necessary nor a proper party in a s 39B application. The reason given was that a combination of s 477 and s 479 of the Act relieved the RRT from the tedium of entering submitting appearances, not only to judicial review applications under the Act (grounded in s 76(ii) and s 77(i) of the Constitution as matters arising under the Act), but also

to applications under s 39B of the Judiciary Act for constitutional writs[67]. Subject to the qualifications expressed therein, s 39B "vests in the Federal Court the entirety of the jurisdiction which s 75(v) confers on the High Court"[68]. That particular head of federal jurisdiction is attracted by the seeking of a particular remedy against a federal officeholder[69]. Remedy and identity of party are thus critical. Sections 477 and 479 of the Act, read together, accept that s 39B still operates with respect to constitutional writ applications; to deny the necessity for the presence of the RRT on the record would be to withdraw that element which gives the proceeding for constitutional writs the character of a Ch III "matter". As Toohey J put it in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*[70]:

> "Section 39B is enacted pursuant to s 77(i) of the Constitution, which empowers the Parliament to make laws with respect to any of the matters mentioned in s 75, 'Defining the jurisdiction of any federal court other than the High Court'."

92 In the present litigation, a judge of the Federal Court (Mansfield J) held that no basis had been established for relief under s 39B and dismissed the application. An appeal to the Full Court (Heerey, Moore and Kiefel JJ) was dismissed on 11 December 2002. That was shortly before delivery of the decision of this Court in *Plaintiff S157/2002 v The Commonwealth*[71]. This Court gave to the privative clause provision in s 474 of the Act an interpretation which differed from that previously adopted in the Federal Court.

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67 cf *NAAA v Minister for Immigration and Multicultural Affairs* (2002) 117 FCR 287 at 289-294; *NAAG v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 135 at [60].

68 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 181 per Mason CJ. Section 39B has since been amended and augmented (*Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 581-583 [40]-[45], 638 [215]), but this does not diminish the accuracy of the statement by Mason CJ.

69 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559.

70 (1995) 183 CLR 168 at 231.

71 (2003) 211 CLR 476.

In this Court

93 In this Court, it is now accepted that the essential issue for determination is whether the decision of the RRT manifests jurisdictional error. If so, then relief under s 39B of the Judiciary Act remains available notwithstanding s 474 of the Act.

94 In *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB*[72], further consideration was given to *Plaintiff S157* and to the companion decision, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002*[73]. In the joint judgment of Gummow and Hayne JJ in *SGLB*, with which the Chief Justice agreed[74], it was said[75]:

> "Consistently with the reasoning in *Plaintiff S157*, there may be a question as to whether there has been a jurisdictional error by reason of the failure to discharge what have been called 'imperative duties' or to observe 'inviolable limitations or restraints' found in the Act. In *Plaintiff S157*, this question was readily answered, given the nature of the alleged error by the Tribunal. The joint judgment explained the situation as follows:[76]
>
> > 'The plaintiff asserts jurisdictional error by reason of a denial to him of procedural fairness and thus s 474, whilst valid, does not upon its true construction protect the decision of which the plaintiff complains. A decision flawed for reasons of a failure to comply with the principles of natural justice is not a "privative clause decision" within s 474(2) of the Act.'
>
> In other cases, the nature of the alleged error will turn upon the meaning of the legislative criterion of jurisdiction, making the construction of the legislation the primary and essential task. *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte*

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72 (2004) 78 ALJR 992; 207 ALR 12.

73 (2003) 211 CLR 441.

74 (2004) 78 ALJR 992 at 993 [1]-[3]; 207 ALR 12 at 13-14.

75 (2004) 78 ALJR 992 at 1001 [49]-[50]; 207 ALR 12 at 23-24.

76 (2003) 211 CLR 476 at 508 [83]. As to natural justice and jurisdictional error, see *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.

> *Applicants S134/2002*[77] was such a case. The Court divided on the question whether, on the proper construction of the relevant regulations under the Act, as picked up by s 65(1), the Tribunal had been obliged to determine to its satisfaction whether applicants were entitled to protection visas by reason of membership of the family unit of a person who had already been granted a protection visa. The majority answered 'no'; Gaudron and Kirby JJ were of the other view.[78]"

95 On the present appeal, the appellants submit that provisions in Pt 7, Div 4 (ss 423-429A) of the Act[79], in particular s 424A, impose an inviolable limitation or restraint upon the exercise of jurisdiction by the RRT. They contend that in the circumstances of this case s 424A had been engaged but the RRT had not observed its requirements respecting written notice. It is contended that failure to comply with s 424A necessarily entails jurisdictional error and so attracts s 39B of the Judiciary Act. Alternatively, it is submitted that, if s 424A does not, on its proper construction, have this consequence, the same result of jurisdictional error follows from failure in observance of procedural fairness. That was the position in *Plaintiff S157* itself. There is then a debate between the parties as to whether, even if jurisdictional error were shown, as a matter of discretion relief under s 39B can and, if so, should be withheld.

96 There was no failure to comply with s 424A as on its proper construction it did not have the operation the appellants urge. Nor was there a failure to observe the requirements of procedural fairness. Therefore, there was no jurisdictional error, and no occasion to consider denial of relief on discretionary grounds.

The review by the RRT

97 It is convenient to commence by saying something more respecting the conduct of the review by the RRT. By letter dated 19 July 2001 from the RRT, the first appellant was notified that the RRT had looked at all of the material relating to her application but was not prepared to make a favourable decision on that information alone. (That, as will later appear, was a response by the RRT to par (a) of s 425(2) of the Act.) The first appellant was invited "to come to a hearing of the [RRT] to give oral evidence, and present arguments, in support of [her] claims". (That was a discharge of the obligation of the RRT under

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77 (2003) 211 CLR 441.

78 (2003) 211 CLR 441 at 457 [29]-[32], 471 [86]-[88].

79 Part 7 is applicable in the form it took after the commencement of the *Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act* 2001 (Cth).

s 425(1).) She also was told that she was entitled to ask the RRT "to obtain oral evidence from another person or persons".

98 There followed written submissions from solicitors acting on her behalf which were received by the RRT on 1 August 2001. There were further communications, including written submissions by her new adviser, Dr Al Jabiri, received on 23 August 2001. On 5 September 2001, the RRT conducted a hearing. The complaints of failure to comply with s 424A and of denial of procedural fairness arise out of the conduct of the proceedings on that occasion.

99 The RRT had before it the file of the Minister's department supplied, it would appear, by the Secretary under s 418 of the Act. The file included a record of interview on the arrival of the appellants in Australia, the protection visa application, a written statement in support of the application and a record of interview with an officer of the department. The RRT also had before it supplementary statements by the first appellant and the written submissions in support of the application for review which had been received on 1 August and 21 August 2001.

100 The place of the hearing notified to the first appellant was at Woomera Hospital. She was at this stage detained at the Woomera Immigration Reception and Processing Centre. The presiding member of the RRT was at Sydney, as were the appellants' migration agent (Dr Al Jabiri), her daughter Ms Naghdi, the interpreter and several witnesses. During the proceedings, the presiding member took evidence on oath from Ms Naghdi in the absence, at his direction, of her mother from the hearing room at Woomera. As a result, she was unaware from the video link of what was being said in Sydney by her daughter.

101 The first appellant had been sworn. After the evidence of Ms Naghdi was taken and the first appellant had returned, some of the topics covered in that evidence were put to her by the presiding member (Mr Lynch). One of these topics included an alleged violent attack on her whilst she had been living in Shiraz. The transcript of the proceeding then continues:

> "MR LYNCH: Thank you. I won't ask you any further questions about that but I may ask your adviser to inform me further. We do have to close the hearing now. Doctor, in view of the time, we have to adjourn now because the room is being used by another client. I have no further questions. Could I suggest that we adjourn the matter. I'm prepared to close the hearing now and receive written submissions, unless you want especially to make oral submissions. I'm happy to arrange another hearing time to receive oral submissions but in the circumstances I would prefer written submissions and *I'd write to you indicating what matters I'd like to hear first*. Thank you [Ms Naghdi].
>
> INTERPRETER: I think she's talking about (indistinct)

> MR LYNCH: All right. Look, I will be giving close consideration to everything you've raised and I'll be talking with your adviser about other aspects of your case I need to hear about. I know it's been very stressful for you and you're going through a difficult time. I'll be trying to make a decision quickly in your case." (emphasis added)

102 There was no such written communication from the RRT. The adverse decision was issued some six weeks later.

103 It should be added that, at the outset, when outlining the procedures he proposed to follow, Mr Lynch had said:

> "Now, when witnesses are going to give evidence, I will ask that one of them stays outside while the other gives evidence, and when you or your daughter gives evidence I'll ask one or other of you to leave the room at that time. All right. I may in fact do that in relation to Mr Ahmed [a witness for the appellants] when he gives his evidence as well. Just briefly, a couple of things: during the hearing I will tell you about any information I have that is adverse to your claim, and you'll have an opportunity to comment on that information, and so will your adviser."

The legislation

104 As remarked earlier in these reasons, it is apparent that the "invitation" extended in the letter of the RRT dated 19 July 2001 had been an observance by the RRT of its obligation imposed by s 425 of the Act. Section 425 states:

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

105 However, the appeal turns upon earlier provisions in Pt 7. Central to the submissions for the appellants is the proposition that s 424A was engaged at the

proceeding on 5 September 2001 at which evidence was taken. However, on its proper construction, s 424A had no role to play at the hearing on 5 September.

106 Before examining these provisions, it should be noted that the Act also establishes (with a distinct jurisdiction) the Migration Review Tribunal ("the MRT"). Part 5 of the Act concerning review of decisions by the MRT substantially mirrors Pt 7 of the Act. In particular, Div 5 of Pt 5 reproduces the provisions of Div 4 of Pt 7 which are relevant to the resolution of this matter.

107 The critical question in this case of the construction of s 424A is to be answered by having regard to its place in Div 4 and, in turn, the place of Div 4 in Pt 7 of the Act. The process of construction must always commence with an examination of the context in which the provision appears[80]. Part 7 (ss 410-473) is headed "Review of protection visa decisions". Division 2 (ss 411-419) is headed "Review of decisions by Refugee Review Tribunal". Having before it a valid application by the appellants under s 412 for review of the decision of the delegate of the Minister, the RRT was obliged by s 414 to review the decision. The obligation was expressed by the words in s 414 "the [RRT] must review the decision".

108 Division 5 (ss 430-431), headed "Decisions of Refugee Review Tribunal", includes a requirement as to the preparation of a written statement by the RRT (s 430). Division 4 (ss 423-429A) deals with the conduct of the review preceding the recording of the decision of the RRT.

109 Division 4 is headed "Conduct of review" and proceeds sequentially to detail the procedural steps which may or must be taken by the RRT. That some of the steps are permissive and some mandatory is reflected in the usage throughout Div 4 of "may" and "must".

110 Division 4 distinguishes between the ultimate steps concerning appearance before the RRT to give evidence and present arguments (s 425) and the anterior provisions in s 424B which provide for interviews. There is a distinction between the provision of information or the making of comments at an interview under s 424B and the giving of evidence under s 425. The giving of evidence involves the exercise by the RRT of its powers under s 427 to take evidence on oath or affirmation (s 427(1)(a)) and to summon persons to appear to give evidence (s 427(3)(a)).

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80 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

The inquisitorial process

111 With these distinctions in mind, it is convenient to turn to a consideration of the sequence of procedural steps laid down in Div 4. It commences with the permissive provision in s 423 for supply of written arguments by the Secretary of the Minister's department and by the applicant, in each case relating to the issues arising with respect to the decision under review. The applicant may also provide a statutory declaration in relation to any matter of fact the applicant wishes the RRT to consider.

112 The inquisitorial nature of the process is indicated by s 424. The RRT may get "any information that it considers relevant". However, the RRT is obliged to have regard to that information in making its decision. The getting of information by the RRT may be the result of an invitation by the RRT. Section 424 stipulates that such an invitation must be given by one of the methods specified in s 441A[81] for the giving of documents or, if the recipient is in immigration detention, by a method prescribed for the giving of documents to such persons. The only methods prescribed are the giving of the document to the person in question or to another person authorised to receive documents on behalf of that person[82].

113 There follows s 424A. Whilst s 424 is concerned with the gathering of additional information by the RRT, s 424A in certain circumstances obliges the RRT to give to the applicant for review certain information. It is upon s 424A that the appellants place considerable reliance and its text should be set out:

> "(1) Subject to subsection (3), the [RRT] must:
>
> (a) give to the applicant, in the way that the [RRT] considers appropriate in the circumstances, particulars of any information that the [RRT] 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
>
> (c) invite the applicant to comment on it.

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81 Section 441A is included in Div 7A (ss 441AA-441G), which is headed "Giving and receiving review documents".

82 Migration Regulations 1994 (Cth) , reg 5.02.

(2) The information and invitation must be given to the applicant:

(a) except where paragraph (b) applies – by one of the methods specified in section 441A; or

(b) if the applicant is in immigration detention – by a method prescribed for the purposes of giving documents to such a person.

(3) This section does not apply to information:

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

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

(c) that is non-disclosable information."

114 It will be apparent from s 424A(2) that it replicates what might be called the service provisions already found in s 424 with a reference to the methods stipulated in s 441A and to prescribed methods for persons in immigration detention.

115 Section 424A(3)(c) qualifies what otherwise is the obligation under sub-s (1) that the RRT give the applicant information the RRT considers would be a reason or part of the reason for affirming the decision. It does so by excepting "non-disclosable information". That term is the subject of a lengthy definition in s 5(1). It includes information or material which in the opinion of the Minister would be contrary to the national interest or the public interest.

116 Paragraph (b) of s 424A(3) relieves the RRT from what otherwise might be an obligation to give particulars of information already supplied by the applicant for the purpose of the application. In *Minister for Immigration and Multicultural Affairs v Al Shamry*[83], the Full Court indicated that the subject-matter of the exception is information provided by the applicant for review by statutory declaration under par (a) of s 423(1) and in response to an invitation by the RRT under s 424(2). That construction was not challenged on this appeal and should be accepted.

117 Paragraph (a) of s 424A(3) qualifies the obligation of the RRT by excepting from the need of disclosure that information which is "just about a

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83 (2001) 110 FCR 27 at 34, 38-39.

class of persons". No question of the construction of this paragraph arises on the present appeal. In the original jurisdiction of this Court, Kirby J has referred to the possibility that par (a) does not extend to information referring to the social and political conditions of the country concerned, including changes said to disentitle the applicant for refugee status[84]. But this is not the occasion further to consider that issue.

118 What can be stated is that the evident object of s 424A is that, with the qualifications and exceptions just mentioned, fairness to the applicant is to be provided by alerting the applicant to adverse material and affording an opportunity to comment upon it. In *Al Shamry*[85], Merkel J correctly observed:

> "Section 424A does not require the RRT to provide to an applicant all of the information upon which it proposes to act, other than information provided by an applicant for the purpose of the review. Rather, the section requires the RRT to provide the applicant with 'particulars of any information' that the RRT considers would form part of its reason for refusing the application for review, to explain to the applicant why that information is relevant to the review and to invite a response to it."

119 There was debate in submissions as to the statement in par (a) of s 424A(1) that the "particulars" of the information be given to the applicant "in the way that the [RRT] considers appropriate". The phrase "in *the* way" is to be read with the requirement in sub-s (2) that the information (and invitation to comment) be given as there specified. Where the applicant is not in immigration detention, this may be by any one of the methods specified in s 441A and it will be for the RRT to select which of those methods it considers to be appropriate. However, where the applicant is in immigration detention, s 441A is not picked up and the method, to be selected by the RRT as appropriate, must be one of those prescribed.

120 Section 424B has two operations in the inquisitorial procedures of the RRT. The first is attached to s 424 and is concerned with invitations thereunder to give additional information to the RRT; such invitations, in the terms of s 424, may be given to "a person", a term including but not limited to the applicant. The second operation of s 424B is with respect to invitations given by the RRT under s 424A to comment on information; such invitations, given the terms of s 424A, are limited to the applicant.

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84 *Re Minister for Immigration and Multicultural Affairs; Ex parte A* (2001) 185 ALR 489 at 499 [48].

85 (2001) 110 FCR 27 at 40.

121 The invitation given by the RRT is to specify the way in which the material may be given "being the way the [RRT] considers is appropriate in the circumstances" (s 424B(1)). Two methods are then provided. The invitation may be to give information or comments at an interview (s 424B(3)) or "otherwise than at an interview" (s 424B(2)). Section 424C authorises the RRT to make a decision without taking any further action to obtain additional information invited from a person under s 424 (s 424C(1)). Section 424C also authorises the RRT to make a decision without taking any further action to obtain the views of the applicant of information, comments upon which have been invited under s 424A (s 424C(2)). In each case, the RRT is authorised to proceed in this fashion where the information or comment has not been given before the passing of time specified under s 424B in the invitation.

122 The text of s 425 has been set out. The RRT is obliged to invite the applicant to appear to give evidence and present arguments relating to the issues arising with respect to the decision being reviewed. However, the RRT is not obliged to invite the applicant to appear to give that evidence and present arguments in the circumstances specified in s 425(2).

123 One of these circumstances appears in par (c). It is that there has been a failure of the kind indicated in s 424C, namely that a person has been invited to give additional information under s 424 or that the applicant has been invited to comment under s 424A but has not utilised those opportunities. On the other hand, if the RRT on the materials does consider it should decide the review in favour of the applicant, then it is not obliged to take the matter further by inviting the applicant to appear to give evidence and present arguments (s 425(2)(a)). Thus, in a particular case, the comments furnished by the applicant, pursuant to s 424B, upon the particulars of information supplied by the RRT under s 424A, may lead the RRT to determine under par (a) of s 425(2) that it will decide the application in the applicant's favour without going to a hearing under s 425(1).

Conclusions respecting s 424A

124 It will be apparent from the foregoing that what transpired at the hearing conducted under s 425 in the present case did not enliven s 424A. Nor would events after conclusion of the hearing and before the recording of the decision of the RRT. The specific reference in par (c) of s 425(2) back to s 424C, and thus to s 424A, and the failure to take up an invitation thereunder to comment on information, indicates the sequential chain which is provided through Div 4. Section 424A operates at a time before and may operate to qualify the discharge by the RRT of its obligation under s 425(1) to invite the applicant to appear to give evidence and present arguments.

Review powers following appearance under s 425

125 From the foregoing it will be apparent that, as well as s 424A, s 424 (gathering additional relevant information by the RRT) is also limited in operation to a time before s 425 is engaged. This sequential understanding of Div 4 does not deny that, following an appearance by the applicant under s 425 to give evidence and present argument, the RRT is empowered to obtain further information from the applicant or any other person that it may consider to be relevant to its decision.

126 Section 415(1) provides that the RRT may, for the purposes of review, exercise all the powers and discretions that are conferred by the Act on the Minister, or her delegate, in respect of the original decision. Subdivision AB of Div 3, Pt 2 of the Act, headed "Code of procedure for dealing fairly, efficiently and quickly with visa applications", provides in s 56 that the Minister may get any information that she considers relevant in making the decision, and that the Minister must have regard to that information in making the decision. Where the Minister delegates her decision-making powers under s 496(1), the delegate may also exercise the power conferred by s 56.

127 The conferral of this and other powers in the Act, through the conduit of s 415(1), begs the question, what purpose do ss 424, 424A, 424B and 424C serve? These provisions, along with ss 425 and 425A, were inserted by the *Migration Legislation Amendment Act (No 1)* 1998 (Cth)[86] ("the Amending Act") and replaced the former ss 424 and 425.

128 Previously, s 424, headed "Review 'on the papers'", provided that, if the RRT was prepared to make a decision favourable to the applicant, the RRT might do so without "taking oral evidence". The expression "taking oral evidence" was a reference to the former s 425 which was headed "Where review 'on the papers' is not available". Section 425 provided that where s 424 did not apply (ie a favourable decision on the papers could not be made) the RRT "*must* give the applicant an opportunity to appear before it to give evidence" (emphasis added). Unlike the provisions inserted by the Amending Act the former s 424 contained an important limit on what constituted "the papers". Namely, that expression comprised only the documents given to the Registrar under s 418 (the file the Secretary to the Minister's department had supplied) and s 423 (statutory declarations and written arguments provided by the Secretary of the Minister's department and by the applicant in relation to the decision under review) of the Act. Thus, and significantly for the procedures of the RRT, the general powers

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86 Another aspect of this Act was considered in *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 79 ALJR 94; 210 ALR 190.

conferred upon the RRT by s 415(1) of the Act were not available to the RRT to expand the documentary evidence available before s 425 was engaged.

129 When viewed against this backdrop, the changes made by the Amending Act appear to facilitate the making of a decision at an earlier stage in the review. Prior to s 425 being engaged, the RRT was enabled to expand the documentary evidence before it. Thus the RRT was assisted in making a favourable decision without needing to give the applicant an opportunity to appear before it and give evidence – a procedure that may be costly and not always efficient. Therefore, the purpose of ss 424, 424A, 424B and 424C as amended is to improve the efficiency of the RRT's procedures by compelling the RRT to obtain the maximum amount of documentary information that may be available before resorting to the procedure in s 425. Accordingly, despite the existence of similar (if not identical) powers conferred by s 415(1), the Act compels a sequential process upon the conduct of the review by the RRT.

130 Other aspects of the Amending Act reinforce this purpose. It is sufficient to quote from the explanatory memorandum on the Bill for the Amending Act:

> "3. The amendments to the *Migration Act 1958* in relation to the system of merits review of immigration decision-making:
>
> - merge the Migration Internal Review Office (MIRO) and the Immigration Review Tribunal (IRT) into a new body to be called the Migration Review Tribunal (MRT);
>
> - provide the Principal Members of the MRT and the Refugee Review Tribunal (RRT) with clear authority to apply *efficient processing practices*, including giving the Principal Member of the RRT clear authority to give directions on the operation of the RRT and the conduct of reviews;
>
> - specify the circumstances when the Principal Member of the MRT or the RRT may reconstitute a Tribunal for the more *efficient conduct of the review*;
>
> - allow the Minister to appoint a person to act as a Senior Member of the RRT for a period of no more than 12 months;
>
> - prevent MRT and RRT hearings from being *unnecessarily delayed* where:
>
> – prescribed notice of a personal hearing has been provided and no change has been sought; or

> – *an applicant fails to respond* to an invitation to give additional information within the prescribed period (or a further prescribed period)". (emphasis added)

131 The other obvious purpose of s 424A and the associated provisions is to provide a procedure to deal fairly with RRT applications[87]. The provisions provide a statutory regime for the according of procedural fairness but in the limited circumstances discussed. However, as discussed later in these reasons, the RRT continues to owe obligations of procedural fairness after the provisions are spent[88]. Such obligations accompany the general conferral of powers found in s 415 and the specific powers provided for in Pt 7, Div 4 that remain operative[89]. Thus, the obligation to deal fairly with applications for review continues throughout the RRT's review.

132 The sequential approach to the relevant provisions does not, for example, produce the result noted as follows by the Full Court of the Federal Court in *SRFB v Minister for Immigration and Multicultural and Indigenous Affairs* (Ryan, Jacobson and Lander JJ)[90]:

> "His Honour [the primary judge] pointed out that to adopt such a rigid sequence would mean that if the RRT learned of, or realised at or shortly before the hearing, the potential implications of certain information which attracted the application of s 424A, the RRT would have to cancel or adjourn the hearing without then exploring the significance of the information.
>
> His Honour said that the consequence would be a series of abbreviated hearings if further information comes to light."

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87 Section 420(1) of the Act provides:

> "The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick."

88 cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 138-139 [28].

89 See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 99-101 [38]-[41], 142-143 [168]-[169]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 83-88 [90]-[105], 95-98 [131]-[143], 108-109 [171].

90 [2004] FCAFC 252 at [36]-[37].

Such a result assumes there are no other powers to present adverse information to the applicant and, crucially, ignores the obligations to accord procedural fairness that are enlivened upon the giving of the invitation to appear before the RRT. Likewise, it would be wrong to assume that the RRT would not be required to provide to the applicant any adverse information which emerged when a third person gave evidence to the RRT at a hearing.

"May" and "must" in Division 4

133 It is not necessary for the disposition of the present case to determine the consequences of a failure to observe steps in the chain of provisions in Div 4 which are expressed in imperative terms by use of the term "must" in some provisions in contrast to "may" in others. However, given the detailed argument on the point and varying views in the Federal Court, something should be said on the point.

134 Counsel for the Minister emphasised that "must" and "may" in a given context need not necessarily bear what might be thought their primary character. As a general proposition, that may be accepted. However, s 33(2A) of the *Acts Interpretation Act* 1901 (Cth) indicates that in Div 4 the word "may" is used to show that acts or things may be done at discretion of the person or body concerned. Further, Div 4 manifests a carefully poised juxtaposition of the words "may" and "must" to indicate a distinction between a power and a duty imposed upon the RRT. Indeed, the root of the distinction in the legislation may be found in the primary provision in s 414 (in Div 2) that, if a valid application be before it, the RRT "must review the decision". That review is to be conducted in accordance with the procedures, partly imperative, partly permissive, specified in Div 4. Those procedures culminate in the recording of the decision expressed in the imperative term "must prepare a written statement" by s 430 (in Div 5).

135 Counsel for the Minister sought support from a passage in the judgment of the Full Court of the Federal Court in *NAHV of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[91]. Their Honours concluded that any failure to comply with s 424A(2) by providing the invitation through the medium of a document was a failure which was in "procedure" and not one of "substance". Their Honours reserved for consideration the consequences of a failure to observe the apparently imperative requirement of s 424A(1). However, their Honours' views were expressed in a setting where, in the course of a hearing under s 425, the RRT had advised the applicant that it had certain information available to it that was potentially adverse to the applicant's interests and had then discussed this with the applicant[92]. *NAHV* thus concerned an alleged

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91 (2003) 129 FCR 214 at 219-220.

92 (2003) 129 FCR 214 at 217.

operation of s 424A in a situation corresponding to that of the present case, that is to say, in the course of the giving of evidence and presentation of arguments under s 425. However, at that stage, the section had no function to perform.

136 Seen in its proper place in the procedural chain specified in Div 4, s 424A mandates the fairness in the treatment of applicants for review which is an inviolable requirement attaching to the exercise of the jurisdiction of the RRT attracted by s 414 and continuing through to the preparation of the written statement of decision under s 430. It thus answers the description of an imperative duty to observe the stipulations of the Act and entailing review for jurisdictional error under s 75(v) of the Constitution or s 39B of the Judiciary Act.

Procedural fairness

137 There remains the alternative submission that, s 424A apart, the conduct of the hearing on 5 September 2001 has been vitiated by a denial of procedural fairness to the first appellant. Reference has been made under the heading "Review powers following appearance under s 425" to the general powers enjoyed at this stage by the RRT by a combination of ss 56 and 415(1) of the Act. That a denial of procedural fairness at this stage would attract a remedy for jurisdictional error is indicated by *Re Refugee Review Tribunal; Ex parte Aala*[93] and *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*[94]. What should be added, however, is that what might be called the "common law" requirements of procedural fairness in a given case do not have the rigidity of the statutory imperatives of s 424A and associated provisions.

138 It should be noted that this case concerns the Act in a form before the addition of s 422B in Div 4[95]. The new section states that Div 4 "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with". No question presently arises concerning the validity or operation of s 422B.

139 In his detailed reasons, the primary judge (Mansfield J) dealt with the matter on the assumption that what he called "the rules of procedural fairness at common law" applied at the hearing. He concluded:

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93 (2000) 204 CLR 82.

94 (2001) 206 CLR 57.

95 By the *Migration Legislation Amendment (Procedural Fairness) Act* 2002 (Cth).

> "I do not consider that those common law rules were breached by the [RRT] in this instance. The [first appellant] had an opportunity to put her case, and was aware of the matters which were of significance to her case which emerged from the evidence of her elder daughter. She also had an opportunity of responding to those matters, partly by what was put to her during the hearing and partly by being able to make submissions about those matters following the hearing[96]."

140 In short, the requirement that the first appellant withdraw from the hearing room during the questioning of her elder daughter did not, as it transpired, deprive her of the opportunity to learn of material adverse to her claim or to comment upon it.

Conclusions

141 The appellants have not made out a case that the decision of the RRT is rendered infirm for jurisdictional error.

142 The appeal should be dismissed with costs.

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96 See eg *Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 86 [99] per Gaudron J and the cases cited by her Honour.

143 KIRBY J. This appeal from a judgment of the Full Court of the Federal Court of Australia[97] concerns issues of procedural fairness, under the *Migration Act* 1958 (Cth) ("the Act") and by the common law, as those issues affect an application for protection visas made by two Iranian nationals – an adult woman and her daughter[98]. By the Act, the provision of such visas to persons who are "refugees" within the Refugees Convention, as amended by the Refugees Protocol[99], constitutes the way in which this country discharges its obligation to those claiming protection upon that ground.

144 In the circumstances disclosed in other reasons, the essential complaint of the appellants, both in terms of the Act and of the general law, is that they were denied procedural fairness. In particular, they complain that they were not given proper notice of information about circumstances that the Tribunal procured in evidence taken in private from the eldest daughter of the first appellant, resident in Australia, which clearly played a part in the Tribunal's reasoning, affirming the decision under review. Nor were the appellants informed why that information was relevant to the review. Nor were they invited to comment on it. This was so, despite explicit assurances given to the first appellant in the hearing by videolink, based on an exchange between the member constituting the Tribunal, the first appellant's agent and her interpreter and witness. Those persons were in Sydney. The first appellant was then in immigration detention in Woomera[100].

145 The appellants are entitled to succeed. The appeal should be allowed.

The facts, decisional history and legislation

146 The background facts are stated in other reasons[101]. The first appellant, SAAP, is the mother of the second appellant who is an infant. Mother and daughter are adherents of the Sabian Mandean religion, a pre-Christian faith with similarities to other Semitic religions, whose members are allegedly subject to persecution in Iran.

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97 *SAAP of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 411.

98 The Act, s 36.

99 The Convention relating to the Status of Refugees done at Geneva on 28 July 1951, [1954] *Australian Treaty Series* No 5; The Protocol relating to the Status of Refugees done at New York on 31 January 1967, [1973] *Australian Treaty Series* No 37.

100 The exchange is set out in the reasons of Gummow J at [101].

101 Reasons of Gleeson CJ at [10]-[11]; reasons of Gummow J at [87]-[89].

147 The appellants' application for protection visas was rejected by the delegate of the Minister in June 2001. There followed an application under the Act for review by the Refugee Review Tribunal ("the Tribunal"). This proved adverse to the appellants. The appellants then applied to the Federal Court of Australia for judicial review. Their application was dealt with as an application under s 39B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act")[102]. The application failed at first instance. An appeal to the Full Court of the Federal Court was dismissed[103].

148 Both at first instance and on appeal it was found that the Tribunal had not complied with s 424A of the Act in relation to the appellants[104]. Nevertheless, the primary judge refused relief, essentially upon discretionary grounds, being of the view that "in substance" the objective of s 424A of the Act had been achieved[105]. The Full Court also accepted that a breach of s 424A had occurred, because the Tribunal had "failed to give the appellant particulars of the information [upon which it had relied in reaching its adverse decision] in writing"[106]. Indeed, the Full Court recorded that the "Minister does not contend to the contrary of this finding"[107]. Nevertheless, the Full Court rejected the appeal upon the basis of the then understanding of s 474 of the Act ("the privative clause")[108]. It held that the privative clause operated "to render effective the decision [of the Tribunal] despite a breach of s 424A"[109].

149 Soon after the decision of the Full Court, this Court published its reasons in *Plaintiff S157/2002 v The Commonwealth*[110]. The different view adopted by

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102 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 577 at [1] per Mansfield J.

103 *SAAP* [2002] FCAFC 411 at [23].

104 *SAAP* [2002] FCA 577 at [45] per Mansfield J; *SAAP* [2002] FCAFC 411 at [23] per Heerey, Moore and Kiefel JJ.

105 *SAAP* [2002] FCA 577 at [50].

106 *SAAP* [2002] FCAFC 411 at [14].

107 *SAAP* [2002] FCAFC 411 at [14].

108 *SAAP* [2002] FCAFC 411 at [16]-[23].

109 *SAAP* [2002] FCAFC 411 at [23].

110 (2003) 211 CLR 476.

this Court in that decision concerning the ambit of the privative clause to exclude judicial review in a case of breach of "imperative duties" and "inviolable limitations or restraints" established by the statute (or the denial of fundamental rights of procedural fairness recognised in the general law) invalidated the basis of the Full Court's decision in this case.

150 Now, by special leave, the appeal is before this Court for disposition.

151 The relevant provisions of the Act, breach of which the appellants complain of – and specifically s 424A – are also set out or described in other reasons[111]. It is unnecessary to repeat these provisions. However, as is evident from the reasons of the other members of this Court, the solution to the principal issue that engaged most of the argument in this Court concerning the meaning and effect of s 424A can only be reached after a careful examination of that section in the context of the Act. It is necessary to approach that task having regard to the purposes that should be attributed to the Parliament in enacting that provision in the terms adopted.

The issues

152 Five issues arise in the appeal.

(1) *The procedural issue*: Whether the proceedings, as initiated in the Federal Court and in this Court, omitting the Tribunal as a party for the relief sought under s 39B of the Judiciary Act, were correctly constituted and sufficient having regard to the provisions of the Act[112]?

(2) *The statutory issue*: Whether, having regard to the terms of the Act and specifically s 424A, the Tribunal was bound to give the appellants written notice of the information it had obtained from the eldest daughter, having regard to the large significance of that information as the reason, or part of the reason, for affirming the decision under review?

(3) *The procedural fairness issue*: Whether, if breach of the procedural requirements of s 424A was not proved, the appellants had otherwise established breach of the requirements of the general law governing procedural fairness binding on the Tribunal, either as an implication to be imputed to the Parliament in enacting the Act or by reason of the common

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111 See reasons of Gleeson CJ at [1]-[8]; reasons of Gummow J at [104], [107]-[110], [113]; reasons of Hayne J at [182].

112 ss 477, 479.

law, treated as still applicable in the absence of clearly inconsistent provisions of the Act?[113]

(4) *The jurisdictional error issue*: Whether, either for breach of the procedural requirements of s 424A of the Act or of the requirements of procedural fairness under the general law, the appellants had demonstrated such jurisdictional error as would permit the provision of relief to them in their proceedings by way of judicial review in the Federal Court?

(5) *The discretionary issue*: Whether, should such relief be available, as a matter of law, and notwithstanding ss 477 and 479 of the Act, relief under s 39B of the Judiciary Act, by way of the constitutional writs (supplemented by other remedies available under that Act), should be withheld on discretionary grounds, having regard to the circumstances established by the evidence in this case?

The procedural issue

153 Upon the procedural issue, like Hayne J[114], I am in agreement with Gummow J[115], for the reasons that he gives. It was necessary for the Tribunal to be joined as a party to the proceedings in the Federal Court and in this Court. It was for the reasons given by Gummow J that I joined in the procedural order made by this Court during the hearing requiring that the Tribunal be added as the second respondent.

The statutory issue

154 *Sequential v ambulatory approach*: The second issue represents the centrepiece of this appeal. It is the point upon which differing views have been expressed in this Court. The essential question is whether the provisions in Pt 7, Div 4 of the Act, as applicable at the relevant time, are to be treated as having a sequential operation (as Gleeson CJ[116] and Gummow J favour[117]). Or whether

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113 See generally *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 99-101 [38]-[42], 142-143 [168]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 74-75 [52]-[53], 83-84 [89]-[90], 107 [170], 108-109 [171].

114 Reasons of Hayne J at [180].

115 Reasons of Gummow J at [91].

116 Reasons of Gleeson CJ at [18].

117 Reasons of Gummow J at [124].

they are to be given an ambulatory operation so as to engage the performance by the Tribunal of its functions wherever, by their terms, those provisions apply to the circumstances of the case (as favoured by McHugh J[118] and Hayne J[119]). I support the analysis of Hayne J. I agree in his Honour's reasons as they relate to the language and structure of the applicable Division of the Act. To those reasons I would add a number of reasons of my own.

155 *Sequential statutory drafting*: First, there is the way legislation, including federal legislation, is typically drawn. It is conventional for parliamentary counsel to arrange provisions of an Act of Parliament in an order which will appear logical to the mind of the administrator or other person called upon to apply the law and to the lawyer called upon to interpret it. However, in the nature of legislation, required, as it commonly is, to address multiple and unforeseeable circumstances, it is almost impossible to envisage, and provide for, every case to which the statute will apply. If a general logic in the presentation of statutory provisions is attained, that is as much as can usually be hoped for.

156 Ordinarily, at least in the absence of clear provisions demanding a strictly sequential operation, it should not be assumed that an unyielding sequence was intended. Such an approach would restrict the ambit of the operation of the provisions of an enactment in a way that would circumscribe the operation of the law. It would reduce the capacity of the law to apply to the multitude of cases to which, by its terms, it may otherwise apply. It would do so for no reason better than the arrangement of the statutory provisions. Yet that arrangement may have another logical explanation, quite different from sequential operation of those provisions.

157 A general chronological sequence in the provisions of an Act may represent nothing more than the attempt of the drafter to arrange the provisions in an order whose chronological lay-out will make it generally simpler for persons using the Act to find a relevant provision quickly. Because statutes address the affected community at large and normally speak from time to time applying to circumstances that may be very different as time passes,[120] it is ordinarily a mistake to impose upon their provisions interpretations that narrow their operation, limiting language general in its terms so that its application is exhausted once earlier steps, suggested by the chronological sequence, are taken.

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118 Reasons of McHugh J at [60]-[63].

119 Reasons of Hayne J at [202].

120 See eg *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27. See also *Coleman v Power* (2004) 78 ALJR 1166 at 1211 [246]; 209 ALR 182 at 244-245.

158 Where the language is general in its terms, courts should be circumspect in confining the operation of the text on the basis of an inference drawn from the chronological arrangement of the provisions. The provisions have to be organised in some order. Chronological presentation is a natural one to choose. But (without clear language) choosing it does not ordinarily imply a strictly sequential application that results in the exhaustion of the operation of a provision earlier in the arrangement although by its terms, it could still apply to ongoing circumstances. The search always is for the purpose of the Parliament, derived from the language in which that purpose is expressed.

159 *Absence of express limitation*: Secondly, when s 424A of the Act is examined, its language does not contain an express limitation confining its operation to a step in a sequence of events so that the section can only apply to a step taken before the appearance of the applicant in the Tribunal's hearing as envisaged by s 425(1). Such an express limitation could easily have been included, if that had been the purpose of the Parliament.

160 For example, it would have been simple to include in the opening text of s 424A(1) words making it clear that the section applied only "in respect of the documents referred to in s 423 or the additional information referred to in s 424". No such words of limitation in the application of s 424A were enacted. In the absence of such an express limitation in the language of s 424A (a section in any case added to the statutory provisions after their first enactment) this Court should be slow to add such words to those adopted by the Parliament or to conclude that such words, although omitted, are to be found between the lines.

161 *Express regulation of the review*: Thirdly, the purpose of Pt 7, Div 4 of the Act, in which s 424A appears, is to provide a series of powers to, and to cast obligations upon, the Tribunal for (as the title of the Division describes it) the "Conduct of review". The addition of s 424A to these general provisions governing the conduct of the review must be seen as an attempt by the Parliament to provide a general scheme to ensure that such review is conducted with scrupulous fairness for the often vulnerable persons invoking the Tribunal's jurisdiction and powers. Given the overall purpose of the Parliament, so described, there would need to be clear language in s 424A (or elsewhere in the context) to require the general words of that provision to be read down so as to deny its operation, despite its ample terms, where, following a hearing of the Tribunal as mandated in the given circumstances by s 425(1), an issue arises that the Tribunal "considers would be the reason, or a part of the reason, for affirming the decision that is under review"[121].

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121 The Act, s 424A(1)(a).

162 What would be the purpose of the Parliament in denying the application of s 424A(1) to such a case? The suggestion of undue inflexibility is scarcely persuasive[122]. The provisions of the Division are unusually detailed, specific and particular. They may doubtless be seen as inflexible by some officials. But they are dealing with unusually important decisions. A measure of inflexibility is the will of the Parliament so as to protect the rights to due process of those affected. Nor is it persuasive to say that the interpretation adopted affects the capacity of the Tribunal to act in an "economical, informal and quick"[123] way. That requirement in s 420(1), is obviously subject to the express provisions of the Act. It cannot excuse non-compliance with the Act's explicit requirements. In any case, the legislature has also commanded that the conduct of the review be "fair" and "just". This is the end that s 424A is seeking to attain.

163 Clearly, it is entirely possible that a case would arise where new circumstances only come to light during the Tribunal hearing and are critical to the reasoning of the Tribunal (as the appellants say occurred in this case). Indeed, that is the very nature and purpose of the hearing for which s 425(1) of the Act provides. That sub-section requires that the Tribunal must invite the applicant to attend the hearing.

164 In a series of provisions collected in a Division of the Act which generally governs the "Conduct of review", the more natural reading of s 424A is therefore that it operates throughout such review conduct and is not spent at the earlier stage before any hearing by the Tribunal is conducted. In default of such an interpretation, it is left wholly to the general law to govern the duties of the Tribunal in respect of disclosure to those affected of a new and critical circumstance arising during the hearing. A more natural reading is to apply to such a circumstance the provision expressly enacted by the Parliament and collected in this Division governing the conduct of such reviews.

165 *Emphatic terms of the provisions*: Fourthly, it is relevant to have regard to the emphatic language in which s 424A is expressed ("the Tribunal *must*")[124]. Similar emphasis appears in other obligations contained in this Division of the Act, including the provision requiring the Tribunal to invite the applicant to appear before it in the specified circumstances[125]. Such provisions contrast with the permissive language appearing elsewhere in Pt 7, Div 4 of the Act, including in relation to the provision of documents under s 423 and the acquisition of

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122 Reasons of Gleeson CJ at [16].

123 Reasons of Gleeson CJ at [1].

124 The Act, s 424A(1) (emphasis added).

125 The Act, s 425(1). See also ss 425A(1), 426(1).

additional information under s 424. I agree with what Gummow J[126] and Hayne J[127] have written about this differential use of the respective verbs of command and discretion.

166 Whereas, nowadays, "must" is sometimes used without such imperative overtones, in the juxtaposition of language in Pt 7, Div 4 of the Act, it must be assumed that the Parliament, when it used "must", had imperative obligations in mind. Although this does not, of itself, resolve the sequential issue, it does make it much less likely that the imperative command of notification of the kind of "circumstances" mentioned in s 424A – if so important at the *earlier* stage – would be overlooked or ignored by the Parliament at the *later* stage in the Tribunal's deliberations in and following a hearing. Indeed, in practical terms, the Parliament could be taken to know that it was likely to be much *more* important that notification should be given of new circumstances emerging in the hearing, likely to influence the ultimate decision, than in respect only of circumstances arising at the earlier stage on the basis of documents and additional information.

167 If it was so important that such notification *must* be expressly given earlier, it was important later and even more so as the Tribunal approached the moment most critical of all to an applicant – that involving the possibility of formulating the Tribunal's reasons adverse to the applicant, that is, "affirming the decision that is under review".

168 *Upholding the Refugees Convention*: Fifthly, there is the consideration that the provisions for the conduct of a review constitute part of the machinery for the fulfilment of important obligations undertaken by Australia under the Refugees Convention and Protocol. If there is an ambiguity in the Act, said to arise from the sequence of the sections and the place which s 424A takes in that sequence, the ambiguity should be resolved by holding that the Parliament has expressly enacted an obligation in the Tribunal – before and after any hearing and before the decision referred to – to notify an applicant in the way provided of any new circumstances which the Tribunal considers "would be the reason, or a part of the reason, for affirming the decision that is under review" and which has not earlier been notified.

169 This is, after all, simply an express provision to ensure that the Tribunal's procedures attain the highest standards of justice to the applicants before it. As this Court has pointed out in the past, such applicants are frequently in a

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126 Reasons of Gummow J at [133]-[136].

127 Reasons of Hayne J at [206].

desperate situation and, in some cases, their safety and even their lives may be at stake in the important decisions that the Tribunal makes[128].

170 *The accepted construction*: Sixthly, the foregoing interpretation of the Act is not heterodox or surprising. Indeed, as revealed in the decisional record, it was accepted by the primary judge that s 424A applied and was breached in this case. The Full Court of the Federal Court was likewise willing to make that assumption. It recorded that it was not a conclusion challenged by the Minister. In my opinion, first thoughts were best. The section was engaged. The question is therefore whether it was breached.

The procedural fairness issue

171 Having regard to the conclusion on the statutory issue, it is unnecessary, in the circumstances of this case, to reach any final conclusion on the availability of a complaint of procedural fairness under the general law and, if available, to decide whether that complaint was made out. However, in passing this issue by, I would not wish it to be thought that I regarded the appellants' complaints under the general law as lacking substance.

172 An analysis of the sequence of the proceedings before the Tribunal and what the Tribunal member told the first appellant in Woomera alongside the reasons of the Tribunal in this case inclines me to the belief that procedural unfairness, outside the requirements of s 424A, occurred in this instance. It may have arisen because of the pressures of time imposed on the Tribunal as evident in the final exchange between the Tribunal and the first appellant and her agent. However that may be, it is certainly open to interpret that exchange as being a promise to fulfil the kind of obligation that s 424A envisages. In the event, there was no communication between the end of the hearing and the decision of the Tribunal six weeks later, in writing or otherwise. Section 424A was, as the Federal Court found or assumed, breached.

The jurisdictional error issue

173 Nevertheless, is breach of s 424A sufficient to establish jurisdictional error necessary for relief in this case? Because of the mandatory language of s 424A ("must") and the provisions of Pt 7, Div 4, I agree with Hayne J[129] that the breach is sufficient to constitute jurisdictional error, as that opaque expression has been interpreted. An imperative obligation for the conduct of a review by the

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128 See *Abebe v The Commonwealth* (1999) 197 CLR 510 at 577-578 [191] per Gummow and Hayne JJ.

129 Reasons of Hayne J at [204]-[208]. See also reasons of McHugh J at [77].

Tribunal has not been complied with. The will of the Parliament must be obeyed. The resulting decision of the Tribunal is not, therefore, one protected by the Act from judicial review in the Federal Court.

The discretionary issue

174 I also agree with Hayne J that such submissions as were advanced for the refusal of relief on discretionary grounds are unconvincing and should be rejected[130].

175 It may be difficult for some to appreciate the importance of written communications of critical facts in a legal setting. But the Parliament understood the need for it and so provided in s 424A of the Act. A written communication will ordinarily be taken more seriously than oral exchanges. People of differing intellectual capacity, operating in an institution of a different culture, communicating through an unfamiliar language, in circumstances of emotional and psychological disadvantage will often need the provision of important information in writing. Even if they cannot read the English language – or like the appellants, any language – the presentation of a tangible communication of a potentially important, even decisive, circumstance from the Tribunal permits them to receive advice and give instructions.

176 The appellants had lost the assistance of a lawyer (inferentially acting *pro bono*) who had earlier represented them. They had an agent, although he was half a continent away, presumably retained by the eldest daughter. It is precisely for such a case that the provision of written communication was contemplated by the Parliament. It is not a needless formality or an inflexible imposition. It is a prudent procedure enacted to take into consideration the exact circumstances of a case such as the present. It was obligatory to comply with it. Indeed, the Tribunal in effect promised compliance; but failed to do so. The discretionary considerations overwhelmingly favour the provision of relief.

Orders

177 It follows that I agree in the orders proposed by Hayne J.

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130 Reasons of Hayne J at [210]-[211]. See also reasons of McHugh J at [79]-[84].

178 HAYNE J. In conducting a review of the decision of a delegate of the Minister to refuse the appellants protection visas, the Refugee Review Tribunal took evidence on oath from the first appellant's eldest daughter. That daughter had come to Australia before the appellants and had been granted a protection visa. The Tribunal later used what the daughter said (about why the family had left their country of origin, Iran, and about whether family members had been denied education because they were not Muslim) as reasons to affirm the decision under review.

179 This appeal raises three questions. Was the Tribunal bound to give the appellants written notice of the information it obtained from the eldest daughter? If it was, did its failure to do so constitute jurisdictional error or a want of procedural fairness? If those questions are resolved in the appellants' favour, should the discretion to grant relief of the kind the appellants seek be exercised in their favour?

180 The facts and circumstances giving rise to these questions and the procedural history of the matter are described in the reasons of Gummow J. As Gummow J points out, it is necessary first to notice a procedural question about the constitution of the proceedings. For the reasons given by Gummow J, the Tribunal should have been, and now has been, joined as a party to the proceedings. I have reached a different conclusion, however, about whether the Tribunal was bound to give the appellants written notice of the information it obtained from the first appellant's eldest daughter. I consider that the Tribunal was bound to give the appellants written notice of that information and to ensure, so far as reasonably practicable, that the appellants understood why it was relevant to the review. The Tribunal's failure to do so constituted jurisdictional error. The third question, about relief, should be resolved in the appellants' favour.

181 The first two questions raised in the appeal (was the Tribunal bound to give written notice of the information; what are the consequences of failing to do so) require consideration of the meaning and operation of Pt 7 of the *Migration Act* 1958 (Cth) ("the Act") as it stood at the relevant time and, in particular, Div 4 of that Part (ss 423-429A). (It is convenient to continue to speak of the provisions in the present tense despite there having been subsequent changes to them.) The appellants' contentions focused upon one provision of Div 4, s 424A.

Section 424A

182 Section 424A provides that the Tribunal must give an applicant for review of a protection visa decision "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". The section also requires the Tribunal to "ensure, as far as is reasonably practicable, that the applicant understands why [the information] is relevant to the review". Sub-section (3)(a) provides that the section does not

apply to information "that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member". Other exceptions to the reach of s 424A, provided for by s 424A(3), are not relevant.

183 For the reasons given by Gummow J, if s 424A is engaged, the information and invitation to comment are to be given in writing and are to be given (if the applicant is not in immigration detention) by one of the methods specified in s 441A or (where the applicant is in immigration detention) by one of the methods prescribed for the purposes of giving documents to such a person. In either case it will be for the Tribunal to choose which of the available methods of giving the information and invitation to comment will be used. The Minister's contentions to the contrary (which sought to give controlling force to the parenthetical expression in s 424A(1) "in the way that the Tribunal considers appropriate in the circumstances") should be rejected.

184 The information which the Tribunal obtained from the evidence given by the eldest daughter, and which it gave as a reason to affirm the decision under review, was specifically about the first appellant and members of her family. It therefore did not fall within the exception provided by s 424A(3)(a). On its face, s 424A(1) required the Tribunal to give particulars of the information to the appellants and to ensure, as far as practicable, that they understood why it was relevant to the review. When read in the context of the Act as a whole, and particularly the provisions of Div 4 of Pt 7, however, is s 424A to be read as being engaged only at a particular point in the process of the Tribunal's review? That is, do the provisions of Div 4 of Pt 7 establish a *sequence* of procedural steps that are to be taken by the Tribunal when reviewing a protection visa decision? Is the point at which the Tribunal becomes aware of, or identifies, some information that it considers would be the reason, or a part of the reason, for affirming the decision that is under review, significant? In particular, does it matter whether the Tribunal becomes aware of that information, or first identifies it as having the requisite character, before or after the Tribunal decides whether s 425 requires it to invite the applicant to appear before it "to give evidence and present arguments relating to the issues arising in relation to the decision under review"?

185 I would answer each of those questions, "No". There are two related reasons for doing so. First, although the language of the Act permits the contrary construction, I consider the better view to be that the provisions of Div 4 of Pt 7 do not establish a sequence of procedural steps from which the Tribunal may not depart. Secondly, given the nature of the task to be undertaken by the Tribunal, the Act should not be construed as binding the Tribunal to follow a particular and invariable sequence of steps, when conducting a review, unless the language of the Act dictates that result. It does not.

Textual considerations

186 No provision of the Act states expressly that the Tribunal must follow a particular sequence of steps when conducting a review. Read as a whole, however, does Div 4 of Pt 7 bear that meaning?

187 There is, of course, no doubt that Div 4 of Pt 7 is set out in a logical order. It begins by providing for documents that may be given to the Tribunal, in addition to those which the Secretary to the Department must provide[131]; it deals with the Tribunal seeking additional information[132]; it provides for inviting the applicant to appear[133]; and for the applicant to request the calling of witnesses[134]. Sections at the end of the division then deal with the powers of the Tribunal[135] and its conducting its review in private[136]. A review may, perhaps many reviews would, be conducted in steps that generally follow the order in which Div 4 of Pt 7 deals with these particular subjects. It by no means follows from that fact alone, however, that the Act prescribes the order in which the Tribunal is to go about its task of reviewing the decision that has been made and I did not understand the contrary to be suggested.

188 Rather, emphasis was placed upon the provisions of s 425(2) and (3), which qualify the otherwise imperative requirement of s 425(1) that the Tribunal invite the applicant to appear before it "to give evidence and present arguments relating to the issues arising in relation to the decision under review". One of those qualifications (that provided by s 425(2)(c)) is engaged if the applicant either is invited to give additional information, but does not, or is invited, under s 424A, to comment on information, but does not do so within the time fixed for giving the comments. In any such case, "the applicant is not entitled to appear before the Tribunal". If an applicant's appearance before the Tribunal were to be seen as the focus or the culmination of the process of review, the provisions of s 425(2)(c) would suggest that any invitation to the applicant to give information, and any invitation to the applicant to comment on information, would ordinarily come before the "hearing" contemplated by s 425. Even so, it would be another

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131 s 423.

132 s 424.

133 ss 425 and 425A.

134 s 426.

135 s 427.

136 s 429.

and much larger step to construe these provisions as neither permitting nor requiring any departure from this order of events.

189 It is necessary to notice that s 425(2)(c) is engaged not only if s 424C(2) applies to the applicant (as it will if s 424A has been invoked) but also if s 424C(1) applies to the applicant. If a person is invited under s 424 to give additional information to the Tribunal, but does not do so before the time for giving it has passed, s 424C(1) permits the Tribunal to make a decision, without taking further action to obtain the additional information. Section 424C may therefore be engaged where, pursuant to s 424, information is sought from the applicant or from another. Section 425(2)(c) deals with the case where information is sought from the applicant, but not provided in time. In such a case, the applicant is not entitled to appear before the Tribunal.

190 If the provisions of Div 4 of Pt 7 are seen as requiring the Tribunal to follow the sequence in which the several provisions appear in the division, there would be no basis for distinguishing between the Tribunal obtaining information from the applicant under s 424 and its obtaining information either from some other person or in some other way. On the sequential understanding of the provisions, the step of seeking additional information *must* precede the invitation to appear, or at least must precede the appearance. That is, if Div 4 is understood as providing for a sequence of procedural steps, the Tribunal's power to get any information that it considers relevant would no longer be available once it had issued an invitation to the applicant to appear before it, or had had the applicant appear to give evidence and present arguments. No matter what information touching the decision under review emerged at or after the taking of steps under s 425, the Tribunal could not pursue it. The time for obtaining additional information would have passed. So to read Div 4 of Pt 7 would markedly confine the way in which the Tribunal exercises its function of reviewing decisions.

191 There are then some further textual indications that Div 4 of Pt 7 does not prescribe the order in which the Tribunal must go about its task. The Tribunal is obliged to *review* a decision that has already been made. It is not the primary decision-maker. The Act provides[137] that the Tribunal may exercise all the powers and discretions that are conferred by the Act on the person who made the decision. The Act obliges[138] the Tribunal to pursue the objective of providing a mechanism of review that is "fair, just, economical, informal and quick". The Act obliges[139] the Secretary to the Department to give the Tribunal a statement

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137 s 415(1).

138 s 420(1).

139 s 418.

about the decision under review that sets out the findings of fact made by the decision-maker, refers to the evidence on which the findings are based, and gives the reasons for the decision. In addition, the Secretary must give the Tribunal "each other document, or part of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of the decision". The Tribunal, therefore, comes to the review armed with the decision, with a statement of the reasons and evidence upon which it was based and whatever departmental documentary material is thought relevant to the review. Those documents form the foundation for the review in as much as it is the documents that may be expected to form the first and principal point of inquiry about the correctness of the decision under review.

Review – a predominantly documentary process

192 Part 7 of the Act, and Div 4 in particular, contains various provisions whose evident purpose is to afford procedural fairness to applicants. No doubt s 425 is a prominent example of such provisions. But it is not right to see the applicant's appearance before the Tribunal pursuant to s 425, to give evidence and present arguments, as the focus or culmination of the review process. It is no more than one step in what otherwise is a predominantly documentary process.

193 That the process is predominantly documentary is demonstrated by the several provisions (mentioned above) for assembling relevant documents and by some other provisions of Div 4 of Pt 7 to which I should now refer. Sections 424A and 424B provide for applicants being invited to give additional information or comments "at an interview". There is no reason to conclude that such an interview must be conducted by the Tribunal member assigned to conduct the review. Whether or not that is so, the "interview" contemplated by s 424B is treated by the Act as being separate and distinct from the "appearance" contemplated by s 425. No evidence is taken at an interview but a written record of the substance of the comments made, or additional information provided, at the interview would no doubt be prepared.

194 When s 425 is engaged, the applicant appears before the Tribunal "to give evidence and present arguments". When notice of invitation to appear is given under s 425A, the applicant is to be notified[140] that the applicant may give written notice that he or she wants the Tribunal to obtain oral evidence from a person or persons named in the notice[141]. The Tribunal must have regard to the applicant's wishes "but is not required to obtain evidence (*orally or otherwise*) from a person

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140 s 426(1)(b).

141 s 426(2).

named in the applicant's notice" (emphasis added)[142]. The reference to obtaining evidence otherwise than orally contemplates documentary evidence. If evidence on oath or affirmation is taken for the purpose of a review, it need not be taken by the Tribunal member who is conducting the review[143]. Again, it would follow that a written record of the evidence would be considered by the Tribunal member conducting the review.

195 The documentary record provided to the Tribunal and the record of the steps taken by the Tribunal in the course of the review therefore play a prominent part in its processes. Their prominence suggests that the applicant's appearance is not the culmination of the review.

196 There is a further set of considerations which points against adopting a sequential understanding of the provisions. If the Tribunal decides to take evidence from a person named by the applicant, the Act is silent about when that evidence is to be taken. In at least some cases it would be convenient to take the evidence before the applicant appears before the Tribunal; in others, that may be neither necessary nor practicable. In deciding whether evidence or information can be obtained by the Tribunal after the applicant is invited to or does appear, much may be thought to turn on whether, at the time of the appearance, the applicant is in a position to "present arguments relating to the issues arising in relation to the decision under review"[144]. In particular, it might be suggested that, if the applicant could not present arguments relating to the issues arising in relation to the review until all evidence and information had been obtained, the appearance must, in every case, occur after the Tribunal has gathered whatever information or evidence is to be used in the review.

Review – an exercise of Executive power

197 Consideration of this last point about the operation of s 425(1) (whether the applicant is in a position to present arguments relating to the issues arising in relation to the decision) emphasises two important features of Div 4 of Pt 7 of the Act. First, because these provisions regulate the exercise of Executive power, not judicial power, the immediate purpose of the provisions is to provide procedural fairness to applicants in determining, by inquisitorial methods, whether an earlier decision reached should be affirmed or set aside. The provisions are not made to regulate an adversarial contest that will culminate in a trial of issues joined between parties.

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142 s 426(3).

143 s 428.

144 s 425(1).

198 Rather, and this is the second feature of the provisions which is underlined by s 425(1), the issues arising in relation to the decision under review are those which the applicant for review (the visa applicant) has raised by the original claim for protection, the issues which the applicant raises about the way in which the primary decision-maker dealt with those claims and, finally, any issues which either the applicant or the Tribunal raises about subsequently revealed information.

199 Consistent with the inquisitorial nature of the process, the Tribunal is not confined to examining the correctness of the decision under review by reference to material available to the primary decision-maker. That is why the Tribunal may, and commonly will, have regard to matters which have occurred after the decision being reviewed, such as changes in conditions in the applicant's country of origin. Subsequently revealed information may take many forms. It may touch the applicant personally; it may deal more generally with persons in the applicant's position. No less importantly, it may emerge at any time. The Tribunal is empowered[145], in conducting the review, to "get any information that it considers relevant". Inviting a person "to give additional information" is but one way of the Tribunal getting information. (So much follows from the terms of s 424(2)[146].) Given that what I have called subsequently revealed information may emerge at any time, there is no reason to confine the exercise of the Tribunal's power to get any information that it considers relevant to a particular point in the conduct of the review. In particular, the reference in s 425 to the applicant presenting arguments relating to the issues arising in relation to the decision under review does not require that conclusion.

200 First, apart from subsequently revealed information, the issues arising in relation to the decision under review are set at the outset of a review. They may perhaps be refined in the course of the review, but the central issues (apart from any raised by subsequently revealed information) are established at the outset. Secondly, if s 424A is read as being engaged regardless of whether an invitation to appear has been or has to be given to the applicant, the applicant will, under that section, be invited to comment on the relevant information if the information is, for example, specifically about the applicant or another person. (I leave aside whether procedural fairness requires that the applicant be invited to comment on matters of a kind to which s 424A does not apply because it is not specifically about the applicant or another person and is just about a class of persons of which

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145 s 424.

146 "*Without limiting subsection (1),* the Tribunal may invite a person to give additional information." (emphasis added)

the applicant or other person is a member[147].) In these circumstances, the requirement in s 425(1) that the applicant be invited to present arguments relating to the issues arising in relation to the decision under review does not mean that the applicant's appearance is the final point in an otherwise sequential progression of procedural steps.

Review – conclusions

201 Underpinning all of what I have said about the operation of Div 4 of Pt 7 are two fundamental propositions. First and foremost, it must be borne steadily in mind that the Tribunal does not exercise judicial power. It forms part of the Executive, exercising the power given by the Act to the Executive, to grant or refuse to grant "a non-citizen permission, to be known as a visa"[148], in this case, to remain in Australia. The particular kind of visa sought by the appellants was a protection visa[149]. The Act makes elaborate provision for how applications for visas (including applications for protection visas) are to be dealt with. For example, Pt 2, Div 3, subdiv AA of the Act (ss 44-51) regulates applications for visas; subdiv AB (ss 52-64) provides a "[c]ode of procedure for dealing fairly, efficiently and quickly with visa applications"; subdiv AC (ss 65-69) deals with the grant and refusal of visas; and subdiv AG (ss 77-84) makes a number of "[o]ther provisions about visas". The process for review of protection visa decisions for which Pt 7 of the Act provides is no more than a further step in the exercise of Executive power.

202 Secondly, given the nature of the power to be exercised by the Tribunal, there is no reason to read the Act as defining the order in which the Tribunal should set about undertaking its task of reviewing a decision. It may be necessary to read it in that way if the appearance were the point at which issues joined between contesting parties were to be resolved. But there is no joinder of issue between contesting parties. And it is not necessary to read the provisions as providing for an invariable order of events if, as I consider to be the better view of the provisions, the appearance before the Tribunal is no more than one of several different steps to be taken in the course of the review.

203 Did the failure to comply with s 424A constitute jurisdictional error?

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147 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal* (2002) 76 ALJR 966; 190 ALR 601.

148 s 29(1).

149 s 36.

Jurisdictional error?

204 If a valid application is made under s 412 of the Act for review of a decision of a kind identified in s 411, the Tribunal "must review the decision"[150]. A decision to refuse to grant a protection visa is one kind of decision mentioned in s 411. Division 3 of Pt 7 of the Act (ss 420-422A) makes provision for the exercise of the Tribunal's powers and, as has already been seen, Div 4 regulates the conduct of the review. Division 5 (ss 430-431) makes a number of provisions about the Tribunal's decisions – how they are to be recorded (s 430), handed down (ss 430A-430D) and published (s 431).

205 The focus of the inquiry about jurisdictional error must be upon the combined operation of s 414(1) (which obliges the Tribunal to review the decision) and s 415 (which gives the Tribunal the same powers and discretions as are conferred by the Act on the primary decision-maker). It is the validity of the act done in purported performance of the obligation to review and decide which is in issue. The question is, having regard to "the language of the relevant [provisions] and the scope and object of the whole statute"[151], is it "a purpose of the legislation that an act done in breach of [s 424A] should be invalid"[152]? That is, is the Tribunal's decision to affirm the refusal of protection visas to the appellants invalid for want of compliance with s 424A?

206 The language of s 424A is, of course, imperative: "the Tribunal *must*" take the several steps it prescribes. That imperative language stands in sharp contrast with the permissive terms of, for example, s 424 which says that "the Tribunal *may*" take various steps. The evident purpose of the provisions of s 424A (and several other provisions in Div 4 of Pt 7) is to give applicants for review procedural fairness.

207 It is clear that want of procedural fairness may constitute jurisdictional error[153]. As Gaudron and Gummow JJ said in *Re Refugee Review Tribunal; Ex parte Aala*[154]:

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150 s 414(1).

151 *Tasker v Fullwood* [1978] 1 NSWLR 20 at 24 cited in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 391 [93].

152 *Project Blue Sky* (1998) 194 CLR 355 at 390 [93].

153 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.

154 (2000) 204 CLR 82 at 109 [59].

> "However, the conditioning of a statutory power so as to require the provision of procedural fairness has, as its basis, a rationale which differs from that which generally underpins the doctrine of excess of power or jurisdiction. The concern is with observance of fair decision-making procedures rather than with the character of the decision which emerges from the observance of those procedures. Unless the limitation ordinarily implied on the statutory power is to be rewritten as denying jurisdictional error for 'trivial' breaches of the requirements of procedural fairness, the bearing of the breach upon the ultimate decision should not itself determine whether prohibition under s 75(v) should go. The issue always is whether or not there has been a breach of the obligation to accord procedural fairness and, if so, there will have been jurisdictional error for the purposes of s 75(v)."

In the present matter, although the provision now in question was, as I have pointed out earlier, one of several intended to achieve procedural fairness, the immediate focus is not upon the "observance of fair decision-making procedures". It is upon "the character of the decision". Has the Tribunal validly decided the review? Or is the decision reached in the review, in breach of s 424A, invalid?

208 Where the Act prescribes steps that the Tribunal *must* take in conducting its review and those steps are directed to informing the applicant for review (among other things) of the relevance to the review of the information that is conveyed, both the language of the Act and its scope and objects point inexorably to the conclusion that want of compliance with s 424A renders the decision invalid. Whether those steps would be judged to be necessary or even desirable in the circumstances of a particular case, to give procedural fairness to that applicant, is not to the point. The Act prescribes what is to be done in every case.

209 In light of that conclusion, it is not necessary to consider the separate question whether the procedures which were followed by the Tribunal in this particular case were procedurally fair.

Relief?

210 The Minister submitted that no relief should be granted to the appellants. It was contended, in effect, that the course of events at the Tribunal was such that the first appellant (at least by her migration agent) was aware of what the eldest daughter said and had sufficient opportunity to meet it. Lying behind that submission might be thought to have lurked the suggestion that because the first appellant is illiterate in any language and the second appellant is a young child, giving of notice in writing to them in accordance with s 424A would have served no practical purpose. Whether or not that was a proposition that did lie behind

the submission that relief should be refused on discretionary grounds, the submission should be rejected.

211 For the reasons given earlier, the decision reached by the Tribunal is invalid. There is no basis, in this case, on which the undoubted discretion to refuse the relief sought could be exercised against its grant. There has been no suggestion of delay, waiver, acquiescence or other conduct of the appellants said to stand in their way. As Gaudron J said in *Enfield City Corporation v Development Assessment Commission*[155]:

> "Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less." (footnote omitted)

Even if the considerations advanced by the Minister were relevant to considering whether relief should go for jurisdictional error constituted by a want of procedural fairness (a question I need not examine) they are not considerations that bear upon whether certiorari should go to quash what is found to be an invalid decision.

Conclusion and orders

212 For these reasons the appeal should be allowed. I would make the following orders:

1. Appeal allowed with costs.

2. Set aside the orders of the Full Court of the Federal Court made on 11 December 2002 and, in their place, order:

   (a) appeal allowed with costs;

   (b) set aside the orders of Mansfield J made on 10 May 2002 and, in their place, order that:

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155 (2000) 199 CLR 135 at 157 [56].

(i) there be an order in the nature of certiorari to quash the decision of the Refugee Review Tribunal ("the Tribunal") made on 18 October 2001;

(ii) there be an order in the nature of mandamus requiring the Tribunal to review according to law the decision made by a delegate of the Minister on 19 June 2001 to refuse the protection visas sought by the applicants;

(iii) the respondent pay the applicants' costs.