IN THE HIGH COURT OF AUSTRALIA No. S322 of 2010
SYDNEY REGISTRY
BETWEEN

SZNKW
Appellant

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP

First Respondent

REFUGEE REVIEW TRIBUNAL

Second Respondent

APPELLANTS' SUBMISSIONS

These submissions are related to the submissions in *SZNKX v Minister for Immigration and Citizenship* (No. 321 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 contained a correct departmental file number for the appellant in circumstances where other particular details of the letter were provided; or

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

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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: *SZNKW v Minister for Immigration and Anor* [2009] FMCA 713.

5. The reasons for decision of the Federal Court are not reported and the internet citation is: *SZNKW v Minister for Immigration and Anor* [2010] FCA 55.

PART V

6. In July 2008, the appellant arrived in Australia. The appellant is a citizen of Bangladesh. In 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 (*SZNKX*) 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] *SZNKW v Minister for Immigration and Citizenship* [2010] FCA 55 at [4]
[2] *SZNKW v Minister for Immigration and Citizenship* [2009] FMCA 713 [7]

9. The appellant further claimed to fear harm from fundamentalists in his community and that he 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 7 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 3 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 the appellant on 18 December 2008.

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

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

> 32. Finally, the Tribunal placed some weight on the anonymous fax which stated that the appellant's claim to be homosexual was "bogus". The Tribunal explained its weighing of the fax's evidentiary value:
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> As I explained to the applicant in the course of the hearing before me, I would not ordinarily place much weight on a message from an anonymous

[3] [2010] FCA 55 [5]
[4] Tribunal Decision at [90]
[5] *SZNKX v Minister for Immigration and Citizenship* [2010] FCA 55 at [32]-[33]

> informant but I consider it significant that the person who sent this anonymous fax message was clearly close enough to the applicant to know his 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 . . . leads me to find that the applicant is not telling the truth and that he is not homosexual as he claims.

33. With regard to the fax, the Tribunal did not accept the appellant's theory that his former migration agent had sent the fax in retaliation for a dispute over fees. The Tribunal noted that, if the appellant's representative had authored the fax, she would have been placing her registration as a migration agent at risk by admitting that she had knowingly put forward claims she knew to be false; and that no fax was received regarding A despite the fact that both the appellant and A were involved in the dispute with the agent, suggesting that the author of the fax had knowledge of the appellant but not A.

15. The letter itself was not given to the appellant until it was tendered by the Minister at the hearing before the Federal Magistrate.

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[6].

17. On 16 March 2009, the Tribunal affirmed the decision under review[7].

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.

19. On 9 October 2009, the Federal Magistrates Court dismissed the application[8].

20. On 26 October 2009, the appellant appealed to the Federal Court.

21. On 10 February 2010, the Federal Court of Australia dismissed the appeal[9].

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[6] Tribunal Decision at [83]
[7] [2009] FCA 55 [5]

22. On 5 March 2010, an application was made before the High Court of Australia for special leave to appeal the decision.

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

24. On 18 August 2010, his Honour Justice Heydon reinstated the appeal: [2010] HCATrans 214.

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

PART VI

26. 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.

27. For the reasons below, there was jurisdictional error by the Tribunal in that it
20 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.

28. The error appears in the reasons for decision of the Federal Court where her Honour says at [51] to [53]:

> "....I concur with the Federal Magistrate's conclusion that there was no error in the Tribunal's approach to the anonymous fax. As the Federal Magistrate put it (*SZNKW v Minister for Immigration & Citizenship* [2009] FMCA 713 at [65]-[66]):

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[8] [2009] FMCA 713
[9] [2010] FCA 55

> The critical issue is how the Tribunal dealt with this anonymous fax, and the way it went about arriving at its conclusion as to the degree of weight to be placed to it.
>
> *In this regard, I cannot see error in how the Tribunal approached this aspect of its task. It exposed the existence of the anonymous fax to the applicant at the hearing, it explained what the fax contained and its relevance, and gave him an opportunity to comment.* It took into account the applicant's comments and, for cogent reasons which were open to it, arrived at the conclusion that, notwithstanding that the fax was anonymous, some weight should be accorded to it, and that it should be considered along with all the other relevant factors in arriving at the conclusion that the applicant was not a homosexual as he had claimed.
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> 52. The appellant's arguments do not undermine this conclusion. As to the appellant's first argument, I accept that, under normal circumstances, one might reasonably assume that a close relative of a visa applicant would not attempt to damage the applicant's prospects. However, having received a detrimental fax containing information likely to be only known to persons close to the appellant, it was open to the Tribunal to conclude that such a person sent the fax and weigh the information in it accordingly.
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> 53. As to the appellant's second argument, the Tribunal did not, as the appellant implied, rely solely or even primarily on the anonymous fax. As discussed above, the Tribunal relied primarily on inconsistencies and implausible claims in the appellant's own evidence in concluding that the appellant was not homosexual. There is any event no absolute rule preventing the Tribunal from relying on anonymous documents. In general, it is for the Tribunal to decide what weight it will give items of evidence. *This is not to say that jurisdictional error could not be disclosed through a Tribunal's reliance on an anonymous document, but whether or not it was would depend on the circumstances of the case. There were no circumstances here that would justify this conclusion.* (emphasis added)

29. 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 anonymous letter.

30. 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 [52]-[54]:

> 52. Plainly, what was contained in the anonymous fax was information (for the purposes of s.424A) that, by its very terms, did undermine the

applicant's claim to be a homosexual. That is, the core of the applicant's claim before the Tribunal.

53. However, on the only evidence before the Court, this information was put to the applicant orally at the hearing. That is based on the Tribunal's own account of what occurred at the hearing, which remains unchallenged by any evidence to the contrary by the applicant.

54. The Tribunal put this information to the applicant at the hearing pursuant to s.424AA. On the evidence before the Court, I am satisfied that the Tribunal fully complied with the obligations set out in that section. In this way s.424A(2A) was engaged to relieve the Tribunal of the obligation of writing to the applicant pursuant to s.424A(1) in relation to this "information". Noting the relationship between the two sections (see *SZMCD*).

31. On 13 January 2011, the First Respondent filed a Notice of Contention which appears to seek 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.

32. The issue in the appeal would turn 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.

33. 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 the appellant. 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.

34. 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.

35. 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.

36. However, in dismissing the appellant's appeal to the Federal Court of Australia on 10 February 2010, Justice Kenny found[10] that:

> 52. " The appellant's arguments do not undermine this conclusion. As to the appellant's first argument, I accept that, under normal circumstances, one might reasonably assume that a close relative of a visa applicant would not attempt to damage the applicant's prospects. However, having received a detrimental fax containing information likely to be only known to persons close to the appellant, it was open to the Tribunal to conclude that such a person sent the fax and weigh the information in it accordingly.
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> 53. As to the appellant's second argument, the Tribunal did not, as the appellant implied, rely solely or even primarily on the anonymous fax. As discussed above, the Tribunal relied primarily on inconsistencies and implausible claims in the appellant's own evidence in concluding that the appellant was not homosexual. There is any event no absolute rule preventing the Tribunal from relying on anonymous documents. In general, it is for the Tribunal to decide what weight it will give items of evidence. This is not to say that jurisdictional error could not be disclosed through a Tribunal's reliance on an anonymous document, but whether or not it was would depend on the circumstances of the case. There were no circumstances here that would justify this conclusion.

37. 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.

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[10] [2010] FCA 55 at [52]-[53]

38. 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.

39. 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 cases such as *VEAL*[11] is upon providing information so as to allow a fair opportunity to make a response to suggestions made by the author.

40. 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, or 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.

41. 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]).

42. 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.

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

44. 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.

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 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

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

being relied on in affirming the decision that is under review; and

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

(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

45. The orders sought are:

1. That the appeal be allowed.

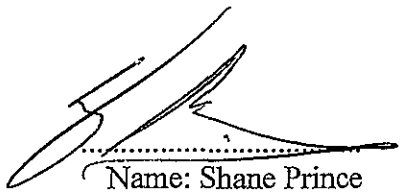
2. That the judgment of the Federal Court of Australia be set aside.

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: 4/2/11



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

2. On 7 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 3 December 2008, the applicant applied to the Tribunal for a review of the decision of the Delegate.

[1] *SZNKW v Minister for Immigration and Citizenship* [2010] FCA 55 at [4]
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4. On 18 December 2008, the Tribunal received an anonymous facsimile relating to the appellant.

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

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[3] [2009] FCA 55 [5]
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[5] [2010] FCA 55

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10 Dated 4/2/11

.....(signed).....
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