IN THE HIGH COURT OF AUSTRALIA No. S321 of 2010
SYDNEY REGISTRY
BETWEEN

SZNKX
Appellant

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP

First Respondent

REFUGEE REVIEW TRIBUNAL

Second Respondent

APPELLANT'S SUBMISSIONS

These submissions are related to the submissions in *SZNKW v Minister for Immigration and Citizenship* (No. 322 of 2010)

PART I

1. The appellant, by his counsel, certifies that the redacted version of the submission is in a form suitable for publication on the internet.

PART II

2. The questions that arise on the appeal are confined to the following:

i. Did the Tribunal fail to provide to the appellant clear particulars of the relevant information (namely, an anonymous letter) by reason of:

(a) failing to identify that the anonymous letter for appellant SZNKW contained a correct departmental file number for the appellant in circumstances where other particular details of the letter were provided; or

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(b) failing to provide the physical document to the appellant for inspection.

ii. Was s424AA operative in the circumstances, so as to excuse what would otherwise be a breach of s424A of the *Migration Act 1958* (the Act) in relation to the anonymous letter?

PART III

3. The appellant certifies, by his counsel, that he has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903*.

PART IV

4. The reasons for decision of the Federal Magistrate are not reported and the internet citation is: *SZNKX v Minister for Immigration and Anor* [2009] FMCA 971.

5. The reasons for decision of the Federal Court are not reported and the internet citation is: *SZNKX v Minister for Immigration and Anor* [2009] FCA 1407.

PART V

6. On 14 July 2008, the appellant arrived in Australia. The appellant is a citizen of Bangladesh. On 15 August 2008 he applied for a Protection (Class XA) visa[1].

7. The appellant's claims to protection turned on fears of persecutory harm in Bangladesh due to his homosexuality.

8. The appellant and his partner (*SZNKW*), travelled together to Australia as participants in World Youth Day and sought protection visas shortly after arrival. They attempted to make a joint application however were told to apply separately[2].

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[1] *SZNKX v Minister for Immigration and Citizenship* [2009] FCA 1407 at [2]
[2] *SZNKX v Minister for Immigration and Citizenship* [2009] FMCA 971 [1]-[2]

9. The appellant further claimed to fear harm from fundamentalists in his community and would be subject to criminal sanctions by the authorities. These factors were material to the decision by him and his partner to come to Australia and to safely pursue his lifestyle.

10. On 13 November 2008, a decision was made by a delegate of the Minister for Immigration and Citizenship refusing the application for a Protection (Class XA) visa[3].

11. On 8 December 2008, the appellant applied to the Tribunal for a review of the decision of the Delegate.

12. On 6 February 2009, the appellant attended a hearing before the Tribunal, during which he was advised that the Tribunal had received an anonymous facsimile relating to SZNKW on 18 December 2008.

13. The hearing was scheduled on the same day as the hearing of SZNKW before the same Tribunal Member although each hearing was conducted separately. The Tribunal appears to have considered the evidence of the appellant and SZNKW as being 'mutually corroborative' however, by a decision in the same day the Tribunal found that SZNKW was not a homosexual man and so gave no weight to the corroboration given by SZNKW[4].

14. The Tribunal's treatment of the facsimile was summarised by Justice Lander below[5]:

> The RRT has recorded that it informed the appellant that the message identified the appellant's partner by his name, date of birth and passport number, and stated that the appellant's partner's claim to be homosexual

[3] [2009] FCA 1407 at [6]
[4] Tribunal Decision at [85]
[5] *SZNKX v Minister for Immigration and Citizenship* [2009] FCA 1407 at [8]

was "totally bogus". It informed the appellant that the message said that "[redacted] had a close relationship with his parents, that his parents had blessed him before he left for Australia and that he had a girlfriend". The RRT further recorded (at [84]):

> As I put to the appellant, the anonymous message is relevant to whether I accept that he himself is homosexual since he claims to be in a homosexual relationship with his partner [redacted] and the message casts doubts on whether [redacted] is homosexual. As I explained to the appellant, I would not ordinarily place much weight on a message from an anonymous informant but I consider it significant that this person is clearly close to the appellant's partner in that this person knew the appellant's partner's passport number and the nature of the claims he had made in support of his application for a protection visa. Accordingly I give what is said in the message some weight along with the other evidence before me which, for the reasons given above, leads me to find that the appellant is not telling the truth and that he is not homosexual as he claims.

15. The letter itself was not given to the appellant until it was tendered by the Minister at the hearing before the Federal Magistrate. It had not been included in the Court Book prior to the hearing[6].

16. The Tribunal rejected the appellant's submission that the letter had been orchestrated by his former Migration Agent with whom he and his partner had fallen out[7].

17. On 13 March 2009, the Tribunal affirmed the decision under review[8].

18. On 9 April 2009 and amended on 15 June 2009, an application was made under the *Migration Act 1958* (Cth) seeking review of the decision of the 13 March 2009 Refugee Review Tribunal by the Federal Magistrates Court. On 10 September 2009, the Federal Magistrates Court dismissed the application[9].

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[6] [2009] FMCA 971 [4]
[7] Tribunal Decision at [83]
[8] [2009] FCA 1407 [9]
[9] [2009] FMCA 971

19. On 1 October 2009, the appellant appealed to the Federal Court.

20. On 2 December 2009, the Federal Court of Australia dismissed the appeal[10].

21. On 4 January 2010, an application was made before the High Court of Australia for special leave to appeal the decision. On 1 February 2010, the application was taken to have been abandoned.

22. On 13 May 2010, an application was made to reinstate the application. On 18 August 2010, His Honour Justice Heydon reinstated the application for special leave: [2010] HCATrans 214.

PART VI

23. The Federal Court erred by upholding the Federal Magistrate's finding that the way in which the Tribunal dealt with the anonymous letter by exposing its existence and explaining its contents to the appellant involved no jurisdictional error.

24. For the reasons below, there was jurisdictional error by the Tribunal in that it failed to give clear particulars of the letter by omitting to either provide a copy of the letter to the appellant or by failing to disclose that the letter contained the exact Departmental file number for the appellant.

25. The error appears in the reasons for decision of the Federal Court where his Honour says at [20]:

> The third ground must also be dismissed because the Federal Magistrate was under no obligation to comply with s 424A because of the provisions of s 424A(2A). The RRT proceeded under s 424AA and gave the appellant clear particulars of the information that the RRT considered would be the reason or part of the reason for affirming the delegate's decision which was the information contained in the letter the RRT received on 18 December 2008. Once the RRT had complied with s 424AA, it was

[10] [2009] FCA 1407

> relieved of the obligation to comply with s 424A by the provisions of s 424A(2A). The third ground must be dismissed.

26. There was no issue below that but for the potential operation of s424AA there would have been a failure to comply with s424A of the Act by the Tribunal in relation to the letter.

27. The Federal Magistrate's reasons for decision record the position which was not the subject of any criticism in the appeal before the Federal Court. The Federal Magistrate said at [20]:

> Finally, the applicant says that there was a breach of s.424A of the Act. In his written submissions he refers to country information and, of course, there is no breach of s.424A by not referring country information to an appellant for comment (424A(3)(a)). However, there is no doubt, and it is accepted by the Minister, that the "dob-in letter" is a piece of information which would attract the requirements for s.424A unless the Tribunal had given the applicant the benefit of s.424AA.

28. On 13 January 2011, the First Respondent filed a Notice of Contention which appears to raise, for the first time, a contention that the letter was not information within the meaning of s424A of the Act. The appellant will respond to that Notice of Contention in the submissions in reply.

29. The issue in the appeal turns on whether s424AA was engaged, as found by the Courts below, when either the letter itself or one material particular in the letter was not disclosed to the appellant.

30. A particular of the letter which was not disclosed to the appellant was that the letter identified the correct Department of Immigration file number for appellant SZNKW. Many other particulars of the letter were identified to the appellant by the Tribunal in purported reliance on s424AA but there is no issue that the Departmental file number was disclosed.

31. This particular of the information would have armed the appellant with the ability to support his theory that the anonymous letter to have been sent by his former migration agent with whom he had fallen out over unpaid fees. He never had the

opportunity to invite the Tribunal to have regard to the fact that the letter contained information which one might reasonably infer could only be known by the migration agent.

32. Further, by not being provided with an opportunity to inspect the document in question, the appellant was denied the opportunity of inviting inferences to be drawn from textual similarities between the phraseology of the anonymous letter and correspondence in his possession from the former migration agent. In particular the similar use of ampersands throughout both documents from his migration agent and in the anonymous letter.

33. However, in dismissing the appellant's appeal to the Federal Court of Australia on 2 December 2009, Justice Lander found[11] that:

> "the Federal Magistrate was under no obligation to comply with s 424A because of the provisions of s 424A(2A). The RRT proceeded under s 424AA and gave the appellant clear particulars of the information that the RRT considered would be the reason or part of the reason for *affirming* the delegate's decision which was the information contained in the letter the RRT received on 18 December 2008. Once the RRT had complied with s 424AA, it was relieved of the obligation to comply with s 424A by the provisions of s 424A(2A)."

34. A miscarriage of the legislative process has occurred because the appellant was not provided with clear particulars of the anonymous letter by operation of s424AA, such as to enable him to present submissions to the Tribunal which could have persuaded the Tribunal or addressed it to an important piece of evidence which has apparently escaped its attention.

35. The issue of what level of particularisation of information is required for the purposes of ss424AA and s424A (2A) is of significance to many other cases.

36. It is respectfully submitted that section 424AA should be read in the context that it provides part of the framework for codification of natural justice. The focus in

[11] [2009] FCA 1407 at [20]

cases such as *VEAL*[12] is upon providing information so as to allow a fair opportunity to make a response to suggestions made by the author.

37. A question may arise as to whether the less formal manner of providing information in s424AA would make the content of the duty to provide clear particulars different to the obligation in s424A. The preferable construction is that given the interaction of the two sections, the obligations are meant to be co-extensive so that the obligation in s424A to provide clear particulars cannot be avoided by a different standard applying to s424AA.

38. In *SZMCD v Minister for Immigration and Citizenship* [2009] FCAFC 46 at [2], Moore J held that it cannot be doubted that s424AA and s424A are intended to be complementary. In their joint reasons in *SZMCD*, Justices Tracey and Foster considered the legislative history of s424AA and also found that s424AA and s424A worked in a complementary manner such that information which would not be information for the purposes of s424A would not be information for the purposes of s424AA (at [91]).

39. Given the linkage between ss424A and s424AA, it is submitted that there is no reason why a different approach should be taken to the meaning of providing "clear particulars" under s424AA as opposed to s424A.

40. The underlying purpose of s424A as explained by his Honour McHugh J in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 remains prescient in relation to s424AA:

> The obligation to deal fairly with applications for review must continue throughout the Tribunal's review. One aspect of that obligation is that the appellant 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 appellant the opportunity to comment on adverse material obtained at a hearing before the Tribunal (when the appellant 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 appellant the opportunity to comment upon adverse material. Such a result only obtains if the

[12] *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 99 [27] per The Court

Division is construed to that effect - which begs the question. But given the rule that the principles of procedural fairness apply unless excluded by express words or necessary implication, the assumption seems sound.

41. In the present case, the failure to provide the particulars identified denied to the appellant his opportunity to present evidence and arguments to fully deal with the matters raised against him by the Tribunal arising from the letter. That has led to the miscarriage of the statutory process envisaged by the Division of which s424AA and a424A are a part.

10 **PART VII**

The relevant statutory provisions as they existed at the relevant time were as follows:

Section 424A of the *Migration Act 1958* (Cth) provides as follows:

Information and invitation given in writing by Tribunal

(1) Subject to subsections (2A) and (3), the Tribunal must:

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

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

(c) invite the applicant to comment on or respond to it.

30 (2) The information and invitation must be given to the applicant:
(a) except where paragraph (b) applies—by one of the methods specified in section 441A; or

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

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

information to the applicant, and invites the applicant to comment on or respond to the information, under section 424AA.

(3) This section does not apply to information:

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

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

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

(c) that is non-disclosable information.

8. Section s 424AA provides the following:

Information and invitation given orally by Tribunal while applicant appearing

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

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

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

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

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

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

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

applicant reasonably needs additional time to comment on or respond to the information.

PART VIII

Orders sought

42. The orders sought are:

1. That the appeal be allowed.

2. That the judgment of the Federal Court of Australia be set aside.

3. That the constitutional writs issue, directed to the Second Respondent quashing the decision of 13 March 2009 and requiring it to hear the application for review according to law.

4. That the First Respondent pay the appellant's costs of these proceedings and all proceedings below.

5. Any further order(s) that the Court considers just in the circumstances.

Dated: 7.2.11

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APPELLANT'S CHRONOLOGY

Part I:

The appellant certifies by his counsel that the redacted version of the chronology is in a form suitable for publication on the Internet.

Part II:

1. On 14 July 2008, the appellant arrived in Australia. The appellant is a citizen of Bangladesh. On 15 August 2008 he applied for a Protection (Class XA) visa[1].

2. On 13 November 2008, a decision was made by a delegate of the Minister for Immigration and Citizenship refusing the application for a Protection (Class XA) visa[2].

3. On 8 December 2008, the appellant applied to the Tribunal for a review of the decision of the Delegate.

4. On 18 December 2008, the Tribunal received an anonymous facsimile relating to SZNKW.

[1] *SZNKX v Minister for Immigration and Citizenship* [2009] FCA 1407 at [2]
[2] [2009] FCA 1407 at [6]

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5. On 6 February 2009, the appellant attended a hearing before the Tribunal, during which he was advised of the existence and some of the particulars of the anonymous facsimile relating to SZNKW.

6. On 16 March 2009, the Tribunal affirmed the decision under review[3].

7. On 9 April 2009, an application was made under the *Migration Act 1958* (Cth) seeking review of the decision of the 16 March 2009 Refugee Review Tribunal by the Federal Magistrates Court.

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8. On 10 September 2009, the Federal Magistrates Court dismissed the application[4].

9. On 1 October 2009, the appellant appealed to the Federal Court.

10. On 2 December 2009, the Federal Court of Australia dismissed the appeal[5].

11. On 4 January 2010, an application was made before the High Court of Australia for special leave to appeal the decision.

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12. On 13 May 2010, an application was made to reinstate the application.

13. On 18 August 2010, His Honour Justice Heydon reinstated the application for special leave: [2010] HCATrans 214.

14. On 10 December 2010, their Honours Justices Gummow and Hayne granted special leave to appeal.

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[3] [2009] FCA 1407 [9]
[4] [2009] FMCA 971
[5] [2009] FCA 1407

Dated 4/2/9

.....(signed).....
S E J Prince
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