FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v SZLSP [2010] FCAFC 108

Citation:	Minister for Immigration and Citizenship v SZLSP [2010] FCAFC 108
Appeal from:	SZLSP & Anor v Minister for Immigration & Anor [2009] FMCA 932
Parties:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZLSP, SZLSQ and REFUGEE REVIEW TRIBUNAL**
File number:	NSD 1164 of 2009
Judges:	**KENNY, RARES AND BUCHANAN JJ**
Date of judgment:	3 September 2010
Catchwords:	**MIGRATION – jurisdictional error** – conclusory adverse finding made by tribunal without identifying evidence or other material on which it was based – tribunal failed to comply with s 430(1)(d) of the *Migration Act 1958* (Cth) by failing to refer to evidence or other material on which findings of fact were based – inference that tribunal had no evidence or other material before it to make finding **Held:** appeal dismissed
Legislation:	*Migration Act 1958* (Cth) s 430
Cases cited:	*Applicant WAEE v Minister* (2003) 75 ALD 630 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353

	Collector of Customs, Tasmania v Flinders Island Community Association (1985) 7 FCR 205 *Dalton v Deputy Federal Commissioner of Taxation* (1986) 160 CLR 246 *Dornan v Riordan* (1990) 24 FCR 564 *Ex parte IBM Global Services Australia Ltd* [2005] FCAFC 66 *Kennedy v Australian Fisheries Management Authority* (2009) 182 FCR 411 *Liversidge v Anderson* [1942] AC 206 *George v Rockett* (1990) 170 CLR 104 *Maroun v Minister for Immigration and Citizenship* [2009] FCA 1284 *Mashayekhi v Minister for Immigration and Multicultural Affair*s (2000) 97 FCR 38 *Minister for Immigration and Citizenship v Le* (2007) 242 ALR 455 *Minister for Immigration and Citizenship v SZMDS* (2010)266 ALR 367 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 *Minister for Immigration and Multicultural Affairs v Gutierrez* (1999) 92 FCR 296 *Minister for Immigration and Multicultural Affairs v Li* (2000) 176 ALR 66 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12

Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme (2003) 216 CLR 212

Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476

Pollocks v Minister for Immigration and Multicultural Affairs (2001) 195 ALR 7

R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd (1953) 88 CLR 100 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656

R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd (1952) 85 CLR 138

Re Minister for Immigration and Multicultural Affairs; Ex Parte Durairajasingham (2000) 168 ALR 407

Saeed v Minister for Immigration and Multicultural Affairs (2010) 267 ALR 204

SBCC v Minister for Immigration & Multicultural Affairs [2006] FCA 270

SBCC v Minister for Immigration & Multicultural Affairs [2006] FCAFC 129

SZACW v Minister for Immigration [2004] FCA 1690 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212

SZFNP v Minister for Immigration and Multicultural Affairs [2006] FCA 1527

SZLGP v Minister for Immigration and Citizenship [2008] FCA 11

SZLSP v Minister for Immigration [2009] FMCA 932

	WAHP v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 87 *WAIJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 80 ALD 568 *WALT v Minister for Immigration and Multicultural and Indigenous Affairs* [2007] FCAFC 2 *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548
Date of hearing:	9 February 2010
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	120
Counsel for the Appellant:	Mr J Smith and Mr P Knowles
Solicitor for the Appellant:	DLA Phillips Fox
Counsel for the First and Second Respondents:	Mr J F Gormly

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	
GENERAL DIVISION	NSD 1164 of 2009

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION AND CITIZENSHIP Appellant
AND:	SZLSP First Respondent SZLSQ Second Respondent REFUGEE REVIEW TRIBUNAL Third Respondent

JUDGES:	KENNY, RARES AND BUCHANAN JJ
DATE OF ORDER:	3 SEPTEMBER 2010
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the first and second respondents' costs of and incidental to the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	
GENERAL DIVISION	NSD 1164 of 2009
ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA	

BETWEEN:	MINISTER FOR IMMIGRATION AND CITIZENSHIP Appellant

AND:	SZLSP First Respondent SZLSQ Second Respondent REFUGEE REVIEW TRIBUNAL Third Respondent

JUDGES:	KENNY, RARES AND BUCHANAN JJ
DATE:	3 SEPTEMBER 2010
PLACE:	SYDNEY

REASONS FOR JUDGMENT

KENNY J:

The Proceeding

1 This is an appeal from a judgment of the Federal Magistrates Court delivered on 24 September 2009, granting an application for judicial review of a decision of the Refugee Review Tribunal ('the Tribunal') and issuing orders of certiorari and mandamus. In this Court, the Tribunal, named as the third respondent, has filed a notice of appearance, indicating that it would submit to any orders of the Court, but has not otherwise participated in the proceeding. All references to the respondents below should be understood as indicating only the first and second respondents.

2 For the reasons stated below, I would dismiss the appeal.

3 According to the Tribunal, the first and second respondents, who are husband and wife, are both citizens of China and arrived in Australia on 7 April 2007. They applied for protection visas on 13 April 2007. The first respondent

claimed that he had practiced Falun Gong in China since before 1999 and that, as a result, he had suffered persecution in that country. As a result of practising Falun Gong, the first respondent claimed that he was arrested on two occasions and that he and his wife had been subjected to violence by police and lost their employment. The second respondent also claimed that her husband had been arrested because of his practice of Falun Gong and that the couple had experienced violent treatment by police. She did not claim to be a Falun Gong practitioner herself.

4 The procedural history of the proceeding is not straightforward. On 9 July 2007, a delegate of the appellant Minister refused the respondents' protection visa applications; and, on 7 November 2007, the Tribunal affirmed the delegate's decision on review. The respondents' subsequent judicial review application in the Federal Magistrates Court was dismissed, but, on an appeal to the Federal Court, the Court made consent orders for the issue of writs of certiorari and mandamus on 4 November 2008.

5 On 13 February 2009, a differently constituted Tribunal found that the first respondent had not practiced Falun Gong in China and would not seek to do so if he returned to China, and therefore affirmed the delegate's decision. The respondents again sought judicial review in the Federal Magistrates Court. In reasons delivered 24 September 2009, the Federal Magistrate concluded (at [62]) that the "the Tribunal . . . fell into jurisdictional error by asking itself the wrong question". By a notice of appeal dated 14 October 2009, the Minister appealed to this Court, contending that the Federal Magistrate erred in finding jurisdictional error.

The Tribunal Decision

6 When the matter came before the Tribunal in January 2009, the Tribunal wrote to the respondents, inviting them to attend hearings that month. There were apparently some procedural irregularities related to these invitations to attend, but they were resolved. The Tribunal also wrote to the respondents under s 424A of the *Migration Act 1958* (Cth) seeking comment about certain alleged inconsistencies in their previous evidence. The respondents were invited to attend interviews immediately before their hearings to provide their responses, which they did. In the end, however, the identified inconsistencies played little part in the Tribunal's ultimate decision. With the assistance of an interpreter, the respondents appeared before the Tribunal on 13 and 30 January 2009. In addition to the inconsistencies identified in the letters, the Tribunal also questioned the first respondent regarding the tenets of Falun Gong. The Tribunal's evaluation of the first respondent's answers to these questions served as the essential basis for its decision.

7 In its reasons of 13 February 2009, after referring to the procedural background and the relevant law, the Tribunal reproduced verbatim and as part of its own reasons the lengthy description of the respondents' claims and evidence contained in the reasons for decision of 7 November 2007, which

had been given by the previously constituted Tribunal. Following this, the Tribunal gave a relatively cursory description of the respondents' evidence before it in January 2009. As to its questions regarding Falun Gong, the Tribunal stated simply (at [28]): "At hearing, I first asked the first named applicant a series of questions about Falun Gong. He answered none of them correctly".

8 The Tribunal set forth its conclusions in a brief section headed "Findings and Reasons". It stated (at [31]): "I do not accept the claims of either applicant and believe they [sic] stories have been concocted". The Tribunal explained its reasons for this conclusion as follows (at [32]-[37]):

Some of my reasons are of lesser importance. The second named applicant has given conflicting testimony over time about the precise circumstances of her being injured by police and hospitalised. These inconsistencies certainly undermine confidence in her evidence. This lack of confidence is reinforced by the conflicting claims made as to whether she had to report to police or not.

However, the principal reason why I do not accept the claims of the applicants is that I do not believe that the first named applicant is a Falun Gong pratitioner. His inability to answer correctly my questions about basic elements of Falun Gong belief causes me to discount any possibility that he has practiced Falun Gong in China as he claims. Accordingly, I find that his claimed practice in Australia is not for reason of genuine adherence to Falun Gong, but, rather, for the purpose of strengthening his claim to be a refugee. In accordance with s.91R(3) [of the Migration Act], therefore, I will disregard this practice. Because of my finding that he knows little – almost nothing – about Falun Gong, I do not believe that he would seek to practice Falun Gong should he return to China.

His statement that the printed material he circulated included a call on people to leave the Chinese Communist party is completely inconsistent with the non-political nature of Falun Gong and I do not accept the claim.

As to the second named applicant, her claims collapse because they are predicated on her husband being a Falun Gong practitioner, which I have found he is not. However, the confusion in her own evidence on two critical matters – exactly what happened to her on the day her husband was arrested and whether or not she has [sic] subsequently to report to the police – undermine her credibility and lead me to conclude that she is not a witness of truth and to reject her claims for that reason also.

Accordingly, I do not accept that any of the events claimed by the applicants to have led to their departure from China did in fact occur. I find that the applicants left China of their own free will seeking a migration outcome. I do not accept that the applicants have suffered harm in China for any Convention reason. Nor do I accept that there is a real chance that they will suffer such harm should they return to China in the foreseeable future.

I find that the first and second named applicants do not have a well founded fear of persecution in China for a Convention reason.

9 Although the Tribunal identified factual inconsistencies in the second respondent's evidence that led it to conclude that she was not a credible witness, it did not find that similar factual inconsistencies impugned the first respondent's evidence. The only reason given by the Tribunal for disbelieving the first respondent's evidence that he had practiced Falun Gong in China (as opposed to his claim that he distributed political literature, which is not now in issue) was the Tribunal's perception that his answers to "my questions about basic elements of Falun Gong belief" were not "correct". The Tribunal's reasons do not advert to any particular questions or answers. They do not disclose the source or substance of the Tribunal's understanding of Falun Gong doctrine, and nor do they reveal why the Tribunal considered the answers given by the first respondent to be deficient.

10 There is no reference in the Tribunal's reasons to any material against which the first respondent's knowledge of Falun Gong could rationally be evaluated, and there is no such material elsewhere in the record. The bulk of the Tribunal's reasons (eleven and a half out of fifteen pages) is text copied directly from the reasons for decision of the Tribunal, differently constituted, in November 2007. While this cut-and-paste approach does not of itself amount to jurisdictional error, when coupled with a sparse account of subsequent evidence and slight additional analysis, the approach does not engender any confidence that the Tribunal discharged its statutory role with diligence or care.

11 At any rate, the Tribunal's first decision was not based on the first respondent's knowledge of Falun Gong; and none of the evidence referred to in the copied portion of the reasons for that decision is capable of falsifying answers to questions about Falun Gong doctrine. Other than this copied text, the only references to evidence or material that might bear on this issue to be found in the reasons currently being considered is the brief summary of evidence at the January 2009 hearing (mentioned above) and the following statement:

The Tribunal has before it the Department's file relating to the applicants. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

The delegate's decision did not mention any material that could have been probative of Falun Gong doctrine. The context makes it plain enough that the "other material" mentioned in this passage did not play any significant role in the Tribunal's decision. Taking the reasons on their face, the Tribunal would appear to have evaluated the first respondent's answers without any rational basis for that evaluation.

12 The only clue as to what may have been the Tribunal's yardstick in this regard is contained in the transcript of the first respondent's hearing in January 2009. This transcript shows that, in the course of the first respondent's evidence, the Tribunal referred to a particular text as support for certain propositions about Falun Gong. In the transcript, the Tribunal described the text only as "my text", but the identity of the text is not otherwise

stated. Further, without further explication, it would be impossible to say from the face of the transcript that the first respondent was incapable of giving satisfactory answers to the Tribunal's questions.

13 At the hearing before the Federal Magistrate (and on appeal), the question of what precisely could be discerned from the transcript was explored at length. The Federal Magistrate appears to have assumed that "my text" was the basis for the Tribunal's finding that the first respondent was unable "to answer correctly [its] questions about basic elements of Falun Gong belief". Ultimately, however, other than what the reasons themselves reveal, the nature of the Tribunal's decision-making process does not clearly appear. It is against this background that the Court must now consider the Federal Magistrate's finding of jurisdictional error.

Federal Magistrate's decision

14 The grounds of appeal agitated by the respondents in the Federal Magistrates Court, as reported in the Federal Magistrate's reasons, were that "the Tribunal constructively failed to exercise its jurisdiction . . . by applying a standard comprising the possession of specific knowledge of Falun Gong theory which it required the [first respondent] to meet"; and that the Tribunal's findings regarding the first respondent's lack of knowledge of Falun Gong "could not be said to be clear and open on the evidence, not least because the evidence of the correctness of the answers was never made known": see *SZLSP v Minister for Immigration and Citizenship* [2009] FMCA 932 at [35] and [38]. As reported in the Federal Magistrate's reasons, the Minister argued that the respondents' case was in substance an attack on the merits of the Tribunal's decision and as such did not reveal jurisdictional error.

15 The Federal Magistrate's reasons for judgement discussed the authorities relied on by the respondents in support of the proposition that the Tribunal committed jurisdictional error by requiring the first respondent to meet a specific standard of knowledge. These authorities were *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548 ('*Wang*'); *WALT v Minister for Immigration and Multicultural and Indigenous Affairs* [2007] FCAFC 2 ('*WALT*'); and *SBCC v Minister for Immigration & Multicultural Affairs* [2006] FCA 270 (at first instance); [2006] FCAFC 129 (upheld on appeal) ('*SBCC*'). The Federal Magistrate's reading of these authorities was as follows (at [52]):

In my view, with respect, the decisions in *SBCC* and *WALT* require an examination of the Tribunal decision to see whether the Tribunal did, in fact, set up a minimum standard of knowledge of the religion or belief and thereby take on the role of 'arbiter of doctrine' (*Wang* at 552, [16]), or whether it was doing nothing more than questioning the applicant about his or her beliefs on matters which that particular religion teaches (*WALT* at [29]) or legitimately exploring what that person knows about the religion 'in order to assess the genuineness of the claim' (*SBCC* at [47]).

16 On this appeal, the Minister argued, and Justice Buchanan has accepted, that the Federal Magistrate rejected the respondents' submission that the Tribunal erred by applying an arbitrary standard. I respectfully disagree. After the passage quoted above, the Federal Magistrate began to consider the application of this reading of the authorities to the Tribunal's decision (at [53]-[55]), but, without proceeding far, turned his attention (at [56]) to "another matter of concern", namely, "the point that the Tribunal, in testing the First Applicant's knowledge of Falun Gong, was relying on a text, the nature of which was not disclosed".

17 In exploring this point, the Federal Magistrate considered the decisions in *SBCC* at first instance and on appeal. Both at first instance and on appeal, the decision of the Tribunal under scrutiny was found to be without jurisdictional error. The Federal Magistrate identified differences between the approach of the Tribunal in *SBCC* and the approach of the Tribunal in this case. His Honour indicated that that these differences led him to conclude that the Tribunal in this case had committed jurisdictional error by asking the wrong question (at [60] -[62]):

In the matter under review, what the Tribunal did differed from the approach taken by the Tribunal in *SBCC*. The Tribunal in the matter under review did not disclose its source of information for examining the First Applicant about his knowledge of Falun Gong, either in the Decision Record or in the transcript of the hearing. . . . All that the Tribunal did was refer to "my text".

The other significant departure from the decision of the Tribunal in *SBCC* is that the Tribunal in the matter under review relied primarily on its finding that the First Applicant knew little, "almost nothing", about Falun Gong in order to deal with the cases of both Applicants. In the Tribunal decision in *SBCC*, the Tribunal did not regard that applicant as a credible witness for a number of reasons, which were quite separate from its finding about the applicant's lack of knowledge of Falun Gong.

It is for these reasons, I am satisfied that the Tribunal in the matter under review fell into jurisdictional error by asking itself the wrong question, as the Applicant's counsel submits. (Footnotes omitted)

18 The quoted paragraphs indicate that the Federal Magistrate relied on two points of difference from the approach taken by the Tribunal in *SBCC*: the non-disclosure of the text and the fact the Tribunal decided the case primarily based on a finding that the applicant lacked knowledge of Falun Gong. The second point apparently reflects his Honour's application of the principle that he derived from *Wang*, *WALT*, and *SBCC* regarding the application of an arbitrary standard.

THe Parties' Submissions on appeal

19 The Minister submitted that the Federal Magistrate erred in "proceed[ing] on the basis that a Tribunal's decision will be infected by jurisdictional error in circumstances where it does not disclose its source of

information for examining an applicant about his or her knowledge of a belief system and relies primarily on a finding that the applicant knows little about that system in order to deal with the application for review". In the alternative, the Minister submitted that the Federal Magistrate erred in finding that the Tribunal had asked itself the wrong question, and in concluding that the Tribunal had improperly applied a minimum standard of knowledge for Falun Gong adherents.

20 In written submissions, the Minister supported these points with three arguments. First, the Minster argued that the decisions in *SBCC* did not stand for the propositions the Federal Magistrate derived from the case. Second, the Minister again asserted that the Tribunal had legitimately explored the first respondent's knowledge of Falun Gong. Third, the Minister argued that the Tribunal had not improperly set itself up as an "arbiter" of religious beliefs, as its questions related to the teachings of Li Hongzhi, who the first respondent accepted as the "teacher" of Falun Gong.

21 In written submissions, the respondents argued that the Minister mischaracterized the Federal Magistrate's use of *SBCC* and the basis for his Honour's resolution of the appeal. They maintained that the Federal Magistrate correctly "found that the Tribunal constructively failed to exercise its jurisdiction by applying a standard of specific knowledge of Falun Gong theory which it required the first [respondent] to meet". According to the respondents, the Tribunal's non-disclosure of the text during the hearing was not the true basis for the Federal Magistrate's finding of jurisdictional error. The respondents also repeated their submission below that "the Tribunal's findings were not clear and open on the evidence . . . on the basis that the evidence of the correctness of the answers was never made known by the Tribunal in its decision".

22 Relying on s 27 of the *Federal Court of Australia Act 1976* (Cth), the respondents also sought leave to adduce further evidence on the hearing of the appeal. This evidence was to be a copy of the book "Falun Gong" by Li Hongzhi. At the hearing, counsel for the respondents stated that this was done in the hope that the Minister would agree that the proffered text was the one referred to by the Tribunal in its questioning of the first respondent. The Minister did not make this concession, however, and the respondents' counsel ultimately conceded that, in the circumstances, the proffered evidence was not relevant on the issue of alleged jurisdictional error, which was the sole issue before us. The respondents' counsel maintained that the text was relevant to rebut an argument that relief would be futile if the Court dismissed the appeal, but, since the Minister advanced no such argument, no question of futility of relief arises. The respondents' request for leave must be refused. The proffered text cannot be considered on the appeal for any purpose.

Consideration

Non-disclosure of text to respondents did not indicate jurisdictional error

> 23 Before turning to the main point in the appeal, I would dispose of one question briefly. This is the question of the Tribunal's failure to identify "my text" during its questioning of the first respondent. In this context, I would distinguish between information the Tribunal is obliged to disclose to an applicant before reaching a decision and information the Tribunal is obliged to include in its written statement of the reasons for decision.
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> 24 Although the Federal Magistrate's reasons for judgment are not entirely clear in this regard, his Honour appears to have been mostly concerned with the need to make the former type of disclosure (as to the latter, see below). The respondents did not seek to defend this aspect of his Honour's reasons; instead, they argued that the supposed need to disclose before reaching a decision did not form part of his Honour's reasons for judgment. I am unpersuaded by the respondents' characterization of his Honour's reasons. On my reading of these reasons, the Federal Magistrate concluded that the Tribunal's failure properly to identify the text at the hearing was indicative of jurisdictional error of the "wrong question" variety.
>
> 25 The Federal Magistrate identified the Tribunal's failure to "disclose its source of information [about Falun Gong], either in the Decision Record *or in the transcript of the hearing*" (at [60], emphasis added) as one of his reasons for concluding that the Tribunal asked itself the wrong question. In so doing, his Honour relied (at [57]) on the following passage from the reasons for judgment of Mansfield J at first instance in *SBCC* ([2006] FCA 270 at [27]; emphasis added in Federal Magistrate's reasons):

I do not consider the Tribunal's questioning of the applicant on his knowledge of the exercises and cultivation of Falun Gong is capable of indicating a closed mind on its part. It had to address his claim to have been a Falun Gong practitioner since mid 2002. **It had reasons to doubt its accuracy, based upon other aspects of the applicant's evidence.** Its questions then were directed to testing his knowledge of Falun Gong exercises and practice. **It did so using material which it identified, and which the applicant acknowledged he was aware of.** Members of the Tribunal in many instances develop a relatively detailed knowledge of the political or religious situation or of the political or religious beliefs of certain groups in many countries. So long as it acts consistently with the requirements of procedural fairness, the Tribunal informs itself as it thinks fit: s 420(2) and Pt 7 Div 4 of the Act; see also *SFGB v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 77 ALD 402 at 408 (SFGB). **This is not a case where the Tribunal did not disclose the source of its information:** cf *Collector of Customs, Tasmania v Flinders Island Community Association* (1985) 7 FCR 205 at 210–211. Its questioning was not unreasoned or unreasonable. Its conclusions about the applicant's level of knowledge w[ere] not shown to be based on selective material, nor to lack a foundation in the material referred to. Indeed the applicant accepted at the conclusion of that sequence of questions that what the Tribunal had put to him

was based on what committed practitioners of Falun Gong 'read again and again and again on a daily basis'. (Footnotes omitted)

> 26 It is, however, important to read Mansfield J's references to the Tribunal's disclosures to the applicant in context. As the Minister noted in argument on the appeal, Mansfield J's observations were made in response to an allegation of apprehended bias on the part of the Tribunal. That argument was described in the paragraph immediately preceding the one quoted by the Federal Magistrate:

Counsel submitted that material indicated a closed mind on the part of the Tribunal, or (as it was put) a closed mind to the question of whether the applicant has a well-founded fear of persecution for a Convention reason. He contended that material showed the focus of the Tribunal was upon whether the applicant 'comes up to scratch on whatever scale of religious zealotry the Tribunal sees fit', and so showed the Tribunal's purpose was apparently to reject the applicant's claimed commitment as a practitioner of Falun Gong.

In *SBCC* [2006] FCA 270 at [27] Mansfield J cited the fact that the Tribunal had disclosed the source of information to the applicant as evidence that, contrary to this argument, the Tribunal was not set on rejecting the applicant's claims. Mansfield J's statement in this context does not support the proposition that a failure on the Tribunal's part to identify a text or other source of information for an applicant before reaching a decision indicates that the Tribunal has asked itself the wrong question.

> 27 In this connection, it must be borne in mind that the Tribunal's obligation to disclose information is limited by the operation of ss 424A and 422B of the Migration Act. The effect of s 424A(3)(a) is that information "not specifically about the applicant or another person and … just about a class of persons of which the applicant or other person is a member" is excluded from the Tribunal's disclosure obligations under s 424A of the Act. The identity of a text about Falun Gong, though relied on by a Tribunal in evaluating an applicant's knowledge, is information which is therefore excluded from the Tribunal's s 424A disclosure obligations: see *SZFNP v Minister for Immigration and Multicultural Affairs* [2006] FCA 1527 at [8]. Further, because of the limiting effect of ss 424A and 422B with respect to the Tribunal, the statement by this Court in *Collector of Customs, Tasmania v Flinders Island Community Association* (1985) 7 FCR 205 at 210-11, about the proper practice of the Administrative Appeals Tribunal under its governing Act with respect to the disclosure of its sources of information, is inapplicable to the Refugee Review Tribunal; and the Federal Magistrate's reliance on the statement was also misplaced.
>
> 28 Thus, to the extent that the Federal Magistrate inferred jurisdictional error simply from the fact that the Tribunal did not reveal the identity of "my text" to the respondents during the Tribunal's questioning of the first respondent, his Honour erred.

29 However, as I have noted, there were two bases for the Federal Magistrate's finding of jurisdictional error. The second basis was "that the Tribunal . . . relied primarily on its finding that the [first respondent] knew little, 'almost nothing', about Falun Gong in order to deal with the cases of both [respondents]". This ground can be fairly characterized as reflecting the Federal Magistrate's acceptance of the submission that the Tribunal erred by requiring the first respondent to meet an arbitrary standard of knowledge. This raises an altogether more complicated question.

Whether the Tribunal fell into jurisdictional error by imposing an arbitrary standard of knowledge of Falun Gong

Relevant authorities: "arbitrary standard"

30 Applications for protection visas not uncommonly involve claims for refugee status based on professed membership of particular religious groups. In reviewing the Tribunal's decisions about such claims, the Court has noted that, ideally, such claims should be handled sensitively. At the same time, a lack of sensitivity does not necessarily indicate jurisdictional error. In this context, the primary question in this appeal is whether the Tribunal fell into jurisdictional error in resolving the issue of the first respondent's adherence to Falun Gong on the basis of its finding that none of his answers to questions about Falun Gong were correct, either by setting itself up as the "arbiter" of religious doctrine or otherwise. I turn first to the authorities relied on by the Federal Magistrate in concluding that it did.

31 The notion that acting as an "arbiter" of religious doctrine may be jurisdictional error was first expressed in *Wang*. Gray J (105 FCR at 551-52, [15]-[16]) expressed "doubt as to the correctness of the approach" evinced by the Tribunal's finding that the applicant in that case had "provided sufficient information on his beliefs and activities for it to be feasible that he ha[d] a rudimentary knowledge of the Christian faith". His Honour commented (at 552 [16]) that:

Religion is a matter of conscientious belief, professed adherence and practice. The RRT seems to have approached the issue on the basis that the appellant had to satisfy the RRT that he was possessed of a specific level of doctrinal knowledge to justify being regarded as a Christian. It is not appropriate for the RRT to take on the role of arbiter of doctrine with respect to any religion. Compare *Mashayekhi v Minister for Immigration and Multicultural Affair*s (2000) 97 FCR 381 at [11]–[16].

32 *Mashayekhi v Minister for Immigration and Multicultural Affair*s (2000) 97 FCR 381 ('*Mashayekhi*'), to which Gray J referred, was, however, a case where a lack of sensitivity was not found to indicate jurisdictional error. The applicant in *Mashayekhi* claimed to have converted to Christianity in Iran, asserting that "his interest in Christianity arose as a result of his friendship and association with Armenian Christians who informed him about Christianity and asked him to convert" (384 [11]). During the Tribunal's questioning of the

applicant, some uncertainty arose as to the denomination to which the applicant claimed to have converted. Merkel J was critical of the lack of sensitivity displayed in the Tribunal's treatment of this uncertainty (at 384-85 [12]):

Without seeking any real clarification from the applicant as to his understanding of Christianity and Catholicism the RRT proceeded to ask a series of questions (some of which were referred to in the decision) that would be relevant to ascertaining the genuineness of a conversion to Roman Catholicism in Australia, but which *may* be problematic in respect of the conversion in Iran attested to by the applicant. Nevertheless, the deficiencies in the answers given by the applicant to many of those questions were used by the RRT against the applicant on the issue of credibility.

33 His Honour was also critical of the Tribunal's failure to fully reveal its sources of information and their relation to the situation of converts in Iran (at 385 [15]):

While I accept that, in varying degrees, the matters relied upon by the RRT for not accepting the applicant's account of his conversion to Christianity can be logically probative of the genuineness of the alleged conversion, the weight to be given to such matters depends upon the extent to which the alleged conversion in Iran bore some similarity to the background knowledge the RRT was purporting to bring to bear on that issue. However, little was revealed by the RRT on those matters.

34 His Honour finally observed (at 385 [16]) that

. . . if the RRT is to fairly and justly discharge its important functions under the Act, it is critical that it:

- be sensitive to the cultural, social and religious *difference* that exists in so many of the societies with which its cases are concerned;

- does not arrive at or state its findings of fact on such issues with greater confidence than the circumstances of the particular case may warrant.

Though Merkel J's reasons suggest that he considered the Tribunal to have acted otherwise than "fairly and justly", his Honour ultimately concluded (at 385 [17]) that no jurisdictional error was shown.

35 In *WALT*, the Full Court considered and rejected an argument that the Tribunal committed jurisdictional error in taking the wrong approach to an applicant's claim that he had converted from Islam to Christianity at the age of eleven. At first instance, the applicant, relying on Gray J's observations in *Wang*, unsuccessfully "argued that the Tribunal wrongly took into account the perceived deficiencies in his knowledge as a Christian after his 'conversion' when considering whether he had converted to Christianity at that age", and that "the Tribunal had wrongly filtered his claim through its own views of what were appropriate understandings and beliefs for a Christian to have": *WALT*

[2007] FCAFC 2 at [16]. He sought to vindicate his position on appeal; and the Full Court in *WALT* addressed his reliance on *Wang* as follows (at [28]-[32]):

In *Wang* at 552, [16], Gray J pointed out that it is not appropriate for the Tribunal to take on the role of arbiter of doctrine with respect to any religion. So much may be accepted. Degrees of understanding and commitment of those practising any particular faith will vary. To ascribe to all who are, or claim to be, adherents to a particular religion a required minimum standard of practice or a required and consistent minimum understanding of its tenets may be erroneous.

But it does not follow that the questioning of a person, even a person as young as 11, who claims to have in effect given up his family and community connections for having espoused a particular religion, about that person's beliefs on matters which that particular religion teaches or its tenets, means that the Tribunal is necessarily becoming the arbiter of the doctrine of that religion.

We agree with the learned primary judge, that the Tribunal did no more than that. It did not set a level of knowledge of, and commitment to, Christianity which the appellant was required to meet to satisfy it that he had converted to Christianity. It merely explored the level of his knowledge and understanding, and his commitment. Clearly, the appellant had virtually no knowledge or understanding of Christianity either at the time of his "conversion", or at the time of the Tribunal's hearing. Nor had the appellant practised his claimed new religion in any way which he identified. The way the Tribunal approached this issue does not reveal any lack of sensitivity to the possible cultural differences which may inform the practice of a particular religion in a particular country: cf *Mashayekhi v Minister for Immigration and Multicultural Affair*s (2000) 97 FCR 381 per Merkel J at 384-385, [11]–[15].

. . . .

The Tribunal, as its reasons indicate, took a range of factors into account in rejecting the appellant's claim that he had converted to Christianity at age 11. In addition to his knowledge of Christianity at that time and subsequently, and the evidence that he had not practised Christianity in any identifiable way, it considered his explanation for his claimed conversion, the way in which he said he came to be converted, the fact that he had not consulted his family or others about his plans or developing beliefs, and that he was vague in his account of seeking protection from the authorities and appeared to change his evidence when questioned on such matters. They were all relevant matters for the Tribunal to consider.

36 In *SBCC*, the Full Court considered and rejected a similar argument, again relying in part on Gray J's statements in *Wang*, this time in the context of claimed adherence to Falun Gong ([2006] FCAFC 129 at [46]-[49]):

The second ground of appeal was said to go to the 'apparent imposition by the Tribunal of a standard that it imposed as to the requisite level of knowledge of Falun Gong doctrine that might attract Falun Gong status'. There was, it was said, no evidence before the Tribunal to indicate any 'cut off' point for an acceptable minimum level of knowledge for a Falun Gong practitioner.

The short answer to this contention is that where a person makes a claim to be an adherent to a particular religious movement or set of beliefs, the Tribunal can quite legitimately explore what that person knows about the religion in order to assess the genuineness of the claim. That is what happened in this case.

Any criticism of the process of the Tribunal's reasoning to a finding on credit does not expose jurisdictional error. It is also to be borne in mind that the Tribunal's assessment of credit in this case was based upon more than just the appellant's level of knowledge of his professed religion.

The second ground of appeal as formulated is also based upon the assumption that the Tribunal held that 'every believer or follower of the Falun Gong religion must have certain knowledge or provide certain answers concerning aspects of that religion'. This was not a proposition enunciated or implied in the Tribunal's reasons.

> 37 These authorities indicate that the question whether applying an "arbitrary standard" of knowledge of religious doctrine constitutes jurisdictional error is a complex one. I accept that a Tribunal which relies on the premise that "every believer or follower of [a religion] must have certain knowledge or provide certain answers concerning aspects of that religion" may well fail to engage with the question whether the particular applicant before it is in fact a follower of the religion, and so fall into jurisdictional error. There is, however, a difference between: (a) operating from the premise that all believers will have certain specific knowledge; and (b) concluding, after exploring the matter and without any preconception as to what knowledge *all* believers will demonstrate, that a particular applicant's lack of knowledge indicates that he is not a genuine adherent of a religion. Further, it must be remembered that the Tribunal's written reasons typically represent a Tribunal's concluded view after considering all the evidence. If a Tribunal ultimately finds that an applicant's lack of particular knowledge is a reason to reject his claim, this finding does not necessarily mean that the Tribunal approached the matter from the outset on the a priori basis that the applicant was *required* to demonstrate that knowledge.
>
> 38 Absent an explicit statement in the Tribunal's reasons that an applicant must meet a particular standard of knowledge to establish that he is a follower of his claimed religion, it may not always be possible to distinguish a potentially illegitimate a priori approach from a legitimate exploration of an applicant's knowledge. As the analysis in *WALT* and *SBCC* demonstrates, the Tribunal's reliance on other factors besides its evaluation of an applicant's knowledge will typically be a strong indicator that the Tribunal has conducted a legitimate exploration rather than made a determination by reference to a preconceived minimum standard of knowledge. Even where the Tribunal relies primarily on its evaluation of the applicant's answers, however, it will not necessarily run into jurisdictional error. As the authorities emphasize, there is nothing objectionable in the Tribunal questioning an applicant about his or her beliefs. When the Tribunal does so, it is not prohibited from evaluating the applicant's answers against probative material evincing the doctrines of the religion in question, and the weight to be given to that evaluation will generally be a matter for the Tribunal.

39 If the Tribunal is to avoid jurisdictional error, however, certain qualifications must be added to the preceding statements. Where the Tribunal rejects an applicant's claim based on perceived deficiencies in the applicant's knowledge of religious doctrine, there must be a basis for concluding that the particular elements of doctrine in question are elements that an adherent to the religion in the applicant's position might be reasonably expected to know. If this condition is satisfied, and the applicant is wholly ignorant of the relevant doctrinal elements, it will be a short step to infer that the applicant is not a follower of the religion as he or she claims. Where the Tribunal's material and the applicant's answers differ in matters of expression, emphasis or detail, however, the issue becomes more complex. In these circumstances, the perceived variations between the Tribunal's material and the applicant's answers must be such that there is a logical connection between those variations and the conclusion that the applicant is not an adherent of the religion. Depending on the facts of a particular case, trivial variations in detail or superficial differences in expression may not rationally justify the conclusion that an applicant's knowledge is less than would be expected of a genuine adherent. Under such circumstances, jurisdictional error is a possibility.

40 Thus, the Minister's submission that any consideration of the Tribunal's finding regarding the first respondent's knowledge should necessarily be avoided due to risks of "merits review" must be rejected. The Migration Act and the authorities clearly disclose the basis for mandated judicial review. Section 65 of the Migration Act provides that the Minister is to grant a protection visa application if he is "satisfied" that the relevant criteria have been met and deny the application if he is "not so satisfied". However, the Minister (or the Tribunal: see *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 ('*SGLB*') at 20 [37]) is only empowered to make a determination regarding the relevant state of satisfaction where that determination is based on findings or inferences of fact that are grounded upon probative material and logical grounds: see *Minister for Immigration and Citizenship v SZMDS* (2010)266 ALR 367('*SZMDS*') at 376-77 [37] –[42] per Gummow ACJ and Kiefel J (dissenting as to the application of law to facts) (citing, amongst other authorities, *SGLB* 207 ALR at 20-21 [37]-[38] per Gummow and Hayne JJ; *WAIJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 80 ALD 568 ('*WAIJ*') at 573-74 [17]-[26] per Lee and Moore JJ 573-74 [22]; and *SZLGP v Minister for Immigration and Citizenship* [2008] FCA 1198 at [15] per Gordon J) and 388-389 [102]-[105], 393-96 [121]-[131] per Crennan and Bell JJ (citing, amongst other authorities, *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 ('*Avon Downs*') at 360 per Dixon J; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 ('*Eshetu*') at 657 [147] per Gummow J). As stated by Gummow and Hayne JJ in *SGLB* (207 ALR at 20 [37]-[38]):

The satisfaction of the Minister is a condition precedent to the discharge of the obligation to grant or refuse to grant the visa, and is a "jurisdictional fact" or criterion upon which the exercise of that authority is conditioned. . . .

The satisfaction of the criterion that the applicant is a non-citizen to whom Australia has the relevant protection obligations may include consideration of factual matters but the critical question is whether the determination was irrational, illogical and not based on findings or inferences of fact supported by logical grounds. If the decision did display these defects, it will be no answer that the determination was reached in good faith. (Footnotes omitted)

41 Where the Tribunal's determination regarding the state of satisfaction turns on its evaluation of an applicant's knowledge of a religion, and that evaluation is irrational in the relevant sense, the jurisdictional foundation for the Tribunal's decision will be absent. As Gummow ACJ and Kiefel J observed in *SZMDS* (266 ALR at 327 [40]), the conclusion that a Tribunal's decision was irrational in the requisite sense should not be reached lightly. "Irrational" and "illogical" in this context "are analogues of arbitrary or perverse" and "are not used with a lesser colloquial meaning that may be applied where the words are introduced in debate to emphasise the degree of dissent from a disputed conclusion or point of view": see *WAHP v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 87 at [7] per Lee J (dissenting in the result), citing (amongst others) *Eshetu* 197 CLR at 626 [40] per Gleeson CJ and McHugh J; and see also *SZMDS* 266 ALR at 396 [130] per Crennan and Bell JJ. At the same time, however, apprehension of merits review must not operate to shield decisions which have been reached without the necessary jurisdictional foundation: see *SZMDS* 266 ALR at 377 [42] per Gummow ACJ and Kiefel J.

42 I would interpolate here that the conditions discussed above at paragraph [39] will not always, and need not necessarily, be expressly articulated in the Tribunal's reasons. Often they will be apparent from the nature of the material relied on by the Tribunal. I would also interpolate that the "material" may be the knowledge the Tribunal has acquired through exposure to previous claims based on the same religion (see, e.g., *SBCC* [2006] FCA 270 at [27]), though there is nothing to suggest that such was the case here. When the Tribunal relies on its accumulated personal knowledge, however, s 430(1)(d) of the Migration Act requires that it refer to that fact in its reasons (see below).

Relevant authorities: section 430

43 During the hearing of the matter, as noted earlier, much attention was given to the inferences that might be drawn from the transcript. Any inferences to be drawn from the transcript regarding the Tribunal's approach must, however, be consistent with the reasons the Tribunal has actually provided, and those reasons must be read in light of the Tribunal's obligations under s 430 of the Migration Act. As Gleeson CJ said in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 ('*Yusuf*') at 330 [5], "[w]hen the Tribunal prepares a written statement of its reasons for decision in a given case, that statement will have been prepared by the Tribunal, and will be understood by a reader, including a judge reviewing the

Tribunal's decision, in the light of the statutory requirements contained in s 430".

44 Section 430(1) of the Migration Act provides:

Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:

(a) sets out the decision of the Tribunal on the review; and

(b) sets out the reasons for the decision; and

(c) sets out the findings on any material questions of fact; and

(d) refers to the evidence or any other material on which the findings of fact were based.

45 In argument on the appeal, counsel for the Minister was asked to address the possibility that the Tribunal had failed to comply with s 430(1)(d), i.e., that there was "evidence or . . . other material" against which the Tribunal evaluated the first respondent's answers, but which was not referred to in the written statement prepared by the Tribunal. In the Federal Magistrate's reasons, and, to some extent, in the argument before us, the assumption was made in light of the transcript that this was the case. For the reasons explored below, including that the Tribunal is presumed to have been cognizant of s 430(1), this assumption may not be justified. These reasons flow from the authorities interpreting s 430 and, in particular, from the High Court's judgment in *Yusuf*.

46 In *Yusuf*, the High Court construed s 430(1)(c) as simply obliging a Tribunal to set out the findings which it had actually made. The Court rejected the position that the provision imposed an obligation to make findings on particular questions of fact that are objectively "material": see *Yusuf* 206 CLR at 330-32 [5], [9]-[10] per Gleeson CJ and 346 [68] per McHugh, Gummow and Hayne JJ (with whom Gleeson CJ agreed); see also 337-38 [33]-[34] per Gaudron J and 392 [217] per Callinan J. The absence of a finding on a particular question of fact in the Tribunal's reasons did not mean that the Tribunal had failed to set out the finding, but that it had not made a finding on the question at all. The Court therefore held that an alleged violation of s 430(1)(c) was not in itself a ground for jurisdictional error: *Yusuf* 206 CLR at 348-49 [75].

47 Section 430(1)(d) has been given a similar construction. In *Minister for Immigration and Multicultural Affairs v Li* (2000) 176 ALR 66 at 75 [44] ('*Li*'), a Full Court of this Court (Hill, Matthews and Lindgren JJ) stated:

With respect, we think that the learned primary judge erred in thinking that s 430(1)(d) required that the evidence or other material on which a finding of fact is based be capable of supporting it. In our view, all that is required by s 430(1)(d) is

that the RRT identify the evidence or other material on which it, the RRT, in fact based its findings on any material questions of fact.

See also *Pollocks v Minister for Immigration and Multicultural Affairs* (2001) 195 ALR 73 at 81-82 [35].

> 48 Nonetheless, *Yusuf* indicates that s 430 plays an important role in ensuring that administrative decision-makers do not exceed their jurisdiction. McHugh, Gummow and Hayne JJ observed (206 CLR at 346 [69]):

It is not necessary to read s 430 as implying an obligation to *make* findings in order for it to have sensible work to do. Understanding s 430 as obliging the Tribunal to set out what were its findings on the questions of fact it considered material gives the section important work to do in connection with judicial review of decisions of the Tribunal. It ensures that a person who is dissatisfied with the result at which the Tribunal has arrived can identify with certainty what reasons the Tribunal had for reaching its conclusion and what facts it considered material to that conclusion. Similarly, a court which is asked to review the decision is able to identify the Tribunal's reasons and the findings it made in reaching that conclusion. The provision entitles a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material. This may reveal some basis for judicial review by the Federal Court under Pt 8 of the Act, or by this Court in proceedings brought under s 75(v) of the Constitution…. It may reveal jurisdictional error. The Tribunal's identification of what *it* considered to be the material questions of fact may demonstrate that it took into account some irrelevant consideration or did not take into account some relevant consideration. (Footnotes omitted)

Gleeson CJ agreed with McHugh, Gummow and Hayne JJ, and made similar comments (206 CLR at 330-31 [5]) regarding the role of s 430. Though Gaudron J ultimately reached a different conclusion than the majority regarding the construction of s 476(1)(a) of the Migration Act as it stood at the time, her Honour's analysis of the obligation imposed by s 430(1)(c) (206 CLR at 338 [34]-[35]) was also similar.

> 49 Gummow ACJ and Kiefel J recently considered the function of s 430 in *SZMDS*. Their Honours explained that "[m]any of the leading authorities in [the High Court] in which administrative decisions were challenged concerned legislative regimes in which there was no counterpart of s 430 of the [Migration] Act", and administrative decision-makers were therefore not required to provide a statement of the reasons for their decisions: *SZMDS* at 266 ALR at 375 [34]. When such decisions "presented an inscrutable face", error could often only be inferred from the circumstances surrounding the decision: *SZMDS* 266 ALR at 375 [34], citing *Avon Downs*. Gummow ACJ and Kiefel J observed that s 430's requirements obviate "the necessity for a process of divination undertaken in the earlier authorities dealing with other legislation": *SZMDS* 266 ALR at 376 [36].

Application of authorities

50 Although the transcript of the interview became the focus of the Minister's argument at the hearing of the appeal, the Court's analysis must begin with what the reasons reveal about the Tribunal's decision. The fundamental difficulty in this case is that there is no reference in the Tribunal's reasons to any material on which it based its finding that none of the first respondent's answers were "correct" and the first respondent therefore knew "almost nothing" about Falun Gong belief. Taking the Tribunal's reasons on their face, it appears that the Tribunal arbitrarily decided the first respondent's answers were "wrong" without any logical basis to do so. Had there been any "evidence or . . . other material" on which the Tribunal's finding regarding the first respondent's knowledge was based, the Tribunal, aware of its obligations under s 430(1)(d), would presumably have referred to it. The inference arises that the Tribunal's decision was not based on findings or inferences of fact grounded upon probative material and logical grounds. The question is whether the Court should draw this inference, or the contrary inference that the Tribunal's finding was logically based on probative material to which it has not referred in the reasons.

51 The former inference (i.e., as to the absence of probative material or logical grounds) arises squarely from the principle enunciated in *Yusuf* that reasons are prepared in the context of s 430 and must be read in light of that section's requirements. However, a comment of Gleeson CJ in *Yusuf* raises the questions whether a reviewing court should always draw this inference in circumstances like the present and, if not, when should the court draw the other inference. Gleeson CJ's comment was that "[t]here may be cases where it is proper to conclude that the Tribunal has not set out all its findings" (206 CLR at 332 [10]), without indicating what factors might distinguish such cases. The same reasoning would indicate that there may be cases where it is proper to conclude that the Tribunal has not referred to the evidence on which its findings were based (though the Tribunal had such evidence). His Honour noted that it was not suggested in the matters before the Court then that the Tribunal had made a finding which it failed to set out, adding that the consequences of such a failure were not in issue.

52 In their joint judgment, McHugh, Gummow and Hayne JJ did not directly address the possibility raised by Gleeson CJ. Their Honours' reasons indicate, however, that a reviewing court should be wary of inferring lightly that the Tribunal has made a finding that it has not set out: see *Yusuf* 206 CLR at 346 [68]-[69]) (or, relevantly in the present case, has relied on unknown evidence or other material to which it has not referred). Their Honours emphasized that the purpose of s 430 was to ensure that an aggrieved party can identify with "certainty" why the Tribunal decided as it did, and that a reviewing court is informed of the same thing. Similarly, although Gaudron J did not address Gleeson CJ's suggestion directly, her Honour's reasons discuss the inference to be drawn in terms that would not appear to allow for variation. Gaudron J explained that "if in its written statement setting out its decision, the Tribunal fails to refer to or fails to make findings with respect to a relevant matter, **it is to be assumed, consistently with the clear directive in s 430 of the Act**, that the Tribunal has not regarded that question as material": see 206 CLR at 338 [37] (emphasis added).

53 In the specific context of s 430(1)(d), this Court said in *Minister for Immigration and Multicultural Affairs v Gutierrez* (1999) 92 FCR 296 that "[t]he purpose of s 430(1)(d) is to arm the reader of the decision with an understanding of the steps by which the Tribunal reached its decision" (at 300 [13] per North J). See also *Li* 176 ALR at 75 [44] in which the Full Court observed that one of the purposes of s 430(1)(d) was to "expose[ ] . . . error".

54 The Court's function is, of course, to review *decisions* for jurisdictional error, and not to review reasons. There may be cases where what appears on the face of the Tribunal's reasons to be a jurisdictional error is shown by the record before the reviewing court to be merely a failure to comply with s 430. Such a failure does not constitute jurisdictional error. In the case of a failure to comply with s 430, the appropriate course for an aggrieved applicant is to seek an order compelling the Tribunal to comply with its obligations under s 430. The ensuing written statement may or may not reveal jurisdictional error: cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 ('*Ex parte Palme*') at 224-25 [41]-[46] per Gleeson CJ, Gummow and Heydon JJ; and *Kennedy v Australian Fisheries Management Authority* (2009) 182 FCR 411 at 435 [70] per Tracey J.

55 In a case such as the present, it will always be possible to speculate that the Tribunal has relied on absent and unidentified probative material, but it will rarely be possible to establish that fact with any degree of confidence. In the ordinary course of things, a reviewing court is bound to consider, consistently with s 430, that what purports to be the Tribunal's written statement under s 430 sets out what were in fact the reasons for the Tribunal reaching the decision set forth in that statement; the findings set out therein are the findings the Tribunal actually made and considered material to its decision; and the evidence and other material referred to therein is in fact the evidence and material on which the Tribunal based those findings. To do otherwise would transform judicial review into an exercise in divination of the sort s 430 was designed to avoid. Considering the function of s 430, a reviewing court should not depart from this approach unless there is a sound reason to do so. I conclude that there is no such reason here.

56 Before explaining why I have reached this conclusion, I note that the circumstances of the present case should not be confused with the situation in which there has been a total failure to give reasons, such as that considered by the High Court in *Ex parte Palme*. In *Ex parte Palme,* the Minister cancelled the visa held by a German citizen (the prosecutor) pursuant to s 501(2) of the Migration Act (which empowers the Minister to cancel a person's visa where "the Minister reasonably suspects that the person does not pass the character test" and "the person does not satisfy the Minister that the person passes the character test"), but failed to provide a written notice "set[ting] out the reasons . . . for the decision" as required by s 501G(1)(e) of the Act. Under the circumstances of the case, it was open to the Minister reasonably to suspect that the prosecutor did not pass the character test in light of s 501(6) and (7) of the Act, because the prosecutor had pleaded guilty to murder in 1992 and been sentenced to a term of sixteen years

imprisonment. The statement provided by the Minister was described in the concurring reasons of McHugh J (216 CLR at 227 [54]):

What [the Minister] provided to the prosecutor did not constitute "reasons" for the purpose of s 501G(1)(e). What the Minister did was to provide the prosecutor with a copy of the Departmental brief to the Minister discussing the issues in the case neutrally. The brief did not argue for any particular conclusion. It also contained an attachment that listed the options open to the Minister. One option was to cancel the visa. The Minister took that option, which he indicated by crossing out the other options. The copy sent to the prosecutor showed that the Minister had exercised this option and cancelled the visa. But it is impossible to deduce from the selection of the option and the brief's discussion of the issues, what were the Minister's reasons for cancelling the visa.

57 Gleeson CJ, Gummow and Heydon JJ accepted (at 224 [40]) that the Minister had failed to "set[ ] out the reasons" for his decision. Their Honours concluded, however, that it was not open to infer from Minister's failure to provide reasons that he lacked any reason for his decision (216 CLR at 223-24 [39]):

It was decided by this court in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*, where an order for prohibition under s 75(v) of the Constitution was made, that the "inadequacy" of the material on which the decision-maker acted may support the inference that the decision-maker had applied the wrong test or was not "in reality" satisfied of the requisite matters. Given the detail supplied in the [Departmental brief] (including the annexures) and the statement by the Minister set out above, and not challenged, that he had considered all relevant matters, the decision in *Melbourne Stevedoring* is of no assistance to the prosecutor. Nor, for the same reasons, is the statement by Gibbs CJ in *Public Service Board (NSW) v Osmond*, made with reference to *Padfield v Minister of Agriculture, Fisheries and Food*, that "if the decision-maker does not give any reason for his decision, the court may be able to infer that he had no good reason". That inference is not open here. (Citations omitted)

58 *Ex parte Palme* does not compel the conclusion by analogy that this Court cannot infer that the Tribunal here lacked evidence or other probative material against which to evaluate the first respondent's knowledge. Their Honours did not suggest that inferences of the type discussed in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 120 or *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 663-4 (referring to *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1053) would never be appropriate. Rather, their Honours' conclusion was based on the nature of the particular material before the Minister on that occasion. In light of the detail of the Departmental brief, the proper inference was not that the Minister had no reasons for his decision but that he must have had reasons, which he had failed to state. The potential inference that the Tribunal's finding must have been based on probative material does not have the same force here, because there is no relevant probative material mentioned in the Tribunal's written statement under s 430. Nor is there probative material disclosed in the

record equivalent to the Departmental brief in *Ex parte Palme* that is capable of supporting the Tribunal's finding.

59 Further, there was a complete failure to give reasons in *Ex parte Palme* rather than the provision of reasons deficient in one aspect (i.e., a failure to refer to the evidence on which the decision-maker's key finding was based), as would be the case here on the Minister's analysis. In essence, the Minister in *Ex parte Palme* provided a record of the decision "present[ing] an inscrutable face" under a statutory regime where, consistent with the importance of certainty in reasons for decision-making, such impenetrable decisions were not permitted. The Tribunal here *has* provided a written statement of reasons which to all appearances complies with s 430. These reasons indicate why the Tribunal decided as it did: that is, because it did not consider the first respondents' answers correct, it concluded that he lacked knowledge of Falun Gong and was not a Falun Gong adherent. The reasons refer to evidence, though, on its face, none of that evidence appears capable of falsifying answers to questions about Falun Gong belief. These are the circumstances in which the possible inference of jurisdictional error arises here. The circumstances of *Ex parte Palme* are not equivalent.

60 Ultimately, as noted earlier, the choice here is between an inference that material to which the Tribunal did not refer and which does not appear in the record was not part of the material on which the Tribunal based its finding regarding the first respondent's knowledge, and an inference that unidentified material, not mentioned in the Tribunal's written statement and not in the record, provided a basis for the Tribunal's finding. Having regard to s 430, the first inference is self-evidently stronger than the second, notwithstanding that counsel for the Minister argued for acceptance of the second inference.

61 Counsel for the Minister submitted that sufficient information could be gleaned from the transcript to conclude that the reference to "my text" (see [12]-[13] above and [63] below) provided a rational foundation for the Tribunal's evaluation of the first respondent's knowledge, and the Court should therefore conclude that there was no jurisdictional error by the Tribunal. Counsel pointed to four factors in the transcript, which, so he argued, indicated that the unidentified text provided a rational basis for the Tribunal's determination. Essentially, counsel encouraged the Court to engage in a rather convoluted process of divination to "fill in" the absent rational basis for the Tribunal's finding.

62 Foremost among the factors on which the Minister's counsel relied was counsel's assertion that the unnamed text was written by Li Hongzhi, who was, so counsel said, held by Falun Gong practitioners to be the authority on Falun Gong doctrine; and, further, so counsel said, the first respondent's answers indicated that he, at least, regarded Li Hongzhi as authoritative. Therefore, so counsel argued, although it was not possible to determine precisely what material the Tribunal relied on in finding that the first respondent lacked knowledge of Falun Gong, it might be inferred that the Tribunal relied on a text by a person accepted as authoritative by the first respondent and Falun Gong adherents. Therefore, so counsel submitted, the

Tribunal's evaluation of the first respondent's answers had a rational foundation, and to consider whether the evaluation was correct in light of that foundation was to engage in merits review.

63 A fundamental difficulty with this argument is that the transcript does not in fact say that Li Hongzhi was the author of the text mentioned by the Tribunal during the questioning of the first respondent. Counsel's argument was based on two appearances of the phrase "Li Hong Zhi says" in the transcript:

TRIBUNAL MEMBER: What colour is the Falun?

APPLICANT: It is red and black.

TRIBUNAL MEMBER: Li Hong Zhi says it's yellow.

. . . .

TRIBUNAL MEMBER: What does Li Hong Zhi say is the top priority of the practitioner?

APPLICANT: To attain a level, various level of attainment.

TRIBUNAL MEMBER: According to my text the top priority of a Falun Gong practitioner is the cultivation of something he calls the Xin Xing?

At best, however, these passages might be seen as establishing that "my text" was a text purporting to state what "Li Hongzhi says", though, in truth, the passages do not establish even that. The author of the text may have been Li Hongzhi, but, consistently with the transcript, the author may as easily have been reporting Li Hongzhi's words (perhaps in translation) second- or third- hand, or at an even greater remove. The author may have been a follower of Li Hongzhi, a neutral observer, or even hostile to Falun Gong. There are numerous possibilities, none of which can be tested in any meaningful way.

64 Counsel for the Minister also argued that one could infer that the unidentified text provided a rational foundation for evaluation of the first respondent's knowledge because the first respondent himself accepted certain propositions that the Tribunal claimed to derive from it. The argument seemed to be that the first respondent conceded his answers were wrong. This is not, however, a fair reading of the transcript. On occasion, the first respondent accepted the Tribunal's statements as correct, but explained why he considered those statements consistent with his answers as he had expressed them.

65 Counsel for the Minister further argued that the Tribunal's questions went to central matters of Falun Gong belief. Counsel identified the Falun, Xin

Xing and the “black substance” as the three subjects explored during the Tribunal’s questioning of the first respondent. Counsel submitted that the Falun and Xin Xing were central aspects of Falun Gong belief, and that the black substance was a topic introduced by the first respondent. Questioning a claimed adherent of Falun Gong about these subjects was, so counsel argued, different from questioning him about random minutiae. According to this argument, resolving the first respondent’s claim based on his knowledge of central aspects of Falun Gong doctrine could not be said to be arbitrary.

66 There was, however, nothing in the record to establish that the concepts identified by counsel for the Minister were central to Falun Gong doctrine, although counsel for the respondents did not dispute that they were. It can probably be assumed that the Falun, at least, plays some important role. The first respondent spoke of “black influence”; it was the Tribunal that introduced the phrase “black substance”, but this difference can probably be put to one side. Even if one assumes that the subjects canvassed in the Tribunal’s questions were important aspects of Falun Gong doctrine, this would not establish that there was a rational connection between the text and the Tribunal’s finding as to the first respondent’s lack of knowledge of Falun Gong. The issue is not simply the subject matter of the Tribunal’s questions but how the content of the text compared with the first respondent’s answers.

67 At one point, counsel for the Minister also sought to derive support from the fact that the Tribunal asked more than “one or two” questions during its questioning. Counsel did not, however, rely heavily on this consideration, which in truth does little to advance the Minister’s case. So far as the transcript indicates, the extent of the Tribunal’s inquiry into the first respondent’s knowledge was comparatively limited. In any event, tallying the number of questions asked by the Tribunal establishes nothing of present relevance.

68 Aside from the individual difficulties with the Minister’s four factors, there are other problems with the Minister’s position. One puzzle that arises when the transcript and the reasons are read together is the marked change in the Tribunal’s evaluation of the first respondent’s answers between the Tribunal’s questioning of the first respondent and the Tribunal’s delivery of its reasons for decision. The Tribunal went from the view expressed in at the hearing that “several” of the first respondent’s answers were “either not correct or partly correct and partly incorrect” to the view expressed in the reasons that none of them were correct. One explanation for this change may be that the Tribunal abandoned reliance on the unnamed text at some point after the hearing and before the delivery of the reasons, perhaps because the Tribunal considered the text was not a reliable source of Falun Gong doctrine. There are numerous other possibilities that might explain the change. Whatever the true position, this unexplained change highlights the difficulties inherent in inferring that the Tribunal’s relied to any extent on unidentified material that finds no place in its written statement under s 430. The fundamental and inescapable problem with the Minister’s position is, however, that, even if one assumes that the Tribunal had regard to a text by Li Hongzhi, so long as the

text is unidentified, there is no way of knowing whether there was information in that text which rationally supported the conclusion that Falun Gong doctrine was not as described by the first respondent.

69 Ultimately, however, the Minister's position did not require the Court to accept the Minister's "reconstruction" of a purported basis for the Tribunal's finding. The Minister argued that, even if the Court was not satisfied by reference to the transcript that there was no jurisdictional error, nonetheless it was incumbent on the respondents to establish jurisdictional error and they had not done so. According to the Minister, the respondents were required positively to establish that the unidentified text did not provide a foundation for the Tribunal's finding, even though the text was not referred to in the written statement given under s 430 and was not otherwise identifiable in the Tribunal record. Plainly enough, such a burden would be impossible to meet. Simply put, if the text cannot be identified, there is no way the hypothesis that it supported the Tribunal's finding can be refuted. Of course, it was only necessary that, having regard to the first respondent's answers and the text, the Tribunal's finding as to the first respondent's lack of knowledge was reasonably open to it (cf *SZMDS* 266 ALR at 396 [131] per Crennan and Bell JJ) – a proposition that in other circumstances might have been difficult to refute. But this is no answer to the fact that on the Minister's approach the respondents would find it virtually impossible to show that a key finding or inference of fact was not grounded in probative material and logical grounds.

70 Nor is it an answer to say that the respondents could have sought an order of mandamus compelling the Tribunal to identify the "text" mentioned by it at the hearing (cf. *Ex parte Palme* at 224 [41]). Such an obligation to disclose could arise only if the Tribunal's finding was in fact based on the text: see s 430(1)(d). As discussed above, however, the fact that the Tribunal did not refer to the text in its s 430 statement gives rise to an inference that the Tribunal did not in fact rely on it. The same uncertainty that makes speculation regarding the Tribunal's reliance on the text problematic would make it impossible for the respondents to establish entitlement to an order compelling the Tribunal to identify the text. When one looks closely at the position in which the Minister's approach places the respondents, their attempt to introduce a text into evidence is understandable, even if it was ultimately misguided.

71 It is well-established that the onus lies with the party seeking to establish jurisdictional error: see, for example, *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138 at 155 per Dixon, Fullagar and Kitto JJ; *Ex parte IBM Global Services Australia Ltd* [2005] FCAFC 66 at [27] per Gray, Whitlam and Moore JJ; and *Maroun v Minister for Immigration and Citizenship* [2009] FCA 1284 at [15] per Jagot J. However, as this Court has observed, "[i]ssues regarding the burden of proof are not always straightforward in judicial review proceedings": see *Minister for Immigration and Citizenship v Le* (2007) 242 ALR 455 at 472 [55] per Kenny J. If the respondents' onus entails negating the possibility that an unidentified and apparently unidentifiable text, which was not referred to in the

Tribunal's s 430 statement, provided the otherwise absent rational basis for the Tribunal's finding, then their appeal must fail.

72 It is, however, unnecessary to go this far. Under the circumstances of the present case, the respondents have met their burden. On the face of the Tribunal's written statement, the Tribunal's conclusion that the first respondent's answers were not correct was not grounded in probative material and logical grounds. That is, the statement does not disclose any material by reference to which a rational decision-maker could have evaluated the first respondent's answers; no such material can be found in the record; and no other logical basis justifies the Tribunal's finding. In these the circumstances, it is appropriate to infer that the Tribunal's decision-making was arbitrary and irrational such as to constitute jurisdictional error. In support of validity, the Minister could only speculate as to the nature and existence of purportedly probative but unidentified and unidentifiable material, an approach antithetical to that of s 430 of the Migration Act. Accordingly, the Federal Magistrate did not err in finding jurisdictional error.

Resolution of appeal

73 For the reasons stated, the appeal should be dismissed, with costs.

I certify that the preceding seventy-three (73) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kenny.

Associate:

Dated: 3 September 2010

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	
GENERAL DIVISION	NSD 1164 of 2009
ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA	

BETWEEN:	MINISTER FOR IMMIGRATION AND CITIZENSHIP Appellant
AND:	SZLSP First Respondent SZLSQ Second Respondent REFUGEE REVIEW TRIBUNAL Third Respondent

JUDGES:	KENNY, RARES AND BUCHANAN JJ
DATE:	3 SEPTEMBER 2010
PLACE:	SYDNEY

REASONS FOR JUDGMENT

RARES J:

74 The first and second respondents are husband and wife. The central question in this appeal is whether the Refugee Review Tribunal made a jurisdictional error in rejecting the husband's and wife's claim to protection visas. It did so in a written statement prepared for the purposes of s 430(1) of the *Migration Act 1958* (Cth) that simply set out the following:

"[33] However, the principal reason why I do not accept the claims of the applicants is that I do not believe that the first named applicant [i.e. the husband] is a Falun Gong practitioner. His inability to answer correctly my questions about basic elements of Falun Gong belief causes me to discount any possibility that he has practised Falun Gong in China as he claims. … because of my finding that he knows little – almost nothing – about Falun Gong, I do not believe that he would seek to practice Falun Gong should he return to China."

75 Significantly, the tribunal did not set out any more material at any point in its s 430(1) statement concerning what was wrong with any answers that the husband gave. The tribunal had earlier recorded its account of its questioning at the hearing in the following terms:

"[28] At hearing, I first asked the first named applicant a series of questions about Falun Gong. He answered none of them correctly."

76 The trial judge held that the tribunal had made a jurisdictional error by asking itself the wrong question, by setting up a minimum standard of knowledge of a religious belief and then taking on the role of "arbiter of doctrine", relying on what Gray J had said in *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548 at 552 [16]. He held that the tribunal had not disclosed its source of information for examining the husband about his knowledge of Falun Gong either in the decision record or in the transcript of the hearing that was in evidence. He said, correctly, that all the tribunal had done was to refer during the hearing to "my text", being simply a text he identified as written by (Master) Li Hong Zhi.

77 The Minister has appealed against his Honour's finding that the husband and wife were entitled to constitutional writ relief against the tribunal's decision. He contended that the transcript identified instances where the husband agreed with the tribunal member that an answer he had given in respect of questions relating to Falun Gong was erroneous, when confronted by the member's assertion of what Master Li had written.

78 However, there was no evidence before the trial judge, or before the Full Court of any text against which the correctness of the tribunal's assertions or the husband's answers could be ascertained. At one point during the hearing of the appeal, counsel for the husband and wife sought to tender fresh evidence of a work by Master Li. However, when the Court enquired whether this document was the material relied on by the tribunal, counsel said he was unable to establish that it was. Accordingly the document must be rejected, particularly given that counsel for the Minister asserted that there was more than one text by Master Li setting out doctrines of Falun Gong.

79 The tribunal's questioning of the husband on issues relating to Falun Gong extended over only about three pages of transcript. Buchanan J has set these out in full in his reasons. There are instances in that questioning in which the husband acknowledged that an earlier answer he had given could be supplemented in the sense that he added a further statement or explanation. However, it is not self-evident that the previous answer(s) given by the husband was or were wrong. There is no other material in the evidence of what was before the tribunal that referred to "the evidence or any other material on which the [tribunal's] findings of fact were based" that the husband was not a Falun Gong practitioner because of his inability to correctly answer the member's questions about basic elements of Falun Gong.

80 This omission occurred despite the requirement of s 430(1)(d) to refer to that evidence or material. That section contains an important command to the tribunal to identify particular matters. In the form it was in on 13 February 2009, when the tribunal member signed the decision, s 430 provided (s 430(2) has since been repealed):

"430 Refugee Review Tribunal to record its decisions etc.

(1) Where the Tribunal makes its decision on a review, the Tribunal **must prepare a written statement that**:

(a) sets out the decision of the Tribunal on the review; and

(b) sets out the reasons for the decision; and

(c) sets out the findings on any material questions of fact; and

(d) **refers to the evidence or any other material on which the findings of fact were based**.

(2) A decision on a review (other than an oral decision) is taken to have been made on the date of the written statement.

(3) Where the Tribunal has prepared the written statement, the Tribunal must:

(a) return to the Secretary any document that the Secretary has provided in relation to the review; and

(b) **give the Secretary a copy of any other document that contains evidence or material on which the findings of fact were based**." (emphasis added)

81 The Minister argued that any failure to refer to the evidence or other material on which the findings of fact were based in accordance with s 430(1)(d) did not affect the validity of the tribunal's decision to affirm the

delegate's refusal to grant a protection visa to the husband and wife. He contended that this omission was not a jurisdictional error in the making of that decision, even if there were non-compliance with a mandatory requirement of the Act that related to the decision.

82 In *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 346 [69], McHugh, Gummow and Hayne JJ said:

> **"**[69] It is not necessary to read s 430 as implying an obligation to make findings in order for it to have sensible work to do. Understanding s 430 as obliging the Tribunal to set out what were its findings on the questions of fact it considered material gives the section important work to do in connection with judicial review of decisions of the Tribunal. **It ensures that a person who is dissatisfied with the result at which the Tribunal has arrived can identify with certainty what reasons the Tribunal had for reaching its conclusion and what facts it considered material to that conclusion. Similarly, a court which is asked to review the decision is able to identify the Tribunal's reasons and the findings it made in reaching that conclusion.** The provision entitles a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material *(Repatriation Commission v O'Brian* (1985) 155 CLR 422 at 446, per Brennan J; *Sullivan v Department of Transport* (1978) 20 ALR 323 at 348-349, per Deane J, at 353 per Fisher; cf *Fleming v The* Queen (1998) 197 CLR 250 at 262-263 [28]-[29])l This may reveal some basis for judicial review … in proceedings brought under s 75(v) of the Constitution. ... The Tribunal's identification of what *it* considered to be the material questions of fact may demonstrate that it took into account some irrelevant consideration or did not take into account some relevant consideration (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24)." (emphasis added)

83 Their Honours attached significance to the section's requirement to set out the facts that the tribunal considered material to its conclusion. That requirement is an important safeguard prescribed by the Parliament for the effective judicial review of the decisions of an administrative body. The tribunal is not required to deal in its written statement under s 430(1) with every possibility that could be adverted to or is raised by the applicant for review. The duty to prepare a written statement must be sensibly interpreted and applied with a view to achieving good and effective administration: *Dornan v Riordan* (1990) 24 FCR 564 at 567 per Sweeney, Davies and Burchett JJ. And the obligation imposed by s 430(1) requires the tribunal to set out and refer to the matters identified in each of pars (a)-(d) of the subsection. That obligation involves the tribunal recording what it did, not what it was asked to do, or supposed to do, or might have done.

84 The purpose of the requirement in s 430(1) for the tribunal to prepare a written statement containing the four categories of matter that the provision specifies, is to enable a person affected by the decision to shape his or her further conduct in the sense explained by Gibbs CJ, Mason, Wilson, Brennan

and Dawson JJ in *Dalton v Deputy Federal Commissioner of Taxation* (1986) 160 CLR 246 at 250 in respect of the analogous, but not identical, s 25D of the *Acts Interpretation Act 1901* (Cth). It is important to construe the tribunal's obligation to provide the written statement under s 430(1) having regard to the recognition in the Act that the tribunal can give its decision and articulate its reasons orally. What s 430(1) does is to impose a requirement that should be understood in the sense explained by the Court in *Dalton* 160 CLR at 250, namely:

"Of course, what has been said does not mean that s. 25D applies only when the person making the decision is obliged to give his reasons immediately the decision is given. However, the section requires that **the obligation to give reasons should arise from the fact that the decision was given and as an adjunct to it** and not by reason of the happening of, or as an adjunct to, some subsequent circumstance." (emphasis added)

85 This does not permit s 430(1) to be construed as a requirement that goes to jurisdiction in the sense that the decision will be invalid because a written statement has not been prepared. In *Re Minister for Immigration and Multicultural Affairs; Ex Parte Durairajasingham* (2000) 168 ALR 407 at 424 [70] McHugh J explained that (unlike the wording of s 25D of the *Acts Interpretation Act*) the opening words of s 430(1) presuppose that the decision has been made and the subsection then imposes requirements to be fulfilled by the tribunal subsequently. So much must be the case where the tribunal makes a decision orally.

86 However, the requirements of s 430(1) impose on the tribunal the task of preparing in writing its reasons, findings of facts and identifying what basis it had for these. This is an adjunct to the ability of a person affected by the decision to challenge it. Hence, the importance the courts have placed on the absence from the written statement under s 430(1) and its analogues of some matter that would have demonstrated that the decision was made according to law or not affected by jurisdictional error. A written statement ensures transparency in the tribunal's exercise of a power conferred on it by the Parliament. This transparency is essential under s 430 to enable the Court to exercise the judicial power of the Commonwealth in reviewing whether the decision was made according to law or affected by a jurisdictional error.

87 The written statement prepared by the tribunal for the purposes of the present decision is bereft of any reasoning process or evidence to support the finding of fact that the husband knew little or almost nothing about Falun Gong. The tribunal member's bare assertion that the husband had not answered his questions "correctly" about what it asserted were basic elements of Falun Gong, was not self-evidently correct.

88 The Court has no basis to determine whether the tribunal member was, in fact, referring to a text written by Master Li and whether the member's assertions of its contents in the transcript were correct. That, of course, is a

process that goes beyond an examination of the actual decision of the tribunal which may become necessary in order to determine whether the deficiency in the tribunal's written statement under s 430 did or did not involve some misconception of its task. In addition, the tribunal member has presupposed that there was some "correct" answer to his questions, without disclosing any evidence or other material on which that assertion was based, let alone any explanation as to how whatever answers the husband gave were or were not correct.

89 The difficulty is compounded because during the course of the hearing, at the end of his questioning about the theory of Falun Gong, the tribunal member said to the husband:

"I have to say you don't know much about Falun Gong theories. **Several** of the answers you have given me are **either not correct or partly correct and partly incorrect** … ." (emphasis added)

90 As Kenny J explains in her reasons, this was a more generous acknowledgment of the husband's achievement of the Tribunal's unidentified standard than the conclusion in its s 430 statement that *none* of the husband's answers was correct.

91 The brevity of the tribunal's reasons or written statement, in itself, (i.e without more) is not a jurisdictional error: cp *SZACW v Minister for Immigration* [2004] FCA 1690 at [29] per Allsop J. However, its brevity may indicate that the tribunal did not, in fact, perform its function of review according to law. This is because the significance of what the written statement omits from that which s 430(1) mandates, indicates, for example, that it did not have evidence or other material on which its findings of fact were based: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 224 [39]-[40] per Gleeson CJ, Gummow and Heydon JJ. And, as Dixon J explained in his well known judgment in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 a full consideration of what was before a decision-maker who is not required to give reasons for not being satisfied about a matter, may show that the decision reached is capable of explanation only on the ground of the jurisdictional error. He said:

"It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law."

92 However, the purpose of s 430 is the opposite. It is to expose to scrutiny what the tribunal in fact did in the four respects (specified in s 430(1)) and by doing so to enable the process of judicial review to be undertaken so as to ascertain whether the decision-maker acted in the performance of his or her statutory power or function according to law. Even so, the reasons or written statement "… should not be construed minutely and finely with an eye keenly attuned to error": *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh

and Gummow JJ. Nonetheless, the Court should not approach the function of judicial review by presuming that the tribunal had a basis in evidence or other material for its principal factual finding (that it did not accept that the husband was a Falun Gong practitioner) that it did not identify in its written statement. It may be that the conclusory assertions in the tribunal's written statement are justifiable. But, it did not justify them and it referred to no basis within the meaning of s 430(1)(d) for its findings.

93 The transcript of the hearing before the tribunal does not carry the matter further because there is no evidence or material on which the accuracy of the husband's answers can be assessed. In particular, the issue raised by counsel for the husband and wife attempting to tender a book by Master Li, to which the Minister objected, demonstrates that the transcript is Delphic and not informative. That is because s 430(3)(b) required the tribunal to give the Secretary a copy of "my text". The absence of that text from the evidence before the trial judge, and the Minister's inability to tender it, again shows that the failure of the tribunal to discharge its function under s 430(1) may have been because it had no basis for its assertions about correctness of the husband's answers. It may also have been, as Kenny J discusses in her reasons, because the tribunal was quoting from someone else's assertion of what Master Li had written. In the end result, the tribunal did not identify any material on which its conclusory finding was based.

94 The tribunal's findings were concerned with the objective accuracy of answers based on unidentified, and thus unknown, criteria that it applied. And, there is no means to assess whether it was acting on material that it was entitled to take into account or on some other basis or, even, on nothing at all. Thus, the brevity of the tribunal's written statement under s 430(1) and the absence of any identified basis for its findings of material fact about the husband's knowledge and practice of Falun Gong lead to the inference that the tribunal had no evidence or other material referred to in s 430(1)(d) or s 430(3)(b): *Yusuf* 206 CLR at 346 [69].

95 It would be an inversion of the express requirement of the Parliament for this material to be identified, if the Court excused its omission by seeking to glean from the transcript some basis to uphold the decision that the tribunal did not begin to articulate. That would be to adopt a merits review. The purpose of the requirement in s 430 that the tribunal identify the evidence or other material on which it based its findings of fact is an important safeguard against any arbitrary or unlawful exercise of the executive power of the Commonwealth. It secures transparency in administrative decision-making. These are basic elements of the rule of law secured by s 75(v) of the Constitution: cf *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482 [5] per Gleeson CJ, 513-514 [102]-[104] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

96 Here, s 65(1) of the Act requires a bona fide attempt by the decision-maker to be satisfied: *Saeed v Minister for Immigration and Multicultural Affairs* (2010) 267 ALR 204 at 218 [53]-[55] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ. The purpose of the tribunal's statement under s 430(1)

is to inform the applicant for review and the officer or authority of the Commonwealth whose exercise of power has been reviewed of the basis on which the tribunal exercised the power. This is not to suggest that the s 430(1) statement itself is the subject of judicial review: it is not. Rather, the s 430(1) statement informs the Court of the process by which the tribunal exercised its powers under the Act. Examination of what the s 430(1) statement says and does not say can assist the Court in ascertaining whether the tribunal made a jurisdictional error in the process by which it made its decision: *Yusuf* 206 CLR at 348-349 [74]-[75].

97 Nor can the tribunal's assertions of the contents of "my text" and some error by the husband fill the void. The tribunal's assertions in the transcript do not establish the existence of any evidence or material referred to in s 430(1)(d) any more than if it had said that it thought that it had a reasonable basis for its findings. This was the error exposed by Lord Atkin in his famous dissent in *Liversidge v Anderson* [1942] AC 206 at 244-245, namely that where a statute requires a person to have a basis for acting, it is not enough that he or she merely *thinks* that basis exists: see *George v Rockett* (1990) 170 CLR 104 at 112.

98 The issues considered by the tribunal can involve, and often are claimed to involve, persons who fear for their lives if their claims for protection visas be rejected. As French, Sackville and Hely JJ said in *Applicant WAEE v Minister* (2003) 75 ALD 630 at 641 [46] some of its decisions may literally be life or death decisions for an applicant. Where the tribunal fails to comply with the requirements of s 430(1) and it is not possible to be satisfied that its written statement had a proper basis, the Court can infer, safely, that the tribunal constructively failed to exercise its function of review.

99 I am of opinion that the tribunal committed a jurisdictional error. I agree with the orders proposed by Kenny J.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 3 September 2010

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	
GENERAL DIVISION	NSD 1164 of 2009
ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA	

BETWEEN:	MINISTER FOR IMMIGRATION AND CITIZENSHIP Appellant
AND:	SZLSP First Respondent SZLSQ Second Respondent

JUDGE:	KENNY, RARES AND BUCHANAN J
DATE:	3 SEPTEMBER 2010
PLACE:	SYDNEY

REASONS FOR JUDGMENT

BUCHANAN J:

100 In my view this appeal should be upheld.

101 The respondents are husband and wife who are citizens of the People's Republic of China. They entered Australia on 7 April 2007 and made claims for protection visas on 13 April 2007. Their applications were refused

on 9 July 2007 by a delegate of the appellant (the Minister). On 30 July 2007 they applied to the Refugee Review Tribunal ("the RRT") for review of the delegate's decision. On 27 November 2007 the RRT affirmed the delegate's decision, but on 4 November 2008 a judge of this Court ordered by consent that the applications for review be remitted to the RRT. The RRT made a further decision on 13 February 2009 affirming the delegate's decision to refuse to grant protection visas.

102 The principal reason why the respondents' claims were not accepted was that the first respondent was, in the view of the RRT, unable to correctly answer questions about basic elements of Falun Gong belief notwithstanding that he claimed to be a Falun Gong practitioner who would be persecuted in China for his religious beliefs and practices if forced to return there. The RRT expressed the view that the first respondent knew almost nothing about Falun Gong. Those conclusions were used in two ways. First, the RRT found that it was obliged to disregard the first respondent's claimed practice of Falun Gong in Australia by reason of the provisions of s 91R(3) of the *Migration Act 1958* (Cth) ("the Migration Act"). Section 91R(3) directs that conduct in Australia be disregarded unless it is established that the conduct was not engaged in for the purpose of strengthening a claim to be a refugee. Secondly, the RRT found that, because he knew almost nothing about Falun Gong, the first respondent would not seek to practice Falun Gong should he return to China and there was no risk of persecution on that account.

103 The RRT's findings about the matter were expressed very briefly. They consist of the following statements:

> 28. At hearing, I first asked the first named applicant a series of questions about Falun Gong. He answered none of them correctly. …
>
> …
>
> 33. However, the principal reason why I do not accept the claims of the applicants is that I do not believe that the first named applicant is a Falun Gong practitioner. His inability to answer correctly my questions about basic elements of Falun Gong belief causes me to discount any possibility that he has practiced Falun Gong in China as he claims. Accordingly, I find that his claimed practice in Australia is not for reason of genuine adherence to Falun Gong, but, rather, for the purpose of strengthening his claim to be a refugee. In accordance with s.91R(3), therefore, I will disregard this practice. Because of my finding that he knows little – almost nothing – about Falun Gong, I do not believe that he would seek to practice Falun Gong should he return to China.

104 Although it does not appear from anything said in the decision of the RRT, the questions which were administered to the first respondent proceeded by reference to an unidentified text. So much appears from a transcript of the hearing before the RRT which was admitted into evidence in subsequent proceedings for judicial review of the decision of the RRT. The transcript was

before the Court on the present appeal. I shall set out the whole of the relevant part of the transcript:

TRIBUNAL MEMBER: I would like you to tell me something about Falun Gong theory. For example what is the Falun?

APPLICANT: The term was created by the Master Li Hong Zhi. It basically says when any person who is practicing Falun Gong there is a wheel inside of you that the wheel turns when you are practising.

TRIBUNAL MEMBER: Where does it come from?

APPLICANT: It is based on the very origin or the very root of the universe or the cosmos and every Falun Gong practitioner believes in achieving truthfulness, forbearance and compassion. Falun is a high level practicing of a law if you like. True Falun Gong believers, any true Falun Gong believer has a wheel called Falun or the law wheel that swirls or turns inside his body. This is one of the characteristics of Falun Dafa or the important law of Falun which was created by Mater Li Hong Zhi.

TRIBUNAL MEMBER: How does this wheel get inside people?

APPLICANT: When you are practising Falun Gong you have this idea, and that's how it goes into the body. When the person is practising Falun Gong that person is required to be very calm.

TRIBUNAL MEMBER: What colour is the Falun?

APPLICANT: It is red and black.

TRIBUNAL MEMBER: Li Hong Zhi says it's yellow.

APPLICANT: Well in the centre of the logo it resembles a Yin and Yang logo, it has red and black. Surrounding that logo, that Yin and Yang logo is red coloured wheel, is yellow coloured wheel.

TRIBUNAL MEMBER: What does Li Hong Zhi say is the top priority of the practitioner?

APPLICANT: To attain a level, various level of attainment.

TRIBUNAL MEMBER: According to my text the top priority of a Falun Gong practitioner is the cultivation of something he calls the Xin Xing?

APPLICANT: That's right. The height of Xin Xing will reflect on the level of your attainment.

TRIBUNAL MEMBER: Well tell me about the cultivation of Xin Xing, what does that involve?

APPLICANT: Your moral character. It is based on the philosophy of truthfulness, compassion and forbearance.

TRIBUNAL MEMBER: Well that's not what my text says. My text says that the cultivation of Xin Xing is involved with gain and loss.

APPLICANT: That is correct because the level of Xin Xing directly ties in with the level of your achievement or attainment. For example truthfulness, the practitioner is required to be truthful. Compassion means a person needs to do good deeds to accumulate virtue. Forbearance means that a person should bear something that a normal person will not be able to bear. That means the person has reached a new totally different level. One needs to get rid of the dark or the black influence inside your body by practicing five sets of Falun Gong exercises and then one can reach a level that Falun gong prescribes.

TRIBUNAL MEMBER: What is this black substance you are talking about?

APPLICANT: Black substance refers to something bad inside your body, something that is not morally correct or morally wrong. You need to get rid of that black substance.

TRIBUNAL MEMBER: What is that black substance called in Falun Gong literature?

APPLICANT: Even though we practice those five sets of Falun Gong exercises every day, however cannot, I am not able to give you a detailed and accurate account of what's in the textbook. I understand the spirit of the text composed by Master Li and I practice according to the spirits of the text. I remember that sentence that has a reference to the black substance however can I cannot logically repeat that sentence although I understand the meaning of that sentence.

TRIBUNAL MEMBER: You talk about a black substance, how is this black substance created?

APPLICANT: I can put this way as an explanation. There is always a good person and a bad person. Before a person starts practicing Falun Gong inside his body it contains bad substance. If you believe in Falun Gong when you practice, when one practicing Falun Gong one gets rid of this black substance during practicing.

TRIBUNAL MEMBER: But how does the black substance get there in the first place?

APPLICANT: My understanding of the black substance is that it refers to bad virtues or bad characters inside a person such as selfishness, such as indifference to other people, and by practicing Falun Gong and by remembering of truthfulness, forbearance and compassion, one can get rid of these bad virtues or characters.

TRIBUNAL MEMBER: And is there any other substance that a Falun Gong practitioner has?

APPLICANT: Well getting rid of the bad substance such as this and by doing this by practicing Falun Gong and to cultivate Xin Xing or hearts and minds or character and to achieve, then one can achieve a certain level. So the higher the level you achieve the deeper the strength of your attainment.

TRIBUNAL MEMBER: I want to go back to the idea of gain and loss. According to the teaching of the Master what do you gain and how do you gain things and what do you lose and how do you lose things?

APPLICANT: You gain what Master Li has said about practicing Falun Gong and you gain by practicing in order to achieve, in order to reach the same level as Master Li has done, so that you can see things that other people cannot see.

TRIBUNAL MEMBER: What is it that you gain, what do you gain?

APPLICANT: You mean gain what is the question?

TRIBUNAL MEMBER: What is it that you gain?

APPLICANT: I practice Falun Gong and after having done that I have become physically stronger. I do not need to seek medical attention for some minor ailments.

TRIBUNAL MEMBER: And what is meant by the term loss? I said the cultivation of Xin Xing involves gain and loss. Now I have asked you about gain, tell me about loss?

APPLICANT: Loss for example physically, after I started practicing Falun gong I used to have a stomach problem, now no longer. And also loss refers to getting rid of bad virtues or bad characters inside me.

TRIBUNAL MEMBER: I have to say you don't know much about Falun Gong theory. Several of the answers you have given me are either not correct or partly correct and partly incorrect. …

> 105 Although caution is needed when dealing with the written record of oral exchanges which occur through the medium of an interpreter, it seems readily apparent that the first respondent showed no resistance to the propositions said by the RRT to be derived from the unidentified text. It is also apparent from the last passage in the extract that the immediate reaction of the member of the RRT was that the first respondent's answers revealed a lack of knowledge about Falun Gong theory.
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> 106 Towards the end of the interview the RRT asked the first respondent if there was anything he would like to add or if there were matters not discussed that he would like to discuss. The first respondent said there were not. The RRT then asked the respondents' adviser, who had accompanied them at the interview, if there was anything the adviser would like to say and the adviser said there was not. Shortly thereafter, at the end of the interview, the Tribunal Member said:

I've asked the applicant a lot of questions about Falun Gong and I've expressed the opinion that he doesn't know much about Falun Gong beliefs. And that is something that I will need to think about.

> 107 It was legitimate for the RRT to explore with the first respondent his claim to fear persecution on the ground of his religious belief and/or practice and, in that connection, to explore the depth of his knowledge of, and commitment to, Falun Gong. Evaluation of the first respondent's answers was a matter for the RRT in its assessment of the merits of the claims of the respondents for protection visas. Although the RRT's summary of those issues, in which it identified the principal reason why the respondents' claims were not accepted, may be criticised as unnecessarily brief, that does not establish that the RRT did not give the necessary attention to the first respondent's claims or that its conclusions about the issue were unavailable or unsafe.
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> 108 When the RRT affirmed the delegate's decision to refuse to grant protection visas, the respondents applied to the Federal Magistrates Court of Australia ("the FMCA") for judicial review of the RRT's decision. The FMCA was restricted in those proceedings, as is this Court on the present appeal, to consideration of whether the RRT had committed jurisdictional error. The decision of the FMCA was delivered on 24 September 2009 (*SZLSP and Anor v Minister for Immigration and Anor* [2009] FMCA 932). The FMCA found that jurisdictional error had occurred. In the decision the FMCA considered, but seemingly rejected (at [52]-[55]), an argument that the RRT had constructively failed to exercise its jurisdiction by applying a standard concerning the possession of specific knowledge of Falun Gong theory which it required the first respondent to meet (see at [35]). A similar argument was advanced on the present appeal. Counsel for the respondents contended that the RRT had not really weighed or evaluated the first respondent's answers to the RRT's questions, but rather the RRT had just administered a test which the first respondent would either pass or not pass without any attempt to assess his answers in a proper fashion. The FMCA did not base its conclusion, that jurisdictional error had occurred, on arguments of this character. In my view it was correct not to do so.
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> 109 However, a further submission was accepted by the FMCA as identifying jurisdictional error on the part of the RRT (at [56]-[62]). The foundation of the finding appears to be that reliance by the RRT on a text, the identity of which was not disclosed, led to the RRT asking itself the wrong question. With respect, I find the connection between use of the unidentified text and the conclusion that the wrong question was asked elusive. In the course of its reasons, the FMCA referred to a judgment of Mansfield J at first instance in *SBCC v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 270 and to the fact that Mansfield J's judgment was upheld on appeal (*SBCC v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 129 at [46]-[50], [53]). However the passages extracted from the judgment of Mansfield J were not, as I read them, directed to the issue which appeared to be relied upon to find jurisdictional error in the present case. Mansfield J was addressing an argument that a member of the RRT

demonstrated bias. No such finding was made in the present case and would not, in my view, have been available.

110 The use of an unidentified text would not represent jurisdictional error unless it infringed a requirement of the Act. In addition, it would be necessary to bear in mind whether a relevant failure to identify material infringed the statutory requirements concerning the nature of the hearing or only those concerned with the form or content of a decision. For example, s 424AA and s 424A of the Migration Act each require that the RRT give applicants before it clear particulars of, and opportunities to comment on, certain information that would be a reason for affirming a decision under review. Those requirements relate to the nature of the hearing to be conducted by the RRT. The obligations do not extend to information not specifically about an applicant. Such provisions have no application in the present case. There appears to be no other provision which would oblige the RRT to disclose the source of its knowledge about Falun Gong teachings, or the teachings of any other religion or the shared beliefs of its practitioners, during the course of the hearing. In my view, the use by the RRT of an unidentified text in the hearing, even if it would have been desirable that it be clearly identified for the first respondent, does not, without more, raise any question of jurisdictional error. Nor does the use of the text, or any failure to disclose its name during the hearing, support a contention that the RRT asked itself the wrong question.

111 In *SZLIQ v Minister for Immigration and Citizenship* [2008] FCA 1405 (*"SZLIQ"*) I decided that the undisclosed use by the RRT of an Australian book about growing vegetables in home gardens to evaluate commercial potato growing practices in China led it into jurisdictional error. However, that judgment is distinguishable from the present case. In *SZLIQ* the use by the RRT of an Australian home gardening book bore no apparent relevance to an understanding of commercial potato growing practices in China, or to an assessment of that appellant's knowledge about such practices. In the present case the text used by the RRT as the basis of its questions, although unidentified, was understood by the first respondent to reflect the teachings of Falun Gong. His answers were given with an evident appreciation that his knowledge of Falun Gong teachings and practices was being compared with what the text disclosed.

112 Apart from the conduct of the hearing, the decision of the RRT is open to the criticism that it did not comply with the obligation in s 430(1)(d) of the Act to refer "to the evidence or any other material on which the findings of fact were based". The requirement in s 430(1)(d) is expressed in mandatory terms. It is common to see, in decisions made under the Act, a list of material before the decision-maker. For example, in the decision of the delegate made on 9 July 2007 which refused the first respondent's application for a protection visa, the following is recorded:

5. Material before the Decision-maker

Evidence used in making my decision is found in the following documents:

1. Departmental file: CLF2007/59925 relating to the applicant;

2. The United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status (the UNHCR Handbook).

3. Country information as cited in this decision record

4. Relevant Commonwealth case law as cited in this decision record

113 The delegate did not base the decision to refuse a visa upon any examination or testing of the first respondent's knowledge of Falun Gong although it was noted that the lack of any detail about his claimed Falun Gong practice suggested he was not actively involved as a Falun Gong practitioner. The decision of the RRT which requires consideration in the present case did not list the material which was before the RRT. It did not, by way of discussion either, disclose much about the material upon which the RRT relied, apart from referring to earlier proceedings in the RRT. The RRT said, simply:

19. The Tribunal has before it the Department's file relating to the applicants. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

114 Specifically, so far as the present case is concerned, although in the extract from the RRT decision set out earlier the RRT made clear what was the principal reason for rejecting the first respondent's claims, beyond referring to its administration of a series of questions it did not identify in its decision the material upon which the finding was based that the answers were incorrect. That certainly appears to be a failure to comply with s 430(1)(d). If the failure represented a jurisdictional error it might, in an appropriate case, justify remitting the matter to the RRT to remedy at least that defect. However, even in such a case, the remedy which was sought in the FMCA is discretionary. It would only be necessary to remit the matter to the RRT if to do so could "possibly have made any difference" (see *Stead v State Government Insurance Commission* (1986) 161 CLR 141).

115 Furthermore, jurisdictional error would only be established in a particular case by showing that a mandatory statutory obligation was disobeyed (see *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294) and that, in addition, the exercise of jurisdiction was thereby effected (*Craig v State of South Australia* (1995) 184 CLR 163 at 179; see also *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]). Where the statutory requirement infringed is correctly regarded as a procedural one it would be necessary also to consider the extent and consequences of the departure from it and whether, in

the circumstances, an applicant was denied natural justice (*Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627).

116 In the present case it was not demonstrated that the exercise of the jurisdiction of the RRT was affected by any failure to comply with s 430(1)(d). In my view the obligation in s 430(1)(d) is a procedural one. It was not established that departure from it meant that the first respondent was denied natural justice. It was not apparent either, that identification of the text used by the RRT could possibly have made a difference to an examination, for the purposes of judicial review, of its conclusions.

117 At the hearing of the appeal, counsel for the respondents sought to leave to introduce into evidence, and rely upon, a translated text of the teachings of Li Hong Zhi, the founder of Falun Gong. The text was entitled "Falun Gong". Counsel was permitted to refer to the text on the basis that a ruling would be made in the present judgment about its admissibility. The text might have been admissible if it was common ground, or there was satisfactory evidence, that it was the text used by the RRT. Neither foundation was present. It might have been admissible if pressed on the basis that it demonstrated that the RRT's assessment of the first respondent's answers was so unsatisfactory as to show bias on the part of the RRT or a failure to understand the nature of its task. No such submission was made, or would have been available. I would not admit the text into evidence on the appeal, although it could make no difference to the outcome of the appeal if a contrary view was taken.

118 Although counsel for the respondents was not able to establish that the text provided to the Court on the appeal was the text of Falun Gong teachings actually used by the RRT, it was apparent that, even if it was accepted as a reliable guide to those teachings, it would not provide the respondents with a foundation from which they might have submitted that the RRT's conclusions about the first respondent's answers represented a failure to faithfully address the issues before it, or disclosed any other form of jurisdictional error. Even accepting therefore, that failure to identify the text might in some circumstances reveal a jurisdictional error, such an error was not established in the present case.

119 In the circumstances, in my view, the appeal should be upheld. There appears to be no reason why the ordinary practice should not be followed so far as costs are concerned.

120 The decision of the FMCA should be set aside and in lieu thereof it should be ordered that the application for judicial review to that Court be dismissed. The respondents should pay the costs of proceedings in the FMCA and in this Court.

I certify that the preceding twenty-one (21) numbered

paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan.

Associate:

Dated: 3 September 2010