Migration and Refugee Division Procedural Law Guide

Chapter 7: Procedural fairness and the Tribunal

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7. PROCEDURAL FAIRNESS AND THE TRIBUNAL[1]

7.1 Introduction

7.1.1 There is no precise definition of the terms 'procedural fairness', 'natural justice' and 'substantial justice' and they are often used interchangeably. Such terms are used to describe the set of rules or principles which have developed in the common law to ensure that administrative decision-makers follow a fair decision-making procedure. Traditionally, the common law rules of procedural fairness have consisted of two limbs:

- the hearing rule; and
- the bias rule.

7.1.2 A third limb, sometimes referred to as the 'evidence rule' has emerged, more recently, in the case law.[2]

7.1.3 To ascertain what must be done to comply with the rules of procedural fairness in a particular case, the starting point is the statute creating the decision-making power that is to be exercised. By construing the statute, one ascertains not only whether the power is conditioned on observance of the principles of procedural fairness but also whether there are any special procedural steps which extend or restrict what the principles of procedural fairness would otherwise require.[3] The requirements of procedural fairness vary from case to case and depend on the statute creating the power to make a decision, which means it is not possible to exhaustively list the types of situations which attract procedural fairness.

7.2 Applicability of procedural fairness to reviews under Parts 5 and 7 of the Migration Act 1958

Restrictions on procedural fairness

7.2.1 Part 5 Division 5 [migration] and Part 7 Division 4 [protection] of the *Migration Act 1958* (Cth) (the Migration Act) set out 'codes of procedures' for the Migration and Refugee Division (MRD) of the Tribunal which were introduced by the *Migration Reform Act 1992* (Cth) (Reform Act). These 'codes' contain powers and obligations that the Tribunal exercises relating to matters such as the receipt and disclosure of information, conduct of hearings and witness evidence. It was intended that these codes would 'eliminate the legal uncertainties that flow from the non-codified

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] Aronson and Groves *Judicial Review of Administrative Action* (5th Ed, Thomson Reuters, 2013).
[3] *Kioa v West* (1985) 159 CLR 550 at [9], [13].

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common law principles of natural justice while retaining fair, efficient and legally certain decision-making procedures'.[4]

7.2.2 However, in *Re MIMA; Ex parte Miah*, a majority of the High Court found that the procedures introduced by the Reform Act did not exclude the decision-maker's obligation to accord procedural fairness to an applicant.[5] The High Court in *Plaintiff S157/2002 v Commonwealth of Australia* further held that a breach of the common law rules of procedural fairness was a jurisdictional error, which was not protected by s 474 (the privative clause) and therefore was subject to judicial review.[6]

7.2.3 In response to this judgment, the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth) (Procedural Fairness Act) inserted a number of provisions into the Migration Act which specify that each of the relevant divisions of the Migration Act in which they appear is taken to be 'an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with'. The provisions included s 357A [Part 5] and s 422B [Part 7].[7] According to the Explanatory Memorandum for the Bill to the Procedural Fairness Act, ss 357A/422B and their equivalents were intended to 'provide a clear legislative statement' that the codes are an exhaustive statement of the requirements of natural justice in relation to the matters with which they deal.

7.2.4 The proper construction of ss 357A/422B is a matter that has received considerable judicial attention. Argument in the courts has generally centred around the question of whether the words, 'in relation to the matters it deals with', in those provisions require decision-makers to identify whether there is an applicable common law rule of natural justice then examine the provisions of the relevant division to see whether it is expressly dealt with. While different views have been expressed, the weight of authority gives an expansive reading to these provisions.[8]

7.2.5 In *MIMIA v Lay Lat* the Full Federal Court found that reference to the Explanatory Memorandum and the Second Reading Speech made it plain that s 51A and the related provisions in ss 357A/422B, were intended to overcome the effect of the High Court's decision in *Re MIMIA; Ex parte Miah.*[9] The Full Court, following *VXDC v MIMIA*,[10] held that it was the intention of the legislative drafters that the Migration Act provide a comprehensive procedural code containing detailed provisions for procedural fairness but which exclude the common law natural justice rule.[11]

7.2.6 A contrary view was expressed in *Antipova v MIMIA* where a single judge sitting in the Federal Court's appellate jurisdiction expressly declined to follow *Lay Lat*:

> *To the extent to which* Lay Lat *might be taken to be authority on the meaning and effect of s 357A of the Migration Act, it does not bind me to hold that Ms*

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[4] Explanatory Memorandum for the Bill to the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth) (Procedural Fairness Act).
[5] *Re MIMA; Ex parte Miah* (2001) 206 CLR 57.
[6] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.
[7] See also: ss 51A; 97A; 118A; and 127A. Sections 357A and 422B of the Migration Act apply in relation to any application for review made on or after 4 July 2002 (s 7, Procedural Fairness Act).
[8] For the alternate view see *Moradian v MIMIA* (2004) 142 FCR 170. See also *WAJR v MIMIA* (2004) 204 ALR 624.
[9] *MIMIA v Lay Lat* (2006) 151 FCR 214. The Full Federal Court considered the effect of s 51A of the Migration Act which is the equivalent of ss 357A/422B in relation to visa applications at Departmental level.
[10] *VXDC v MIMIA* (2005) 146 FCR 562.
[11] *MIMIA v Lay Lat* (2006) 151 FCR 214 at [66].

> *Antipova's only entitlement to procedural fairness is to be found in the meagre provisions of Division 5 of Part 5 of the Migration Act. In my view, to the extent that it suggests that s 422B excludes all principles of procedural fairness, other than those found in Division 4 of Part 7 of the Migration Act,* VXDC *is fundamentally wrong. The obiter remarks in* Lay Lat *are entitled to great respect, appearing as they do in a considered judgment of a Full Court, but I cannot bring myself to accept that they are correct.*[12]

7.2.7 Justice Gray did not have regard, however, to another judgment of the same Full Court handed down later on the same day as *Lay Lat*. In *SZCIJ v MIMA*,[13] the Court followed its own reasoning in *Lay Lat* and held that the common law natural justice hearing rule did not apply in relation to a review under Part 7 of the Migration Act. This reasoning in *SZCIJ* was subsequently followed in numerous Federal Magistrates Court and Federal Court judgments as binding *ratio*.[14]

7.2.8 The issue was considered by the High Court in *Saeed v MIAC*.[15] While the Court accepted that the introduction of s 51A of the Migration Act [the primary decision equivalent of ss 357A, 422B] was a response to the decision in *Miah*, it concluded that the scope of the exclusion of procedural fairness was to be considered having regard to the text of s 51A itself, in particular the words 'in relation to the matters it deals with', and the provisions interacting with it.[16] The Court found in that instance that the common law rules of procedural fairness did not operate in respect of s 57 [provision of adverse information] but only to the extent of the 'matters' it dealt with, that is the provision of adverse information to persons in the migration zone, not other persons such as offshore applicants.[17] Although the Court was examining the operation of s 51A, its broader observations about the correct approach to determining the scope of such provisions is equally applicable to ss 357A and 422B.[18] In *AZR16 v MIBP*, the Court accepted that there was scope for the residual operation of procedural fairness obligations to matters not dealt with in Division 4 of Part 7 of the Migration Act (which contains s 422B [s 357A]).[19]

7.2.9 In *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP*, the High Court in obiter considered the operation of s 422B [s 357A].[20] The Court considered that *Saeed v MIAC* applied to the provisions of s 422B [s 357A] and found that ss 422B(1) and

[12] *Antipova v MIMIA* (2006) 151 FCR 584 at [97].
[13] *SZCIJ v MIMA* [2006] FCAFC 62.
[14] See e.g., *SZEQH v MIAC* (2008) 172 FCR 127 at [27]–[30] in which the Court held that the meaning of s 422B was settled by *MIMIA v Lay Lat* (2006) 151 FCR 214. The Court also noted that *Lay Lat* was consistent with the High Court decision in *SZFDE v MIAC* (2007) 232 CLR 189. See also *MZYEH v MIAC* [2010] FMCA 27 at [22].
[15] *Saeed v MIAC* (2010) 267 ALR 204.
[16] *Saeed v MIAC* (2010) 241 CLR 252 at [34].
[17] *Saeed v MIAC* (2010) 241 CLR 252 at [56]. Under s 57(3), the obligation to give certain information to the applicant did not apply unless the visa could be granted in the migration zone. However, as a result of *Saeed v MIAC*, s 57 applied to require invitation to comment on adverse information for 'onshore' visa applications and common law procedural fairness applied for 'offshore' visa applications. To minimise the risk of applying procedural fairness incorrectly, amendments by *Migration Legislation Act (No 1) 2014* (Cth) subsequently repealed s 57(3) so that the statutory obligation to invite comment on information under s 57 of the Migration Act applies to all visa applications.
[18] See for example *Khan v MIAC* (2011) 192 FCR 173 where Buchanan J observed at [40] that, in the context of the operation of s 357A(1), the 'matter' with which s 359A is concerned (that is, providing relevant and adverse information for comment) exhaustively stated the content of the natural justice rule.
[19] *AZR16 v MIBP* [2017] FCA 1453 at [72]–[73]. The Court made these findings in circumstances where the applicant argued that the Tribunal did not have a power to send letters outside of the power in s 424(2) which is contained in Division 4. The Court rejected this argument that there needed to be such a source of power, noting that this overstated the effect of s 422B which is to confine the exhaustive ambit of Division 4 to matters dealt with in that division.
[20] *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP* [2019] HCA 3.

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422B(2) operate to ensure the Tribunal's compliance with the procedures prescribed by Division 4 of Part 7 will constitute compliance with its procedural fairness obligations to the extent of the subject-matter of each specific provision relates to the Tribunal's review. The subject-matter of each provision is indicated by, but not limited to, the terms of each provision.[21]

The role of procedural fairness in the event of statutory non-compliance

7.2.10 The High Court considered the consequences of non-compliance with a statutory obligation in *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP*.[22] The Court held that the materiality of any non-compliance with a statutory obligation to the decision made is necessary for the non-compliance to amount to jurisdictional error (that is, the applicant is deprived of the possibility of a successful outcome as a result of the non-compliance). Specifically in that case, the Court held that there is an obligation of procedural fairness to disclose the fact of the non-disclosure certificate/notification to the applicant in the review. However, the majority held that if the Tribunal breaches that obligation, it will result in a jurisdictional error only where the breach is material to the decision.[23]

7.2.11 The effect of ss 357A and 422B was also considered by the High Court in *MIAC v SZIZO*.[24] In that case, it was contended by the Minister that s 422B should be construed as indicating that compliance with each of the identified procedures in Part 7 Divisions 4 and 7A [protection] would always discharge the Tribunal's obligations under the natural justice hearing rule. However, it did not follow that departure from those steps was intended to exclude consideration by a court of whether the requirements of natural justice have been satisfied.[25] The Court appeared to accept this argument, finding that notwithstanding the detailed prescription of the regime under Divisions 4 and 7A and the use of imperative language, it was an error to conclude that the provisions of ss 441G and 441A relating to notification were inviolable restraints conditioning the Tribunal's jurisdiction to conduct and decide a review. They were procedural steps that were designed to ensure that an applicant for review was able to properly advance his or her case at the hearing; a failure to comply with them will require consideration of whether in the events that occurred the applicant was denied natural justice. In the events that occurred in that case, the Court found there was no denial of natural justice and therefore no jurisdictional error.[26] In reaching its conclusion, the Court distinguished *SAAP v MIMIA*,[27] making it clear that the obligations imposed by

[21] *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP* [2019] HCA 3 at [35]–[36] per Gageler, Keane and Bell JJ.
[22] *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP* [2019] HCA 3 at [29]–[30], [38], [45]–[49]. Note that the minority, at [78]–[79], agreed that there is an obligation of procedural fairness to disclose the non-disclosure certificate/notification to the applicant but that any breach of that obligation amounts to jurisdictional error. Their Honours held that the materiality of the error to the outcome should determine whether the Court grants relief after the jurisdictional error has been made out (and that where the breach is not material, relief would be futile).
[23] That is, a breach of the obligation to inform the applicant of a non-disclosure certificate will result in jurisdictional error only where the applicant has been deprived of the possibility of a successful outcome because the Tribunal's decision could have been different if the certificate had been disclosed. If documents and information covered by a non-disclosure certificate were of such marginal significance or were not relevant to the outcome of the review, non-compliance with the procedural fairness obligation to disclose the existence of a certificate is unlikely to result in jurisdictional error.
[24] *MIAC v SZIZO* (2009) 238 CLR 627 at [1], [27]–[28], [32].
[25] *MIAC v SZIZO* (2009) 238 CLR 627 at [28].
[26] *MIAC v SZIZO* (2009) 238 CLR 627 at [35]–[36].
[27] *SAAP v MIMIA* (2005) 228 CLR 294.

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ss 424A(1) and 425 [ss 359A(1), 360] were of a different character to the obligations in ss 425A, 441A and 441G [ss 360, 379A, 379G] relating to the *manner* in which notices are to be given, and that a breach of the latter will not necessarily lead to jurisdictional error.

7.2.12 Following *SZIZO*, if the Tribunal complies with the procedural code set out in the Migration Act, there can be no breach of the natural justice hearing rule. However, if it is established that there has been a failure to strictly comply with a provision that is not an imperative duty or inviolable limitation on the exercise of power (i.e. typically a procedural step), the courts will consider whether the Tribunal acted consistently with the requirements of the natural justice hearing rule.[28] Accordingly, the Tribunal conducts its reviews in a manner which complies with the requirements of the natural justice hearing rule.

7.2.13 Sections 357A and 422B do not alter the Tribunal's obligation to accord natural justice apart from the hearing rule. For example, a breach of the bias rule will still result in jurisdictional error. Not informing the applicant of a change of approach in relation to an issue may in some circumstances be a breach of procedural fairness which is not governed by the hearing rule.[29] Common law rules of natural justice will also have application in relation to Tribunal decisions other than decisions on a review,[30] such as in no jurisdiction cases or the determination of a fee waiver application on a reviewable decision under Part 5 of the Migration Act.[31]

7.2.14 Procedural fairness requires that a person whose interests may be affected by a decision has the opportunity of being heard.[32] Accordingly, it has been noted that the obligation to provide an applicant with a hearing which is procedurally fair affects the Tribunal's dealings with that applicant, not its dealings with third parties.[33] However, in some cases, the interests of a person may be represented by someone else, and the Tribunal may discharge its obligations via that person.[34]

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[28] See for example, *SZKJI v MIAC* [2009] FMCA 1252 at [82]. In that case the Court found that the Tribunal did not technically comply with reg 4.35 as an invitation to comment did not give the prescribed period of notice. Nevertheless, the applicant suffered no denial of natural justice as he attended the scheduled interview and gave extensive comments. As there was no denial of natural justice, the departure from s 424B and reg 4.35A did not lead to a finding that the Tribunal decision was invalid. See also *SZOFE v MIAC* (2010) 185 FCR 129 in relation to the application of the principle in *SZIZO* to the decision notification requirements set out in s 66 of the Migration Act, discussed in Chapter 2 – Notification of primary decisions.

[29] *ABZ16 v MIBP* [2018] FCA 412 at [21]–[25] where the Court held that s 422B(1), and by extension the hearing rule, had no application where the Tribunal had told the applicant it would make enquiries to the International Committee of the Red Cross (ICRC) to verify a document, did not tell the applicant that it was told by the ICRC that the applicant should make their own enquiries and then, following reconstitution to a different member, placed no weight on the document. The Court held that this was procedurally unfair and that as the information in question was not governed by any of the provisions in Division 4 of Part 7, s 422B(1) was not applicable and the Tribunal was bound by the usual rules of procedural fairness.

[30] *SZEYK v MIAC* [2008] FCA 1940.

[31] *Auro v MIAC* [2008] HCATrans 248.

[32] *Kioa v West* (1985) 159 CLR 550.

[33] *SZNFW v MIAC* [2009] FMCA 950 at [42]. In *SZRKF v MIAC* [2012] FMCA 859, whilst the applicant's father was invited to a hearing in his capacity as common law guardian of an infant applicant, and was also given the opportunity to comment and respond at the hearing in relation his own purported application for review, the applicant's mother, also a purported review applicant, had not been invited to the hearing and there was no evidence to suggest that the applicant's father also represented his wife's interests. The Court found the Tribunal failed to provide procedural fairness to the applicant's mother by failing to give her the opportunity to make any comment on the issue of jurisdiction as it related to her (at [39]–[44]). Undisturbed on appeal: *SZRKF v MIAC* [2013] FCA 181. Application for special leave to appeal to the High Court dismissed: *SZRKF v MIAC* [2013] HCASL 113.

[34] See *SZRKF v MIAC* [2012] FMCA 859 where the Court at [39]–[40] held that, in circumstances where the applicant was a minor and her father acted on her behalf as her common law guardian, and where the Tribunal gave the applicant the opportunity, through her father, to explain her claims, procedural fairness obligations towards the applicant were discharged through her father. Undisturbed on appeal: *SZRKF v MIAC* [2013] FCA 181. Application for special leave to appeal to the High Court dismissed: *SZRKF v MIAC* [2013] HCASL 113.

7.3 Requirement to 'act in a way that is fair and just'

7.3.1 Sections 357A(3) and 422B(3) require the Tribunal, in applying the relevant divisions, to act in a way that is 'fair and just'. According to the Explanatory Statement for the Bill to the Review Provisions Act, these amendments were intended to 'ensure that in carrying out the procedures and requirements regarding the natural justice hearing rule set out in the Migration Act (which continue to be an exhaustive statement of the natural justice hearing rule), the Tribunal must do so in a way that is fair and just'.

7.3.2 The Explanatory Memorandum expressly indicates that the codes of procedure in Part 5 Division 5 and Part 7 Division 4 are intended to continue to be an exhaustive statement of the natural justice hearing rule. This indicates that ss 357A(3) and 422B(3) should not be construed as reintroducing a requirement to comply with the common law natural justice hearing rule in addition to compliance with the procedural code.[35] Such an approach would leave little work for subsections (1) and (2) to do.

7.3.3 The proper construction of ss 357A(3) and 422B(3) was considered in *MIAC v SZMOK*.[36] In that case, a unanimous Full Federal Court found that s 422B(3) may be understood as an exhortative provision in the same way as s 420(1) is an exhortative provision. The High Court in *MIMA v Eshetu*[37] had previously found that s 420 [s 353][38] did not create rights or a ground of review and the Full Federal Court relied on this to find that just as s 420 does not create rights or a ground of review, so s 422B(3) should not be understood as creating a procedural requirement over and beyond what is provided for in Division 4 of the Migration Act.[39] The Court found that s 422B(3) speaks of how the Tribunal must act in applying Division 4 and is not a free standing obligation, but simply draws content from the other provisions of Division 4.[40]

7.3.4 Following *MIAC v SZMOK*, given the obligation in ss 357A(3)/422B(3) required the Tribunal to act in a way that was fair and just 'in applying' the relevant division, the scope of the obligation appeared limited by the specific procedures contained in the Migration Act. For example, a court could not find that, in applying s 424A, s 422B(3) required the Tribunal to disclose in writing particulars of adverse information, such as general country information, that would otherwise be covered by the exceptions in s 424A(3).[41] .In addition, the Tribunal's obligation to act in a

[35] *MIAC v SZMOK* (2009) 257 ALR 427 at [15].
[36] *MIAC v SZMOK* (2009) 257 ALR 427. The Full Federal Court took essentially the same approach as *SZNFV v MIAC* [2009] FMCA 414 at [10]. In that case, the Federal Magistrates Court found that Perram J's comments in *SZLLY v MIAC* (2009) 107 ALD 352 said no more than that the apparent effect of the introduction of sub-section (3) into s 422B is to reinsert a procedural fairness obligation in the exercise of powers and the observation of duties conferred or imposed by div 4 of pt 7 of the Migration Act. The Court took the view that s 422B(3) did not establish a new freestanding obligation, the breach of which would give rise to jurisdictional error. The sub-section simply illuminated the Tribunal's obligations in relation to its powers and duties found elsewhere in the Division.
[37] *MIMA v Eshetu* (1999) 197 CLR 611 at [158].
[38] This provision provides that the Tribunal, in reviewing a decision is not bound by technicalities, legal forms or rules of evidence; and must act according to substantial justice and the merits of the case.
[39] *MIAC v SZMOK* (2009) 257 ALR 427 at [15]. See also *SZNJM v MIAC* [2009] FMCA 603 at [35].
[40] *MIAC v SZMOK* (2009) 257 ALR 427 at [16].
[41] See also *SZNFW v MIAC* [2009] FMCA 950 at [37] where the Federal Magistrates Court applied *MIAC v SZMOK* in rejecting an argument that s 422B(3) required the Tribunal to use its power under s 424(2) to request information in writing, where the Tribunal was permitted to obtain the information informally under s 424(1). The applicant argued that because the information

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way that was fair and just in conducting its review does not require it to provide advice about an issue that extends beyond the Tribunal's practice and procedure in conducting its review, even if the applicant is unrepresented.[42]

7.3.5 Earlier judgments that construed ss 357A(3) and 422B(3) as introducing an additional statutory obligation on the Tribunal, a breach of which was capable of constituting a jurisdictional error, were no longer to be considered good authority in light of the decision in *MIAC v SZMOK*.[43]

7.3.6 However, while *MIAC v SZMOK* is still considered the authority for the reasons below, in *MIAC v Li*[44] a majority of the Full Federal Court departed from the established authority in *MIAC v SZMOK*[45] and found that ss 357A(3) and 353[46] [ss 422B(3) and 420] contained substantive requirements and were not 'mere exhortations'. The majority held that a failure to properly consider a request for an adjournment or an unreasonable refusal to adjourn a review may in some circumstances give rise to jurisdictional error on the basis that it will amount to a breach of the statutory requirement to act fairly found in these provisions.[47] In coming to this conclusion, the majority relied on changes in the statutory framework since *MIMA v Eshetu*[48] and the High Court's characterisation of s 420 in *MIAC v SGUR*[49] as a 'requirement' imposed on the Tribunal in its discharge of its core function of reviewing decisions.[50]

7.3.7 The conflicting Full Federal Court authority on the application of ss 357A(3)/422B(3) and ss 353/420 was then considered on appeal by the High Court in *MIAC v Li* [51] The Court did not endorse the opinion of the majority in the Court below that the directions in ss 353 and 357A(3) provide substantive grounds of review, however both the plurality and Justice Gageler made it clear that those provisions inform the

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was likely to be given great weight and because s 424(1) of the Migration Act required that such information be considered by the Tribunal, the interests of justice made it necessary for the Tribunal to know exactly what was asked and who was asked and, impliedly, that this meant that such communications should be in writing. The Court found that, as s 424(1) did not require that the Tribunal's requests or the informants' responses be recorded in writing, s 422B(3) was not offended.

[42] *Mohammed v MIBP* [2018] FCA 2085 at [93]–[97] where the Court found that the Tribunal's obligation to act in a way that is fair and just did not require it to inform the applicant that the Tribunal could not provide written permission to enable the applicant to obtain an offer of enrolment as required for a Subclass 573 visa.

[43] See *SZEQH v MIAC* (2008) 172 FCR 127 at [34]; *SZHUH v MIAC* [2008] FCA 1893 at [18]. In *SZLTF v MIAC* [2009] FMCA 401, the Tribunal was found to have breached s 422B(3) by failing to put the applicant on notice of a determinative issue at the hearing. The Court distinguished s 422B(3) from the 'facultative' guidance in s 420(2)(b) suggesting that s 422B(3) imposes a procedural requirement: at [33].

[44] *MIAC v Li* (2012) 202 FCR 387.

[45] *MIAC v SZMOK* (2009) 257 ALR 427 and also *MIMA v Eshetu* (1999) 197 CLR 611.

[46] Sections 353 and 420 provide that the Tribunal is not bound by technicalities, legal forms or rules of evidence; and shall act according to substantial justice and the merits of the case.

[47] In *MIAC v Li* (2012) 202 FCR 387 the minority decision followed the authority in *MIAC v SZMOK* (2009) 257 ALR 427, finding that a failure to adjourn a review cannot constitute a breach of procedural fairness as being contrary to s 357A(3) because s 357A(3) is an exhortative provision that does not create a procedural requirement over and beyond the express provisions of pt 5 div 5 [general migration] of the Migration Act: per Collier J at [83].

[48] *MIMA v Eshetu* (1999) 197 CLR 611.

[49] *MIAC v SZGUR* [2011] 241 CLR 594. In particular, French CJ and Kiefel J found at [19] that the power conferred by s 427(1)(d) [s 363(1)(d) pt 5] is to be exercised having regard to the requirement imposed on the Tribunal, in the discharge of its core function of reviewing Tribunal decisions, to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick as set out in s 420 [s 353].

[50] Subsequent to the conflicting Full Federal Court authority, the Federal Court in *WZAOT v MIAC*[2013] FCA 136 accepted, consistent with *MIAC* v *SZMOK* (2009) 257 ALR 427 and the *obiter dicta* of Justice Gummow in *NAIS v MIMIA*(2005) 228 CLR 470, that s 420(1) may not delimit the Tribunal's jurisdiction. However, by contrast, the Court considered that s 422B(3) has substantive application, preferring the decision of the Full Federal Court in *MIAC v Li* (2012) 202 FCR 387 over *MIAC v SZMOK* on this point.

[51] *MIAC v Li* (2013) 249 CLR 332.

statutory procedural requirements. The plurality ultimately declined to determine what s 357A(3) requires and what may be the consequences of a breach.

7.3.8 In *Duggal v MIBP*[52] the Federal Circuit Court subsequently confirmed that the High Court in *MIAC v Li* did not overrule the Full Federal Court's finding in *MIAC v SZMOK* that breach of provisions such as s 357A(3) does not create a substantive ground of review.

7.3.9 Accordingly, where the Tribunal has some discretion in the manner in which it follows the statutory procedures, the Tribunal considers what 'fairness and justice' would require in the circumstances. For example, in deciding whether to postpone or reschedule a hearing, in considering requests for extensions of time to provide information or comments, or in deciding whether to take witness evidence, the Tribunal endeavours to act in a way that is fair and just.[53]

7.4 Legal unreasonableness

7.4.1 An essential element in lawful decision-making is that a statutory power or discretion must be exercised reasonably. A decision may be regarded as unreasonable where particular jurisdictional errors are shown in the decision-making process, such as failing to have regard to a relevant consideration or having regard to an irrelevant consideration. A decision may also be invalidated by legal unreasonableness where the decision lacks an 'evident and intelligible justification'.[54]

7.4.2 The current leading authority on legal unreasonableness is the High Court case of *MIAC v Li.*[55] The principles in *Li* were applied in *MIBP v Singh*.[56] Both judgments are discussed below. To summarise, the fundamental principle from these judgments is that a discretionary power must be exercised reasonably. What is reasonable will turn heavily on the facts and the totality of the circumstances in the particular case, including the statutory context. Some of the matters which *may* be relevant in determining legal reasonableness include:

- the whole history of the proceedings;[57]
- whether the applicant has been given a fair opportunity to present their case, for example by giving evidence and making submissions, particularly where the evidence in question in critical to the outcome of the review;[58]

[52] *Duggal v MIBP* [2015] FCCA 1630.
[53] In *Ni v MIAC* [2009] FMCA 580 the Court found that the Tribunal had acted consistently with s 357A(3) in inviting an applicant to respond to a s 359A invitation at an interview with an interpreter in circumstances where it was put on notice that the applicant was having difficulty responding in writing due to language barriers: at [18]. In *SZMJV v MIAC* [2009] FMCA 715 the Court found that the Tribunal had not acted inconsistently with s 422B(3) in circumstances where it did not address the issue of an extension of time to provide documents expressly with the applicant because there was no statutory obligation in s 424A and s 424B to do so.
[54] *MIAC v Li* (2013) 249 CLR 332 at [76].
[55] *MIAC v Li* (2013) 249 CLR 332.
[56] *MIAC v Singh* (2014) 308 ALR 280.
[57] See for example *Kaur v MIBP* [2014] FCA 915, where the Court found that the history of contact between the applicant and the Tribunal meant that it acted legally unreasonably by not attempting to contact the applicant prior to proceeding to a decision under s 362B [s 426A] following her non-appearance at the hearing. See also *MZAHC v MIBP* [2016] FCCA 340 at [57]–[74] in which the Court held that the Tribunal's refusal of an adjournment request, and insistence that the applicant attend a hearing, was arbitrary and legally unreasonable in circumstances where it was aware that an earlier Tribunal's decision had been quashed by the Court because of apprehended bias and that the applicant, terrified from her first experience before the Tribunal, was requesting more time to obtain evidence so as to be better prepared.

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- whether there is a reasonable basis for expecting a favourable outcome if the applicant's request is granted;[59]
- what reasons have been put forward by the applicant for the request and whether the Tribunal has 'actively engaged' with those reasons.[60]

7.4.3 In regards to this last point, there is no statutory obligation on the Tribunal to record its reasons for refusing to exercise a discretion, however the Tribunal will often record detailed reasons for refusing such a request, either in the decision itself or by way of a file note. Where reasons are given, they are intended to demonstrate active consideration of the reasons for the request and the particular circumstances of the case as the reasons are likely to provide the focus for any evaluation of whether the decision is legally reasonable.[61] However, even where some reasons have been provided, legal unreasonableness may be established if a court is unable to comprehend how the decision was arrived at.[62] Where the Tribunal does not give reasons, a court may draw an inference as to whether the request was actively considered and/or whether the refusal was justified in the factual context presented.[63]

7.4.4 Legal unreasonableness can also apply in the absence of any fault by the Tribunal, due to the absence of lawful basis for a Tribunal decision as a result of a judicial decision that invalidates a previous decision that is a condition precedent for the Tribunal's exercise of power.[64]

7.4.5 In *MIAC v Li*[65] the Tribunal refused an adjournment where the applicant had sought a review of an unsuccessful skills assessment with the relevant assessing authority and was waiting upon the review outcome. The Tribunal considered that the applicant had been provided with enough opportunities to present her case and therefore proceeded to make its decision. The Court found that the refusal of the adjournment in the circumstances had an arbitrariness about it that rendered it unreasonable. The Court held Tribunal must not arbitrarily exercise its discretion whether or not to grant an adjournment but rather must do so by reference to the facts and circumstances of the individual case and in a manner which is reasonable and that has regard to the statutory purpose of s 360. The plurality and Gageler J made it clear that ss 353 as it then stood[66] and 357A(3) (which provide that the

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[58] *MIAC v Li* (2013) 249 CLR 332.
[59] See for example *Karki v MIAC* [2013] FCCA 806 where the Court found that the Tribunal's decision to refuse an adjournment of a 'few weeks' was unreasonable in circumstances where the applicant may have satisfied the criteria at the time of the decision had he been allowed more time.
[60] *MIBP v Singh* (2014) 308 ALR 280.
[61] *MIAC v Singh* (2014) 308 ALR 280.
[62] *MIAC v Li* (2013) 249 CLR 332 at [76].
[63] See *Duggal v MIBP* [2015] FCCA 1630, a PIC 4020 case concerning the Tribunal's refusal to summons a witness, which provides an example of the Court considering for itself the justification or intelligibility of the refusal, where no reasons were given by the Tribunal. See also *Kaur v MIBP* [2014] FCA 915, *SZTJF v MIBP* [2014] FCCA 16, *Kumar v MIBP* [2014] FCCA 2780 for further examples.
[64] *MIBP v Mohammed* [2019] FCAFC 49 at [66]–[78], where the Court found that that it was legally unreasonable for the Tribunal to affirm the refusal of the permanent partner visa when the application for review in relation to the temporary partner visa had not been validly determined, notwithstanding that the Tribunal was unaware and could not have been aware, that the application for the temporary partner visa was yet to be determined (as the Court found the Tribunal's decision in relation to the temporary partner visa was affected by error after the Tribunal had made its decision on the permanent partner visa).
[65] *MIAC v Li* (2013) 249 CLR 332 at [76].
[66] Sections 353 and 420 were amended by *the Tribunals Amalgamation Act 2015* (Cth) (Amalgamation Act) with effect on and from 1 July 2015. The Tribunal's stated objective of providing a mechanism of review that is fair, just, economical, informal and quick was removed and in its place, a new s 2A of the *Administrative Appeals Tribunal Act 1975* (AAT Act) sets out that in

Tribunal's objective is to act in a way which is 'fair', among other things) also inform what may be considered as reasonable and the statutory procedural requirements.[67]

7.4.6 In *MIBP v Singh*,[68] the Tribunal had granted an initial adjournment to receive the results of IELTS tests from the applicant but then refused a subsequent adjournment request for a remark of the test. The Full Federal Court unanimously found that the Tribunal erred by not giving the adjournment request any independent, active consideration and by not asking itself how long the re-mark would take. The Full Court commented that *Li* is not a 'factual checklist' to be followed and applied in determining whether there has been a legally unreasonable exercise of a discretionary power, rather the determination of legal unreasonableness is invariably fact dependent and will require careful evaluation of the evidence before the court, including any inferences which may be drawn from that evidence, and the particular context and circumstances before the Tribunal. The judgment illustrates the importance of demonstrating 'active' consideration of the request, having regard to all relevant factors including the reasons for the request.[69]

7.4.7 Following *Li* and *Singh*, the principle of legal unreasonableness has been applied in numerous cases. While the majority of cases concern the exercise of a procedural discretion, the principles have also been applied in the context of substantive decisions as discussed below.

Procedural matters

Rescheduling or adjourning the hearing

7.4.8 The current leading authorities on postponing or adjourning are *Li* and *Singh* as discussed above. The following cases are further illustrations of the relevant principles in this context:

- In *Siddique v MIBP*,[70] the Court found the Tribunal's refusal to adjourn a hearing to enable the applicant to undertake a further language test was unreasonable and lacked an evident and intelligible justification. In this case, the applicant had cited a number of personal circumstances in seeking more time to undertake a further language test, which were not considered by the Tribunal in refusing the applicant's request.

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addition to being fair, just, economical, informal and quick [s 2A(b)], the Tribunal must provide a mechanism of review that is accessible, proportionate to the importance and complexity of the matter and promotes public trust and confidence on decision making.

[67] The High Court did not endorse the Full Federal Court reasoning in *MIAC v Li* (2012) 202 FCR 387 that those provisions provide substantive grounds of review. The plurality ultimately declined to determine what s 357A(3) requires and what may be the consequences of a breach.

that the directions in ss 353 and 357A(3) provide substantive grounds of review, however both the plurality and Justice Gageler made it clear that those provisions inform the statutory procedural requirements. The plurality ultimately declined to determine what s 357A(3) requires and what may be the consequences of a breach.

[69] Note that the Full Court's emphasis in *MIBP v Singh* (2014) 308 ALR 280 on the lack of intelligible justification *in the reasons given by the Tribunal* for the decision to refuse the adjournment request and its tentative view that the 'intelligible justification' must lie within those reasons, are arguably at odds with the High Court's reasoning in *MIAC v Li* (2013) 249 CLR 332.

[70] *Siddique v MIBP* [2014] FCA 1352. See also *BVZ15 v MIBP* [2016] FCCA 343 and *MZAHC v MIBP* [2016] FCCA 340 for further cases where unreasonableness was established because the Tribunal did not address all of the reasons for the request or all of the applicant's circumstances.

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- In *Rathor v MIBP*,[71] the Tribunal denied the applicant's request for a postponement of the hearing because his adviser was unavailable. While the Federal Circuit Court found the Tribunal's reasons for refusing to reschedule the hearing were not unreasonable in the sense described in *Li*, the Court held that the exercise of the Tribunal's discretion miscarried because it did not give weight to the statutory code of procedure of which the hearing opportunity is a critical part. The Court further held that attendance of an applicant and their assistant as permitted by s 366A should be assumed to serve a real purpose and that it was not a legitimate reason to refuse a request because the Tribunal was of the view that the attendance of the assistant would be pointless. While *Rathor v MIBP* does not stand for the proposition that it would never be permissible to refuse to postpone a hearing where the representative is unable to attend, when considering a request for adjournment, the Tribunal generally has regard to the importance of the statutory framework including particularly the applicant's right to a hearing and to be assisted at the hearing.[72]
- In *Pathak v MIBP*,[73] the Court held that the Tribunal was unreasonable in taking into account its doubts about a separate matter that it had not determined (whether the applicant was genuine applicant for entry and stay as a student) when refusing an adjournment to allow the applicant to obtain further evidence of financial support.

7.4.9 There have been a number of cases which distinguished *Li*. For example:

- In *Singh v MIAC*,[74] the Court found no error in the Tribunal refusing the appellant more time to obtain relevant evidence in circumstances where the appellant had had a significant amount of time to procure it but had not done so, and there was no material before the Tribunal to suggest that he was taking steps to do so.
- In *Thapaliya v MIAC*,[75] *Uddin v MIMAC*,[76] and *Pakala v MIBP*,[77] the Courts distinguished *Li* on the basis that there was no evidence to suggest that a satisfactory result in an English language test was 'just around the corner'.
- In *MIBP v Sandu*,[78] the Court held the Tribunal was not unreasonable in refusing an adjournment to allow the applicant to obtain a second skills assessment given the reason for seeking the adjournment would not have affected the Tribunal's decision that the applicant failed to satisfy PIC 4020.

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[71] *Rathor v MIBP* [2014] FCCA 10.
[72] Note that the Court in *Rathor v MIBP* [2014] FCCA 10 did not consider the effect of s 357A [s 422B] or 366A(2) [no pt 7 equivalent] in its reasons.
[73] *Pathak v MIBP* [2015] FCA 683.
[74] *Singh v MIAC* [2013] FCA 669.
[75] *Thapaliya v MIAC* [2013] FCCA 456 at [31]–[32].
[76] *Uddin v MIMAC* [2013] FCCA 906.
[77] *Pakala v MIBP* [2014] FCCA 145.
[78] *MIBP v Sandu* [2016] FCA 130.

- In *Haque v MIAC*,[79] *Khan v MIMAC*,[80] and *Gazi v MIAC*,[81] the Courts found that the Tribunal had not acted unreasonably as it had given proper and active consideration to the requests.
- The decisions in *SZSLI v MIAC*,[82] *MZZJ v MIMAC*,[83] *Nawaz v MIBP*,[84] and *Islam v MIBP* [85] concerned adjournment requests to provide documents/information to the Tribunal. The Courts in each of these cases found that the Tribunal did not act unreasonably in refusing the request in circumstances where there was no evidence before the Tribunal as to how the documents/information would have assisted the applicant's case or would have affected the decision.
- In *Yadagiri v MIBP*,[86] the Court found that the Tribunal did not act unreasonably by not providing the applicant further time to obtain documents in relation to a criterion which the Tribunal concluded it was not necessary for it to consider.

7.4.10 In more recent cases, the Courts have applied the principles in *Li* and *Singh* broadly. For example, in *Haque v MIBP*,[87] the Court found the Tribunal acted unreasonably because it misunderstood the factual basis for the applicant's request for an adjournment. In *BVZ15 v MIBP*,[88] the decision to refuse an adjournment was held to be unreasonable because there was no discernible consideration of the applicant's circumstances which included being in detention and unable to read the primary decision or have had it translated to them. Although these are novel applications of the *Li* and *Singh* principles, they do not broaden their scope.

7.4.11 Chapter 22 – Rescheduling or adjourning the hearing contains further discussion of how the Courts have applied the principles in cases relating to postponement or adjournment requests.

Making a decision on the review without taking any further action to allow or enable the applicant to appear

7.4.12 The following cases illustrate the relevant principles from *Li* and *Singh* in the context of making a decision on the review without taking any further action to allow the applicant to appear before the Tribunal pursuant to ss 362B [Part 5] and 426A [Part 7]:

- In *Malecaj v MIBP*,[89] the Tribunal's stated reason for proceeding to make a decision without taking any further action under s 362B [s 426A] was that the

[79] *Haque v MIAC* [2013] FCCA 1275.
[80] *Khan v MIMAC* [2013] FCCA 1527.
[81] *Gazi v MIAC* [2013] FCA 1094.
[82] *SZSLI v MIAC* [2013] FCCA 500.
[83] *MZZJ v MIMAC* [2013] FCCA 1507.
[84] *Nawaz v MIBP* [2015] FCCA 1432.
[85] *Islam v MIBP* [2015] FCCA 617.
[86] *Yadagiri v MIBP* [2016] FCCA 2279. In that case, the applicant sought further time to provide evidence relating to the financial capacity criterion for the grant of a Student visa. The Court found no error in the Tribunal refusing to provide further time in circumstances where the applicant did not meet another criterion for the visa, namely the genuine temporary entrant criterion.
[87] *Haque v MIBP* [2015] FCCA 1765.
[88] *BVZ15 v MIBP* [2016] FCCA 343 at [94]–[111].
[89] *Malecaj v MIBP* [2016] FCA 1508.

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appellant did not contact the Tribunal to explain why he could not attend the hearing. The Federal Court found that the Tribunal's decision was legally unreasonable as it knew the appellant's reason for not being able to attend was that he had left Australia and that his absence was lawful, temporary and short-term.

- In *Kaur v MIBP*,[90] *AZAFB v MIBP*,[91] and *WZAVH v MIBP*,[92] the Courts found the Tribunal acted unreasonably by failing to contact the applicants before proceeding to decision following the applicants' non-appearance at the hearing. Each of these judgments turned heavily on the facts of the case, including that the applicants either did not receive, or claimed not to have received, the hearing invitation. The Tribunal decisions in these cases were made before the introduction of the standard practice of sending SMS hearing reminders, which may limit the impact of these judgments.
- In contrast, see *MIBP v SZVFW*,[93] *Kumar v MIAC*,[94] *Kaur v MIBP*,[95] and *Aneja v MIBP*,[96] where the applicants unsuccessfully alleged that the Tribunal failed to give them an opportunity to be heard in circumstances where the hearing invitation was returned unclaimed and/or the applicants did not contact the Tribunal prior to the hearing and the Tribunal proceeded to a decision on the papers. In each case the Court distinguished *Li*.[97]

Deciding whether to take oral evidence from witnesses

7.4.13 The following cases considered whether it was legally unreasonable to not take oral evidence from witnesses:

- In *SZVGP v MIBP*,[98] the Court found that the Tribunal acted unreasonably where it declined to take evidence from a witness by telephone because it was concerned that privacy would be breached if the call was intercepted. In the absence of any evidence of risk that the telephone call to the witness might be intercepted, the Tribunal's reasoning that an interception may breach the privacy of the proceedings were no more than speculative.

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[90] *Kaur v MIBP* [2014] FCA 915
[91] *AZAFB v MIBP* [2015] FCA 1383.
[92] *WZAVH v MIBP* [2016] FCCA 1020.
[93] *MIBP v SZVFW* [2018] HCA 30 at [69], [84], [123], [141]. The High Court held that where the justification to proceed has regard to the circumstances (such as the applicant's failure to appear without explanation) and is mindful of the requirement to be fair and just but also to be economical and quick, the Tribunal would ordinarily act reasonably in proceeding to make a decision on the merits without any further attempt to make contact with the applicant, and that it will be rare to find that the exercise of the discretion in this manner would be unreasonable.
[94] *Kumar v MIAC* [2013] FCCA 1440.
[95] *Kaur v MIBP* [2014] FCCA 161.
[96] *Aneja v MIBP* [2014] FCCA 413.
[97] See also *SZVRY v MIBP* [2016] FCCA 1018 where the Court found that the fact that the Tribunal did not attempt to contact the applicants using a mobile phone number provided did not give rise to any unreasonableness. The Court found that case was clearly distinguishable from *AZAFB v MIBP* [2015] FCA 1383 because it was clear the applicants had received the hearing invitation. See also *SZVMG v MIBP* [2016] FCCA 631 at [35] and [38] where the Court found that there was no unreasonableness in the Tribunal proceeding to a decision in circumstances where the decision was made less than one day after the scheduled hearing. The Court reasoned that this was sufficient time for the applicant to contact the Tribunal to explain his absence. The applicant told the Court that he did not attend the hearing because he *'…remembered the wrong time of the hearing date…'* and *'…was not in Sydney on that date'*.
[98] *SZVGP v MIBP* [2016] FCCA 3210.

- In *BOL15 v MIBP*,[99] where the Tribunal decided not to call the applicant's witness, reasoning that if the applicant had a witness to corroborate his claims he would have raised it at the earliest opportunity. The Court found that the decision lacked intelligible justification, as the applicant had submitted to the delegate that he had such witnesses and therefore the Tribunal erred by relying on a failure to previously make a request to call a witness.
- In *BTF15 v MIBP*,[100] the Court found that it was not unreasonable for the Tribunal to decline to take oral evidence from the witnesses where there was no reason on the face of the material before the Tribunal to suppose that the authors of the statements could allay its particular concerns about the appellant's credibility.

Substantive decisions

7.4.14 Although *Li* and *Singh* were both in relation to the Tribunal's exercise of a discretion relating to a procedural matter, some later judgments have extended the application of the principles to substantive decisions. For example, in *MIBP v SZSNW*,[101] the Full Court of the Federal Court considered the operation of legal unreasonableness in the context of an Independent Merits Review (IMR), with a majority of the Court finding that the Reviewer's rejection of the applicant's contention that he had previously made a claim of sexual assault was in error. While the Court accepted that legal unreasonableness was involved, these judgments reflect a different approach to the scope and operation of unreasonableness, with a majority finding that it operates only on the exercise of statutory powers or discretions. The judgments illustrate the difficulties of predicting the way a legal error might be characterised in the context of a substantive decision.

7.4.15 More recently, in *Nagaki v MIBP*,[102] the Court held that unreasonableness in decision making by an administrative decision maker is a concept that is relevant only to the exercise of a discretion and has no place to play in relation to a decision maker's findings of fact.

7.4.16 The following judgments are further examples of how Courts have applied the concept of legal unreasonableness in the context of substantive decisions:

- In *MIBP v Stretton*,[103] the Federal Court considered whether a personal decision of the Minister under s 501(2) to cancel the respondent's visa was unreasonable. The Court held that the Minister's decision was not unreasonable as he had weighed the relevant competing considerations and

[99] *BOL15 v MIBP* [2016] FCCA 1994.
[100] *BTF15 v MIBP* [2016] FCA 647 at [57].
[101] *MIBP v SZSNW* [2014] FCAFC 145. See also *Jung v MIBP* [2015] FCCA 1096 where the Court applied *Li* and *Singh* and found the Tribunal's conclusion that the applicant was not genuine in his intention to only visit Australia (so did not satisfy cl 685.221(c) in the Regulations for a medical treatment visa) was unreasonable. This was despite the exercise of a discretion not being in issue, and the applicant arguing the case on the basis of illogicality or irrationality.
[102] *Nagaki v MIBP* [2016] FCCA 1070 at [40]. In this case, the Court found no error in the Tribunal determining that there were no compelling circumstances affecting the sponsor for a Partner visa for the purposes of reg 1.20J(2).
[103] *MIBP v Stretton* [2016] FCAFC 11. This case concerned a personal decision by the Minister that was not reviewable by the Tribunal in any of its Divisions.

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made the decision within his lawful authority in an area in which he had a 'genuinely free discretion'.

- In *ABAR15 v MIBP (No 2)*,[104] the Federal Court found that the Tribunal's conclusion (that the applicant could obtain protection from the authorities in Vietnam which would reduce any risk of harm to less than a real risk for the purposes of the 'complementary protection' ground) was legally unreasonable because it was reached by impermissible reasoning from findings that were not capable of being supported by the country information upon which the Tribunal relied.
- In *Salonga v MIBP*,[105] the Court applied *Li* and *MIMA v Eshetu*[106] to find that the Tribunal's conclusion that the applicant's spousal relationship had ceased was not unreasonable or illogical, and its conclusions could be justified on the primary facts that it had found.
- In *Jung v MIBP*,[107] the Court found the Tribunal's conclusion that the applicant was not genuine in his intention to only visit Australia (so did not satisfy cl 685.221(c) for a medical treatment visa) was unreasonable given the questions asked of him at the hearing and the circumstances in which they were asked.
- In *BIN18 v MICMSMA*,[108] the Court found that an IAA reviewer had not shown an intelligible justification for preferring a UK Home Office report over a DFAT report in circumstances where both reports offered differing opinions on a matter integral to the question for determination, such that the reviewer's decision was legally unreasonable. The DFAT report offered a less favourable assessment of the situation the applicant would face if they were to return to their home area whereas the UK Home Office report indicated they would not face persecution in that area. The Court accepted that it was open to the IAA reviewer to prefer the UK Home Office report but that it needed to provide an intelligible reason for doing so.
- In *AYQ18 v MHA*,[109] the Court applied the principles of legal unreasonableness to find there was no evident or intelligible basis provided in the IAA's reasons for its finding that it was implausible that the applicant would have to continue to report to the army in 2013 given he was detained and released in 2009 in circumstances where the IAA accepted that he had ongoing reporting obligations until the end of 2012. The Court acknowledged that a decision maker is entitled to draw the line somewhere, accepting that findings of fact need to be reasonably arrived at; however, the IAA needed to provide an explanation or point to a reasoning process as to why, in the particular

[104] *ABAR15 v MIBP (No 2)* [2016] FCA 721.
[105] *Salonga v MIBP* [2014] FCCA 1173.
[106] *MIMA v Eshetu* (1999) 197 CLR 611.
[107] *Jung v MIBP* [2015] FCCA 1096.
[108] *BIN18 v MICMSMA* [2020] FCA 1094 at [8]–[13]. The Court noted that the conclusion of legal unreasonableness can, *inter alia*, be drawn in the event that a decision 'lacks an evident and intelligible justification'.
[109] *AYQ18 v MHA* [2019] FCA 1751 at [47]–[50].

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circumstances of this case, that line is drawn at 2013. The Court reasoned that, without providing an explanation, such a conclusion may be arbitrary.

7.5 The hearing rule

7.5.1 The natural justice hearing rule requires that a person who will be adversely affected by a decision be given an opportunity to present their case, be told the substance of the case to be answered and be given an opportunity of replying to it.[110]

The oral hearing

7.5.2 Under the common law, the rule that a person be given an opportunity of being heard does not necessarily require an oral hearing in every case. Although there may be occasions when an oral hearing is necessary to accord procedural fairness, for example, where a real issue of credibility is involved or it is otherwise apparent that an applicant is disadvantaged by being limited to written submissions.[111]

7.5.3 However, as indicated above, the relevant statutory framework informs what procedural fairness requires in each circumstance.[112] In the context of reviews under Part 5 and Part 7 of the Migration Act, ss 360 and 425 respectively indicate that an applicant is to have an opportunity to attend an oral hearing and this is subject only to limited exceptions.[113]

7.5.4 In *SZQGL v MIAC*[114] the Court set out a useful review of the distinction between the common law hearing rule and the statutory obligations under s 425 of the Migration Act, and between an Independent Merits Review (IMR) 'interview' and Tribunal 'hearing'. The Court held that s 425 focuses on a particular statutory construct, that is, the invitation to a particular hearing and the opportunity to deal with the issues arising in the review before the Tribunal at that hearing, whereas the IMR's obligations are not shaped by s 425, instead the duty on the IMR to act fairly arises from the requirements at common law, which does not always requires an 'actual' hearing, as distinct from the applicant being heard. The Court concluded in that case there was no obligation at common law on the IMR to have put certain country

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[110] *Kioa v West* [1985] HCA 159 CLR 550 at 582.
[111] *Applicant NAHF of 2002 v MIMIA* (2003) 128 FCR 359 at [33]–[35]. In *MZYLE v MIAC* [2011] FMCA 589 and *MZYLF v MIAC* [2011] FMCA 621 the Court considered the requirements of procedural fairness at common law in the context of the IMR. The Court found no error with the reviewer relying upon what the applicant had said in earlier interviews. The Court held procedural fairness required a common sense approach in asking the question of whether or not a person was given a reasonable opportunity to be heard and put their case, and whether any inferences were reasonably available as a result of statements or omissions from statements made in the past. An appeal by the Minister from the judgment of *MZYLE v MIAC* was dismissed: *MIAC v MZYLE (No 2)* [2011] FCA 1467. See also, *Cheng v MIAC* [2011] FCA 1290 where the Court considered the requirements of procedural fairness in the context of 'no jurisdiction' decisions made in relation to reviews under Part 5 of the Migration Act. The Court commented that if jurisdiction is in issue, there may be some circumstances, such as where there is a genuine dispute as to the facts, in which an opportunity to be heard may have some utility. This case was however, not one of them as there was effective notification of the delegate's decision. Given its conclusions on effective notification, the Court did not resolve whether the source of the application of those principles was to be found in the common law, or whether any common law principles have been excluded by the provisions of the Migration Act.
[112] *SZBEL v MIMA* (2006) 228 CLR 152 at [26]. For an illustration, see *SZOGP v MIAC* [2010] FMCA 704 at [57]–[59] and *SZQGA v MIAC* [2012] FCA 593.
[113] The obligation in ss 360/425 is subject to three exceptions: where the Tribunal is able to make a favourable finding without a hearing; where the applicant consents to the Tribunal proceeding without a hearing; and where the applicant has not responded within the prescribed period to an invitation to provide information or to comment on adverse information (for further discussion see Chapter 12 – Review of files and duty to invite the applicant to a hearing).
[114] *SZQGL v MIAC* [2011] FMCA 1019.

information to the applicant at interview, or otherwise as the applicant knew the case against him, and had been exposed to the substance of the country information which ultimately informed and was relied upon by the IMR.

7.5.5 In the statutory context, failure by the Tribunal to provide an applicant with an opportunity to present their case at an oral hearing, for example, by refusing an adjournment or providing an inadequate interpreter, may give rise to a breach of the common law rules of procedural fairness, or be construed as a breach of the requirements of ss 360 and 425.[115]

7.5.6 For example, in *MIMIA v Maltsin* the Full Federal Court found that the Tribunal, by setting a time limit determined by the Tribunal member and not hearing all of the witnesses, rather than weighing the importance of their evidence to the case, had denied the applicant a hearing and breached the obligations on the Tribunal under s 361.[116]

7.5.7 Similarly, in *Antipova v MIMIA* the Federal Court held that because the Tribunal had interrupted and imposed an arbitrary time limit on the applicant, the Tribunal did not permit her to give evidence and present arguments as she wished.[117] The invitation to a hearing was therefore not a real and meaningful one, and therefore the invitation under s 360 had not been extended to the applicant.

7.5.8 For an oral hearing, the hearing invitation is not to be 'an empty shell or a hollow gesture'. [118] The court authorities provide that the Tribunal is to ensure that applicants have the opportunity to put all their claims to the Tribunal,[119] and that they are not discouraged by the Tribunal from presenting information on critical claims that might be rejected,[120] or misled by a representation that they will have a further opportunity to present claims or make submissions.[121]

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[115] *Applicant NAHF of 2002 v MIMIA* (2003) 128 FCR 359 at [33]–[35]; *NAOV v MIMIA* [2003] FMCA 70 at [33] See also *BEG17 v MICMSMA* [2020] FCA 660 at [60]–[65], in which the invitation under s 425 was not meaningful because the appellants were not provided with a real chance to present their case. In this case, the appellants were each separately put on notice about a critical issue for the first time at hearing, but were not offered the opportunity to seek an adjournment or to provide corroborative evidence or submissions, or time to confer to discuss the issue prior to the end of the hearing. The Court noted that, given the lateness and unexpected nature of the issue, the appellants had no opportunity to provide evidence to corroborate their answers and rejected the Minister's assertion that it was a case of the appellants not being given an opportunity to 'better their evidence' and that the Tribunal was not required to give such an opportunity.

[116] *MIMIA v Maltsin* (2005) 88 ALD 304.

[117] *Antipova v MIMIA* (2006) 151 FCR 480.

[118] *Mazhar v MIMA* (2001) 183 ALR 188 at [31] and *MIMIA v SCAR* (2003) 198 ALR 293 at [33].

[119] In *SZRUK v MIAC* [2013] FMCA 109 the applicant claimed her child had been "restless" at the hearing and as a result the Tribunal has become 'rushed'. However, before the Court, the applicant could not give details of what else she had wanted to say before the Tribunal and the Court found that while there were difficulties presented by the applicant's child, on balance, the applicant was given a meaningful opportunity to present her case: at [40].

[120] See *Applicant S298/2003 v MIAC* [2007] FCA 1793 where the Court found that the Tribunal misled the appellant into believing that tendering of an original document would not advance his case. That advice was, on the Tribunal's own reasoning, wrong. An original document could have been investigated and if established as authentic, might have led the Tribunal not to make adverse credibility findings against the appellant. See also *SZHAI v MIAC* [2008] FMCA 49.

[121] See, for example, *NAAG of 2002 v MIMIA* [2003] FCAFC 135 (misleading the applicant as to what she was required to prove); *MIMIA v SGJB* [2003] FCAFC 290 (misleading the applicant into believing that the Tribunal had accepted a witness's written statement); *SDAF v MIMIA* [2003] FCAFC 127 (misleading the applicant into expecting that there would be the opportunity to provide final written submissions); *SZAQH v MIMIA* [2004] FMCA 408 (misleading the applicant into believing the Tribunal accepted his evidence about his political activities); *M1031 of 2003 v MIMIA* [2004] FMCA 763 (misleading the applicant about the nature of the adverse country information because it was put out of context) and *VHAX v MIMIA* [2005] FMCA 270 (misleading the applicant into believing the Tribunal viewed her claim of sexual assault sympathetically when in fact it was rejecting the evidence).

Fitness to attend a hearing

7.5.9 The Tribunal considers whether the applicant's condition is such that he or she is able to participate effectively in the hearing.[122] However, this does not necessarily mean that if an applicant is unfit to ever attend a hearing that there will be procedural unfairness. In *SZOGP v MIAC*,[123] for example, the Tribunal proceeded to a decision without taking oral evidence from the applicant wife following receipt of a medical report that stated she was unfit to participate 'in the foreseeable future'. The Court noted that assuming a right of fair procedure could be implied, only such obligations that were consistent with the statutory scheme and were appropriate to the particular matter would be imposed. The Court found that the statutory scheme included an obligation on the Tribunal to complete the review without undue delay. Furthermore, the particular circumstances of the case supported a finding of no unfairness, which included that the applicant was assisted by a migration agent; that the correspondence from the agent invited the Tribunal to devise procedures for completing the review on the basis that the applicant was unfit in the foreseeable future; and that there was an absence of protest with the course taken and no further request for rescheduling of the hearing.[124]

Gender, cultural and vulnerable person considerations

7.5.10 The MRD's *Guidelines on Gender* and *Guidance on Vulnerable Persons* provide guidance on addressing the needs of applicants with gender-related claims in protection visa reviews and those individuals who face particular difficulties in the review process. While the Guidelines do not form mandatory considerations for the Tribunal,[125] a failure by the Tribunal to take the guidelines into account in an appropriate case may result in jurisdictional error, for example if it results in an applicant being denied a real and meaningful opportunity to participate in a hearing.

7.5.11 In *Applicants M16 of 2004 v MIMIA*,[126] the Court found the Tribunal denied the applicant procedural fairness by failing to provide a proper hearing in circumstances where the female applicant had stated in her submissions that she had secret,

[122] See for example *MIMIA v SCAR* (2003) 198 ALR 293, followed in *SZIWY v MIAC* [2007] FMCA 1641 at [33]. See Chapter 14 – Competency to give evidence and Chapter 22 – Rescheduling or adjourning the hearing for further information on these points.
[123] *SZOGP v MIAC* [2010] FMCA 704 at [57]–[59].
[124] Compare with *MZYZE v MIAC* [2013] FCCA 569 where the Court, applying the principles in *MIMA v SCAR* (2003) 128 FCR 553, accepted that where an applicant's illness prevented his attendance at the hearing, thereby denying him a real chance to be heard, that that applicant had been denied procedural fairness. While the Court noted at [24] that it would be a 'rare case' where a person was so ill as to prevent their attendance at a hearing, it also found that it made no difference that the Tribunal was unaware of his circumstances or that the denial of procedural fairness in no way flowed from any conduct of the Tribunal: at [23]. The Court in *SZSNO v MIAC* [2013] FCCA 824, also applying the principles in *SCAR*, found at [17] that, in circumstances where an applicant is unable, through ill health, to attend the Tribunal's hearing, the element of s 425(1) that such hearing as is offered be "real and meaningful" cannot be satisfied. Although characterised as a breach of s 425 in that case, the Court, like in *MZYZE*, concluded that the inability of the applicant to attend the Tribunal hearing by reason of injury was such that, through no fault of its own, the Tribunal failed to accord the applicant with the hearing with which it was obliged to have provided.
[125] In *Applicants M16 of 2004 v MIMIA* (2005) 148 FCR 46, the Court considered that the Tribunal should have had regard to the Minister's Gender Guidelines. While *M16* was followed in *MZXFJ v MIMA* [2006] FMCA 1465, in the judgment of *M100 of 2004 v MIAC* (2007) 213 FLR 63, the Court found that the Minister's gender guidelines and the Tribunal's credibility guidelines were not published under s 499 of the Migration Act and were therefore not binding on the Tribunal at [90]. These guidelines did not concern a policy relevant to the exercise of a discrete discretionary power, but consisted of statements of general principle. The Court's judgment in *M100* was followed in *SZTSK v MIBP* [2014] FCCA 2277 in relation to the Tribunal's *Gender Guidelines* and in *MZZWO v MIBP* [2014] FCCA 3007 in relation to the Tribunal's *Guidance on Vulnerable Persons*. *SZTSK v MIBP* [2014] FCCA 2277 was upheld on appeal in *SZTSK v MIBP* [2015] FCA 106.
[126] *Applicants M16 of 2004 v MIMIA* (2005) 148 FCR 46.

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sensitive information that she was prepared to reveal to a female case officer. However, the male Tribunal Member did not attempt to encourage her to reveal this information and the Court found that the Tribunal should have referred to the issue in the course of the hearing and could have suggested that the applicant give evidence through the female interpreter, in the absence of her husband and the male migration agent. Alternatively, the Tribunal could have given the applicant the opportunity to put her claims in writing, if she could not bring herself to reveal them to him. In effect, the Tribunal ignored the real likelihood that the applicant's evidence on the subject had not been exhausted.

7.5.12 In *MZZFU v MIBP*,[127] the Court considered a complaint concerning the gender of the Tribunal member given the sensitive nature of some of the issues raised at the hearing and found the Tribunal did not fall into error. In rejecting the applicant's complaint, the Court took into account that the applicant did not go so far as to request that a female member of the Tribunal hear the case, that no such application was pressed either before or at the hearing or after the hearing concluded, that although the applicant became distressed when giving certain evidence, she was able to give her evidence, that neither she nor her lawyer at any stage sought that the proceedings be stood down or adjourned and that she did not articulate, beyond a general assertion that she would have been better able to answer questions had she not been so distressed, what further evidence she would have given that might have been more persuasive in any event.

The use of interpreters

7.5.13 If an applicant cannot adequately express himself or herself in English, the Tribunal is under a statutory obligation, under ss 360 and 366C,[128] and 425 and 427,[129] to provide a competent interpreter, who provides competent interpretation.[130] If the Tribunal provides an interpreter whose interpretation is such that the applicant is unable adequately to give evidence and present argument to the Tribunal, there may be a breach of the Tribunal's statutory obligation.[131] Similarly, under the common law, if the Tribunal fails to provide an interpreter when it is clear that one is needed,[132] or if an interpreter provided by the Tribunal interprets in a inadequate

[127] *MZZFU v MIBP* [2014] FCCA 212.
[128] Section 366C sets out requirements for the Tribunal to appoint an interpreter where requested by the applicant (s 366C(1) and (2)), and where the Tribunal considers the person appearing is not sufficiently proficient in English (s 366C(3)).
[129] Section 427(7) states that "[i]f a person appearing before the Tribunal to give evidence is not proficient in English, the Tribunal may direct that communication with that person during his or her appearance proceed through an interpreter".
[130] *Perera v MIMA* (1999) 92 FCR 6 at [17], [20]; *Mohsen Soltanyzand v MIMA* [2000] FCA 917 at [20]. For an example of circumstances in which the obligation will not arise see, *MZYJW v MIAC* [2011] FMCA 534 where the Court was not persuaded that the applicant was unable to put his case as he never sought an interpreter, was present with a migration agent who never sought to intervene and request an interpreter or adjournment of the hearing and the transcript of the hearing demonstrated on the applicant's part a clear understanding and level of responsiveness that could only come with sufficient understanding of English.
[131] *Mazhar v MIMA* (2000) 183 ALR 188 at [31]. For a review of case law on the standard of interpretation required for a fair hearing, see *SZGWM v MIMA* [2006] FMCA 1161 at [18]–[22].
[132] *NAKK v MIMIA* [2004] FMCA 43. In the unusual circumstances of that case, the Tribunal had dismissed the interpreter as incompetent, and proceeded with the hearing without an interpreter, relying on the applicant (who appeared to be competent in English) to tell it if there were any problems. However, the transcript disclosed that there was some confusion. The Court held that there was a denial of procedural fairness as the Tribunal had accepted the necessity of an interpreter and that necessity had been established by early confusion. The failure to provide an interpreter prevented the applicant from obtaining an effective hearing.

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way, there may be a breach of the hearing rule because the apparent opportunity to put a case is illusory.[133]

7.5.14 Not every error or problem with interpretation will amount to a denial of procedural fairness. Interpretation may be less than perfect but not give rise to practical injustice.[134] It suffices that the interpretation is sufficiently accurate as to permit the idea or concept being interpreted to be communicated.[135] Lack of procedural fairness will arise where the errors in interpretation relate to matters of significance for the applicant's claim or the Tribunal's decision[136] and the standard of interpretation is so inadequate that it could be said that the applicant is effectively prevented from giving his or her evidence.[137]

7.5.15 See Chapter 20 – The role of the interpreter at the hearing for more information on the use of interpreters by the Tribunal and potential issues that may arise.

The applicant's right to know the case against him/her

7.5.16 The applicant's right to know the case against him or her involves a duty on the Tribunal to plainly and unambiguously raise the critical issues on which his or her application might depend so that he or she may have an opportunity of being heard on them. Procedural fairness requires the decision maker to identify for the person affected any critical issue not apparent from the nature of the decision or the terms of the statutory power.[138]

7.5.17 For example, in a protection case it may be procedurally unfair to make a protection visa decision on the basis of an issue, such as safe third country, unless those issues have been raised with the applicant.[139] In this regard, in *VUAN v MIMIA* the Court held that the Tribunal failed to accord procedural fairness in relation to the issue of internal relocation as no question was asked nor was any issue raised by the Tribunal at the hearing about the possibility or reasonableness of the applicant relocating to another part of his country so as to avoid the persecution he claimed to have suffered.[140] The applicant was not aware of the factor on which his case was likely to turn, and upon which it did in fact turn. In contrast, in *WZAQE v MIAC*, the

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[133] *SZAAJ v MIMIA* [2004] FCA 312 at [40]. Most cases relating to Tribunal proceedings have considered this issue under s 425. However, the relevant principles and standards are, in general, equally applicable under the common law.
[134] *NAOV v MIMIA* [2003] FMCA 70 at [35]. See also *SZGSI v MIAC* [2009] FCA 200 where the Tribunal took into account a transcript submitted by the applicant which identified errors and omissions made by the interpreter. The Court found that while not perfect, the translation could be considered sufficiently accurate so that it conveyed the ideas and concepts being communicated: at [52].
[135] *WACO v MIMIA* (2003) 131 FCR 511 at [66].
[136] *Perera v MIMA* (1999) 92 FCR 6 at [45]–[46].
[137] *Appellant P119/2002 v MIMIA* [2003] FCAFC 230, accepting the formulation put by the Minister, referring to *Perera v MIMA* (1999) 92 FCR 6 at [38]–[41]. See also *SZGWN v MIAC* (2008) 103 ALD 144. Although the error in that case was a breach of s 425 (because s 422B applied), the reasoning is applicable in a procedural fairness context. The interpreting errors were so comprehensive as to affect both the asking of relevant questions and the evidence given in response. As such, the Tribunal's reliance on a transcript identifying the relevant errors was not sufficient to overcome the defects in the oral hearing. For further discussion see Chapter 20 – The role of the interpreter at the hearing.
[138] *MIAC v SZGUR* (2011) 241 CLR 594 at [9].
[139] See *SZIOZ v MIAC* [2007] FCA 1870 in which the Tribunal failed to notify the appellant that whether he was a Falun Gong practitioner was an issue before the Tribunal. Because the issue before the delegate was whether the appellant was a Falun Gong 'practitioner of interest', whether the appellant was a Falun Gong practitioner at all was a separate issue that should have been put to the applicant. See also *SZQEM v MIAC* [2011] FMCA 662 where the Court found the adverse material that was centrally relevant, being the circumstances of Western forces deployed in Afghanistan, did not originate with the applicant, was not put to the applicant by the IMR and would not have been apparent to the applicant.
[140] *VUAN v MIMIA* [2005] FCA 1638 at [7].

Court found the applicant was on notice about the substantive issue of relocation and the country information being relied on.[141]

7.5.18 Whether a person is on notice of the relevant issues will depend on the entirety of the circumstances, including the applicant's ability to comprehend the matter and whether they are represented.[142] Applicants are generally entitled to assume that the reasons given in the delegate's decision for refusing a visa will identify the issues for the related review unless the Tribunal informs the applicant otherwise.[143]

7.5.19 Sections 425 and 360 require that review applicants be given an opportunity to be heard on 'the issues arising in relation to the decision under review'.[144] The Tribunal therefore gives applicants a sufficient opportunity to give evidence or make submissions in relation to any determinative issue and the Tribunal is obliged to identify any other issue(s) it may consider relevant.[145]

7.5.20 In *SZBEL v MIMA*,[146] the High Court found that the Tribunal did not accord the applicant procedural fairness in circumstances where it did not give him a sufficient opportunity to give evidence or make submissions at the hearing about what turned out to be two of the three determinative issues arising in relation to the decision under review. A '*SZBEL*-type' error may also occur if the Tribunal fails to alert an applicant that it might regard evidence as implausible unless corroborated by other direct evidence.[147]

7.5.21 In *Zhang v MIAC*,[148] for example, the delegate cancelled the applicant's student visa based on a breach of 8202(3)(a) and the Tribunal subsequently affirmed the decision based on a breach of condition 8202(3)(b) without raising the applicant's compliance with 8202(3)(b) at the hearing. The Court found that to characterise the matter as simply a breach of condition 8202 would be to fail to identify sufficiently the issues which were before the Tribunal. In *Khan v MICMSMA and Rahman v MICMSMA*,[149] the Court found that the Tribunal had not indicated its concern about

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[141] *WZAQE v MIAC* [2013] FCCA 97 at [26].
[142] *CPW16 v MIBP* [2017] FCA 1210 at [26] where the Court held that the extent to which the Tribunal needs to 'put' an issue to an applicant at a hearing will depend on a range of factors including the applicant's education level, command of English (where there is no interpreter) and whether they are represented. In some instances it may be necessary for the Tribunal to make an express statement that a matter is in issue if this won't be clear to an applicant. Application for special leave to appeal to the High Court was dismissed: *CPW16 v MIBP* [2018] HCASL 9.
[143] *SZBEL v MIAC* (2006) 228 CLR 152 at [36], [44], [47]. See also *SZJHL v MIAC* [2007] FCA 1713. In *SZNWA v MIAC* [2010] FCA 470 at [33], the Court held the delegate's reasons and the Tribunal's questions at hearing, including asking the applicant to expand upon relevant factual aspects of her claims, indicated that everything she said was in issue. It was not necessary for the Tribunal to alert the applicant specifically to the possibility that the Tribunal might not accept certain aspects of her claims. Note in *MZYOI v MIAC* [2012] FCA 868, the Court at [93] held in the context of an entirely fresh determination, such as that conducted by an IMR, where it is made clear that all claims are the subject of the fresh determination, there is no need to identify the crucial issues in contention by specifically notifying the applicant of any intended divergence from the assessor's findings on dispositive facts or issues.
[144] See Chapter 13 – The hearing for further information on the hearing obligations of the Tribunal.
[145] See for example, *MZXPO v MIAC* [2007] FMCA 1484, in which Riley FM found that the Tribunal had failed to alert the applicant to an issue on which the decision turned – here the absence of charges laid against the applicant, which in turn led the Tribunal to decide that the applicant was not a member of a political party: at [49]–[50]; *SZKPJ v MIAC* [2007] FMCA 1237, in which the Court held that despite general discussion at hearing, the Tribunal failed to put the applicant on notice that his employment with an organisation, as well as his membership of that organisation (and the delegate's acceptance of the claim), was in issue: at [59] – [61]. See also *AZAAD v MIAC* (2010) 189 FCR 494;*SZRFQ v MIAC* [2012] FMCA 772 in which the Court held that procedural fairness (as well as s 425) required the issue of whether the applicant's claim had been abandoned to be squarely, clarified with the applicant in the course of the hearing: at [29]–[31]; and, in the IMR context, *MZYRK v MIAC* [2012] FMCA 284 at [20] and *SZQVO v MIAC (No 2)* [2012] FMCA 512.
[146] In *SZBEL v MIMA* (2006) 228 CLR 152.
[147] *Elliott v MIMA* (2007) 156 FCR 559 at [44].
[148] *Zhang v MIAC* [2007] FMCA 1855.
[149] *Khan v MICMSMA and Rahman v MICMSMA* [2019] FCCA 3057 at [17]–[19].

the financial capacity of the business to employ the nominee on a full-time basis for two years, which led to procedural unfairness. The delegate had refused the application on the basis that the training requirements were not satisfied, while the Tribunal affirmed the decision on the basis that it was not satisfied the applicant met the financial capacity requirement. Prior to the hearing the Tribunal had sent the applicant a letter indicating that it required up to date information addressing reg 5.19, and during the hearing the Tribunal questioned the applicant about the financial status of the business. The Court acknowledged there is no requirement on the Tribunal to identify the significance of the questions it asks at hearing; it is however required to identify the issues which will be dipositive to the outcome of the review.[150] Asking questions which may be directed at a particular requirement in some circumstances may not be sufficient to put an applicant on notice of the dispositive issue.

7.5.22 In contrast, in *SZQOJ v MIAC*,[151] the Court found the Tribunal had raised the issues of substance at the hearing in circumstances where the decision of the Tribunal disclosed a wide range of credibility concerns, none of which might be determinative in isolation, but which were determinative when considered cumulatively. The Court found that there was no single item of evidence which assumed the same level of significance as was the case in *SZBEL*.

7.5.23 However, the Tribunal is not required to identify possibly determinative issues prior to the hearing.[152]

7.5.24 The extent of the common law requirement will vary according to the circumstances of the particular case. While applicants are generally informed of the kind of matters a decision maker is taking into account, they need not necessarily be informed of the precise nature of every matter a decision maker might take into account, nor does procedural fairness require that the applicant have an opportunity to comment on every piece of adverse information irrespective of its credibility, relevance or significance.[153] The decision maker is not obliged to put to an applicant every assertion of apparent unreliability, provided that the Tribunal has raised clearly with the applicant the critical issues.[154]

7.5.25 The Tribunal is also not required to identify for applicants issues which would be 'apparent' from the terms of the Migration Act and *Migration Regulations 1994* (Cth) (the Regulations).[155] For example, in *MIAC v Pham*[156] the applicant sought a Partner visa on the basis of a 'non-judicially determined claim of domestic violence' where an essential issue was whether the statutory declarations relating to domestic violence met the requirements prescribed in Division 1.5 of the Regulations. The Court found that it was 'apparent' from the terms of the Regulations that this would be an issue and the applicant was not entitled to assume that it would not be a live issue before the Tribunal. As such there was no

[150] *Khan v MICMSMA and Rahman v MICMSMA* [2019] FCCA 3057 at [18].
[151] *SZQOJ v MIAC* [2012] FMCA 298.
[152] *AZAAD v MIAC* [2010] FCAFC 156 at [39].
[153] *Kioa v West* (1985) 159 CLR 550 at 628.
[154] *WACO v MIMIA* (2003) 131 FCR 511.
[155] *SZBEL v MIMA* (2006) 228 CLR 152 at [29]; *MIAC v Pham* [2008] FCA 320 at [51]–[54].
[156] *MIAC v Pham* [2008] FCA 320.

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requirement on the Tribunal to advise the applicant that the statutory declarations which had been provided were deficient.

7.5.26 The rules of natural justice that require the giving of an opportunity to be heard applies to the party directly affected by the decision, i.e. the review applicant in the context of Tribunal proceedings. There is no obligation on Tribunal to extend procedural fairness to third parties such as witnesses.[157]

Adverse information

7.5.27 The Tribunal has a statutory obligation to disclose adverse information in ss 359A and 424A. It also has an obligation to disclose adverse information under the common law. In the Tribunal context, the kinds of information that may need to be put to the applicant typically include: country information that is contrary to the applicant's claims;[158] 'dob-in letters'; expert opinions, such as linguistic analyses or opinions given by the Department's Document Examination Unit or an Independent Expert;[159] information that has been provided by the applicant in relation to an earlier visa application; and information provided by another applicant in relation to his or her own application.[160] Some of these are also covered by the statutory obligation to disclose adverse information in ss 424A and 359A (discussed in Chapter 10 – Statutory duty to disclose adverse information).

7.5.28 Under the common law, where no problem of confidentiality arises, an opportunity is to be given to the applicant to deal with adverse information that is credible, relevant and significant to the decision to be made.[161] In *MZYOD v MIAC*, for example, the Court found the IMR failed to accord the applicant procedural fairness by not alerting him to a DFAT report and its potential significance, and providing him

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[157] See for example *BCF15 v MIBP* [2016] FCCA 2340. In that case, the Court found no error in the Tribunal's finding that the applicant's mother (who was a witness and not a person directly affected by the Tribunal decision) had deliberately given false evidence in support of the applicant without putting to her that she was giving false evidence. The Court held that the rule in *Browne v Dunn* (1893) 6 R 67 (which requires the cross-examiner of a witness in adversarial litigation to put to that witness the nature of the case on which the cross-examiner's client proposes to rely in contradiction of that witness) has no application to an inquisitorial proceeding of the sort conducted by the Tribunal.

[158] In *MZYPQ v MIAC* [2012] FMCA 33 the Court found that neither the outcome of the IMR's Google searches nor the IMR's conclusions from those searches could be described as adverse. The IMR's conclusion that the nickname 'Sea Pigeon' was given to LTTE smugglers as a group and not to the applicant's father as an individual did not cause the IMR to reject the applicant's claim that his father was a Sea Pigeon or cause him to make adverse findings about the applicant's credibility.

[159] In *Maman v MIAC* [2011] FMCA 426, the Court held that an independent expert, was required to provide the applicant with common law procedural fairness in the steps leading to the preparation of their opinion as to whether the applicant had suffered family violence, including putting adverse information considered to be credible, relevant and significant for comment. The Court further held the Tribunal, having been made aware of the expert's possible failure, was required when considering if the report was "properly made" to assess whether or not the applicant had received procedural fairness from the independent expert. On appeal in *MIAC v Maman* (2012) 200 FCR 30 the Court unanimously confirmed that an independent expert providing an opinion is bound by the common law rules of procedural fairness. However the Tribunal's role in identifying a denial of procedural fairness by the independent expert was not discussed in any detail. Note, however in *Al-Momani v MIAC* [2011] FMCA 453 the Court, concluded that the extent of any obligation on the independent expert themselves to afford procedural fairness was minimal, given the Tribunal is obliged to take such steps: at [45]–[47].

[160] In *DZADP v MAIC* [2013] FMCA 35 the Court found that the IMR had erred in not putting to the applicant significant inconsistencies in his brother's account for comment.

[161] *Kioa v West* (1985) 159 CLR 550 at 629. In *SZQKC v MIAC* [2011] FMCA 848 the Court found information contained in a 2010 DFAT report was known to the applicant through the primary assessor's reason for decision and was addressed on more than one occasion in submissions made by or on behalf of the applicant and as such there was no obligation on the IMR to raise it further. Like the judgments of *SZQII v MIAC* [2011] FMCA 789 and *SZQJH v MIAC* [2011] FMCA 845 this judgment emphasises that the requirements imposed by the rules of procedural fairness will vary depending on the context of the review. The Court's findings were undisturbed on appeal in *SZQKC v MIAC* [2012] FCA 249. Application for special leave to appeal to the High Court was also refused: *SZQKC v MIAC* [2012] HCATrans 145.

with the opportunity to comment upon it.[162] What was determinative in this case was not whether the applicant or his advisers would have been aware of the information in question, but rather that they would not have been aware of how the information was to be used.

7.5.29 When providing information for comment, the Tribunal ensures that the applicant has sufficient information about what it considers to be adverse to be able to respond in a meaningful way.[163] For example, in *WAFV of 2002 v MIMIA*[164] the Full Federal Court held that the failure by the Tribunal to supply the applicant with the actual tape on which a linguistic analysis of the applicant was based, and later relied upon in rejecting his integral claims, was a breach of procedural fairness, as insufficient information was available to allow the applicant to respond in a meaningful way. Excerpts from the linguistic report dealing with matters of pronunciation and dialect/language variants were considered inadequate. The Court considered that, in this particular situation, the Tribunal should have provided a copy of the full report used by the Department, as well as a copy of the tape upon which the report was based.

Country information

7.5.30 Country information is one category of information which is usually covered by the exceptions in ss 424A and 359A, and therefore, does not need to be put to the applicant, but in some circumstances, may be the subject of breaches of the common law hearing rule. Common situations that can give rise to a breach of the hearing rule in relation to country information include: where the information undercuts the applicant's case on a particular issue, where the information is critical to the Tribunal's decision and the applicant is not on notice of the issues raised by the information, for example because it was not relied upon by the delegate and was not discussed at the hearing, or the information relates to a significant event that has occurred since the delegate's decision and/or Tribunal hearing which has led to a major change or the information is recent and in relation to an evolving situation. Set out below are examples of some common scenarios which have arisen in case law, and while the majority of these cases relate to the IMR, the Court's reasoning is equally applicable to the Tribunal.

1) <u>Information not raised previously</u>

7.5.31 A breach of procedural fairness may occur where an applicant has not been on prior notice of the issues raised by the information. In *Applicant A179 of 2002 v MIMIA*[165] the Court found a breach of procedural fairness in circumstances where

[162] *MZYOD v MIAC* [2012] FMCA 4. This and other cases (including *DZAAZ v MIAC* [2012] FMCA 39; upheld on appeal in *DZAAZ v MIAC* [2012] FCA 1128 and cases there cited) demonstrate that what amounts to unfairness will depend on the precise circumstances of the particular case, including how the information is ultimately used.
[163] *SZRPA v MIAC* [2012] FMCA 91 in which the Court held that information should be provided in a way that is comprehensible so that the applicant may give further evidence or make submissions in respect of it. However, there is no common law obligation to explain the relevance of adverse information (in contrast to the obligation under ss 359A and 424A of the Migration Act) at [24]. Undisturbed on appeal: *SZRPA v MIAC* [2012] FCA 962.
[164] *WAFV of 2002 v MIMIA* (2003) 132 FCR 280. But note that by majority (Carr J dissenting) the Court nevertheless dismissed the appeal because the Tribunal's decision was open to it on an alternative basis.
[165] *Applicant A179 of 2002 v MIMIA* [2003] FCA 1547. See also *SZGLQ v MIMA* [2006] FCA 1506 at [11] (pre-s 422B/357A).

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the Tribunal relied on the reasons of the delegate but also found that country information did not support the applicant's claims, and gave the applicant no opportunity to comment on this country information. Similarly, in *SZQZM v MIAC*[166] the Court found the IMR had failed to provide the applicant with an opportunity to comment on information in a New York Times report, which was relied upon by the IMR but was not discussed at interview and which the applicant's advisers were not aware of until considerably later than the interview.[167]

2) Currency of information

7.5.32 Relying on updated country information, without putting that information to the applicant, has been found to establish a breach of procedural fairness. In *SZQEK v MIAC*[168] the Court found that the IMR erred by failing to disclose updated UNHCR Guidelines to the applicant because although the content of earlier UNHCR Guidelines had been put to the applicant, the reliance by the IMR on the *currency* of the updated UNHCR Guidelines made it necessary for those Guidelines to be put to the applicant. Similarly, in *SZRFG v MIAC*[169] the Court found that the IMR erred by failing to invite the applicant to comment on a Departmental report which was released after the IMR interview and which was given particular pertinence by the decision maker by reason of its *official source, recent currency* and *the materiality of the content*.

7.5.33 However, note that *SZQEK v MIAC* was distinguished by the Federal Court in *MZYLY v MIAC*[170] which found in the circumstances of that case the relevant advice in the 2009 and 2010 versions of the UNHCR guidelines were similar and the substance of information in the 2010 version was put to the appellant in the course of the applicant's RSA interview. Similarly, in *ALQ15 v MIBP*[171] the Federal Court found that information in an updated DFAT report did not raise any new issues but rather the report discussed an issue which had emerged from the course of the continuum initiated by the protection visa application and which had already been addressed at a hearing before the Tribunal.

7.5.34 Similarly, relying on very recent information which the decision maker is aware of and which has not been put to an applicant may result in a breach of procedural fairness. For example, in *ABV16 v MIBP*, the appellant claimed that his parents would be required to pay a fee (which they could not afford) to include him in their household registration in China, however, following the hearing Chinese policy was relaxed which meant that those, such as the appellant, who were unregistered could now be registered. On the basis of the new information, the Tribunal dismissed the claim and affirmed the decision. The Court held that the policy

[166] *SZQZM v MIAC* [2012] FMCA 1136.
[167] In contrast, in *MZYPF v MIAC* [2011] FMCA 985 the Court found the IMR's failure to put a New York Times article and UNHCR Guidelines to the applicant did not deprive him of the opportunity to respond to the issue of relocation. The article was an issue in the RSA and extracts from the UNHCR Guidelines were not adverse.
[168] *SZQEK v MIAC* [2011] FMCA 628.
[169] *SZRFG v MIAC* [2012] FMCA 509.
[170] *MZYLY v MIAC* [2012] FCA 357.
[171] *ALQ15 v MIBP* [2015] FCA 1253 at [17]–[18].

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change gave rise to a new issue and the Tribunal erred by not inviting the appellant to a hearing to present evidence and make submissions on it.[172]

7.5.35 If an applicant's representative is aware of information, there may be no breach of procedural fairness. For example, the Court in *SZQHC v MIAC*[173] found that a failure to put updated UNHCR Guidelines to the applicant in circumstances where there was evidence that the migration agent was in fact aware of the new guidelines did not result in a denial of procedural fairness. Moreover, in *DZAAQ v MIAC*[174] the Court emphasised there was no error in circumstances where the applicant's agent already had access to earlier UNHCR Guidelines and where the updated country information was of a kind that the agent was *likely to have had access to independently*.

3) Novel information

7.5.36 In *SZQIA v MIAC*[175] the Court found information contained in a DFAT cable did not have the characteristics of novelty and significance to the IMR's decision and that not every proposed citation of a piece of background information was required to be put an applicant. In this case, the IMR's adverse findings and conclusions were, in their terms, entirely based upon the applicant's personal circumstances as found from an assessment of the applicant's own evidence.

7.5.37 Similarly, in *DZAAZ v MIAC*[176] the Court found the substance of country information was raised previously and that by the time of the IMR process that information could not be considered novel. On appeal the Federal Court upheld the primary judge's findings, however in *obiter* comments the Court considered that the issue of whether information was 'novel', was irrelevant to the question of procedural fairness.[177]

4) Where some but not all information undercuts the applicant's case on a particular issue

7.5.38 In some circumstances, a failure to put a particular piece of information will result in a breach of procedural fairness. In *SZQJP v MIAC*[178] the Court held that putting the applicant on notice of the substance of a United Kingdom Asylum & Immigration Tribunal publication was not sufficient to satisfy procedural fairness obligations, and an error arose from the fact the applicant was not made aware of a particular piece

[172] *ABV16 v MIBP* [2017] FCA 184 at [31]. See also *SZPAD v MIAC* [2012] FMCA 73 in which an error of law was established on the basis that neither the applicant nor his agent were aware of the existence of new country information which had been published after the applicant's IMR interview and that they were not warned of the IMR's intention to rely decisively on all or some of it. In *MZYPK v MIAC* [2012] FMCA 95, however, the Court found no error in circumstances where the IMR was not aware of new country information, published just five days before its recommendation was made, and held that it should not be regarded as 'constructively' aware of it, and further, that it would not have affected the outcome. The Court was also not prepared to find the IMR should be taken to be aware of country information because it was known to the Department.
[173] *SZQHC v MIAC* [2011] FMCA 851. See also *SZQNF v MIAC* [2011] FMCA 965.
[174] *DZAAQ v MIAC* [2012] FMCA 38.
[175] *SZQIA v MIAC* [2011] FMCA 904.
[176] *DZAAZ v MIAC* [2012] FMCA 39.
[177] *DZAAZ v MIAC* [2012] FCA 1128 [42]–[43]. See also *MZYVM v MIAC* [2013] FCA 79 where the Court held that the substance of the country information that the IMR failed to put to the applicant was either not novel or would have been obvious on the known material.
[178] *SZQJP v MIAC* [2011] FMCA 759 at [37].

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of country information which the IMR regarded as undercutting the applicant's case on a particular issue.[179]

7.5.39 In contrast, in *DZABZ v MIAC*[180] the Court found no error in the IMR's adverse reliance on the entirety of a New York Times report, where the applicant had provided extracts of that report which were supportive of his claims and had chosen to omit other parts of the article. The Court found the advisers were aware of the negative conclusions in the article and had the opportunity to address them in submissions they made.[181]

5) Where information is recent and in relation to an evolving situation

7.5.40 Failing to put recent information about an evolving situation to an applicant can result in a breach of procedural fairness. In *MZYRD v MIAC*[182] the Federal Court found the applicant was not accorded procedural fairness when he was not given an opportunity to respond to very recent information that was only available after the hearing in relation to an evolving situation, namely the situation faced by a failed Tamil asylum seeker in Sri Lanka.

Personal knowledge or experience of the decision maker

7.5.41 Decision makers are entitled to rely upon their own personal knowledge or experience in assessing the applicant's claims.[183] Where that knowledge or experience is adverse to the applicant's claims however, procedural fairness generally requires that the basis on which that knowledge is held and its relevance to the issues be explained so that the applicant is put on notice and given an opportunity to address those matters with the Tribunal.[184]

Substance of the information

7.5.42 Where procedural fairness requires information to be disclosed, it does not usually require disclosure of the actual text or actual documents: what is important is that the *substance* of the information is conveyed, so that the applicant may put

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[179] However, note that in *SZQFY v MIAC* [2011] FMCA 996 the Court held that a failure to disclose information unknown to the applicant will amount to a denial of procedural fairness vitiating the review unless the failure did not result in practical injustice or could have no bearing on the review's outcome. An appeal to this judgment was dismissed: *SZQFY v MIAC* [2012] FCA 486. In contrast in *SZQHC v MIAC* [2011] FMCA 851 the Court found the IMR denied procedural fairness by not affording the applicant an opportunity to address a New York Times report and held it was not necessary for the applicant to present better evidence of 'practical injustice' arising from the failure to invite comment. Further, in *SZQNO v MIAC* [2012] FCA 326, the Federal Court overturned the findings of the Federal Magistrate that there had been no practical injustice arising from the failure of the IMR to put the applicant on notice of relevant country information.
[180] *DZABZ v MIAC* [2012] FMCA 372.
[181] This approach was also adopted in *DZACD v MIAC* [2012] FMCA 373. See also *SZQHH v MIAC* (2012) 200 FCR 223 where the Court found that there was no information of substance of which the respondent had not been on notice about.
[182] See also *MZYRD v MIAC* [2012] FCA 830.
[183] For example, in *AZAFG v MIBP* [2016] FCA 81 at [63], the Court held that it was open to an Independent Protection Assessment Reviewer to refer to their own knowledge of the behaviour of Vietnamese street children and awareness of the Vietnamese language and script when assessing an applicant's claims to have been living on the street and their proficiency in Vietnamese. In *Kolan v MIBP* [2016] FCCA 341, the Court held that it was open to the Tribunal to rely upon the Member's knowledge of the practice of specific education providers to provide Certificates of Enrolment to students who do not hold student visas when assessing the applicant's claim that the specific providers refused to issue him with a CoE.
[184] *Kolan v MIBP* [2016] FCCA 341 at [49].

arguments about its relevance or adduce whatever competing material may be available to him or her.[185]

7.5.43 In *Darabi v MIAC*, for example, the Court found there was no unfairness in circumstances where the substance of the issues and the substance of the country information were put to the applicant.[186] The Court noted there may however be circumstances where the applicant can only have the opportunity to meaningfully respond when he has been given the actual text. Similarly, in *SZQHZ v MIAC* the Court found no error in circumstances where the particular information relied on by the IMR was listed as the country information that was detailed in the RSA Officer's assessment, and provided by the applicant's advisor.[187] Further, in *SZQQD v MIAC* the Court found no error, in circumstances where the IMR wrongly attributed evidence to a DFAT report rather than UNHCR guidelines, on the basis that the applicant had the opportunity to address the information and its source at interview.[188]

7.5.44 However, while there is no absolute obligation to disclose the source of information to an applicant, there may be circumstances where this may be relevant to the question of the reliability of the document.[189] For example, in *SZQFY v MIAC*, in circumstances where the applicant accepted the credibility of the relevant country information, the Court found there was no error in failing to disclose that information to the applicant.[190] Conversely in *SZPAC v MIAC*,[191] the Court found that the supply of documents may be necessary where the issues are raised in such a way, or are of such a character, that the applicant could not respond to them meaningfully without being provided with the documents. In this particular case, the applicant should at the very least have been told it was a UNHCR publication.[192]

Confidential information

7.5.45 For consideration of the obligations to disclose confidential *adverse* information under the statutory regime (ss 359A and 424A), see Chapter 10 – Statutory duty to disclose adverse information.

7.5.46 The scope of the duty to disclose may be narrowed or reduced in relation to confidential information, such as 'dob-in' letters where issues of confidentiality arise, or material where disclosure would be contrary to the national or public interest.[193] In such cases, consideration is given to whether the particular material is truly

[185] *NAVM v MIMIA* [2004] FCA 99 at [33]. This was also confirmed in *Applicant VEAL of 2002 v MIMIA* (2005) 225 CLR 88.
[186] *Darabi v MIAC* [2011] FMCA 371.
[187] *SZQHZ v MIAC* [2011] FMCA 747.
[188] *SZQQD v MIAC* [2012] FMCA 104.
[189] *SZQHH v MIAC* (2012) 200 FCR 223 at [28], [70].
[190] *SZQFY v MIAC* [2012] FCA 486.
[191] *SZPAC v MIAC* [2011] FMCA 517.
[192] See also *Razai v MIAC* [2011] FMCA 777 at [124], [127] (undisturbed on appeal: *Razai v MIAC* [2012] FCA 394 and application for special leave to appeal to the High Court also refused: *Razai v MIAC* [2012] HCATrans 145); *DZADH v MIAC* [2012] FMCA 1112 at [23], [24]; *DZABX v MIAC* [2012] FMCA 1157 at [55]–[58].
[193] See *NAVK v MIMA* (2004) 135 FCR 567 at [87]–[89], where the Full Court cited with approval *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 472; *Ansett Transport Industries Ltd v Secretary Department of Aviation* (1987) 73 ALR 205 at 218; *Sankey v Whitlam* (1978) 142 CLR 1; *Alister v The Queen* (1984) 154 CLR 404 and *Chu v MIEA* (1997) 78 FCR 314.

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confidential or properly the subject of a public interest immunity claim.[194] If it is, the Tribunal considers whether it is possible to reconcile the competing interests of procedural fairness and non-disclosure by disclosing the gist of the relevant material.[195]

7.5.47 In a matter that pre-dated the introduction of s 422B [protection] and 357A [migration], the High Court in *Applicant VEAL of 2002 v MIMIA* held that in situations where the Tribunal is given confidential adverse information that is *credible, relevant and significant* to the decision to be made, the Tribunal is under an obligation to provide the substance of such information for comment as a matter of procedural fairness.[196] The High Court found that the Tribunal denied the applicant procedural fairness in failing to put the substance of information contained in a 'dob-in letter' to him for comment, even though the Tribunal, in its reasons stated that it put no weight on the letter and reached its conclusions by other means.

7.5.48 The High Court emphasised that general principles of procedural fairness focus on *procedures* rather than *outcomes* such that it was irrelevant that the Tribunal ultimately gave no weight to the adverse information. The Court recognised that there was a public interest in ensuring that information supplied by an informer was not denied to the Executive government and to that effect considered the public interest could be accommodated with principles of procedural fairness by providing the applicant with the substance of the allegations in the letter, but not revealing their source or how they had been received.[197]

Adverse conclusions

7.5.49 The Tribunal is not required to invite comment on its thought processes on the way to its decision.[198] In *MIAC v SZGUR* the Court observed, for instance, that the exclusion of a requirement for the Tribunal to put inconsistencies and contradictions

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[194] *NAVK v MIMA* (2004) 135 FCR 567 at [90]. At first instance (*NAVK v MIMA* (2004) 78 ALD 142) the Court found that a failure to make inquiries as to confidentiality could, in some circumstances, amount to a breach of procedural fairness where the information was readily available and 'centrally relevant' to the decision to be made. Although this decision was ultimately overturned by the Full Federal Court, it was on different grounds. The Full Court did not decide whether the Tribunal was obliged to exercise its power under s 427 and make inquiries. In *Elhamid v MIAC* [2011] FMCA 386 the Court considered the distinction in the authorities between issues of national security and individual informants and found this distinction became insignificant where the identity of an informant placed the individual potentially in a position of great personal harm should their identity be known. The Court determined the application for public interest immunity be granted on the basis that the release of the relevant documents could put in jeopardy the physical safety and wellbeing of the informant.

[195] *NAVK v MIMA* (2004) 135 FCR 567 at [88]. In *Louis-Jean v MIAC* [2010] FMCA 710, the Court left open the possibility of a residual common law obligation to provide the applicant with the substance of a dob-in letter while finding that the Tribunal had given the applicant the information in the dob-in letter that could be regarded as credible, relevant and significant in the context of the Tribunal having put the substance of the information to the applicant under s 359A and expressly stating in the decision record that it gave no weight to the letter. For further discussion on the statutory duty to disclose see Chapters 10 – Statutory duty to disclose adverse information and 31 – Restrictions on disclosing and publishing information.

[196] *Applicant VEAL of 2002 v MIMIA* (2005) 225 CLR 88. See also *SZGCK v RRT* [2007] FCA 1247 at [22]–[25]; *S142 v MIAC* [2007] FMCA 582.

[197] *Applicant VEAL of 2002 v MIMIA* (2005) 225 CLR 88 at [24]. Note that the Tribunal decision in this case was not subject to s 422B of the Migration Act and so the High Court limited its reasoning to general principles of procedural fairness and left open the nature of the obligation where the decision is subject to s 422B.

[198] *Re MIMIA; Ex parte Applicant S154/2002* (2003) 201 ALR 437 at [54], [85]–[86] referring to *Commissioner for ACT Revenue v Alphaone P/L* (1994) 49 FCR 576 at 592. See also *WAGU v MIMIA* [2003] FCA 912 at [36]; *NAEQ v MIMIA* [2003] FMCA 482 at [48]; *WACO v MIMIA* (2003) 131 FCR 511 at [46].

in an applicant's testimony and written submissions to the applicant in a s 424A invitation is consistent with the limits on procedural fairness at common law.[199]

7.5.50 However, this general proposition is qualified by the principle that a decision-maker is required to advise applicants of any adverse conclusion which would not obviously be open on the material supplied by or known to the applicant, or not an obvious and natural evaluation of that material.[200] An applicant should not be left 'in the dark' as to the risk of an adverse finding being made and thus deprived of any opportunity to adduce additional material of probative value.[201] Whether failure to alert an applicant to the possibility of an adverse conclusion is unfair will depend upon consideration of the full circumstances of the case.

7.5.51 The High Court has observed that the fact that the Tribunal is not required to expose its thought processes or provisional views for comment before making a decision is not to say that the Tribunal cannot or should not, when exercising its discretion, invite a review applicant to make submissions in relation to apparent inconsistencies or contradictions which have been identified by it. Once issued, such an invitation may amount to a binding indication that the review process will not be concluded until the applicant has had an opportunity to respond.[202]

Misleading the applicant

7.5.52 The Tribunal endeavours to act in a transparent manner so that applicants are not misled in a way that denies them an opportunity to present evidence in support of their case. For example, if the Tribunal indicates to an applicant that it will write to him or her or indicates that it will need to hold a further hearing, or give the opportunity to provide further submissions, but then doesn't complete this action without putting the applicant on notice that it has changed its mind, the Tribunal may deprive the applicant of procedural fairness.

7.5.53 In this regard, in *Applicant NAFF of 2002 v MIMIA* the High Court found that there was a breach of procedural fairness where the Tribunal gave an undertaking at the end of the hearing that it would give the applicant a further opportunity to address inconsistencies in his evidence but failed to do so, and made a decision without giving any further opportunity or explaining why it had changed its approach.[203]

7.5.54 Similarly, in *SZQEF v MIAC*[204] the Court found the applicant was denied procedural fairness where, at interview, the IMR had indicated it would wait for evidence to be submitted before finalising its recommendation and the IMR's reasons were based

[199] *MIAC v SZGUR* (2011) 241 CLR 594 at [9].
[200] *MIAC v SZGUR* (2011) 241 CLR 594 at [9]. See also *NAEQ v MIMIA* [2003] FMCA 482 at [48]–[49] and cases there cited; see also *Re MIMA; Ex parte Applicant S154/2002* (2003) 201 ALR 437 at [48], [86]; see also *NAJK v MIMIA* [2004] FCA 163, *Djalic v MIMIA* [2003] FMCA 569; *SZFDK v MIMA* [2006] FMCA 1692 at [43].
[201] *Re RRT; Ex parte Aala* (2000) 204 CLR 82 at [78] referring to *Mahon v Air NZ Ltd* [1984] AC 808 at 821.
[202] *MIAC v SZGUR* (2011) 241 CLR 594 at [9].
[203] *Applicant NAFF of 2002 v MIMIA* (2004) 221 CLR 1. See also *NBID v MIMIA* [2005] FMCA 653 at [47] in which the Court, in similar circumstances to those in *Applicant NAFF of 2002,* found that the Tribunal breached procedural fairness by making an undertaking at the hearing that if it had any problems with the applicant's evidence, it would give the applicant an opportunity to comment which it did not do; and *SZGSG v MIAC* (2009) 109 ALD 567, where the Tribunal indicated that it would write to the applicant with the results of further enquiries it was planning to undertake, but failed to so, or otherwise inform the applicant, when those enquiries proved fruitless.
[204] *SZQEF v MIAC* [2012] FMCA 33.

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on what was conceded to be a mistaken premise that the IMR had written to the applicant and requested that evidence.

7.5.55 However, in *SZRAE v MIAC*[205] the Court distinguished *Applicant NAFF of 2002* on the facts and found that the IMR said nothing at the hearing or in the subsequent correspondence to suggest that they would feel a need to invite further comments from the applicant, nor that they would do so, before writing the decision. The Court also found there was no evidence that either the applicant or the applicant's agent were ever left under any impression that they would be invited to make further submissions in the event that the IMR did not view favourably the documents submitted to him after the interview.[206]

7.5.56 The failure to follow foreshadowed procedures may not always, of itself, constitute procedural unfairness. For example, in *SZQVK v MIAC*, the Court distinguished *Applicant NAFF of 2002* on the facts and found that there was no denial of procedural fairness in circumstances where the Tribunal decided not to proceed with inquiries which were foreshadowed at the hearing. The Court commented that the outcome in *Applicant NAFF of 2002* was not based on a duty to complete a foreshadowed procedure, but upon a duty not to reach a decision which forgot the previous impression that further evidence was needed from the applicant.[207] Where the applicant is made aware that the Tribunal no longer proposes to proceed as indicated and is given an opportunity to provide any further evidence or submissions, this may not constitute procedural unfairness.[208]

7.5.57 Examples of where the Tribunal and the IMR have been found to have denied applicants procedural fairness by misleading them include where the Tribunal and the IMR:

- failed to inform an applicant that a new member would complete a review following the reconstitution of the Tribunal;[209]
- misled the applicant as to the issues[210] or into believing that a matter was no longer in issue;[211]

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[205] *SZRAE v MIAC* [2012] FMCA 409 at [58]–[59]. Undisturbed on appeal: *SZRAE v MIAC* [2012] FCA 916.
[206] See also *Gungor v MIAC* [2011] FMCA 516 where the Court found the Tribunal had not made a representation so clear, unambiguous and unqualified that it would provide the applicant with a legitimate expectation that the comments which he made to the Tribunal would be passed to the Independent Expert for her consideration. See also *DZAAB v MIAC* [2012] FMCA 295 at [14]. Upheld on appeal: *DZAAB v MIAC* [2012] FCA 999.
[207] *SZQVK v MIAC* [2012] FMCA 474 (Smith FM, 29 May 2012) at [42].
[208] *Re MIMIA; ex parte Lam* (2003) 216 CLR 212. See Gleeson CJ at [34] where His Honour stated 'what must be demonstrated is unfairness, not merely departure from a representation' and that 'the ultimate question is whether there has been unfairness.' Similar statements were made by McHugh and Gummow JJ at [103] and Hayne J at [111]. See also *ABZ16 v MIBP* [2018] FCA 412 at [21]–[25] where the Court held that it was procedurally unfair to tell the applicant it would make enquiries to the International Committee of the Red Cross (ICRC) to verify a document, not tell the applicant that it was told by the ICRC that the applicant should make their own enquiries and then, following reconstitution to a different member, place no weight on the document without informing the applicant.
[209] *SZARJ v MIMIA* [2004] FMCA 557. Although the Court agreed that there was no obligation to hold a further hearing, the applicant claimed that, had she known of the reconstitution, she would have requested a hearing before the new member. In view of the adverse credibility findings made by the second member, the Court found that the importance the applicant placed on personally meeting with the Member was not misguided.
[210] See for example, *MZYNV v MIAC* [2011] FMCA 790 where the Court found that a 'natural justice letter' sent by the IMR misled the applicant to believe that the relevant issue would be whether he could 'relocate to Kabul', not whether Kabul was a place that he could 'return' to. The Court held it was unfair to divert the applicant's attention so that his submissions focused on the issue of reasonableness, and had this not occurred, the applicant's submissions may have concentrated on the risk of persecution thereby affecting the outcome of the recommendation (at [84]–[85]). See also *SZRBZ v MIAC* [2011] FMCA 537 where the Court found that the applicant was not denied procedural fairness in circumstances where the IMR had not construed country information relating to failed asylum seekers returning to Iran in the same way as the Tribunal had in a decision. The

- misled the applicant into believing that evidence or a claim had been accepted;[212]
- dissuaded the applicant from tendering further evidence in relation to a matter which is subsequently a part of the reason for affirming the delegate's decision;[213]
- misled the applicant into expecting that there would be the opportunity to provide final written submissions;[214]
- deprived the applicant of an opportunity to make a submission at interview as to why an adverse inference should not be drawn from an examination of particular evidence which corroborated the applicant's claims,[215]
- deprived the applicant of a fair opportunity to present evidence to the Tribunal by failing to respond to the applicant's email offering to obtain documents.[216]

Rejection of corroborative evidence

7.5.58 Applicants may put forward various types of evidence to corroborate their claims, including reports from professionals such as medical doctors, psychologists and social workers, oral or written evidence from friends, family and associates attesting to the truth of the applicant's claims, and various forms of documentation and other evidence. The issue that most commonly arises in respect of such documentation is the authenticity or reliability of the corroborative evidence.

7.5.59 The Tribunal properly considers corroborative evidence and may, after considering it, then reject that evidence.[217] The relevant factors in relation to corroborative evidence include first, the cogency of the evidentiary material and, second the place of that material in the assessment of the applicant's claims.

7.5.60 Whether the Tribunal has properly considered evidence and whether a failure to consider the evidence is material to the outcome, will turn on the facts of each

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Court held that consideration of the information cited by the Tribunal disclosed that the conclusion it reached was not the only one open and the IMR's reasoning and conclusion did not introduce a new issue which procedural fairness required be identified to the applicant.

[211] *SZHAI v MIAC* [2008] FMCA 49; *NAAG of 2002 v MIMIA* [2003] FCAFC 135.

[212] *MIMIA v SGJB* [2003] FCAFC 290; *SZAQH v MIMIA* [2004] FMCA 408; *VHAX v MIMIA* [2005] FMCA 270.

[213] *Applicant S298/2003 v MIAC* [2007] FCA 1793 where the Tribunal misled the appellant into believing that tendering of an original would not advance his case. The Court found that that advice was, on the Tribunal's own reasoning, wrong. An original document could have been investigated and if established as authentic, might have led the Tribunal not to make adverse credibility findings against the appellant.

[214] *SDAF v MIMIA* [2003] FCAFC 127.

[215] *WZARB v MIAC* [2013] FCA 523. In that case, the Federal Court accepted that in respect of the applicant's claims of former employment the IMR had undertaken to look at the original of the applicant's work ID card and revert to the applicant in the event that this disclosed anything adverse to his interests, but then did not do so.

[216] *SZUON v MIBP* (No 2) [2019] FCA 348 at [58] where the Court found that Tribunal misled the applicant by failing to respond to the applicant's email that they would lodged a freedom of information application with the department to obtain documents for their review if the member wished. In the Tribunal's decision it noted that the applicant's agent said he would seek documents through FOI but the Tribunal had not received any further material. The Court held that the Tribunal's silence suggested that the Tribunal did not require the appellant to obtain the documents.

[217] *SZGKX v MIAC* (2007) 94 ALD 604. In this case, the applicant had submitted specific media reports which substantiated his claim. The Tribunal, in its decision, noted that the applicant had provided 'various media reports' and gave them no further consideration. The Court held that the Tribunal erred by failing to take into account relevant material corroborating the appellant's claims and this 'reflected an extent of confinement in the requisite width of approach required in the light of those facts and circumstances': at [32]. See also *AVC16 v MIBP* [2018] FCA 1238 at [38]–[42] where the Court held that the Tribunal erred by refusing a review applicant's request for it to watch a video regarding current affairs in his country. This was because the information in the video was found to be relevant and probative to the review applicant's claims, and the Tribunal disregarded it without sufficient reason. The Court reasoned that if the video evidence was viewed, it may have led to the Tribunal accepting the review applicant's claims.

matter. For example, in *MIAC v MZYZA* the Federal Court did not consider that the mention of document fraud during the hearing was insufficient to lead to a conclusion that the Tribunal actually decided that a letter was fraudulent where there was no further reference to that letter within its Findings and Reasons.[218] In upholding the Minister's appeal, the Federal Court accepted that it would be inappropriate to draw the inference that the letter had not been considered where it had been referred to and the applicant questioned on its contents. Whatever the Tribunal's reasons were for not referring to it further, the Federal Court was of the view that it could not have been inferred that the contents of the letter had not been considered. In *MIAC v SZRKT* the Federal Court found the Tribunal did not consider an academic transcript, the matter to which that transcript went to founded the Tribunal's rejection of the applicant's claims on the basis that he had been untruthful, and given the significance of the material to the decision, the Tribunal had erred.[219]

7.5.61 In some instances, the Tribunal may undertake further enquiries before rejecting corroborative evidence.[220] For instance, in *MZYID v MIAC*[221] the Court held the Tribunal erred when, in rejecting a witness statement as a forgery, it did not contact the overseas witness on a telephone number provided. The Court found the Tribunal failed to properly have regard to a statement by the applicant's solicitor that she had spoken to the witness, and he had agreed to make himself available to give evidence. Although, in *SZRPM v MIAC*[222] the Court found the Tribunal was not obliged to make inquiries with witnesses, in relation to corroborative documents as its reasons for not doing so was on probative material which supported the conclusion that it would not be of relevant utility to do so. It is also noteworthy that the Tribunal made no findings as to fraud or even forgery in relation to the documents in this case and instead its findings were that the documents did not contain truthful information.

Determining how much weight to give evidence

7.5.62 The question of weight to be given to a document is a matter for the Tribunal.[223] In *MIAC v SZJSS*, for example, the plurality of the High Court found no error in the Tribunal giving 'no weight' to documentary evidence produced by the respondent, which it accepted as genuine, on the basis that its content was undermined by the

[218] *MIAC v MZYZA* [2013] FCA 572 at [47]–[48].
[219] *MIAC v SZRKT* (2013) 212 FCR 99. In that case, the Court held that the Federal Magistrate did not err in concluding that the Tribunal had given no consideration to the transcript: *SZRKT v MIAC* [2012] FMCA 950. The Court found that the relevance of the transcript to the claimed study was so high that the obvious inference from the absence of reference to the document, that the Tribunal did not take it into account, was not outweighed by general references to material on the files. By way of contrast, in *CTU15 v MIBP* [2017] FCA 1445 at [13]–[14] the Court held that the Tribunal had not erred when it did not explicitly consider the appellant's evidence about a leg injury (which formed part of his claim to fear harm from followers of a different religion) in circumstances where the Tribunal had made comprehensive findings rejecting the appellant's credibility and accepted that he had sustained the said injury. The Tribunal also rejected the applicant's offer to view the injury. The Court reasoned that explicit consideration of the injury would not have established how it had been sustained and could not have affected the credibility findings.
[220] *SZMWI v MIAC* (2009) 111 ALD 160. Contrast with *SZNIQ v MIAC* [2009] FMCA 549 where the Court found that as the Tribunal had made clear and definite findings about the applicant's lack of credibility in relation to his essential claims, it was open to it to give no weight to the corroborative documents.
[221] *MZYID v MIAC* [2010] FMCA 749 at [39].
[222] *SZRPM v MIAC* [2012] FMCA 1142. Upheld on appeal: *SZRPM v MIAC* [2013] FCA 196.
[223] *MIAC v SZNPG* (2010) 115 ALD 303 at [24].

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respondent's own evidence.[224] The High Court held that the value of the documents was a question on which reasonable minds may differ and that the Tribunal's preference for other evidence over the documents could not be said to constitute a failure to take into account a relevant consideration, or a failure to respond to a substantial argument or to result in a conclusion that was manifestly irrational or unreasonable.[225]

7.5.63 Similarly, in *MIAC v MZYHS* the Federal Court found that it was for the Tribunal to determine the weight to be given to an expert psychologist's opinion, having regard to the other evidence before it that supported or undermined the supposed facts on which the opinion was said to be based.[226] Given its 'major concerns' with the respondent's credibility, it was open to the Tribunal to find that, insofar as the report and the other evidence tended to corroborate the respondent's account, they were to be given little if any weight.

7.5.64 A corresponding example can be seen in *MZYJN v MIAC*[227] which concerned the manner in which the Tribunal dealt with a police report, in giving some but reduced weight to the report and yet rejecting the point to which the report was directed. The Court found the Tribunal probably intended that in balancing and assessing all of the evidence, the police report was not sufficient to overcome the impression gained by the Tribunal from the applicant's evidence. However, the Court commented that the Tribunal could have more clearly expressed this in its findings and reasons to demonstrate it was engaged in a balancing exercise.

7.5.65 After weighing a particular piece of evidence against other material, the Tribunal is not obliged to reach a different conclusion simply because that evidence supports an applicant's case.[228]

7.5.66 Where the Tribunal has reached a tentative conclusion that an applicant's claims have been fabricated, the Tribunal is entitled to reject evidence which would, if accepted, have corroborated the applicant's account.[229] However whether corroborative evidence can be rejected out of hand depends upon the nature, content and quality of that evidence.[230] See for example *SZNYF v MIAC*[231] where the Federal Court found that the Tribunal erred in its consideration of an official document bearing the seal of the relevant authority that on its face appeared to be genuine.

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[224] *MIAC v SZJSS* (2010) 243 CLR 164) at [33]–[37].
[225] See also *MZYUV v MIAC* [2013] FCA 498, where the Court commented that it would have been preferable if the Reviewer had made some more detailed analysis of the documents in question, but confirmed that provided documents are not disregarded, their weight is a matter for the decision maker.
[226] *MIAC v MZYHS* [2011] FCA 53 at [31]. See also *MZZFS v MIAC* [2013] FCCA 576, where the Court found no error in the Tribunal's consideration that submitted psychologist reports were diminished by their narrow focus and lack of analysis and were therefore given some, but not substantial, weight.
[227] *MZYJN v MIAC* [2011] FCA 548. Special leave to appeal from *MZYJN* was dismissed on the basis the application did not advance any questions of law: *MZYJN v MIAC* [2011] HCASL 140.
[228] *MIAC v SZNPG* (2010) 115 ALD 303 at [25]. The Full Federal Court observed at [26] that jurisdictional error is not established where the reasons for rejecting corroborative evidence are briefly expressed.
[229] *MIAC v SZNSP* (2010) 184 FCR 485 at [36].
[230] *MIAC v SZNSP* (2010) 184 FCR 485 at [36].
[231] *SZNYF v MIAC* [2010] FCA 839.

According little or no weight to the evidence

7.5.67 Corroborative evidence may be rejected after properly considering the material.[232] Where corroborative evidence tendered by an applicant is rejected as *of no weight* because it is dependent upon and can be shown to be undermined by findings as to the applicant's credibility, procedural fairness does not require the Tribunal to first put to the applicant that the evidence may be so regarded.[233] This is an example of the general proposition that procedural fairness does not require the Tribunal to invite comment upon its thought processes on the way to its decision.[234]

7.5.68 It is open to the Tribunal to first assess an applicant's credibility and then, in light of that assessment, consider what weight to give to corroborative documents.[235] For example, in *MIAC v SZNSP* the Federal Court commented that, in circumstances where the provenance of a document is unproved but it is proffered by a witness whose credibility has been destroyed, the document has no more credit than the person proffering it.[236] As a result, the Court found that the Tribunal did not act irrationally by giving no weight to a potentially corroborative witness statement which had been provided by an applicant who lacked credibility.

7.5.69 However, the Federal Court in *SZNYF v MIAC* also observed that it may be possible for evidence of an applicant before the Tribunal to result in adverse credibility findings but nonetheless the applicant be the genuine recipient of a particular document, in this case, a valid summons.[237] In this case, the Court found that the Tribunal erred in failing to consider whether the applicant had been the subject of a valid summons and explaining why it decided to place no weight on the document.

Rejection of evidence on the basis of fraud or fabrication

7.5.70 Where corroborative evidence is rejected on the basis of a positive finding of fraud, forgery, fabrication or on some other positive basis which has never been put to the applicant, there may be a breach of procedural fairness.[238] See for example, *MIBP*

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[232] In *BRGAN of 2008 v MIAC* (2009) 112 ALD 617 at [25], the Court found the Tribunal had not undertaken a sequential reasoning process despite its reasons being expressed in that manner but had taken into account the corroborative evidence before rejecting the applicant's claims. See also *SZRQR v MIAC* [2013] FMCA 21; *SZIYX v MIAC* [2007] FMCA 308 at [66], *SZRCY v MIAC* [2013] FMCA 51; *Chen v MIAC* [2011] FCAFC 56; and *Shah v MIAC* [2011] FMCA 18.
[233] *WAGU v MIMIA* [2003] FCA 912 at [36]; see also *WACO v MIMIA* (2003) 131 FCR 511 at [41], *NAAK of 2002 v MIMIA* (2004) 3 FCR 663 at [31] and *WAJR v MIMIA* (2004) 204 ALR 624 at [56]: 'It may be that procedural fairness would not require the Tribunal to invite comment prior to finding no more than that it was not satisfied about the reliability or genuineness of particular documents'.
[234] *WAGU v MIMIA* [2003] FCA 912 at [36] and *WAEJ v MIMIA* (2003) 76 ALD 597.
[235] *Re MIMA; Ex Parte Applicant S20/2002* (2003) 198 ALR 59 at [49]; *MIAC v SZNSP* (2010) 184 FCR 485 at [37]. This approach was followed in *SZNXI v MIAC* [2010] FMCA 535; *AZAAY v MIAC* [2010] FMCA 903; *SZONR v MIAC* [2011] FMCA 89 at [37], [54], [57] and [88]; *SZRRM v MIAC* [2013] FCA 809 and *SZTND v MIBP* [2015] FCA 115.
[236] *MIAC v SZNSP* (2010) 184 FCR 485 at [36].
[237] *SZNYF v MIAC* [2010] FCA 839 at [26].
[238] *WAGU v MIMIA* [2003] FCA 912 at [36] followed in *SZBZN v MIMIA* [2006] FMCA 27 at [11]. See also *MIMIA v SZEBA* [2005] FCAFC 216 at [25]–[26] in which the Court held the Tribunal denied procedural fairness when it failed to offer reasons why a medical certificate presented in support of the respondent's claims had been found to be false or prepared according to his instructions and failed to put the question of the authenticity of the document to the respondent for comment; and *SZMUK v MIAC* (2009) 112 ALD 295 in which the Court held, without considering s 422B, that there was a denial of procedural fairness as the appellants had not been warned that evidence submitted would be treated as untrue unless corroborated: at [17]. Notwithstanding this, the Court's finding would equally support a conclusion of breach of s 425. See also *SZNWY v MIAC* [2009] FMCA 1224.

v Ly[239] where the Court held that the issue of the genuineness of hotel receipts, which were provided after the hearing for the purpose of corroborating a claim, needed to be put to the review applicant at a new hearing. The Tribunal rejected that the receipts were genuine based on their appearance and placed little weight on them. While it was clear that the Tribunal wanted to see receipts, the Court rejected that it was obvious that an issue may arise about the genuineness of the receipts, and as such the Tribunal was required to put its concerns to the review applicant at a hearing. In contrast, however, the Full Federal Court in *MIAC v SZMOK*[240] found there was there was no procedural unfairness in the Tribunal's treatment of the applicant's evidence as the Tribunal made it abundantly clear to the respondent that it did not believe the very late claim he was making, was reluctant to give him time to provide further material and that even if documents were provided, the Tribunal may not accept them. In doing so, the Full Federal Court noted that there was no general rule that the Tribunal could not make a finding that a document was not genuine without specifically referring the applicant to its concerns about the document.

7.5.71 Where it is thought that corroborative evidence has been concocted, and in that sense affects the applicant's credibility, the Tribunal generally gives the applicant the opportunity to respond.[241] In *SZGTZ v MIAC*[242] the Tribunal refused to give weight to corroborative statements from the applicant's mother and uncle because it found they were a 'self-serving fabrication written expressly for the purpose of enhancing the applicant's claim to be a refugee'. The Court found that the Tribunal was required to raise with the applicant its concerns that the documents were a fabrication and ask him to comment upon them.

7.5.72 Further, where the finding of fact does not turn upon an applicant's credibility and where there is nothing on the face of the documents themselves to alert the decision maker that they are forgeries, the Tribunal would generally afford the applicant the opportunity to respond to the conclusion that they are not genuine (so as to avoid a finding that it was unfair).[243]

Corroborative evidence from witnesses

7.5.73 The Tribunal generally takes corroborative evidence from a nominated witness, who is available at hearing, where their evidence is relevant to the applicant's case and there is a possibility that those claims to which the evidence of the witness relates will be rejected.[244] However, where the material the nominated witness is expected

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[239] *MIBP v Ly* [2018] FCAFC 123 at [44]–[45]. See also *WZANF v MIAC* [2010] FMCA 110 at [60]–[61], [81], [130] where the Court found the Tribunal failed to comply with s 425 because it did not allow an applicant the opportunity to make submissions or raise arguments on the authenticity of critical documents containing relevant material. The Court found their authenticity was not clearly put in issue by requiring an original document to verify a copy, there was nothing on the face of the documents to indicate that they were not authentic or to cast doubt on their authorship, and the documents were not inconsistent with the applicant's account.
[240] *MIAC v SZMOK* (2009) 257 ALR 427.
[241] *WACO v MIMIA* (2003) 131 FCR 511 at [53]. See also *NATS v MIMIA* [2005] FMCA 221 and *QAAR v MIMIA* [2005] FCA 1818.
[242] *SZGTZ v MIAC* [2007] FMCA 1898.
[243] *WACO v MIMIA* (2003) 131 FCR 511 at [54]; *SZBZN v MIMIA* [2006] FMCA 27 at [10].
[244] See, for example, *WAGO v MIMIA* [2004] FMCA 412 at [52]–[53] where the Court found that the Tribunal breached procedural fairness in refusing to obtain evidence from a witness at the hearing who had previously supplied a written statement, where the witness' evidence was relevant and available. The Court found the Tribunal should have accepted the

to give may affect whether the Tribunal is required to take evidence from them. In this regard, in *Chen v MIAC* the Court found no error in the Tribunal's decision not to take oral evidence from witnesses who had already provided written declarations, in circumstances where the applicant had not given notice under s 361(2) [s 426(2)], the applicant's agent had confirmed to the Tribunal their evidence was confined to the matters already referred to in their declarations, and the Tribunal accepted the evidence of those witnesses.[245]

7.5.74 As with all corroborative evidence, the Tribunal undertakes a proper consideration of relevant witness evidence that is given. If the Tribunal subsequently declines to give weight to such evidence, the Tribunal generally sets out in the decision record why it has taken this course. In *SZIEW v MIAC* the Court found that the Tribunal's rejection of witness evidence merely because it was of a hearsay character and the primary witness was un-examinable was irrational because, if properly considered and accepted, that material could have directly affected an assessment of the applicant's claims.[246] Further, in *SZQVM v MIAC*[247] the Court held that if the Tribunal is provided with relevant probative evidence which is hearsay, it must consider what weight it can put upon that evidence.

7.5.75 In situations where an applicant does not attend a hearing, but forwards a submission containing corroborative documents, the Full Federal Court has held that it is not a denial of procedural fairness if, having declined to attend the hearing, the applicant is taken to have assumed the risk that inconsistencies, omissions or other unsatisfactory features of his documents would be noted by the Tribunal without his having an opportunity to explain or clarify them.[248]

7.5.76 Further, if the applicant already knows that the authenticity of documents is clearly an issue to be determined by the Tribunal, it might not be a failure of natural justice for the Tribunal to advise the applicant that, subject to any submissions which the applicant was permitted to make, the Tribunal was likely to find any further documents to be forgeries.[249]

7.5.77 See Chapter 17 – Requests to call witnesses for further guidance on requests to call witnesses and obtain documents.

Failure to inquire

7.5.78 There may be circumstances in which a failure to make an obvious inquiry about a critical fact, the existence of which is readily ascertained, could constitute a failure to conduct a review or be otherwise so unreasonable as to support a finding that the

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offer of the witness' evidence once it made findings rejecting the applicant's evidence and the witness' corroboration of that evidence. See also *Haidari v MIAC* [2009] FMCA 1178; *MZYID v MIAC* [2010] FMCA 749 at [39]; and *DZAAN v MIAC* [2012] FMCA 37 at [114].

[245] *Chen v MIAC* [2011] FCAFC 56.

[246] *SZIEW v MIAC* (2008) 101 ALD 295 at [16].

[247] *SZQVM v MIAC* [2013] FCA 5.

[248] See *S58 of 2003 v MIMIA* (2004) 85 ALD 492 at [25]. The Court held that once the applicant declined to attend the hearing, it was not required to bring to his notice each matter which caused it to have reservations about the authenticity or truth of the contents of a particular document. The Tribunal was entitled to treat him as having elected to rely solely on the documents without the support of oral testimony or submissions (at [27]).

[249] *NADC v MIMIA* [2003] FCA 201 at [23].

Tribunal's decision is infected by jurisdictional error.[250] However, the High Court in *MIAC v SZIAI* observed, it is difficult to see any basis upon which a failure to inquire could constitute a breach of the requirements of procedural fairness at common law.[251]

7.5.79 Failing to make an enquiry which, even if undertaken, could not have affected the outcome of the Tribunal's decision may not amount to a jurisdictional error.[252]

7.5.80 Examples of scenarios in which the Court has found failure to make obvious inquiries about factual material include the Tribunal:

- not accepting an untranslated document from an applicant and not obtaining a translation of a document or giving the applicant a reasonable opportunity to do so in circumstances where the Tribunal had already accepted the applicant's factual claim of kidnapping as true;[253]
- not making any enquires with the Department as to the existence of the 'full record of the [applicant's] airport interview' in circumstances where the applicant had requested it in response to a s 424A invitation summarising the interview;[254]
- failing to make further inquiries about a critical fact in circumstances where the Tribunal proceeded to decision in the absence of a reply from the appellant to a s 359A/359(2) letter, coupled with the ease with which such inquiry could be made, the paucity of facts on an issue critical to the eventual finding (being whether the Tribunal was positively satisfied that there were no exceptional circumstances);[255]
- failing to contact a witness in circumstances where the applicant supplied the Tribunal with the telephone number of the witness whose statement the Tribunal rejected without contacting the witness.[256]

7.5.81 In contrast, examples of scenarios in which the Courts have found no such duty include:

- where the Tribunal did not to make inquiries of the applicant's mother who had been named as a proposed witness and the Court found there was

[250] *MIAC v SZIAI* (2009) 259 ALR 429 at [25]. Without conclusively deciding, the Court in *SZNWA v MIAC* [2010] FMCA 21 observed that 'some circumstances' as described in *SZIAI* could encompass the relevant circumstance in *MIAC v Le* (2007) 164 FCR 151 (i.e., that in certain rare or exceptional circumstances, the Tribunal's failure to enquire may ground a finding of jurisdictional error because the failure may render the ensuing decision manifestly unreasonable).
[251] *MIAC v SZIAI* (2009) 259 ALR 429 at [26]. See also *MIEA v Teoh* (1995) 183 CLR 273 at 290.
[252] *SZRGW v MIAC* [2012] FMCA 701 at [35]–[36]. Undisturbed on appeal in *SZRGW v MIAC* [2013] FCA.
[253] *SZRGW v MIAC* [2012] FMCA 701 at [29]. The Court held that in those circumstances there remained a critical issue of the motivation of the kidnappers, and unless it was plain that the document did not bear on the issue, the Tribunal erred in not receiving the document, and obtaining, or allowing the applicant to obtain a translation. Undisturbed on appeal: *SZRGW v MIAC* [2013] FCA. An application for special leave to appeal to the High Court was dismissed: *SZRGW v MIAC* [2013] HCASL 110.
[254] *SZMYO v MIAC* [2011] FCA 506. The Court found the Tribunal denied the applicant a meaningful opportunity to respond the s 424A invitation, and should have exercised its power under s 427(1)(d) [s 363(1)(d)] to require the Minister to arrange for an investigation to be made and then report back to the Tribunal. The possibility of a successful outcome for the applicant had the audio recording been before the Tribunal could not be discounted as the transcript of the audio recording was in significant respects different to the summary of the airport interview.
[255] *Khant v MIAC* (2009) 112 ALD 241. The error was characterised as failure to conduct a proper review.
[256] *SZNIL v MIAC* [2009] FMCA 883. The Court found the opinion of the witness bore on the applicant's credibility, which was central to the outcome of the review and could have easily been ascertained by the Tribunal.

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nothing the applicant's mother might have said that was likely to have been critical to the Tribunal's reasoning process;[257]

- where the Tribunal did not make inquiries to verify a document which had not been signed nor checked by the author as neither the contact details nor confirmation of the author were critical facts that would have made any material difference to the way in which the Tribunal discharged its obligation to review;[258]
- where the Tribunal did not make inquiries to verify a document in circumstances where independent evidence indicated document fraud;[259]
- where the Tribunal had not been referred to a particular document but simply invited to follow a hyperlink to an internet web page and to find for itself what might be there and to gauge for itself what might be relevant;[260]
- where the Tribunal did not inquire about conflicting evidence from the same source and there was no evidence to demonstrate what information the Tribunal would have gleaned had it made that enquiry, and no basis to conclude that such an enquiry would have produced evidence which might have led the Tribunal to make a different decision;[261]
- where the Tribunal did not make inquiries about the applicant's brother's successful protection visa application, in circumstances where there was no explanation as to why the applicant deliberately did not put the relevant reasons for the brother's successful decision before the Tribunal at the hearing.[262]

7.5.82 For a further discussion on the issue of inquiries see Chapter 11 – Power to obtain information.

Practicable administrative or procedural steps

7.5.83 There is, some suggestion in the case law that a failure to take a reasonably practicable administrative or procedural step could result in a denial of procedural fairness. In *SZJBA v MIAC*,[263] for example, the Tribunal received a fax in response to a request to provide information which did not appear to contain all the pages noted on the coversheet. The Court found that the Tribunal should have telephoned to confirm whether an error in transmission had occurred and have all the pages sent through.[264] The Court's finding in *SZJBA* appears to go beyond the usual

[257] *WZARE v MIAC* [2013] FCA 122 at [58]. The Court was of the view that even if the Tribunal had heard from her directly, it would have received no information additional to that which the applicant had provided to the Tribunal about the nature of some threatening phone calls.
[258] *AZAAY v MIAC* [2010] FMCA 903.
[259] *AAO15 v MIBP* [2015] FCCA 2365 at [23].
[260] *SZQVH v MIAC* [2012] FMCA 246. The Court found that the Tribunal although the inquiry was obvious and simple to undertake, the relevant documents had no determinative relevance. See also *Nguyen v MIAC* [2010] FMCA 847.
[261] *Singh v MIAC* [2013] FMCA 222.
[262] *AME15 v MIBP* [2015] FCCA 3082. The Court expressed difficulty in this case with the judgment in *AZAFM v MIBP* [2015] FCCA 2831 which found otherwise in similar circumstances. *AZAFM v MIBP* does not accord with other authorities such as *SZMXS v MIAC* [2009] FMCA 537 and should be treated with caution.
[263] *SZJBA v MIAC* (2007) 164 FCR 14.
[264] *SZJBA v MIAC* (2007) 164 FCR 14 at [60].

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categories of jurisdictional error. However, where possible the Tribunal seeks to act consistently with the Court's views.

7.5.84 If, for example, an applicant appears to assume that certain evidence has been received by the Tribunal but such evidence is not on the file, the Tribunal may contact the applicant to alert them to the fact that the evidence has not been received. In *Pham v MIAC*[265] the applicant's agent foreshadowed that certain witness statements would be forwarded to the Tribunal. Subsequent correspondence from the agent appeared to assume that the statements had already been forwarded when in fact they did not appear on the file. The Court found that the Tribunal ought to have contacted the applicant's agent to determine the whereabouts of the statements before it made the decision. Similarly, in *SZOPF v MIAC*[266] the applicant argued the Tribunal fell into jurisdictional error for failure to make inquiries as to the whereabouts of photographs which the applicant claimed were submitted by his solicitor along with his protection visa application. However, in that case the Court found that it was not for the Tribunal to make out the applicant's case and found no error in circumstances where the applicant was put on notice that the photographs were not before the Tribunal and had taken no steps to secure their presentation to the Tribunal.

7.5.85 A similar view to *SZJBA v MIAC* was expressed in *SZHVM v MIAC* where the Court commented that if there is material before it that on its face suggests that an error has occurred the Tribunal should take simple administrative steps (such as a phone call or letter) to address the issue.[267] For example, where an applicant does not appear at a hearing and the hearing invitation has been returned to sender, depending on the circumstances of the case and at the Tribunal member's discretion, contact may be made with the applicant by telephone, if a telephone number has been provided in connection with the review.[268] However, although there may be certain circumstances in which it may be appropriate for the Tribunal to make further inquiries when documents are returned unclaimed, there is no general duty to do so.[269] In *Kaur v MIBP*[270] the Court confirmed that, although the discretion to proceed without a hearing must not be exercised capriciously, the mere fact that a hearing invitation is returned unclaimed does not oblige the Tribunal to follow up to find other addresses at which the applicant might be contacted.

7.5.86 Accordingly, where there is no suggestion before the Tribunal that the applicant was unaware of the hearing and where it is clear that the Tribunal has complied with relevant statutory and regulatory obligations in issuing the hearing invitation, there

[265] *Pham v MIAC* [2007] FMCA 827. Although the Minister successfully appealed the Federal Magistrate's judgment, the appeal was upheld on different grounds and did not address the Federal Magistrate's findings on this issue: *MIAC v Pham* [2008] FCA 320.
[266] *SZOPF v MIAC* [2010] FMCA 924 at [137].
[267] *SZHVM v MIAC* (2008) 170 FCR 211. In that case there was no material before the Tribunal which would have put it on notice of an error or irregularity which needed to be followed up administratively.
[268] See, for example, *SZKUI v MIAC* [2008] FMCA 126. However, the Court in that case found that the failure to do so did not result in legal error.
[269] In *SZLJK v MIAC* [2008] FMCA 694 the Court found that in circumstances where the applicant failed to attend the Tribunal hearing and did not contact the Tribunal to seek an adjournment or to explain their failure to attend and where the Tribunal was satisfied that its statutory and regulatory obligations were complied with, it was open to the Tribunal to proceed to make a decision without taking further action to contact the applicant.
[270] *Kaur v MIBP* [2014] FCA FCCA 161.

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is no duty on the Tribunal to make further inquiries of the applicant.[271] For example, in *Shah v MIAC*[272] the Court commented that the fact that the applicant had responded to past correspondence but not to the hearing invitation did not make it obvious that an inquiry should be made as to whether he wished to attend the hearing. To impose a requirement on the Tribunal to telephone the applicant after his failure to appear at the hearing in these circumstances would undermine the administrative certainty sought to be achieved by the deemed receipt provisions in the Migration Act.

Reasonable time to submit further evidence

7.5.87 If the applicant requests additional time to submit further evidence and the Tribunal considers it appropriate to allow him or her to do so, the Tribunal will generally provide a reasonable period within which the material may be submitted. In considering what constitutes a reasonable period the Tribunal has regard to all of the circumstances. Whether a time period is reasonable or not will depend on the specific circumstances of each matter.

7.5.88 In *MZXPI v MIAC*[273] the applicant claimed he had a card evidencing his membership of a political organisation in India, and requested one month to obtain it. The Tribunal allowed two weeks and the Court considered that the Tribunal's refusal to allow the four weeks was so unreasonable as to amount to a denial of procedural fairness. The Court noted that where the documents were to come from within Australia then a two week period would have been more than adequate.

7.5.89 Similarly, in *Tran v MIAC* the Court found the Tribunal's refusal of a request for an extension of time to provide evidence that the applicant had been nominated by a party to an approved labour agreement unreasonable in circumstances where the time would have been short (two to six weeks) and where significant delays had already arisen in the conduct of the review by the Tribunal.[274]

7.5.90 In contrast, in *SZMMJ v MIAC*, the Court found no error in the Tribunal's refusal to allow the applicant one month to obtain further documents in circumstances where two earlier opportunities to provide documents had been given; the applicant had failed to send any document on those two occasions; the request was made on the last day before he was required to respond to the Tribunal's s 424A invitation; the documents were unspecified; and, the Tribunal gave the applicant further time to provide documents until the handing down of its decision.[275]

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[271] *SZICU v MIAC* (2008) 100 ALD 1 at [28]–[29]. See also *MZXTA v MIAC* [2008] FMCA 1201 where the Court found that the Tribunal was not obliged to make enquiries with a medical practitioner after the applicant failed to attend a hearing. The medical practitioner had provided a report describing the applicant's symptoms but made no comment on whether the applicant was unfit to attend the scheduled hearing. The Court held that the Tribunal was under no general obligation to embark on an open ended enquiry given it had found the applicant was engaged in delaying tactics: at [12]. See also *SZOZE v MIAC* [2011] FMCA 300 where the Court found no error with the Tribunal proceeding to a hearing in the absence of the applicant wife, in circumstances where the Tribunal had asked the applicant husband about his wife's absence and nothing in his response suggested he had not told her about the hearing. An appeal from the judgment was dismissed: *SZOZE v MIAC* [2012] FCA 470.
[272] *Shah v MIAC* [2011] FMCA 18 at [110]–[113].
[273] *MZXPI v MIAC* [2008] FCA 635.
[274] *Tran v MIAC* [2011] FMCA 329. An appeal by the Minister was dismissed: *MIAC v Tran* [2011] FCA 1445.
[275] *SZMMJ v MIAC* [2008] FMCA 1698 at [62].

Delay

7.5.91 Depending on the circumstances, a delay in finalising a matter, or a failure to consider the impact of any delay in assessing an applicant's evidence, may also give rise to a breach of the procedural fairness hearing rule.

7.5.92 Where adverse credibility findings, based solely or significantly on demeanour, are combined with a lengthy or significant delay in delivering the decision containing those findings, in the absence of a reasonable explanation for that delay, it may be inferred, in instances where the delay has prejudiced the applicant, that the procedures followed were unfair, thereby giving rise to jurisdictional error.[276]

7.5.93 In cases where there is a significant delay between the giving of evidence and the Tribunal's assessment of that evidence, there is a risk that the Tribunal's capacity to assess the evidence will be impaired and the applicant may not have a fair hearing of their claims.[277] The High Court in *NAIS v MIMIA*[278] held by majority that the Tribunal's delay in making its decision, in circumstances where an initial hearing was conducted in May 1998 and a further hearing in December 2001 and the Tribunal did not make its decision until December 2002, gave rise to a breach of procedural fairness. The circumstances of the delay, in the context of a decision which turned on the applicants' credibility (including demeanour) created a real and substantial risk that the Tribunal's capacity for competent evaluation of the evidence was diminished, making the procedure unfair.

7.5.94 In contrast, in *SZFNX v MIAC*[279] the Federal Court applied *NAIS* to a Federal Magistrates Court decision and found that a 15 month delay between the last hearing day and the handing down of that decision did not disable the Federal Magistrate from making a proper assessment of the critical credibility issues. In that

[276] *SZKJV v MIAC* [2011] FCA 80 at [33], summarising the principles arising from *NAIS v MIMIA* (2005) 228 CLR 470.
[277] *NAIS v MIMIA* (2005) 228 CLR 470. In contrast, in *SZAHQ v MIMIA* [2004] FCA 953 at [6]–[8] the Court found that there was nothing in the circumstances to justify a conclusion that there had been a miscarriage of justice owing to the delay of two and a half years between hearing and Tribunal decision, particularly as the adverse credibility findings were unrelated to questions of demeanour but related to the applicant's claims being inconsistent with country information. Similarly, in *SZMZQ v MIAC* (2009) 108 ALD 147, no error was found in circumstances where there was a substantial delay between the delegate's decision and the Tribunal's, but where the Tribunal's reasoning was based on evidence given at the Tribunal hearing which had taken place only 3 weeks before the Tribunal made its decision. In *SZKJV v MIAC* [2011] FCA 80, the Court found at [42]–[43] that in the circumstances of that case, an eight month delay could not be characterised as lengthy, significant, protracted or serious and that there was nothing in the reasons to suggest that the delay resulted in any unfairness to the appellant. In *Arshad v MICMSMA* [2020] FCCA 536 the Court found no error in the Tribunal checking PRISMS records some months after the hearing (which showed that the applicant's enrolment, which had been in effect at the time of the hearing, had been cancelled due to non-commencement of studies), issuing a s 359A letter in relation to the lack of enrolment and ultimately affirming the decision under review on the basis of non-enrolment, in circumstances where the Tribunal made no adverse credit findings against the applicant and consideration of the applicant's demeanour did not arise (at [23]–[26]). Further, in *DGS18 v MICMSMA* [2020] FCCA 1973, the Court was satisfied that the Tribunal's delay of approximately 14 months did not impair the Tribunal's ability to assess the applicant's evidence and evaluate their claims, as the credibility findings did not turn on the applicant's demeanour, and the Tribunal provided reasons which were extensive, detailed and forensic (at [97]–[98], [106]). Similarly, in *BYV16 v MICMSMA* [2020] FCCA 1030 the Court found no error where the Tribunal made a decision two years after the hearing, without any explanation for the delay, noting at [44] that there was a critical distinction between this case and *NAIS v MIMIA* (2005) 228 CLR 470, as none of the Tribunal's findings turned on the assessment of the applicant's demeanour or honesty and sincerity as a witness. The Court also found at [62]–[63] that the fact that the delay in producing a decision may be unreasonable, it does not necessarily render the decision as a whole as unreasonable, and that the decision not to invite the applicant to a further hearing caused the Tribunal's decision to be unreasonable. In *CLM19 v MICMSMA* [2020] FCCA 981, the Court found, at [39]–[40], no error where there was a delay of almost 20 months between the Tribunal's hearing and decision, inferring that the Tribunal had had regard to the audio recording and/or transcript of the hearing before the decision and again noting that any credibility concerns were related to contradictions and discrepancies in the evidence, rather than the applicant's demeanour at the hearing.
[278] *NAIS v MIMIA* (2005) 228 CLR 470.
[279] *SZFNX v MIAC* (2010) 116 ALD 85 at [148]–[150]. An application for leave to appeal the Federal Court's decision was dismissed by the High Court: *SZFNX v MIAC* [2010] HCASL 258.

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case, the reasons were comprehensive and there were no errors or omissions which would invite the conclusion that delay must have had an effect on the reasoning process such as to invalidate it.[280]

7.5.95 However, in cases where a matter has been remitted by a court on one or more occasions, or where a significant period of time has passed since the primary decision (for example, in cases where a defect in the primary decision notification has enabled the applicant to lodge a valid review application long after the normal prescribed period would have elapsed), the Tribunal has regard to the combined effect of delay, and the disadvantage to an applicant of having to repeat detailed evidence, when assessing the overall consistency of his or her account.[281]

7.5.96 Whether a significant delay between the time of application and the Tribunal's decision might be expected to affect the Tribunal's capacity to assess the applicant's credibility will depend on the circumstances. In *MIAC v SZJSS*[282] the Court found that the evidence which the respondent gave before three different Tribunals was not affected by significant delay which might be expected to affect the Tribunal's capacity to assess credibility, but rather, it was affected by the fact that there had been relevant social and political changes since the protection visa application was made which were addressed by the respondent in a particular way before the Tribunal.[283]

Legal Professional Privilege

7.5.97 A person appearing before the Tribunal is entitled to rely on Legal Professional Privilege when giving oral evidence.[284] Legal Professional Privilege (LPP) is a common law principle which protects from disclosure communications made

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[280] See also *MIAC v MZYNN* [2012] FCA 1177 where the Court held that a lengthy delay between a hearing and the making of a decision does not itself constitute error. What is required is some flaw in the process of arriving at the decision, that can reasonably be attributed to the passage of time.

[281] See *SZIIF v MIAC* (2008) 102 ALD 366 where the Court found jurisdictional error in the Tribunal's failure to take the aspect of delay into account when considering possible inconsistencies between the various statements made by the appellant at different points in time, when the matter had previously been remitted by the Court. By contrast, in *SZKJV v MIAC* [2010] FMCA 558 at [73], [75]–[76], [83], the Court found no jurisdictional error in the *NAIS* sense in circumstances where the reconstituted Tribunal's decision was made eight months after the last hearing and no reference was made in its reasons to the relevance of delay. The Court found that the Tribunal's and applicant's availability was a reasonable explanation, the Tribunal's assessment was not based on demeanour alone and its reasoning not limited to oral inconsistencies arising from various hearings. In upholding this judgment on appeal in *SZKJV v MIAC* [2011] FCA 80 at [37] the Court considered that the Tribunal had given detailed reasons for its adverse credibility findings and had met the need identified by Kirby J in *NAIS* to say why the evidence was believed or disbelieved. In *Benissa v MIAC* [2010] FMCA 657, the applicant had purportedly been notified of an adverse decision in 1997, but that notification was invalid. The Department then sent the applicant a valid notification of the 1997 decision in 2009. The Court distinguished *NAIS* on the basis that there was no delay within the Tribunal's own functions (at [21]) and found that the Tribunal's decision is contained within itself and the lapse of time did not impact on the Tribunal's decision (at [15]). The issue in this case, however, did not turn on credibility.

[282] *MIAC v SZJSS* (2010) 273 ALR 122 at [47].

[283] See also *SZKJV v MIAC* [2011] FCA 80 at [43] where the Court held that the Tribunal had given carefully reasoned explanations as to why each element of the appellant's claims were rejected and there was nothing in the Tribunal's reasons to suggest that the delay had resulted in any relevant unfairness to the applicant. See also *CQV16 V MIBP* [2019] FCA 1098 at [76]–[80] (and *CQV16 v MIBP* [2018] FCCA 3735 at [90], [92]–[94]*)* where the Court, in distinguishing *NAIS*, held that the Tribunal's delay in making its decision did not give rise to a real and substantial risk that the Tribunal's ability to review the applicant's claims and evidence was diminished. The Court found that the Tribunal gave detailed reasons and it did not rely on the applicant's demeanour in deciding not to accept the applicant's claim but the inconsistencies in and inherent improbabilities of the applicant's evidence and claims.

[284] *SZHWY v MIAC* (2007) 159 FCR 1. Followed in *SZHLO v MIAC* [2007] FMCA 1837, in which the Court held that by asking 'did you ask him for any advice about migration or visas' the Tribunal had inquired into communication that was privileged under LPP: at [19]. See also *WAAF v MIMIA* [2003] FMCA 36 at [23] and *SZFPA v MIAC* [2008] FMCA 550 in which the Court considered that it was bound to follow the Full Court decision in *SZHWY* but that in the circumstances the Tribunal did not seek to illicit any information that would have been subject to legal professional privilege.

confidentially between a client and his or her legal adviser[285] for the purpose of obtaining or giving legal advice or assistance. The principle has been codified in the *Evidence Act 1995* (Cth) (Evidence Act) in which it is described as 'client legal privilege'. [286] The Evidence Act has no application in Tribunal reviews in the Migration and Refugee Division.[287] Nonetheless, when conducting the hearing, the Tribunal is mindful of its obligation to inform applicants and any other person appearing before it of their right to claim LPP and that they may decline to answer any questions on that basis.[288] For further information on LPP please see Chapter 13 – The hearing.

Self-Incrimination

7.5.98 Privilege against self-incrimination refers to the common law right of a person not to answer questions or produce material which may tend to incriminate the person of a criminal offence or expose the person to a civil penalty. [289] The common law privilege against self-incrimination has also been codified in the Evidence Act[290] and applies where a witness objects to giving particular evidence on the ground that the evidence may tend to prove that the witness has committed an offence against or arising under an Australian law or a law of a foreign country; or that witness is liable to a civil penalty. Where such an objection is raised, a Court is required to consider whether there are reasonable grounds for the objection and if so, must not require the witness to give the evidence *unless* the Court is satisfied that it is in the interests of justice to require that the witness do so.

7.5.99 Sections 371(2)(b) [Part 5] and 433(2)(b) [Part 7] of the Migration Act provide that it is an offence for a witness appearing before the Tribunal in the Migration and Refugee Division to fail to answer a question that the Tribunal has required them to answer for the purpose of the proceeding. However, ss 371(3) and 433(3) expressly codifies the common law right to claim a privilege against self-incrimination, providing that the offence does not apply if answering the question might tend to incriminate the person. While ss 371(2) and 433(2) refer to a 'witness' appearing before the Tribunal, this would also encompass the review applicants giving evidence at hearing under an invitation sent pursuant to ss 360 [Part 5] and 425 [Part 7].[291]

7.5.100 The Tribunal may deny an applicant procedural fairness where its questioning may cover matters over which the applicant could evoke the privilege against self-incrimination and it does not inform them of their right not to answer its questions before embarking.[292] Such an omission by the Tribunal would result in jurisdictional error if it causes the applicant to suffer practical injustice or the applicant is deprived

[285] Legal Professional Privilege does not apply to discussions between a person and a migration agent who is not also a Legal Practitioner, see *SZKTQ v MIAC* [2008] FMCA 91 at [39].
[286] *Evidence Act 1995* (Cth) (Evidence Act) s 118.
[287] ss 353 [pt 5] and 420 [pt 7], as amended by the Amalgamation Act. See also *SZHWY v MIAC* (2007) 159 FCR 1 at [17].
[288] *SZHWY v MIAC* (2007) 159 FCR 1.
[289] Butterworths Concise Australian Legal Dictionary, 2004.
[290] Evidence Act s 128. Note however that the Evidence Act is not applicable to Tribunal proceedings: ss 353 and 420 of the Migration Act.
[291] The Explanatory Memorandum to the Tribunals Amalgamation Act 2014 (Cth) Bill states that the provision as amended is intended to replace the pre 1 July 2015 provisions: at [821]–[823].
[292] *Kohli v MIBP* [2018] FCA 540 at [33]–[34].

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of a meaningful opportunity to be heard.[293] In *Promsopa v MICMSMA*,[294] the Tribunal failed to inform the applicant about the privilege against self-incrimination before asking her whether she illegally claimed Centrelink payments, which led the applicant to proffer information about her breaches of social security law (and left her liable to prosecution). The Court found that resulted in a practical and real injustice to the applicant because the Tribunal could not have reached its conclusion about her breaches of law, which it described as serious, without the information proffered by her in response to the Tribunal's further questioning, a finding that was material to the Tribunal's ultimate conclusion.

7.5.101 Prior to 1 July 2015, ss 371(1)(b) [Part 5] and 433(1)(b) [Part 7] prohibited a person appearing before the Tribunal to give evidence from refusing or failing to answer a question that they person were required to answer by the Member. However, it appears that a person who appeared before the Tribunal was still entitled to the common law right to claim a privilege against self-incrimination, and that the Tribunal would have been required to advise the person of that right if a question asked of the person may give rise to a legitimate claim of that privilege.[295] It should also be noted that prior to 1 July 2015, ss 371(1A) and 433(1A) provided a basis for a person to refuse or fail to answer a question required of them by the member if the person had a 'reasonable excuse'. Following the reasoning of a Full Court of the Federal Court in *SZHWY v MIAC*,[296] refusing or failing to answer a question on the basis that it would self-incriminate would likely have been considered by a court as a reasonable excuse for not doing so.

7.6 The bias rule

7.6.1 The bias rule, consisting of actual and apprehended bias, is an aspect of common law procedural fairness which requires that the Tribunal be impartial, and be seen to be impartial.

7.6.2 *Actual bias* arising from prejudgment involves a state of mind by the decision maker whilst exercising the decision making power that is so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented.[297]

7.6.3 *Apprehended bias* will be established where a hypothetical fair-minded lay person, properly informed as to the nature of the proceedings or process might reasonably apprehend that the decision-maker might not have brought an impartial mind to making the decision. The test is concerned with possibility (real and not remote) and not probability.[298] The apprehended bias test requires no conclusion about

[293] *Promsopa v MICMSMA* [2020] FCA 1480 at [42].
[294] *Promsopa v MICMSMA* [2020] FCA 1480 at [45].
[295] See *Epeabaka v MIMA* [1997] FCA 413 and *SZHWY v MIAC* (2007) 159 FCR 1 at [75], [77], [110], [112], [151], [160].
[296] *SZHWY v MIAC* (2007) 159 FCR 1 at [110], [137], [151].
[297] See *MIMA v Jia* (2001) 205 CLR 507. The Tribunal's decision was found to be affected by actual bias in *NAOX v MIAC* (2009) 112 ALD 54 on the basis of two factual findings which suggested to the Court that the decision of the Tribunal was moulded to support the particular conclusion that the appellants were not homosexual. This was said to have been done, not as a genuine exercise of administrative fact finding, but in an attempt to insulate the finding from judicial examination, because it was expressed as being based on credibility.
[298] See *Re RRT; ex parte H* (2001) 179 ALR 425 at [27]–[30] and *SZHBP v MIAC* (2008) 103 ALD 595 at [78]. In *SZHBP*, Graham J emphasised that the word 'might' used in the test could not be replaced by 'would' (at [70]).

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what factors *actually* influenced the outcome, that is relevant to a claim of actual not apprehended bias.[299] Furthermore, as it is the perception of the lay observer that is relevant to establishing apprehended bias, mere statements of objectivity will not necessarily suffice.[300]

7.6.4 Any apprehension of bias taints the whole decision and prevents the decision-maker deciding any of the questions before it.[301] Any alternate finding by the Tribunal, not in any part dependent upon the applicant's credibility, will not prevent a decision being set aside on appeal as the decision will still have been arrived at by a decision maker reasonably thought to be biased. Accordingly, once an apprehension of bias is established, the decision maker is, thereafter, disqualified from deciding any of the issues.

7.6.5 In *Re Refugee Review Tribunal & Anor; Ex Parte H & Anor* the High Court held that although the test for apprehended bias in administrative proceedings, as in curial proceedings, was one of objective possibility of bias, the non-curial nature of the Tribunal and the different characteristics of the proceedings must be taken into account.[302] It concluded that, in that case, a fair-minded observer might infer from the constant interruptions to the applicant's evidence and constant challenges to his truthfulness that there was nothing the applicant could do to change the Tribunal's preconceived view that he had fabricated his account. While the High Court acknowledged that the decision-maker will necessarily have to test the evidence presented, often vigorously, this case provides a useful illustration of the type of approach to credibility issues which should be avoided by the Tribunal. Similar comments were also made by the Full Federal Court in *AZAEY v MIBP*[303] in which it observed that a Tribunal hearing is an administrative hearing which at times may only be expected to be testing upon the members themselves and the claimants that come before it and that just as its reasons should not normally be scrutinized with an eye keenly attuned to the perception of error the courts should not scrutinize its procedures with an eye keenly attuned to the perception of procedural irregularity where a hearing has been conducted in a procedurally fair manner overall.

7.6.6 Tribunal members, in the course of putting an applicant on notice of adverse information or issues, generally use language and conduct the review in a manner that demonstrates an open mind. See for example, *SZQPY v MIAC*[304] where the

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[299] *SZHBP v MIAC* (2008) 103 ALD 595 at [79].
[300] See for example *Islam v MIAC* [2009] FCA 1526 at [54] in which the Federal Court held that despite the AAT's disclaimer that it would not take into account potentially adverse information about criminal charges against the applicant when considering the application of s 501, the lay observer could reasonably entertain an apprehension that the decision might have suffered from prejudgment. The Court noted that such an observer could well consider he or she was being asked to, but was unable to, accept that the Tribunal could satisfactorily bifurcate the information it might possess.
[301] *Applicant A165 v MIMIA* [2004] FCA 877 at [86]–[89].
[302] *Re Refugee Review Tribunal; Ex Parte H* (2001) 179 ALR 425. See also *SZBLY v MIAC* (2007) 96 ALD 70 where the Court held at [32] that in circumstances where the Tribunal had affirmed the delegate's decision on credibility grounds but later recalled and reconsidered its decision in response to new information, the matter should have been reconstituted for the second decision. It would otherwise be open for a fair minded and informed person to reasonably apprehend that the original Tribunal member would not bring an impartial mind to bear in making the second decision. Apprehended bias was also established in *VFAB v MIMIA* (2003) 131 FCR 102, *NADH of 2001 v MIMIA* (2005) 214 ALR 264, *WALM v MIMIA* [2005] FMCA 959 and *SZILP v MIAC* [2007] FMCA 592 at [49], where the Tribunal dismissed evidence and did not consider the claims of the applicant fully, because it had prejudged the applicant's claims based on the rejection of his explanations.
[303] *AZAEY v MIBP* [2016] FCAFC 193 at [47]–[48].
[304] *SZQPY v MIAC* [2012] FMCA 263 at [40].

Court expressed concern that the Tribunal description of the hearing showed the applicant's evidence was put under the 'microscope' in the course of the hearing with repeated suggestions to the applicant that the Tribunal might have concerns arising from particular responses. The Court noted that there is a danger when the Tribunal conducts such a hearing that it might suggest to a fair minded observer that it is looking for points upon which to arrive at adverse findings, rather than genuinely assessing the evidence with an open mind until all of the evidence has been received and considered in its entirety.[305]

Putting adverse information to an applicant

7.6.7 There have been a number of cases found by the Courts to be affected by actual or apprehended bias where ss 359A or 424A letters were drafted in a way that suggested that the Tribunal member had already formed a view adverse to the applicant.[306] The Court suggested the use of expressions such as '**may** not be satisfied', 'the Tribunal **may** consider…' and 'this **could** indicate…' may avoid this impression.[307] However, note that in *MZYFH v MIAC*[308] the Court found that when explaining to an applicant that information is being put to him under s 424AA, it was incumbent on the Tribunal to tell the applicant that the information particularised 'would' be the reason or part of the reason for affirming the decision, unless it is persuaded not to do so by the applicant's response. This, however, does not prevent the Tribunal from using language such as 'could' and 'may' when explaining the relevance and consequence of the information, provided the full import of the consequences is made clear.

7.6.8 Similarly, when putting adverse information to an applicant at hearing, the Tribunal does this in a measured manner[309] so as to not be seen to prefer some evidence over other evidence without foundation. For example, in *SZBRO v MIMIA*[310] the Court found that the Tribunal revealed at the hearing that it considered information provided by a DFAT officer to be reliable because of the personal relationship which existed between the DFAT officer and the Tribunal. The appearance of relying on a personal connection to confirm veracity of the evidence was sufficient to establish apprehended bias.

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[305] In contrast, see *Adhikaree v MIBP* [2014] FCCA 621 where the Court found that an apprehension of bias was not established in circumstances where the Tribunal could exercise no independent judgment in deciding the outcome of the review because the Regulations mandated a particular result (being the Tribunal's decision to affirm the refusal of the applicants' Subclass 856 visa applications in circumstances where the Tribunal had earlier affirmed the refusal of the related employer nomination). Upheld on appeal: *Adhikaree v MIBP* [2014] FCA 564.
[306] See for example, *SZGMF v MIMA* [2006] FMCA 283 at [18] and [22] where the Court held that statements contained within the Tribunal's findings and the withholding of particular information contained in a DFAT report concerning the authenticity of documents provided by the applicant established a reasonable apprehension of bias on the part of the Tribunal member. See also *SZKBE v MIAC* [2008] FCA 317 where the s 424A letter included statements such as, '…the Tribunal is not satisfied you are a Falun Gong practitioner', 'The Tribunal considers it implausible…' and 'The information … indicates that you are not a Falun Gong practitioner.' In *MZXPA v MIAC* [2007] FMCA 1619, the s 424A letter noted that the applicant's witnesses were close relatives and friends and as such an inference may be drawn that their evidence was 'not genuine and lacks credibility'. Although the Tribunal did not draw that inference in the decision, the Federal Magistrates Court found that the statement in the s 424A letter was sufficient to give rise to a reasonable apprehension of bias. This finding was overturned by the Federal Court in *MIAC v MZXPA* (2008) 100 ALD 312. See Chapter 10 – Statutory duty to disclose adverse information for further information on the statutory duty to disclose adverse information.
[307] *SZKBE v MIAC* [2008] FCA 317 at [13] and *SZSNU v MIMAC* [2013] FCCA 1219 at [40].
[308] *MZYFH v MIAC* (2010) 115 ALD 409 at [60], [62], [65].
[309] *SZMOE v MIAC* [2009] FMCA 116.
[310] *SZBRO v MIMIA* [2005] FMCA 1890 at [24].

7.6.9 Decision makers are also entitled to rely upon their own personal experience and knowledge to inform their view of relevant issues and a reasonable apprehension of bias should not arise merely because the decision maker has indicated the applicant's account of circumstances does not accord with their own knowledge of country information or experiences.[311] However to the extent that personal experience or knowledge is adverse to the applicant's claims, procedural fairness generally requires that the applicant first be given the opportunity to comment on or address those matters.[312] In *Brar v MIAC*[313], for example, the Court held that the Tribunal's decision was vitiated by a reasonable apprehension of bias as a fair minded observer, aware of all the relevant circumstances, would understand that the Tribunal was in possession of information that there was a class of persons of a significant number who had falsely claimed to have worked at a particular restaurant. The Court found the applicant was entitled to challenge the information which the Tribunal relied upon to establish that class and that by assuming that the information available to the Tribunal from an informant was reliable the Tribunal did not afford the applicant that opportunity and pre-judged that issue.

Conduct at hearing

7.6.10 The Member's conduct during the hearing may give rise to actual or apprehended bias, generally in conjunction with other matters such as a refusal to adjourn a hearing,[314] refusal to take witness' evidence or the final reasons for decision.

7.6.11 However, occasional displays of impatience, irritation, sarcasm or rudeness will not of themselves constitute disqualifying bias.[315] This is so notwithstanding any subjective feelings an applicant may have that the Tribunal was biased against him or her.[316]

7.6.12 Furthermore, bias will not be established simply by showing that a decision maker reached a preliminary view even on a critical matter,[317] or by 'robust questioning'[318]

[311] *SZUXE v MIBP* [2016] FCCA 309 at [25]–[32].
[312] *Kolan v MIBP* [2016] FCCA 341, at [49] where the Court held that the Tribunal Member was entitled to rely upon her knowledge of the normal practice of particular education providers to issue Certificates of Enrolment (CoE) or offers of enrolment to students who do not hold student visas. The applicant had informed the Tribunal that the particular education providers had refused to issue him with a CoE or an offer of enrolment, which the Tribunal Member rejected based on her own knowledge after discussing the issue with the applicant at hearing.
[313] *Brar v MIAC* [2012] FMCA 519.
[314] *NBMB v MIAC* [2008] FCA 149 at [17]. In *Nam v MIAC* [2011] FMCA 340 the Court found no error in circumstances where the Tribunal had adjourned the hearing at the request of the applicant and then declined a further adjournment for the reason offered. The Court held there was a public interest in matters before the Tribunal being brought to a reasonably prompt conclusion. The Court further did not consider that the issuing of the two invitations on the same day (a hearing invitation and s 359A invitation) was indicative of pre-judgement.
[315] *VFAB v MIMIA* (2003) 131 FCR 102 at [23], [81] referring to *Sarbit Singh v MIEA* at 9-10, *C v MIMA* [2000] FCA 1649 at [13]-[16].
[316] *SZMQG v MIAC* [2009] FMCA 699.
[317] *VFAB v MIMIA* (2003) 131 FCR 102 at [23] and *MIAC v MZXPA* (2008) 100 ALD 312 at [15].
[318] *WABF v MIMIA* [2004] FMCA 4 at [49]. Compare with *SZRUI v MIMAC* [2013] FCAFC 80 however where the Full Federal Court over tuned the Federal Magistrates Court at first instance holding, per Robertson J at [87], that the testing by the Tribunal of the applicant's claims and evidence was too frequent and what the Tribunal said was too absolute and definite, taking the form of statements rather than questions. While it was one thing to manifest scepticism and test credibility, it was another thing to state on a dozen occasions in the course of a relatively short hearing that the Tribunal does not or cannot believe the applicant or words to the effect such as '*don't be silly*'. See also *MZZLO v MIBP* (No 2) [2016] FCA 356 at [67] where the Federal Court overturned the Federal Circuit Court at first instance, and held that the way that the Member questioned the appellant about a statutory declaration in the early part of the hearing resembled a memory test which was designed to make the appellant fail in the task and thereby confirm the Member's suspicions about the declaration rather than impartially assess the evidence.

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vigorous testing of evidence,[319] or by a properly considered decision not to undertake further investigations, contact witnesses or provide the applicant with further time to provide evidence.[320] However, a combination of certain conduct may be evidence that the Member came to the hearing with their mind made up such that they were not open to persuasion.

7.6.13 The Tribunal conducts the hearing in such a way that it does not rush questions and answers such that an informed observer may justifiably form a view that the Tribunal is not seeking and considering the evidence being adduced in a measured and careful manner.[321] In *SZGSI v MIAC*[322] the Court noted that the hearing was conducted in a 'robust' manner and that the Tribunal made a 'flippant and unhelpful' remark which the applicant regarded as mocking or sarcastic. However, the Court ultimately found that considered in isolation, it was not so serious as to constitute evidence going towards apprehended bias. Similarly, in *AZAEY v MIBP*[323] an allegation of bias was rejected by the Full Federal Court notwithstanding the Court's description of the Member's conduct during the hearing as involving raising her voice, asking questions in an incredulous manner, emphatically expressing reservations, and interrupting the applicant whilst she answering questions that the Tribunal had posed to her. Accepted deficiencies in the video-link leading to the Tribunal asking further questions before a prior answer had been completed, the limited number of interruptions, the otherwise courteous manner in which the hearing had been completed and the lack of any post-hearing submissions to supplement the applicant's evidence were all factors which lead the Court to find that the member's behaviour had not manifested an unwillingness to entertain the applicant's claims on their merits.

7.6.14 The types of conduct that have attracted the criticism of the courts in the context of allegations of bias include: consistently denying the applicant an opportunity to put forward their case; diminishing the ability of the applicant to contribute usefully to the hearing; warning the applicant not to disrupt the hearing with the 'pretence' he/she can't understand the interpreter; and a failure on the part of the Tribunal to enquire into or obtain readily available and critically important information. Further examples of conduct which has attracted the criticism of the courts are set out below.

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[319] *SZNWS v MIAC* [2009] FMCA 1287 at [11]–[12]. The applicants also claimed that the refusal of the Tribunal to reconstitute the matter following a complaint, as well as the refusal by the member for a postponement of the second hearing, gave rise to actual bias. The Court did not accept either as evidence of bias. In *DZACE v MIAC* [2012] FCA 945 the Court at [30] found that the IMR's questioning at the interview was directed to ascertaining details of the applicant's evidence in a way which was not unfair and in a way which was sensible with a view to testing the reliability of his claims. The Court did not accept that bias was established in these circumstances.

[320] In *SZJCL v MIAC* [2007] FMCA 839 the Court found no apprehended bias where the Tribunal had considered whether to contact various witnesses and undertake further investigations but decided against doing so. See also *SZGWN v MIAC* [2008] FCA 238 where the Court found there was no apprehended bias despite some apparent frustrations and redirecting of questions on the part of the member. The Court found that rather than establishing apprehended bias, this conduct arose due to poor interpretation at the hearing. In *Yadagiri v MIBP* [2016] FCCA 2279 at [16]–[19] the Court did not infer bias from the fact that the Tribunal asked the applicant a question about financial capacity in relation to a Student visa application but said, after the applicant had requested time to provide such evidence, that financial capacity was not going to be an issue in the decision after having already heard evidence about the genuine temporary entrant requirement (which formed the basis of the decision). Upheld on appeal: *Yadagiri v MIBP* [2017] FCA 145 at [33] in which the Court held that the sequence of events at the hearing would not suggest to the fair-minded observer that the Tribunal might have prejudged any aspect of the applicant's case.

[321] *NBMB v MIAC* [2008] FCA 149 at [17].

[322] *SZGSI v MIAC* [2008] FMCA 1649. Upheld on appeal: *SZGSI v MIAC* [2009] FCA 200 at [34]–[35].

[323] *AZAEY v MIBP* [2015] FCAFC 193 at [28].

Impatience, irritation, aggressiveness and hostility

7.6.15 Perceived hostility by the Tribunal may be construed as apprehended bias. In *SZITH v MIAC*[324] for example, the Member's actions in leaving his desk and approaching the applicant and his migration agent caused the applicant and his witness to fear that the Member might be violent towards the agent and the Court found the decision was vitiated by apprehended bias.[325]

Discourtesy, sarcasm, mocking and rudeness

7.6.16 Rude or mocking behaviour by the Tribunal may establish apprehended bias. In *MZYPQ v MIAC* the Court noted the IMR spoke in a sarcastic, mocking and disparaging way during the interview and certain IMR's references bordered on unprofessional conduct.[326] Although bias was not established on the facts of the case, the Court made it clear that sarcastic language is unprofessional and is likely to attract allegations of bias and judicial criticism. Further, in *SZRGE v MIAC*[327] the Court criticised the IMR's comments at interview, which although not such as to amount to an apprehension of bias, could be said to be 'smart', hard and, patronising. Similarly, in *MZZIY v MIBP* and *MZZIZ v MIBP*, where although the Court found the Tribunal was rude at times and used inappropriate language, it was not to the extent that the Tribunal's mind was closed. [328]

Comments and/or tone

7.6.17 Comments made at the outset of hearing that suggest a fixed mind have been found to establish apprehended bias.

7.6.18 In *MZYSQ v MIAC*, for example, the Court found that a 'vehement' expression of disbelief of an aspect of the applicant's claims could have produced a reasonable apprehension of bias in a fair minded, properly informed, lay observer. [329]

7.6.19 Further, in *SZLMW v MIAC* the Court commented that the Tribunal's comments at the outset of the hearing, before any questioning had taken place were an 'excellent example' of apprehended bias.[330] This is because it conveyed that the Tribunal had a closed mind from the outset.

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[324] *SZITH v MIAC* [2009] FMCA 877.
[325] See also *SZEOQ v MIMA* [2006] FCA 1171 at [25]–[26].
[326] *MZYPQ v MIAC* [2012] FMCA 94.
[327] *SZRGE v MIAC* [2013] FMCA 18.
[328] *MZZIY v MIBP* and *MZZIZ v MIBP* [2013] FCCA 1896.
[329] *MZYSQ v MIAC* [2012] FMCA 661 at [62].
[330] *SZLMW v MIAC* [2008] FMCA 1402. In this matter, the Tribunal made opening remarks as follows: '*Now that means that it is very important that I be convinced that you are entitled to a protection visa.... It is very important that anything – that I have confidence in anything you say to me….Because if I lose confidence in what you're telling then that will affect everything that you are trying to persuade me to accept*.' and then went on to question the applicant about the company which employed him and put to the applicant responses from the Australian Consulate which differed from the applicant's response and commented: "…*when you go back you will find lots of surprises because*…" .As a result of the opening statement and this line of discussion, it appeared that the Tribunal had made up its mind about the applicant's claims from the outset. See also *WZANF v MIAC* [2010] FMCA 110 at [119] where the Court found that the Tribunal's tone, although it variously appeared at times to be incredulous, critical and condescending, did not evince bias.

Making value judgments or statements rebutting what is being claimed

7.6.20 Remarks by the Tribunal rebutting the applicant's claims may give rise to apprehended bias, although it will depend on the circumstances of each matter. In *SZRUI v MIMAC*, the Full Federal Court held that, the expression by the Tribunal of its own value judgment that the applicant's claim to have made a girl pregnant would have '*absolutely disgraced*' the family and '*dishonoured the girl*' went beyond a means of eliciting a response and trespassed into the area of a concluded view that a failure on the part of the applicant 'to do something' could only be explained by the claim not being genuine.[331] The Full Federal Court also held that while there is no clear line between testing and arguing, the Tribunal's lengthy statements rebutting what the applicant had said rather than testing the material lead to the reasonable apprehension that the Tribunal was arguing its fixed position, leading to an apprehension of bias in the properly informed lay person. This may be contrasted with *SZUXE v MIBP*[332] where the Court rejected that an apprehension of bias arose merely by the decision maker indicating during the hearing that the applicant's account of certain circumstances did not correlate with their own knowledge of country information or experiences.

Repeatedly interrupting the applicant and making adverse comments

7.6.21 Depending upon the particular circumstances, repeated interruptions by the decision maker and comments that may suggest an assumption that the applicant is not truthful may give rise to apprehended bias. For example, in *MZYYF v MIAC*[333] the Court found a claim of apprehended bias was made out in circumstances where the Tribunal used phrases such as '*I put to you…*', '*I told you at the beginning to be honest with me*' and '*tell me the truth*'. The Court considered these were indicative of a view having already been formed, and a hearing more in the nature of an interrogation. This may be contrasted with *AZAEY v MIBP*[334] where the allegation of bias was rejected by the Full Federal Court notwithstanding a number of occasions where the applicant was interrupted in answering questions posed to her by the Tribunal member. Deficiencies in the video-link leading to the Tribunal asking further questions before a prior answer had been completed, the limited number of interruptions, the otherwise courteous manner in which the hearing had been completed and the lack of any post-hearing submissions to supplement the applicant's evidence were all factors which lead the Court to find that the member's behaviour had not manifested an unwillingness to entertain the applicant's claims on their merits.

7.6.22 Depending upon all the circumstances, a combination of elements may also result in a finding that the Member's conduct demonstrates that there was nothing the

[331] *SZRUI v MIMAC* [2013] FCAFC 80 at [35], [88]. See also *WZATR v MICMSMA* [2019] FCCA 2847 at [28] and [33] where the Court followed *SZRUI* and found that the use of the terms 'stupid' and 'preposterous' by the Tribunal to describe the persons from whom the applicant was claiming harm indicated (along with other things) that the Tribunal had a predetermined view about the claims, and foreclose any possibility for the applicant to persuade the Tribunal.
[332] [2016] FCCA309 at 28.
[333] *MZYYF v MIAC* [2014] FCCA 75.
[334] *AZAEY v MIBP* [2015] FCAFC 193 at [13]–[29] and [47]–[49].

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applicant could say or do to change the Member's preconceived view.[335] For instance, in *MZYSQ v MIAC* the Court was critical of the Tribunal expressing firm views at the hearing and immediately moving on where it appeared not to be open to hearing any more about a matter.[336] The Court found that, taking the hearing as a whole, a fair-minded observer could reasonably have apprehended that the Tribunal had, while the hearing was still underway, formed an immutable view on the issues critical to the case.[337]

Avoiding assumptions based on adviser's or other applicant's behaviour

7.6.23 The Tribunal is careful not to impute to an applicant deficiencies displayed by an adviser or conclude that inappropriate behaviour by the adviser was endorsed by or necessarily affects the account of events given by the applicant.[338]

7.6.24 Further, the same Tribunal member addressing similar claims of two related applicants in proceedings held concurrently for reasons of convenience and without objection from the two applicants will not generally give rise to apprehended bias. In *SZQMZ v MIAC* the Court found, for example, there was no suggestion on the evidence that the Tribunal member prematurely arrived at an adverse conclusion in relation to either of the related applications for review, before completing her hearing and inquiry processes in both of them.[339] The Court found the Tribunal had manifestly given each applicant every opportunity to explain individual claims and had shown a mind that was clearly open to addressing the merits of each case.

Bias in written decisions

Bias emanating from consideration of the evidence

7.6.25 The Tribunal considers all of the evidence available to it. A failure to demonstrate proper consideration of favourable or corroborative evidence in a decision can be indicative of a mind not open to persuasion.[340] Similarly, the selective use, or

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[335] See e.g. *He v MIAC* [2008] FMCA 1437. The Court found that whilst Tribunal's manner at hearing was impolite but not of itself sufficient to give rise to an apprehension of bias, its robust questioning lacked the necessary perception of objectivity or impartiality.
[336] *MZYSQ v MIAC* [2012] FMCA 661 at [122].
[337] See also *Kolan v MIBP* [2014] FCCA 461 where the Court found that the Tribunal's repeated expression of definitive views on the applicant's claims during the hearing, and before all of the evidence had been adduced, was sufficient to give rise to an apprehension of bias. In relation to oral decisions, see *SZANH v MIMIA* [2004] FCA 1280 at [39] where the Court held that the giving of an oral or ex tempore decision does not, of itself, suggest that a Member is biased or has not paid sufficient attention to the claims of the applicant.
[338] See *MZZLO v MIBP* (No 2) [2016] FCA 356 at [76]–[78] where the Federal Court found that, from the Member's attack on the professional conduct of the appellant's lawyer in the preparation of the applicant's evidence, it might reasonably be apprehended by a fair-minded lay person that the Member was so influenced by what he perceived to be the lawyer's improper or inappropriate conduct that he might not bring an impartial mind to the assessment of the appellant's case. This judgment may be compared with *Klychev v MIBP* [2016] FCCA 1211 at [41]–[44] where the Court found that the Tribunal's expression of frustration with the applicant's agent (which was limited to the effect of the agent's conduct on the Tribunal's ability to properly prepare for the hearing) did not give rise to an apprehension of bias. The Court distinguished the circumstances of the case with *MZZLO v MIBP* as there was no direct attack on the agent which resulted in, or could be seen possibly to result in, the rejection of any of the evidence relied upon by the applicant. Upheld on appeal: *Klychev v MIBP* [2016] FCA 1356 at [67]. In addition, see *SZANH v MIMIA* [2004] FCA 1280 at [42] where the Court held that the Tribunal needs to be careful that it does not impute to a claimant the deficiencies of a particular agent or representative.
[339] In *SZQMZ v MIAC* [2012] FMCA 161 (Smith FM, 29 February 2012). Upheld on appeal: *SZQMZ v MIAC* [2012] FCA 1005.
[340] In *SZKLK v MIAC* [2008] FCA 1125, the Court at [52]–[53] found that it was incorrect for the Tribunal to find that the applicant had no association at all with Falun Gong in Australia where his assertion of his association was corroborated by the evidence of his migration agent. Justice Logan held that a fair minded and informed observer would regard the error of fact and omission to consider the ramifications of the asserted association as an error or omission in respect of an 'inconvenient truth'.

rejection, of information which supports the Tribunal's conclusions may give rise to a perception of bias.[341] In *SZGUR v MIAC* the Tribunal was found to have been selective of material going one way when considering a newspaper article and marriage certificate tendered by the applicant in support of his claims.[342]

7.6.26 However, where the Tribunal rejects the applicant's claims and fails to give sufficient weight to a piece of evidence relied upon so as to allow the applicant's application, this itself is not generally evidence of pre-judgment or apprehended bias.[343] That the Tribunal has formed an adverse view after having considered the initial claims and conducted a hearing is not necessarily indicative of bias. In *SZOWH v MIAC* the Court noted that it was apparent the Tribunal had serious credibility concerns at the hearing and that the post hearing submission increased those concerns, and found that the adverse conclusions drawn by the Tribunal about the documents provided after the hearing were open to the Tribunal and did not support an assertion of bias.[344]

7.6.27 The Tribunal considers the evidence before it, and attempts to not overstate any deficiencies in the applicant's evidence to ensure that its findings accurately reflect the evidence.[345] In *SZMSS v MIAC*[346] for instance, the Tribunal was found to have overstated deficiencies in the applicant's demonstrated knowledge of Christianity at hearing. This combined with a failure to give the applicant an opportunity to speak generally about his faith (as opposed to simply respond to the Tribunal's questions) and a finding that the applicant's answers appeared rehearsed or evasive led the Court to find that the decision was affected by apprehended bias.

7.6.28 The Tribunal may occasionally use expert opinions[347] and views expressed by third parties, such as Department officers who have conducted site visits. Prior to using such opinions or views, members generally satisfy themselves that the particular

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In *SZMJH v MIAC* [2008] FMCA 1320 the Court held, at [59] that when confronted with the applicant's assertions as to his identity, the member may have formed the view that the applicant had set out, with the assistance of his migration agent to create confusion about his identity and that the applicant was not, and would not be, able to produce definitive evidence of his identity in the form of his Chinese identity card. When the applicant did produce what was demanded of him the Tribunal changed its approach. The Tribunal treated the identity card as simply part of the 'raft of conflicting information'. In *SZJCL v MIAC* [2007] FMCA 839 the Court found no apprehended bias where the Tribunal had considered whether to contact various witnesses and undertake further investigations but decided against doing so.

[341] *SZKLK v MIAC* [2008] FCA 1125 at [61]–[68]. See also *SZNWZ v MIAC* [2010] FMCA 481 at [25], apprehended bias was not established in circumstances where the Tribunal found that the applicant's claims, narrative, manner of expression, response to s 424A correspondence and migration agent were similar to another application and it had complied with its statutory obligations.

[342] *SZGUR v MIAC* [2007] FMCA 1946.

[343] *MIAC v SZNPG* (2010) 115 ALD 303 at [25].

[344] *SZOWH v MIAC* [2011] FMCA 192 at [26].

[345] *SZLUN v MIAC* [2009] FMCA 1013 at [100]. However, note that in *MIAC v SZJSS* (2010) 273 ALR 122 the High Court overturned the Full Federal Court's finding that the description in the Tribunal's decision of certain evidence given by the respondent as a 'baseless tactic' gave rise to a reasonable apprehension of bias. The High Court found that the language used by the Tribunal, when considered in context, was no more than an indication by the Tribunal that it did not accept the respondent's evidence that he was at risk as claimed, and did not provide any foundation for the contention that the Tribunal had pre-judged the issue. See also *SZSMD v MIBP* [2015] FCA 202 where the Court held the Tribunal's reasoning process for not accepting the applicant's evidence in this case did not give rise to a reasonable apprehension of bias, and that the Tribunal did not require corroborative evidence as a pre-condition to accepting the claims.

[346] *SZMSS v MIAC* [2009] FMCA 93.

[347] For example, *Wu v MIAC* [2011] FMCA 14 considered the Tribunal's reliance upon an opinion from an independent Centrelink expert in the context of domestic/family violence referrals. The Court held at [78] that the Tribunal errs if it relies on an opinion which is vitiated by bias but does not err by not considering whether the opinion might be void on that account. The mere provision of confidential information to an expert does not suggest lack of impartiality (at [80]) and in that case the opinion was found not to be tainted by apprehended bias (at [85]). Furthermore, in the absence of evidence suggesting advocacy or attempts to reinforce a particular view of the facts, the mere provision of information to an expert which the applicant finds disagreeable is insufficient to establish apprehended bias by the Tribunal (at [76]).

opinion is reliable and not affected by apprehended or actual bias. Where the Tribunal adopts an expert's judgment rather than exercising its independent mind, the Tribunal's proposed use of an opinion is generally raised with the applicant,[348] and the reasons for adopting the opinion are containing in the decision record. However, if the Tribunal does not take these steps will not necessarily result in a finding of jurisdictional error on the basis of apprehended bias, and will depend on the circumstances of each matter.

7.6.29 The Tribunal is entitled to have regard to country information of its choosing, including DFAT reports, and to derive factual findings from that country information where the import of that country information has been put to the applicant for comment.[349]

Prejudicial information which is irrelevant to the Tribunal's consideration

7.6.30 On occasion, the Tribunal may have before it information which is highly prejudicial but irrelevant to the matters which form the scope of the review. In such a circumstance, the Tribunal may expressly disavow reliance upon the material. However, procedural fairness may require the Tribunal to discuss the matter with the applicant, and although the circumstances where the Tribunal may be required to recuse itself appear to be rare, it could arise in the context of highly prejudicial information that is irrelevant to the issue on review but subject to a valid non-disclosure certificate that effectively limits or removes procedural fairness options (such as putting the information to the applicant at hearing or under s 359A or 424A) in relation to the information.[350]

Standardised decisions (including reliance on previously constituted Tribunal's reasons)

7.6.31 Using particular template paragraphs in its decision record after having considered the applicant's claims and conducted a hearing will not necessarily indicate pre-judgment on the part of the Tribunal.[351] In *SZQHC v MIAC*[352] the Court noted it

[348] *SZKGE v MIAC* [2007] FMCA 893. In that case, the Federal Magistrates Court expressed some reservations about the Tribunal's use of an expert opinion. However, in the absence of a transcript of the Tribunal hearing, it was not prepared to find any error. The Federal Magistrate's decision was upheld in the Federal Court, again in the absence of evidence: *SZKGE v MIAC* [2007] FCA 1788. See also *Wu v MIAC* [2011] FMCA 14 at [77] where the Court observed that the Tribunal's failure to inform an applicant that adverse information had been provided to an independent expert where there is no obligation to do so will not support a finding of apprehended bias.

[349] *WZATJ v MIBP* [2015] FCCA 333 at [69] where the Court found no bias arising in this context.

[350] See e.g. *FSG17 v MICMSMA* [2020] FCAFC 29 at [41]–[44]. The judgment concerned a review by the IAA. Before the IAA was highly prejudicial information about the appellant's conduct in Australia. The IAA expressly referred to the information in its decision, stating that it was irrelevant to the assessment of the credibility of the appellant's protection claims and the criteria to be determined, and that it had disregarded the information in making its assessment. The Court held that was of such a prejudicial kind that a fair-minded lay observer might reasonably consider that it would be difficult for the decision-maker to put the information out of his or her mind and that a fair minded lay observer might reasonably consider that the information is of a kind that might subconsciously affect the IAA's approach to the decision, notwithstanding that the IAA consciously endeavoured to disregard the information. In this context, the Court considered that more was required than disavowing reliance on the information The Court reasoned that if an applicant is not informed of the information or given an opportunity to respond to it, procedural fairness may require the individual decision-maker exposed to the information to recuse themselves.. As the IAA does not hold hearings, putting the information to the appellant for their comment at hearing was not available, but would be possible for the Tribunal to do (unless an exception, such as a non-disclosure certificate, applied to the information).

[351] In *SZQEL v MIAC (No 2)* [2011] FMCA 582, the Court found that the use of replicated 'template' content from four other IMR recommendations did not establish apprehended bias. The Court held that where a number of decisions were published around the same time and where the same country information was used, there was nothing impermissible in using the same phraseology. In *AZABR v MIAC* [2011] FMCA 825 the Court held, the same Tribunal member's similar reasoning in three cases

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inevitable and even desirable that IMR reports show consistency of approach to country information on 'generic' claims. However, the Court ultimately held that, while there was no vice in dealing with 'generic' claims in standard form, the treatment of the applicant's particular claims by the IMR was very similar to paragraphs in other decisions where only the different factual circumstances had been inserted, raising the apprehension the IMR wished to fit the applicant into the template paragraph he had previously prepared. In *SZQHH v MIAC* the majority of the Full Federal Court found that the IMR's use of a template to express reasons for rejecting the generic claims of the applicant and nine other applicants did not give rise to an apprehension of bias.[353] In allowing the Minister's appeal against the primary judgment, the majority closely analysed the ten decisions in question.

7.6.32 In contrast, however, in circumstances where the adoption of the first Tribunal's reasons by the second Tribunal was substantial, including findings about the credibility of the appellant's claims at a specific level, the Full Federal Court in *MZZZW v MIBP*[354] found that the second Tribunal did not bring an independent mind to the consideration of the appellant's claims and failed to discharge the statutory task imposed on the Tribunal to consider claims on review for itself, 'afresh'. In this case, it was the nature of the copied paragraphs, involving credibility and factual findings specific to the applicant, which the Court distinguished from circumstances involving the use of standard paragraphs about the applicable law and country information, or copying general findings such as those based on country information or generic claims. The Court rejected the notion that 'high volume decision-making' might justify anything other than full and active consideration of the merits in a particular review.

Pattern of decision making

7.6.33 The mere fact of a decision maker deciding a number of cases one way rather than another will, of itself, not generally sustain an allegation that that decision maker might not bring an impartial and unprejudiced mind to the resolution of a particular case. In *ALA15 v MIBP*,[355] the Full Federal Court considered an allegation that the primary judge was predisposed to the view that applications in migration matters were without merit and that it was not possible for that Judge to hear the applicant's application with an open mind. The allegation relied upon a statistical analysis of the number of immigration matters dealt with by that Judge during a particular period, the numbers decided for or against the Minister, comparisons with other Judges of the Circuit Court dealing with similar matters and information published in the then Migration and Refugee Review Tribunals' annual report about decision set-aside

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decided on the same day did not give rise to apprehended bias. Given key aspects of the claims of three applicants were remarkably similar, it was unsurprising that there was a consistency in outcome and that in explaining how the Tribunal reached that particular outcome, similar language and thought processes were evident at [50]. See also, *SZRBW v MIAC* [2013] FCCA, 23 at [77] and *SZRBA v MIMAC* [2013] FCCA 1361 [94]–[99], [117]–[119] (this decision was ultimately overturned by the Full Federal Court, but on different grounds: *SZRBA v MIBP* [2014] FCAFC 81; and *SZTGE v MIBP* [2014] FCCA 1458.

[352] *SZQHC v MIAC* [2011] FMCA 851.

[353] *SZQHH v MIAC* (2012) 200 FCR 223. Special leave to appeal from the Full Federal Court judgment was refused: *SZQHH v MIAC* [2012] HCATrans 220. The judgment was followed by the Full Federal Court differently constituted in *MIAC v SZQHI* [2012] FCAFC 160.

[354] *MZZZW v MIBP* [2015] FCAFC 133.

[355] *ALA15 v MIBP* [2016] FCAFC 30.

rates. In rejecting that an apprehension of bias arose, the Court stated that raw statistics concerning the outcome of migration matters determined by one judge compared with another, or the outcome of Tribunal decisions generally, did not necessarily indicate prejudgment and that the absence of further relevant material which puts such statistics in a proper and informed context, such raw statistics were generally likely to be irrelevant to the knowledge and information imputed to the hypothetical observer.[356]

7.6.34 In addition, the fact that a matter has been reconstituted to the same member upon remittal will not on its own necessarily support a finding of apprehended bias, however, such a decision may be scrutinised by a Court to determine whether the Member brought an open mind to the review.[357]

7.7 The evidence rule

7.7.1 The evidence rule requires that the decision be based upon logically probative evidence (and not mere speculation or suspicion).[358] If a finding is open on the evidence, even if it is not a finding that a court or another decision-maker would have made, there will not be a breach of the evidence rule.[359]

Omissions, inconsistencies and different evidence

7.7.2 It is open to the Tribunal to make findings of fact rejecting claims on credibility grounds.[360] The Tribunal will generally set out reasoning to explain why a particular inconsistency or omission is considered significant enough to support an adverse credibility finding.[361] However, minor omissions or inconsistencies will not, of themselves, generally support major credibility findings.

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[356] *ALA15 v MIBP* [2016] FCAFC 30 at [39], [43]. The statistics provided by the applicant demonstrated that, of the 254 migration matters considered by the primary judge during a period, 252 had been decided in favour of the Minister (or 99.21%). Additional reasons provided by the Court for rejecting the allegation of bias included the applicant's reliance upon statistics that did not provide a valid 'control' for statistical purposes as they related to a period which pre-dated the primary judge's appointment and were also not confined to outcomes in the Federal Circuit Court but also included proceedings in the Federal and High Court (at [40]).

[357] *MZAEU v MIBP* [2016] FCAFC 100. Note however that the finding of no apprehended bias turned upon the facts in this case, specifically, that the appellant was on notice the matter would be heard by the same member and did not object, the Court's interpretation of the second Tribunal decision as reflecting that it considered the relocation issue afresh, and that the decision did not indicate prejudgment.

[358] See Aronson and Groves *Judicial Review of Administrative Action* (5th Ed, Thomson Reuters, 2013) for further explanation of this rule. See for example, *ARG15 v MIBP* [2016] FCAFC 174 at [96]–[99] where the Court held that, in circumstances where there was no probative evidence to support serious findings which were then used to support adverse credibility findings in relation to a witness, the Tribunal's rejection of the appellant's claims was a jurisdictional error. The Tribunal's findings were effectively infected by its unsupported credibility findings and the error was so serious to the rejection of the applicant's claims that it amounted to jurisdictional error.

[359] *MIAC v SZMDS* (2010) 240 CLR 611 at [135]. See, also *SZQAM v MIAC* [2011] FMCA 624 and *SZQVI v MIAC* [2012] FMCA 222 which was undisturbed on appeal in *SZQVI v MIAC* [2012] FCA 1026. See also *MIBP v MZZMX* [2020] FCAFC 175 at [26]–[27], in which the Full Court of the Federal Court unanimously held that once it is established that the Tribunal's factual finding is available on the evidence, further enquiry by a Court considering a judicial review application in respect of a Tribunal decision is not warranted. The Court observed that there was self-evidently a logical connection between the evidence that, on one hand, the Mahdi Army acted through extreme violence and, on the other, the Tribunal's finding that the Mahdi Army had not targeted the visa applicant who had not been subjected to such extreme violence in some time. It observed that is not the role of a Court on an application for judicial review to assess how best to use the country information before the Tribunal, or what weight it should have been given.

[360] In *SZNKO v MIAC* [2013] FCA 123 the Court found that it was reasonably open to the Tribunal, having regard to a collection of facts, to make the finding that it did about the credibility of the applicant from his conduct in lodging a non-genuine letter at: [123]. See in contrast, *SZRHL v MIBP* [2013] FCA 1093 where the Court found the Tribunal's reasoning as to the appellant's credibility, based upon a factual error, was illogical.

[361] *SZLGP v MIAC* [2008] FCA 1198 at [26] and *SZLUN v MIAC* [2009] FMCA 1013 at [100]. See also *BEL16 v MHA* [2019] FCA 1678 at [48] and [108], where the Court held that the Tribunal's approach to assessing credibility was flawed because the

7.7.3 *Different* evidence is not necessarily inconsistent evidence. For there to be an inconsistency between two statements, each of the statements must deal with the same subject matter and on that subject matter, the evidence in the first statement must be inconsistent with the second.[362] In *MZYIC v MIAC*[363] the appellant had provided a statutory declaration in which he stated that he was attacked by supporters of the FM party and that 'the men had their faces covered so [he] could not recognise anyone'. At the hearing before the Tribunal, the appellant was asked how he knew the men were from the FM party and he stated that 'they had a flag on the car'. The Court found that as the subject matter of the second statement (the basis for the appellant's identification of the affiliation of the men that attacked him) was not dealt with in the first statement, there was no inconsistency between the statements. As the finding of inconsistency was a critical step in the Tribunal's ultimate conclusion, the Court held that the Tribunal's decision was affected by jurisdictional error.

7.7.4 Where a finding of inconsistency or omission is a critical step in the Tribunal's ultimate conclusion, that finding must generally be supported by evidence.[364] In *MZYWL v MIMAC*, although the Court found the Tribunal erred in impugning the appellant's credibility, it ultimately held that error was not jurisdictional as it was open to the Tribunal to find, on the basis of other probative evidence, that the appellant had fabricated his claims.[365]

Third party evidence and information (including country information)

7.7.5 The Tribunal exercises care when placing weight on untested anonymous assertions where the relationship between the person making the assertions and the applicant is unknown and it is apparent that the relevant informant may wish the applicant ill.[366]

7.7.6 If relying on other evidence, such as country information, the Tribunal generally articulates the evidence upon which its findings of fact are based and explains why

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discrepancies which the Tribunal relied upon were not significant. See also *CLX17 v MHA* [2019] FCCA 2516 at [70] where the Court held that certain inconsistencies identified by the Tribunal and observations about the applicant's demeanour when recounting her claims were not sufficient to explain or support the finding that the applicant had fabricated her claims, including claims pertaining to sexual assault. See further *DBP16 v MHA* [2020] FCA 781, in which the Court rejected the appellant's assertion of jurisdictional error arising from the concept of proportionality. The appellant contended that the finding of the IAA that he lacked credibility was disproportionate to inconsistencies in his claims, which he considered non-material. The Court disagreed, holding that no present authority supports expanding the application of proportionality as a criterion, or proportionality testing, to fact-finding as it relates to an applicant's credibility. The Court did not consider it necessary or appropriate to undertake a proportionality analysis in order to assess whether the credit finding was properly reasoned and carried out, but instead considered this is a matter to be assessed having regard to the authorities that specifically address jurisdictional error and credibility findings (at [99]).

[362] *MZYIC v MIAC* [2010] FCA 1368 at [16]–[18].

[363] *MZYIC v MIAC* [2010] FCA 1368.

[364] *SFGB v MIMIA* [2003] FCAFC 231 at [19]. In *SZOJV v MIAC* [2011] FMCA 91 at [82] and [86] the Court held that the Tribunal's mistaken conclusion that a particular claim had not been raised in the applicant's protection visa application, and its reliance upon this perceived omission in making adverse credibility findings were findings for which there was no supporting evidence and were critical steps in the Tribunal's ultimate conclusion. See also *BAO18 v MHA* [2019] FCA 965 at [55] where the Court noted that a cumulative finding is only as good as the individual findings lying beneath it, and where purported inconsistencies which are relied upon do not exist or are so minor, they may not form a proper basis to make an adverse credibility finding.

[365] *MZYWL v MIMAC* [2013] FCA 895.

[366] See *SZOOR v MIAC* (2012) 202 FCR 1 where, although ultimately finding that the Tribunal's decision was not affected by error, both McKerracher and Rares JJ expressed concern, in *obiter*, that a decision-maker would place weight on untested anonymous assertions in circumstances where the relationship between the person making the assertions and the applicant was unknown and where the Tribunal accepted that the author of the allegations wished the applicant ill. Their honours posited that such reliance could, in some circumstances, be considered illogical or irrational.

weight is given to that evidence, particularly where the material does not obviously support a critical conclusion or is qualified.[367] While the weight to be given to country information and the assessment of country information is a matter for the Tribunal,[368] failure to give 'proper, genuine and realistic' consideration to evidence relevant to the review may constitute jurisdictional error in some circumstances.[369]

7.7.7 Ministerial Directions made under s 499 of the Migration Act must be considered by the Tribunal, but the terms of the direction will determine the extent to which the Tribunal is obliged to consider matters set out within it. For example, Ministerial Direction 84 (Direction 84) requires that the Tribunal in the exercise of its review powers under s 414 of the Migration Act take into account the Department's complementary protection and refugee law guidelines to the extent that they are relevant as well as any country information assessment prepared by the Department of Foreign Affairs and Trade, if relevant.[370]

Personal knowledge or experience of the decision maker

7.7.8 Decision makers are entitled to rely upon their own personal knowledge or experience in assessing the applicant's claims[371] and, in some circumstances (e.g. where they have a particular expertise in relation to certain countries), they have been encouraged by the courts to draw upon it.[372] In doing so decision makers ensure that their personal experience or expertise is not being used to silence or close discussion with the applicant and that, to the extent that their experience or

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[367] *MZXEL v MIMA* [2007] FMCA 13 at [18]. In *MZYLE v MIAC* [2011] FMCA 589, the Court considered the role of decision-makers in assessing country information. The Court found that the law requires the decision-maker to first make an assessment of the material and identify the facts and circumstances which they are persuaded to accept or reject and assess the weight to place on each item of evidence, and the IMR erred by approaching their task on the basis that they had to "come down on one side or the other". In *SZQQR v MIAC* [2012] FMCA 434, the Court distinguished *MZYLE* on the facts in concluding that the IMR did not err in requiring himself to choose one set of country information over another, and the assessment and recommendation record revealed that the IMR simply preferred one set of country information over another in coming to a finding which was clearly and reasonably open to him. Undisturbed on appeal: *SZQQR v MIAC* [2012] FCA 911. In *MZYYY v MIAC* [2013] FMCA 34 the Court considered the differing views expressed in *MZXMM v MIAC* [2007] FMCA and *SZNXQ v MIAC* [2009] FMCA 1223 as to whether it is open for the Tribunal to rely on Wikipedia as a source of information. The Court held that it is a source to which the Tribunal can pay regard, and that whether an error arises for reliance on a Wikipedia article will depend on the circumstances of the case.

[368] In *MIBP v MZZMX* [2020] FCAFC 175, the Full Court of the Federal Court unanimously held that it is not the role of a court on an application for judicial review to assess how best to use the country information before the Tribunal, or what weight it should have been given (at [27]).

[369] In *MIAC v CZAX* [2012] FCA 873 the Court found it was not open to the primary judge to find that the Tribunal did not give consideration to the country information "sufficiently, fairly or properly" in the sense that expression would have to be understood if it was to form the basis for a conclusion that the Tribunal committed jurisdictional error: at [46]–[47].

[370] In *BQL15 v MIBP* [2018] FCAFC 104 at [17]–[20] the Court held that the Tribunal had implicitly had regard to Direction No 56 (which was in similar terms to the current Direction No 84) but expressed 'considerable disquiet' at the fact that it had to be inferred and stated it was highly desirable, if not essential, that reasons clearly expose consideration being given to directions lawfully given by a Minister. An application for special leave to appeal to the High Court was dismissed: *BQL15 v MIBP* [2018] HCASL 363. In *SZTMD v MIBP* [2015] FCA 150, the Court inferred from the absence of any direct consideration of the matters referred to in Ministerial Direction No 56 that the Tribunal did not consider them to be material to its decision. However, this inference may not always be drawn and the Court made it clear that the manner in which the Tribunal's statement of reasons is written or the surrounding context, for example if there is country information available to the Tribunal that is obviously relevant may detract or even displace such an inference.

[371] For example, in *AZAFG v MIBP* [2016] FCA 81 at [63], the Court held that it was open to an Independent Protection Assessment Reviewer to refer to their own knowledge of the behaviour of Vietnamese street children and awareness of the Vietnamese language and script when assessing an applicant's claims to have been living on the street and their proficiency in Vietnamese. In *Kolan v MIBP* [2016] FCCA 341, the Court held that it was open to the Tribunal to rely upon the Member's knowledge of the practice of specific education providers to provide Certificates of Enrolment to students who do not hold student visas when assessing the applicant's claim that the specific providers refused to issue him with a CoE. See also *SZLUD v MIAC* [2009] FCA 549 at [78]–[79].

[372] *SZUXE v MIBP* [2016] FCCA 309 at [28]. The Court held that the decision maker was entitled to bring their own experience and expertise to bear upon the applicant's claim to fear returning to Yemen as Zaydi Shia as the decision maker held a PhD in Shia political development and had also worked in the embassy in Saudi Arabia and travelled around Yemen.

expertise is based upon past events, there must continue to be a forward looking assessment that does not assume past experience is a reliable guide to the future.[373] The basis on which the knowledge is held and its relevance to the issues is generally explained to the applicant and, where it is adverse to the applicant's claims, the applicant is put on notice and given an opportunity to address those matters with the Tribunal.[374] In some circumstances, such as where a precise assessment of the applicant's technical ability in an area is required, it may be more appropriate for an expert assessment to be provided rather than the decision maker rely upon their own knowledge.[375]

Testing an applicant's knowledge

7.7.9 Where an applicant's knowledge of a particular matter (such as religion or political opinion) is in issue, it is acceptable for the Tribunal to question an applicant about his or her beliefs, explore the level of his or her knowledge and understanding, and evaluate any responses against probative evidence of the relevant doctrines.[376] The weight to be given to that evaluation will generally be a matter for the Tribunal.[377]

7.7.10 In *SZOMD v MIAC*, for example, the Court found that there was nothing improper in such questioning and that it is 'highly pertinent' to ask an applicant about his faith if he is claiming to be in fear of persecutory harm because of it.[378] The applicant in that case wanted to demonstrate Falun Gong exercises, but the Tribunal said that it was unable to be assisted in reaching the requisite level of satisfaction by the applicant demonstrating these exercises, and instead questioned the applicant about his beliefs and practice. The Court held that there was no error in this approach.

7.7.11 However, where the Tribunal rejects an applicant's claim based on perceived deficiencies in the applicant's knowledge, there must be a sufficiently disclosed rational basis for concluding that the particular elements of doctrine in question are elements that an adherent to the religion or belief in the applicant's position might be reasonably expected to know.[379] For example, in *MIAC v SZLSP*[380] the Tribunal's decision record stated that the applicant had been unable to correctly answer questions that the Tribunal asked him about Falun Gong, but did not disclose the source or substance of the Tribunal's understanding of Falun Gong, or why it considered the applicant's answers to be deficient.

7.7.12 What the Tribunal cannot do is impermissibly cast itself in the role of arbiter of what an applicant will be expected to know.[381] In *SZLSP v MIAC* the Court found that the

[373] *SZUXE v MIBP* [2016] FCCA 309 at [29]–[31]. See also *BEY19 v MHA* [2020] FCCA 705 at [18] where the Court criticised the Tribunal member's repeated and pointed references to his own personal experience (which he put the applicant on notice of), observing in *obiter* that such interventions could give the impression not so much of a potential bias but more that the member's own experiences and knowledge took a degree of precedence over, or significantly influenced his assessment of, the applicant's evidence (at [18]).
[374] *Kolan v MIBP* [2016] FCCA 341 at [49].
[375] *AZAFG v MIBP* [2016] FCA 81 at [63].
[376] *SBCC v MIAC* [2006] FCAFC 129 at [45], *MIAC v SZOCT* (2010) 189 FCR 577 at [50].
[377] *MIAC v SZLSP* (2010) 187 FCR 362 at [38].
[378] *SZOMD v MIAC* [2010] FMCA 1001 at [116]–[117].
[379] *MIAC v SZLSP* (2010) 187 FCR 362 at [38]–[39]. See also *MIAC v SZOCT* (2010) 189 FCR 577.
[380] *MIAC v SZLSP* (2010) 187 FCR 362.
[381] *SZLSP v MIAC* [2012] FCA 451.

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Tribunal impermissibly cast itself into the role of arbiter of the level or kind of knowledge, or the level of participation that may be expected of a person claiming to be a follower of Falun Gong without probative evidence to substantiate its conclusions.[382] Rather, there must be a sufficient rational or logical connection between the Tribunal's assessment of the applicant's credit and the material upon which it relied to make that assessment.[383] In *SZLSP v MIAC*[384] the Court found that the expert evidence before the Tribunal was directed to the level of knowledge a genuine practitioner 'would commonly know' however, the Tribunal assessed the applicant's knowledge against what a genuine Falun Gong practitioner 'will know'. Further, there was no probative material before the Tribunal to support its conclusion that there was only one authoritative interpretation of Falun Gong exercises in circumstances where the applicant indicated there were different instruction manuals available, which the Tribunal could have readily tested.

7.7.13 Reliance on other factors, in addition to an 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.[385]

Delay in applying for visa

7.7.14 Delay in applying for a visa, particularly a protection visa for example, may be a legitimate consideration to take into account when assessing the applicant's credibility.[386] However, where an applicant holds another kind of visa, there may not necessarily be any logical connection between the delay in applying for a protection visa and the genuineness of an applicant's claims to fear persecution.[387]

Illogicality and irrationality

7.7.15 In *MIAC v SZMDS*, the High Court held that illogicality or irrationality in the context of jurisdictional fact finding can give rise to jurisdictional error.[388] A decision might be illogical or irrational if only one conclusion is open on the evidence and the decision maker does not come to that conclusion, the decision was simply not open

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[382] *SZLSP v MIAC* [2012] FCA 451.
[383] *MIAC v SZOCT* (2010) 189 FCR 577 at [50].
[384] *SZLSP v MIAC* [2012] FCA 451.
[385] *MIAC v SZLSP* (2010) 187 FCR 362 at [38], cited in *MZYFS v MIAC* [2010] FCA 1325 at [33]. See also *SZOPF v MIAC* [2010] FMCA 924 at [62]–[66] and *SZOHB v MIAC* [2010] FCA 1394 at [29]–[31].
[386] See *ATC15 v MIBP* [2016] FCA 1420 at [61] in which the Court held that a proper and complete enquiry of delay in applying for a protection visa requires the Tribunal to consider the applicant's facts and explanation as to the delay, decide whether the facts were to be believed, and determine whether the delay bore on the applicant's credibility. The Court held that it was open to the Tribunal to find that a delay of six months was significant, given that the applicant claimed that she left Pakistan in July 2012 fearing for her safety and did not lodge a protection visa application until March 2013, two days after her husband's student visa was cancelled.
[387] *SZRQA v MIBP* [2013] FCA 962 at [17]. The Court found no want of logic in the Tribunal's reasoning, in circumstances where the applicant had obtained his student visa fraudulently, that the applicant ought reasonably to have realised that he was vulnerable to deportation and that if he were in genuine fear of persecution he would not have delayed applying for a protection visa.
[388] *MIAC v SZMDS* (2010) 240 CLR 611 at [40]–[42], [130]–[131]. See also *MIMA v SGLB* (2004) 207 ALR 12 at 20–21; and *SZIAY v MIMA* [2006] FMCA 1680 at [48]. See also, *BZAAF v MIAC* [2011] FCA 480 at [14] where the Court in *obiter* comment raised a doubt as to whether the Full Court's finding in *SZNPG v MIAC* [2010] FCAFC 51, that unsound reasoning was not an error of law, could be reconciled with *SZMDS* in relation to illogicality. Special leave to appeal from *BZAAF* was dismissed: *BZAAF v MIAC* [2011] HCASL 145.

on the evidence or there was no logical connection between the evidence and the inferences or conclusions drawn.[389]

7.7.16 However, to the extent that illogicality or irrationality might provide a basis for concluding that a jurisdictional error has been committed, the test is a strict one.[390] Not every lapse in logic will give rise to jurisdictional error and a conclusion of irrationality is not be lightly made.[391] A decision is not illogical or irrational or unreasonable simply because one possible conclusion has been preferred to another and reasonable minds might differ in respect of the conclusions to be drawn from probative evidence.[392]

7.7.17 Where the Tribunal gives reasons for the refusal to exercise a discretionary power, the Full Federal Court in *MIBP v Singh* held that the Court cannot go beyond the reasons stated by the decision maker when considering legal unreasonableness.[393] However, the High Court in *MIAC v Li* has made clear that the test of reasonableness necessarily involves consideration of not just the actual decision and the reasons given for it, but also whether the same decision could have been made on the available material by a reasonable decision-maker.[394] Accordingly, where a decision maker gives reasons and the decision is one to which some logical or rational mind could have come, even if no logic or rationality appears in the reasons given, a jurisdictional error should not arise.[395]

7.7.18 Whether the Tribunal's reasons give rise to illogicality or irrationality may be difficult to determine in practice, as indicated by the divergence of opinion in the High Court in *SZMDS*.[396] A failure to assess an applicant's otherwise cogent and credible

[389] *MIAC v SZMDS* (2010) 240 CLR 611 at [135]. In *SZLSP v MIAC* [2012] FCA 451, the Court applied the principles in *SZMDS* to find that the Tribunal's decision that the applicant was not a genuine Falun Gong practitioner was not grounded on probative material and was therefore not logical. See also *CIC15 v MIBP* [2018] FCA 795 at [25]–[29]. The Tribunal made an adverse credibility finding based on inconsistencies in the applicant's evidence. However, it also accepted that each inconsistency was trivial and could be explained by the passage of time. The Court found that the Tribunal's conclusion that a number of inconsistencies, when considered cumulatively, undermined the credibility of the applicant's claims was illogical. The Court reasoned that once it is accepted that a person's recollection of events is poor, it logically follows that most trivial matters will be equally affected and an adverse credibility finding could not be supported on this basis. See also *CBT16 v MIBP* [2020] FCA 793 at [71]–[72] where there was an illogical step in reasoning and where that faulty step affected a material conclusion. In relation to reliance upon an applicant's speculation about motivations or reasons of a third party's conduct, see *AWU16 v MIBP* [2020] FCA 513 at [45]–[46]. The Tribunal found that the appellants were not credible witnesses on a number of bases, including that it wasn't plausible that the driver transporting the appellant husband between the police station and prison would contact the appellant wife to inform her of the husband's whereabouts (instead preferring country information which indicated the driver would be deterred from doing this given the threat of a response from the authorities). In reaching this conclusion, the Tribunal relied in part on its rejection of the appellant husband's speculation as to why the driver contacted the wife. The Court remarked that "[t]here is certainly a danger in a decision-maker asking a protection visa applicant to speculate about the motivations, reasons or circumstances of a third party in the visa applicant's country of nationality' and held that appellant's speculation about the driver's motivations was not rationally or logically capable of supporting the Tribunal's disbelief of his detailed claims.

[390] *MIAC v SZQXZ* [2012] FCA 931 at [27].

[391] See *CJC16 v MICMSMA* [2020] FCCA 325, where at [89] the Court found that while a finding that a Tribunal's reasoning is illogical or irrational may support a conclusion that the decision is affected by error, the characterisation of such error as jurisdictional error requires a conclusion that the decision is affected by extreme illogicality.

[392] *MIAC v SZMDS* (2010) 240 CLR 611 at [130]–[131], [78]. In *SZQOJ v MIAC* [2012] FMCA 298 the Court held that illogicality in the sense of *SZDMS* goes to the Tribunal's overall satisfaction and that it is not, of itself, enough to identify irrationality in particular aspects of the decision at [37]. See also *SZOOR v MIAC* (2012) 202 FCR 1.

[393] *MIBP v Singh* [2014] FCAFC 1 at [47].

[394] *MIAC v Li* (2013) 249 CLR 332 at [66], [68].

[395] See *MIAC v SZMDS* [2010] 240 CLR 611 at [130]–[131] and *SZOOR v MIAC* (2012) 202 FCR 1 at [3]. See also *SZRSS v MIBP* [2014] FCA 137.

[396] *MIAC v SZMDS* (2010) 240 CLR 611. The varied approaches taken by different members of the High Court in *SZMDS* was summarised by the Federal Court in *MZXSA v MIAC* [2010] FCAFC 123 at [43]–[45] as the essence of Crennan and Bell JJ's reasoning being that a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material that was before the decision-maker, whilst the essence of the approach adopted by Gummow ACJ and Kiefel J was that jurisdictional error may be manifested by the process of reasoning actually adopted by the decision-maker, without more. See also *BFH16 v MIBP* [2020] FCAFC 54 at [45]–[49] where the majority of the Federal Court held that the

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claims in a logical or reasonable manner, may point towards a failure to make findings supported by the evidence, which would constitute jurisdictional error.[397]

Wrong finding of fact

7.7.19 There will be no error of law or jurisdictional error if a Tribunal makes a wrong finding of fact unless the relevant fact can be identified as a jurisdictional fact. In *SZRPT v MIBP* for example, the Court found that no critical finding of fact was based on the Tribunal's unsubstantiated assumption that adult baptismal candidates would have been required to undergo some form of preparation and that in the absence of a finding that the appellant had or had not been baptized, there was no reason to suppose that the Tribunal regarded the question of whether the appellant's failure to prepare for the baptism ceremony as material such that it amounted to jurisdictional error.[398]

7.7.20 A wrong finding of fact will result in a jurisdiction error only where the error is material to the decision. In *Hedari v MIBP*[399] the Court found that the Tribunal misinterpreted DFAT travel advice when considering if the review applicant could visit his family (the visa applicant) in Pakistan in relation to whether there were compelling or compassionate circumstances to waive PIC4020(1)(a). The Tribunal interpreted the DFAT travel advice to caution against travelling to the country ('reconsider your need to travel') when the specific advice for the particular region was 'do not travel'. The Court followed authority in *MIBP v SZMTA*[400] and found that the error was material. This is because had the error not been made, there was at least a realistic possibility of a different conclusion, and accordingly a jurisdictional error had been established.

7.7.21 Similarly, in *CZBQ v MIBP*[401] the Court found the Tribunal made an error about a document provided by the applicant because in finding that the document was not genuine the Tribunal did not consider that clearly on its face the document did identify the person who issued it, that it was signed and that it had a Ministry reference number. This error was not of little significance in the context of the Tribunal's criticisms of the document or its findings as a whole about the applicant's case.

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Tribunal's reasoning to support its finding that the two appellants were not in a homosexual relationship was logically flawed and irrational, but the minority did not. The Tribunal relied on inferences drawn from facts concerning the appellants' behaviour and inconsistencies in their evidence, including that one appellant claimed they did not talk about their first sexual experience together, while the other claimed they did talk about it. The Tribunal concluded that the claimed behaviour of not talking about the experience after such a significant event was implausible. The Tribunal also drew adverse inferences from the appellants' travel and time apart after forming what they claimed to be a strong attachment to each other, and their attendance at gay venues. The majority held that those facts, on their own, are not rationally probative of the assumptions, and that it would be expected that the psychological reactions of a couple to their first sexual encounter are likely to vary widely, reflecting the wide range of human emotional attributes. The assumptions made by the Tribunal about the expected psychological response of the appellants to their first sexual encounter could not be established without other evidence, such as psychological evidence. The majority also noted that if two people give a different account of an event and the evidence of one is rejected, that does not provide a logical basis on which to reject the evidence of the other. However, the minority held at [68]–[71] that the Tribunal was entitled to reason, consistently with human experience, that the appellants' behaviour following the event was relevantly probative of their sexual orientation, and was logically and rationally probative of whether or not the sexual encounter in question occurred, which, in turn, was something that could fairly inform the Tribunal's assessment of the appellants' sexual orientation.

[397] *SZIAY v MIMA* [2006] FMCA 1680 at [48], [60]–[62].
[398] *SZRPT v MIBP* [2014] FCA 24 at [36].
[399] *Hedari v MIBP* [2020] FCA 298 at [11].
[400] *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP* [2019] HCA 3.
[401] *CZBQ v MIBP* [2015] FCA 526 at [26].

7.7.22 In summary, where the Tribunal makes an adverse credibility finding on the basis of a false factual premise which is critical to its overall finding, jurisdictional error may arise.[402]

Cumulative effect of consideration of individual items of evidence, including credibility findings

7.7.23 The Tribunal may rely upon the cumulative effect of items of evidence to support a finding in circumstances where a consideration of each piece of evidence in isolation would not support such a conclusion. For example, in *He v MIBP*[403] the Court held that the Tribunal acted reasonably and rationally in concluding the applicant and sponsor were not in a spousal relationship when they relied on the cumulative effect of the evidence relating to financial circumstances, where a consideration of each factor alone would not have led the Tribunal to reach this conclusion.

7.7.24 The assessment of credibility is necessarily impressionistic, which, if properly formed, takes account of all of the evidence.[404] The Tribunal may make credibility findings based on the cumulative effect of various pieces of evidence. Where the Tribunal has not premised its findings on each of several circumstances being *individually* a reason for an adverse credibility finding, the Court in *CBY15 v MIBP* found that it would be incorrect to ask whether, assuming the Tribunal had made only such findings as did not depend on legally erroneous foundations, its decision might have been set aside for legal unreasonableness.[405] However, where an applicant is able to establish that the Tribunal may not have reached the same decision had it taken into account only those factors that were legally sound, jurisdictional error may result due to the materiality of the adverse credibility finding to the outcome of the application. In *CBY15 v MIBP*,[406] to illustrate the point, the Federal Court adopted the analogy of legs of a table. In that case, once three of the five legs of the Tribunal's reasoning concerning the applicant's credibility were 'kicked out' for want of legal reasonableness, the remaining two were insufficiently robust to support the Tribunal's adverse credibility findings, leaving open the possibility that the Tribunal may have reached a different conclusion.[407]

7.8 Estoppel and the Tribunal

7.8.1 Estoppel in its broadest sense refers to a series of legal and equitable doctrines that preclude a person from denying or contradicting something that has been said before or that has been legally established as true.[408] There are many different kinds of 'estoppel' which may have a role in administrative law.[409] In the Tribunal

[402] *SZLGP v MIAC* [2009] FCA 1470 at [37]–[38]. See also *CUS15 v MIBP (No 2)* [2020] FCCA 220 at [28]–[29].
[403] *He v MIBP* [2016] FCA 2908.
[404] *SZTFQ v MIBP* [2017] FCA 562 at [44].
[405] *CBY15 v MIBP* [2020] FCA 878 at [145], citing *SZTFQ v MIBP* [2017] FCA 562 at [44]–[45]. The Court in *CBY15* found that to take this approach would be to act on an entirely different premise than the Tribunal did.
[406] *CBY15 v MIBP* [2020] FCA 878.
[407] *CBY15 v MIBP* [2020] FCA 878 at [145]–[146], [155].
[408] Bryan A Garner, *A Dictionary of Modern Legal Usage* (Oxford University Press, 2nd Ed 1995).
[409] *MIEA v Kurtovic* [1990] 21 FCR 193 at [207].

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context, estoppel by representation, issue estoppel, res judicata and *Anshun* estoppel are most relevant.[410]

Estoppel by Representation

7.8.2 A claim of estoppel by representation may arise where a decision-maker undertakes to act in a particular manner.[411] The question that then arises is whether this representation gives rise to a claim for a substantive right or entitlement to fairness, as distinct from procedural fairness, such that the decision-maker is prevented from breaching the undertaking.[412] The Courts have been reluctant to extend this doctrine to administrative decision-makers. In *MIEA v Kurtovic* the Court considered the application of estoppel to a determination made to deport a non-citizen.[413] Although the Court found the principle of estoppel did not arise on the facts, it explored whether it generally had any application in administrative law and held there is a duty under the Migration Act to exercise a free and unhindered discretion and estoppel cannot be raised to prevent or hinder the exercise of that discretion.[414] Importantly, the principles arising from this judgment have been applied by subsequent Courts.[415]

7.8.3 Similarly, the Courts will not generally allow estoppel to waive statutory requirements in a way that extends public power.[416] Neither will they apply estoppel where an administrator lacks the power to make the decision sought.[417] For example, in *MIEA v Petrovski*[418] the Full Federal Court considered whether representations by the Minister regarding Mr Petrovski's citizenship status estopped the government from determining he was an 'illegal entrant' within the meaning of

[410] Michael Head, *Administrative Law Context and Critique* (The Federation Press, 2nd ed, 2008) 219.
[411] *MIEA v Kurtovic* [1990] 21 FCR 193 ; *MIEA v Petrovski* (1997) 73 FCR 303. See also Michael Head, *Administrative Law Context and Critique* (2008 2nd Ed) at 219.
[412] Michael Head, *Administrative Law Context and Critique* (The Federation Press, 2nd ed, 2008) 219.
[413] *MIEA v Kurtovic* [1990] 21 FCR 193. The respondent was a non-citizen who was sentenced to imprisonment for manslaughter. An order for his deportation from Australia was revoked by the Minister but the respondent was advised that any subsequent conviction would lead to his deportation being reconsidered. The Minister subsequently determined to deport the Respondent but this decision was quashed by the Federal Court on the basis that the Minister was estopped from making a similar order on the same grounds. On appeal, the Full Federal Court considered the principle of estoppel did not arise on the facts of the case.
[414] *MIEA v Kurtovic* [1990] 21 FCR 193 at [208], [210]. In particular, the Court considered the intentions of the legislature and found it intended '…the discretion to be exercised on the basis of a proper understanding of what is required by the statute and that the repository of the discretion is not to be held to a decision which mistakes or forecloses that understanding'. However, see also Michael Head, *Administrative Law Context and Critique* (The Federation Press, 2nd ed, 2008) at 223, who notes these comments are obiter as the judgment was ultimately decided on the basis of procedural fairness.
[415] In *Attorney-General New South Wales v Quin* [1990] 170 CLR 1, the High Court followed this principle to determine that a representation made by the Executive could not preclude the Executive from adopting a policy contrary to that representation. The Court considered that a public authority cannot be estopped from doing its public duty. See also, *Lu v MIMA* (2000) 176 ALR 79; *MIEA v Sabri Polat* (1995) 57 FCR 98; and *Singh v MIMA* [2010] FMCA 305.
[416] In *Formosa v Secretary Department of Social Security* [1988] 81 ALJR 687, the Federal Court determined that the plaintiff was not entitled to an age pension because she did not apply in writing, despite the Department not advising her of this requirement, cited in Michael Head, *Administrative Law Context and Critique* (The Federation Press, 2nd ed, 2008) at 221. See also, *Kelly v MIAC* [2011] FMCA 557 where the Court considered whether estoppel applied in circumstances where the applicant relied on statements made by the Department that his Subclass 417 visa would not be cancelled if he applied within a reasonable time for a Subclass 457 visa. The Court held it was not required to decide whether estoppel has emerged in Australian administrative law as the applicant did not comply with the condition precedent to the original undertaking (i.e. he did not apply for the Subclass 457 within a reasonable time). See also, *Li v Minister for Immigration* (1991) 33 FCR 568 at 573 where the applicant submitted the Minister was estopped from cancelling her visa upon her arrival in Australia in circumstances where her spouse had withdrawn his sponsorship prior to the grant of that visa. While the Court accepted that the doctrine of estoppel may apply to administrative decisions made at a 'policy level', as opposed to 'operational decisions', it found the applicant could not rely on estoppel as the mere issue of the visa in the context of the legislative scheme did not result in a guarantee that it would not be cancelled or revoked.
[417] See Michael Head *Administrative Law Context and Critique* (The Federation Press, 2nd ed, 2008) at 221; *MIEA v Petrovski* [1997] 73 FCR 303.
[418] *MIEA v Petrovski* (1997) 73 FCR 303.

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the Migration Act. The Court held in circumstances where the law did not permit the grant of citizenship to Mr Petrovski, estoppel could not apply to control the exercise of the statutory powers of the Minister so as to compel him to grant citizenship.

7.8.4 Attempts to rely on estoppel to waive or extend time limits to apply to the Tribunal have been similarly unsuccessful. In *Singh v MIAC*[419] the departmental notification of the decision to refuse to grant a visa to the applicant provided an incorrect time frame in which to apply to the Tribunal for review and the Tribunal found not have jurisdiction to review the application as it was lodged out of time. The Full Federal Court held that administrative decision-makers did not have the power to alter the timeframe for a review application set down by the Migration Act and the Regulations, and that their conduct, if they did so, could not give rise to an estoppel having the effect of extending the relevant timetable.[420]

7.8.5 Other instances in which estoppel has been unsuccessfully raised in the migration context include:

- reliance by an applicant on advice from a departmental officer to lodge his application by post, resulting in the application being received late;[421]
- the failure of a departmental officer to provide correct advice to an applicant under ss 194 and 195 of the Migration Act;[422]
- misleading acts of the primary decision maker / tribunal.[423]

7.8.6 Based on the weight of legal authority, a claim of estoppel by representation against a Tribunal decision-maker is unlikely to be successful. However, any undertakings made by the Tribunal to proceed in a certain matter may give rise to a duty to provide procedural fairness if it fails to act on that undertaking and does not advise the applicant of the altered position.

Issue Estoppel, Res Judicata and *Anshun* Estoppel

7.8.7 Three other 'types' of estoppel which may arise in the Tribunal context are 'issue estoppel' 'res judicata' and '*Anshun* estoppel'. Issue estoppel applies where a judicial determination directly involving an issue of fact or law has disposed of the matter so that it cannot thereafter be raised by the same parties.[424] This principle is to be distinguished from res judicata which applies to an entire claim rather than one issue.[425] These doctrines are founded on the principles that a person ought not

[419] *Singh v MIAC* [2010] FMCA 305 (Jarrett FM, 6 May 2010).
[420] *Singh v MIAC* (2011) 190 FCR 27. See also *Patel v MIAC* [2011] FMCA 223 at [42]–[44] where the Court concluded the Minister could not be estopped from denying the efficacy of the decision notification.
[421] *Singh v MIAC* [2011] FMCA 832. The Court held, as there were other circumstances leading to the applicant's decision to lodge the application by post, it could not be said he was seeking to give effect to an assumption upon which he acted. Accordingly, there was no foundation for a claim of estoppel. However, importantly the Court also confirmed that no principle of estoppel can excuse an administrator from performing a statutory obligation or allow them to act ultra vires
[422] *Tan v MIAC* [2007] FCA 1427 (Rares J, 28 August 2007) where the Court concluded the failure did not give rise to a claim of estoppel against the Minister as s 48(1) prevented him from considering the application for a further visa.
[423] *Diamant v MIBP* [2014] FCCA 21. The Tribunal found it had no jurisdiction to deal with the review application as there was no approved sponsor and the Court held that any argument based on purposed estoppel arising from the misleading acts of the delegate and the Tribunal must fail. See also *Hu v MIBP* [2014] FCCA 312 at [28]–[29].
[424] *Blair v Curran* [1939] 62 CLR 464.
[425] *Blair v Curran* [1939] 62 CLR 464.

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to be vexed twice for one and the same cause and that it is in the interests of the State that there be an end to litigation.[426]

7.8.8 *Anshun* estoppel is an extended form of issue estoppel or res judicata and operates to allow an individual to raise an issue that has been the subject of a previous determination in subsequent proceedings, if there are special circumstances to warrant this approach.[427] There will be no estoppel unless the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it.[428] However, what will be sufficient to constitute special circumstances is not fixed and may involve consideration of a wide range of factors, all of which bear upon the general discretion of the Court.[429] Importantly, it can apply to proceedings in the nature of judicial review of administrative actions.[430]

7.8.9 The application of issue estoppel, res judicata and *Anshun* estoppel to determinations of the Tribunal was considered by the Federal Magistrates Court in *Kong v MIAC*[431] where the applicant lodged a repeat application for review of an earlier Tribunal decision, which had been unsuccessfully litigated. The applicant submitted the Tribunal's earlier decision had been rendered invalid by subsequent Federal Court decisions in unrelated cases. The Tribunal determined it was *functus officio* and had no jurisdiction to again review this matter. Applying the principles of issue estoppel and res judicata, the Court concluded as there had been a final judicial determination of the issue between the parties, the applicant was estopped from asserting that the Tribunal's original decision was affected by jurisdictional error. [432] Applying the principle of *Anshun* estoppel, the Court found the determinative issue properly belonged to the subject of litigation following the Tribunal's original decision and there were no special circumstances to raise this matter in the subsequent proceedings.[433]

7.8.10 On the basis of current judicial authority, if an earlier Tribunal decision has been judicially determined, the doctrines of issue estoppel and res judicata can apply to prevent an applicant from repeatedly litigating the matter. However, rather than invoking these doctrines the Tribunal prefers to determine that it is *functus officio* (see Chapter 28 – Reopening finalised matters). While there is no judicial consideration on the Tribunal's position if the earlier decision was not the subject of judicial review proceedings, it appears that issue estoppel, res judicata and *Anshun*

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[426] *Wong v MIMIA* (2004) 146 FCR 10.
[427] *Port Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.
[428] *Port Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at [37].
[429] *Wong v MIMIA* (2004) 146 FCR 10 at [38]. In this case, the Court considered that a failure of the Minister to comply with a positive duty did not constitute a special circumstance.
[430] *Wong v MIMIA* (2004) 146 FCR 10 at [39]. However, in this case, it was the Minister who asserted the application of res judicata, issue estoppel and *Anshun* estoppel. In considering the application of *Anshun* estoppel, the Court observed that where the beneficiary of the principle is a Minister of state who has no personal interest in the outcome of the proceeding, the principle may be of little significance. See also *Kong v MIAC* [2011] FMCA 583 regarding the application of issue estoppel, res judicata and *Anshun* estoppel to a decision of the Tribunal which was previously the subject of judicial consideration.
[431] *Kong v MIAC* [2011] FMCA 583.
[432] *Kong v MIAC* [2011] FMCA 583 at [23], [25].
[433] *Kong v MIAC* [2011] FMCA 583 at [26]–[33].

estoppel would have no application.[434] In such cases, again the doctrine of *functus officio* would apply to prevent the Tribunal from reconsidering a repeat application.

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[434] Although, see *MIEA v Kurtovic* [1990] 21 FCR 193 at 219 where Gummow J, stated that it was not conclusively settled whether issue estoppel could apply to decisions of AAT.

Migration and Refugee Division Procedural Law Guide

Chapter 8: Notification by the Tribunal

Current as at 17 December 2021

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8. NOTIFICATION BY THE TRIBUNAL[1]

8.1 Introduction

8.1.1 In all reviews, the Migration and Refugee Division (MRD) of the Tribunal is required to give documents or correspondence to an applicant or other person under the *Migration Act 1958* (Cth) (the Migration Act). For example, the Tribunal may be required to invite the applicant to appear at a hearing under ss 360 [Part 5 - migration] or 425 [Part 7 - protection]; or to comment on or respond to adverse information to which s 359A [Part 5] or 424A [Part 7] applies; or may wish to give a formal written invitation to a person to provide information under s 359(2) [Part 5] or 424(2) [Part 7]. In each of these cases, the Migration Act specifies the method by which such invitations must be given. Mandatory requirements also attach to notification of Tribunal decisions.[2] For discussion of the Tribunal's obligation to notify applicants of decisions, see Chapter 26 – Notification of the decision.

8.1.2 In most instances where the Migration Act requires the Tribunal to give a document to a person (other than the Secretary of the Department), it specifies that, if the document is to be given to a non-detainee, it must be given by one of the methods specified in s 379A [Part 5] or 441A [Part 7].[3] Where the person is in immigration detention, the Migration Act usually specifies that the Tribunal must give the document 'by a method prescribed for the purposes of giving a document to such a person'.[4] Where the Tribunal is required to give a document to the Secretary, it must do so using one of the methods in s 379B [Part 5] or 441B [Part 7].

8.1.3 For documents which are not expressly required to be given by a method in s 379A, 379B, 441A or 441B or by a method prescribed for a person in immigration detention, ss 379AA [Part 5] and 441AA [Part 7] apply to enable the Tribunal to give the document by any method that it considers appropriate (which may be one of those statutory methods). The focus of this Chapter is the mandatory statutory methods of notification.

8.1.4 The Migration Act also contains provisions which specify that if a document is sent in a particular way it is taken to be received at a particular time (this is known as 'deemed' notification or receipt). Deemed notification provisions apply to most correspondence required to be given under the Migration Act. These provisions enable the Tribunal to determine when an invitation or document will be taken to

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] See ss 368A, 368D [Part 5 - migration] and ss 430A, 430D [Part 7 - protection]. Note that prior to the commencement of the *Migration Legislation Amendment Act (No 1) 2008* (Cth), the Tribunal was required to notify applicants (other than certain applicants in detention and applicants in respect of whom an oral decision had been given) of a handing down of the decision. The amendments removing the handing down notification procedures apply in respect of decisions made on or after 27 October 2008 and reviews where, before 27 October 2008, notice of the handing down had not been given to the applicant or Secretary.
[3] ss 359(3)(a), 359A(2)(a), 360A(2)(a); 424(3)(a), 424A(2)(a), 425A(2)(a).

have been received, which may be important as various prescribed periods (e.g. the period of notice of a hearing and the periods for response to written invitations to comment or provide information) begin to run from the time of receipt of the invitation or document. See the Prescribed Periods Parts 5 and 7 Table for the prescribed periods and deemed notification periods.

8.1.5 Where an application is made by more than one person through a combined application, for reviews lodged on or after 27 October 2008, and any reviews which have not been decided as at that date, documents given to any one applicant in a combined application are taken to be given to each of them.[5] The Migration Act also makes special provision for notification of minors who are not part of a combined application (see below).

8.2 Method of dispatch of the document – Persons not in immigration detention

8.2.1 Where a document is to be given to a person (other than the Secretary) who is a non-detainee, the Migration Act in many instances requires that the notice be given to the person by one of the methods specified in s 379A or 441A. Those methods are:[6]

- a member, the Registrar or an officer of the Tribunal, or a person authorised in writing by the Registrar, handing the document to the recipient;[7]
- a member, the Registrar or an officer of the Tribunal, or a person authorised in writing by the Registrar, handing the document to another person (who fulfils certain age and other requirements) at the recipient's last residential or business address provided to the Tribunal by the recipient in connection with the review;[8]
- a member, the Registrar or an officer of the Tribunal, dating the document and then dispatching it by prepaid post or by other prepaid means within 3 working days (in the place of dispatch) of the date of the document to the last address for service or the last residential or business address, provided to the Tribunal by the recipient in connection with the review;[9]
- a member, the Registrar or an officer of the Tribunal transmitting the document by fax; or e-mail; or other electronic means to the last fax number,

[4] ss 359(3)(b), 359A(2)(b), 360A(2)(b); 424(3)(b), 424A(2)(b), 425A(2)(b).
[5] ss 379EA and 441EA introduced by *Migration Legislation Amendment Act (No 1) 2008* (Cth).
[6] Note, in respect of Part 5 reviewable decisions, the provisions refer to Deputy Registrar, in addition to the Registrar. In practice, however, the difference is not material.
[7] ss 379A(2), 441A(2).
[8] ss 379A(3), 441A(3).
[9] ss 379A(4), 441A(4).

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e-mail address or other electronic address provided to the Tribunal by the recipient in connection with the review.[10]

8.2.2 A person is generally not considered to be in immigration detention if the person is in criminal detention.[11] A person is in criminal detention for the purposes of the Regulations if they are serving a term of imprisonment following conviction for an offence or in prison on remand.[12]

8.3 Method of dispatch of the document – Persons in immigration detention

8.3.1 If the person is in immigration detention, documents must usually be given 'by a method prescribed for the purposes of giving documents to such a person'.[13]

8.3.2 Regulation 5.02 of the *Migration Regulations 1994* (Cth) (the Regulations) prescribes the method for giving documents to a person in immigration detention and states:

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

There is some uncertainty over the operation of reg 5.02 where an applicant has appointed an authorised recipient.[14]

8.3.3 There is also some ambiguity as to what the term 'giving' means in reg 5.02. On one view, it requires personal hand delivery. The practice in relation to bridging visa detention cases, for example, is to generally fax or email the invitation to the detention centre where it is then served personally on the person in immigration detention. This practice was upheld in *Ozturk v MIMA* where the Court held that the Tribunal was entitled to carry out its function through an agent, including through an officer of the Minister's department.[15]

8.4 Method of dispatch of the document – Secretary of the Department

8.4.1 The Migration Act and Regulations may require the Tribunal to give a document to the Secretary of the Department in a way specified in s 379B or 441B. For example, the Tribunal must give the Secretary a copy of the decision statement of reasons by a method specified in s 379B or 441B. Broadly speaking, the methods specified in

[10] ss 379A(5), 441A(5).
[11] *Sillars v MICMSMA* [2020] FCA 1313 at [35]–[39]. In particular, a non-citizen only enters immigration detention as a result of an executive act taken pursuant to s 189 (at [39]).
[12] reg 1.09. A person is not in criminal detention if they are subject to a community service order; or on parole after serving part of a term of imprisonment; or on bail awaiting trial.
[13] ss 359(3)(b), 359A(2)(b), 360A(2)(b) [Part 5 - migration]; 424(3)(b), 424A(2)(b), 425A(2)(b) [Part 7 - protection].
[14] It is unclear how reg 5.02 interacts with ss 379G and 441G where the applicant has an authorised recipient. For further discussion see below.
[15] *Ozturk v MIMA* (2001) 113 FCR 392.

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those sections are very similar to the methods for giving documents to a person who is not in immigration detention.

8.4.2 The methods are a Member, Registrar, Tribunal officer or other person authorised in writing by the Registrar:

- handing the document to the Secretary or an authorised officer.[16] 'Authorised officer' in this context means an officer (as defined in s 5) authorised by the Secretary or Minister for the purposes of ss 379B and 441B.
- dating and dispatching the document by post or other means within 3 working days (in the place of dispatch) of the date of the document to an address notified to the Tribunal in writing by the Secretary, to which such documents can be dispatched.[17]
- transmitting the document by fax, email or other electronic means to the last fax number, email address or other electronic address notified to the Tribunal in writing for the purpose.[18]

8.5 Time of receipt

Documents sent to applicants and persons other than the Secretary

8.5.1 If a person is notified by one of the methods in s 379A or 441A, the document will be taken to have been received in accordance with s 379C [Part 5 – migration] or 441C [Part 7 - protection], respectively. Sections 379C and 441C provide that the person *is taken* to have received the document, irrespective of whether or not it was *in fact* received:

- when it is handed to them;[19]
- when it is handed to another person at the applicant's last residential or business address;[20]
- if sent by prepaid post or other prepaid means - 7 working days (in the place of the address) after the date of the document, if dispatched from a place within Australia to an address within Australia; and 21 calendar days in all other cases;[21]

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[16] ss 379B(2), 441B(2).
[17] ss 379B(3), 441B(3). Note that, unlike the requirement for dispatch to applicants, there is no requirement that the post or other means be prepaid. 'Other means' may include such methods as delivery by DX. There is also no requirement that the address provided be the last address notified for such purposes.
[18] ss 379B(4), 441B(4).
[19] ss 379C(2), 441C(2).
[20] ss 379C(3), 441C(3).
[21] ss 379C(4), 441C(4).

- if sent by fax, e-mail or other electronic means - at the end of the day on which the document is transmitted.[22]

8.5.2 The combined purpose of the interlocking provisions of ss 379A and 379C, and ss 441A and 441C, is to permit delivery or service of documents to be deemed to have occurred even if that may not have occurred in fact.[23] Another purpose is to have the Tribunal serve documents at the address at which service is most likely to be effective'.[24]

Documents sent to the Secretary

8.5.3 If the Secretary is notified by one of the methods in s 379B or 441B (including a case covered by s 379AA), the document will be taken to have been received in accordance with s 379D or 441D. Sections 379D and 441D provide that the Secretary *is taken* to have received the document, irrespective of whether or not it was *in fact* received:

- when it is handed to the Secretary or an authorised officer by the Tribunal;[25]
- if sent by post or other means in accordance with s 379B or 441B:
  - within Australia, 7 working days (in the place of receipt) after the date of the document; or
  - in any other case, 21 days after the date of the document;[26]
- if faxed, emailed, or sent by other electronic means in accordance with s 379B or 441B - at the end of the day on which it was transmitted.[27]

8.6 Curing errors made when giving the notification

8.6.1 Importantly, for notifications given, dispatched or transmitted on, or after, 5 December 2008, ss 379C(7) [Part 5 - migration] and 441C(7) [Part 7 - protection] provide that if the Tribunal makes an error whilst purporting to give the notice to a person in accordance with one of the methods in s 379A or 441A (for example, by sending it to an incorrect address), *and* the person nevertheless receives the document then the person is taken to have received it as if the deeming provisions in s 379C or 441C apply. The only exception to this is that if a person can show that

[22] ss 379C(5), 441C(5).
[23] *SZOQY v MIAC* [2011] FMCA 120 at [23].
[24] *SZOQY v MIAC* [2011] FMCA 120 at [23].
[25] ss 379D(2), 441D(2).
[26] ss 379D(3), 441D(3).
[27] ss 379D(4), 441D(4).

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he or she received the document at a later time, then he or she is taken to have received the document at the later time.[28]

8.6.2 An error in the content of the notice (e.g. specification of an incorrect period in which comments on adverse information must be received) cannot be cured by s 379C(7) or 441C(7).

8.7 Effect of a failure to comply with notification obligations

8.7.1 A failure to comply with the Tribunal's notification obligations, even when not cured by the operation of s 379C(7) or 441C(7), will not, in every case, result in jurisdictional error invalidating the Tribunal's decision.

8.7.2 The effect of a failure to comply with the statutory notification procedures was considered by the High Court in *MIAC v SZIZO.*[29] In that case, the applicant had appointed his daughter, who was also an applicant before the Tribunal, as his authorised recipient. The Tribunal sent a hearing invitation to the applicant instead of his authorised recipient, but he received it and attended the Tribunal hearing.

8.7.3 The High Court, on appeal, drew a distinction between the procedural provisions dealing with the manner of giving notice and the provisions in the Migration Act aimed at ensuring a procedurally fair review, such as the duty to invite an applicant to appear for hearing (ss 360 and 425) and the obligation to disclose adverse information (ss 359A and 424A). The Court held that not every departure from the steps set out in ss 379A and 441A, and ss 379G and 441G, would result in an invalid invitation without consideration of the extent and consequences of the departure. In circumstances where the applicant was not denied natural justice by reason of the Tribunal's omission, there was no jurisdictional error.

8.7.4 The reasoning of the High Court leaves open the possibility that a failure to comply with the statutory notification procedures could invalidate a hearing invitation or invitation to comment on adverse information, and result in jurisdictional error, if the error prevented the applicant from properly advancing his or her case or otherwise involved a denial of procedural fairness. Accordingly, the Tribunal endeavours to strictly comply with the statutory notification provisions. If, in the course of a review, it becomes apparent that there has been a failure to comply with the statutory notification procedures, consideration is given to whether the error may have resulted in procedural unfairness and whether the notice should be resent.

8.7.5 The High Court in *MIAC v SZIZO*[30] was considering the notification scheme prior to 5 December 2008. For notices given, dispatched or transmitted on, or after, 5 December 2008, ss 379C(7) and 441C(7) provide that if the Tribunal makes an

[28] ss 379C(7), 441C(7). In *Cheng v MIAC* [2011] FMCA 461 the Court noted the Full Court's finding in *Singh v MIAC* (2011)190 FCR 552 at [44] that s 494C(7) [the Departmental equivalent of ss 379C and 441C] will not arise for consideration unless the initial notification is defective.
[29] *MIAC v SZIZO* (2009) 238 CLR 627.
[30] *MIAC v SZIZO* (2009) 238 CLR 627.

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error in giving the document, but the recipient nevertheless receives it, then that person is taken to have received the document at the time he or she would have been taken to have received it under the deeming provisions in s 379C or 441C.[31] The exception to this is if the person can show that he or she actually received it at a later time, in which case, he or she is taken to have received it at that later time.

8.7.6 The High Court's reasoning is relevant in relation to notices given on, or after, 5 December 2008. Where ss 379C(7) or 441C(7) applies because an applicant has in fact received the notice within the normal 'deemed receipt' period, notwithstanding an error, in many cases there will not be a denial of natural justice and, therefore, no jurisdictional error arising from the error. However, if the applicant has demonstrated that the notice was received *after* the normal period, it may be that the notice did not give the required period of notice of a hearing or the prescribed period for response to adverse information such that he or she may have been prevented from properly preparing or presenting their case. In such circumstances there may be a jurisdictional error for breach of s 360 or 425, or s 359A or 424A, notwithstanding the operation of s 379C(7) or 441C(7).

8.8 Notification to authorised recipient

Nomination of authorised recipient

8.8.1 Sections 379G [Part 5 - migration] and 441G [Part 7 - protection] provide for a person to authorise another person to act as an 'authorised recipient'. A person nominated as an authorised recipient is only authorised to receive documents.[32] A person who is an authorised recipient is not prevented from being separately authorised as a representative to do other things on behalf of an applicant but that is a role separate from that of an authorised recipient. Prior to 25 September 2014, a person could be authorised under these provisions to 'do things on behalf of the applicant that consist of, or include, receiving documents'. That is, more than simply receive documents.

8.8.2 Sections 379G and 441G apply regardless of whether the review application is validly made.[33] Prior to 25 September 2014, the obligation to notify an authorised recipient was only engaged once an application for review was properly made.[34]

8.8.3 An applicant, but not the authorised recipient, may vary or withdraw the nomination of a person as an authorised recipient.[35] However, the authorised recipient

[31] ss 379C(7), 441C(7). This provision was introduced by the *Migration Amendment (Notification Review) Act 2008* (Cth). The provision applies to documents given, dispatched or transmitted on or after the commencement date (5 December 2008): s 29.
[32] ss 379G(1)(b), 441G(1)(b) as amended by *Migration Legislation Amendment Act (No 1) 2014* (Cth).
[33] ss 379G(1), 441(1) as amended by *Migration Legislation Amendment Act (No 1) 2014* (Cth). The amendments apply to review applications made on or after 25 September 2014 as well as those made prior to, but not finally determined at that date.
[34] *SZJDS v MIAC* (2012) 201 FCR 1.
[35] ss 379G(3), 441G(3) as amended by *Migration Legislation Amendment Act (No 1) 2014* (Cth). The amendments apply if the notice of the authorised recipient was given before, on or after 25 September 2014.

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themselves, in addition to the applicant, may give notice of a variation in their address.[36]

8.8.4 Accordingly, if in respect of either a valid or an invalid review application, the applicant has given the Tribunal written notice of the name and address of another person (the authorised recipient) who has been authorised by the applicant to receive documents in connection with the review, the Tribunal must give the invitation, to the authorised recipient,[37] unless and until the applicant withdraws or varies the notice given. An authorised recipient cannot unilaterally vary or withdraw their authorisation to receive documents.[38] Although, if the authorised recipient is separately appointed as a representative, they could do so under instruction.[39]

8.8.5 Where an applicant has nominated an authorised recipient, the Tribunal may also give a copy of the document to the applicant, but is not obliged to do so.[40] In giving the document to the authorised recipient, the Tribunal is taken to have given the document to the applicant.[41]

Determining whether there is an authorised recipient

8.8.6 Whether a person has appointed an authorised recipient is a question of fact. As noted above, ss 379G and 441G provide that an applicant may give the name and address[42] of another person to act as an authorised recipient. While the notice of an authorised recipient must be given in writing, a written signature of the person appointing the authorised recipient is not required.[43] It will be sufficient if a person, acting on the authority of the applicant, gives the written notice. For example, in *Huang v MIAC*[44] the applicant's agent (who was not a registered migration agent) completed a visa application form on the applicant's behalf and nominated himself as authorised recipient, the applicant claimed that he had not authorised his agent to nominate himself as authorised recipient and the Court applied principles of contract law to find that there was an implied actual authority from the circumstances of the agency and that the Department was correct to send the decision notification to the authorised recipient.

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[36] ss 379G(3A), 441G(3A) inserted by *Migration Legislation Amendment Act (No 1) 2014* (Cth). The amendments apply if the notice of the authorised recipient was given before, on or after 25 September 2014.
[37] See *Lee v MIAC* (2007) 159 FCR 181 where Besanko J expressly disagreed with the reasoning in *Makhu v MIMIA* [2004] FCA 221 and rejected the Minister's argument that it was possible to just give a s 359A letter to the applicant by a method specified in s 379A at [38].
[38] ss 379G(3), 441G(3); *Guan v MIAC* [2010] FMCA 802.
[39] In *Jalagam v MIAC* (2008) 221 FLR 202, the Federal Magistrates Court found nothing in the authorised recipient provisions to exclude the 'normal presumption that Parliament intends to allow a person to act for the purposes of a statutory provision through an agent.' This reasoning was upheld on appeal in *Jalagam v MIAC* [2009] FCA 197.
[40] See *SZDQZ v MIMIA* [2005] FMCA 1115 at [11].
[41] ss 379G(2), 441G(2).
[42] Note that a ss 379G/441G notice may include more than one address and the address may be a business, residential address and an e-mail address: see *MZZDJ v MIBP* (2013) 216 FCR 153 where the Court considered the equivalent departmental provision (s 494D): at [30].
[43] *Jalagam v MIAC* (2008) 221 FLR 202. This finding was not disturbed on appeal in *Jalagam v MIAC* [2009] FCA 197. This case concerned the equivalent departmental provision (s 494D) but is equally applicable to ss 379G,441G.
[44] *Huang v MIAC* [2011] FMCA 271.

Must an authorised recipient be a natural person?

8.8.7 Case law suggests that an authorised recipient must be a natural person[45] rather than a firm or organisation. A person also cannot have more than one authorised recipient at any time.[46]

Must the authorisation take a particular form?

8.8.8 In *Jalagam v MIAC*, the Federal Court found there was no requirement that the appointment of an authorised recipient be in any particular form.[47] Any notice in writing that meets the elements of s 379G or 441G will suffice.

8.8.9 If there is any ambiguity as to whether the applicant has provided notice of an authorised recipient, or who that person is, the Tribunal may contact the applicant and seek clarification.[48]

8.8.10 In particular, where the applicant has used a Departmental form or an older Tribunal form to notify the Tribunal of an authorised recipient, the language used in the form and the manner in which it has been completed is checked to ensure that it is consistent with the language in s 379G or 441G.[49]

Oral advice of an authorised recipient

8.8.11 An appointment of a person as an authorised recipient must be in writing.[50] If the applicant informs the Tribunal orally that he or she has an authorised recipient, the applicant is usually asked to complete an appointment of authorised recipient form or otherwise notify the Tribunal *in writing* of the name and address of his or her authorised recipient.

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[45] See *Li v MIMA* (1999) 94 FCR 219 at [40] in relation to the then in force s 53(4) and *SZJSP v MIAC* [2007] FCA 1925 at [18].
[46] ss 379G(3), 441G(3).
[47] *Jalagam v MIAC* [2009] FCA 197.
[48] For example, in *SZFQY v MIAC* (2008) 216 FLR 181, the applicant completed the application for review form by indicating that he wanted correspondence sent to his residential address. He also appeared to appoint his adviser as his authorised recipient. The Court found that the language on the application form did not pick up the language in s 441G. The three boxes under the question 'Where do you want us to send correspondence about your application' were mutually exclusive. Ticking 'My residential address in Australia' but not 'My Authorised Recipient' made clear that the applicant was not authorising his advisor to receive documents in connection with his review 'on his behalf'. As such, the Court found the applicant had not appointed an authorised recipient and so the Tribunal erred by sending case-related correspondence to the adviser instead of the applicant. See also *SZJDS v MIAC* (2012) 201 FCR 1 where a division in the Court as to whether the applicant had an authorised recipient was on the facts rather than the legal principles.
[49] *SZFQY v MIAC* (2008) 216 FLR 181. See also for example *SZKHR v MIMIA* [2008] FMCA 138 in which the Department notified the applicants of the primary decision by letter addressed to a Mr Khan on the basis that he had been nominated as their authorised recipient. The Tribunal relied on Form 1231 to find that the applicants had nominated an authorised recipient under s 494D of the Migration Act. Although Mr Khan's details were provided and the applicants signed the form indicating they 'authorise all written communications about the above application be sent to the nominated person', the applicants' details were not filled out and there was no evidence that the form related to a particular visa application. The Court found that as 'the above application' was not identified in any way, the authority was meaningless. This reasoning will apply equally to the Tribunal if the form of appointment of an authorised recipient did not identify that the authority was 'in connection with' the particular applicant's review.
[50] ss 379G(1)(b), 441G(1)(b).

Withdrawing or varying an authorised recipient and varying an address

Who can withdraw/vary the appointment of a person?

8.8.12 An applicant or a person acting on the applicant's instructions, but not the authorised recipient acting alone, may withdraw or vary the appointment of a person under s 379G(1) or 441G(1) as an authorised recipient.

Who can vary an authorised recipient's address?

8.8.13 An authorised recipient, whether or not they are also an agent of the applicant, can however give notice of a variation in their address under s 379G(3A) or 441G(3A). This avoids the Tribunal having to send correspondence to an outdated address merely because it was the authorised recipient, rather than the applicant or someone acting on instructions, who had notified of a change in address.

Is an oral variation/withdrawal acceptable?

8.8.14 Unlike the appointment of an authorised recipient which must be in writing, the Migration Act is silent on how a withdrawal or variation of the notice of an authorised recipient may take place. In these circumstances, the Courts have accepted that an applicant, or a person acting on their instructions, may withdraw or vary their notice of an authorised recipient orally[51] or implicitly through their conduct.[52] An express, or written statement is not required.

8.8.15 While it is clear on current authority that a variation or withdrawal may be made orally, it is less clear whether a *variation* to appoint a different person as authorised recipient may be made orally or whether it should be in writing. While this may be regarded as a variation of a s 379G(1) or 441G(1) notice,[53] it may be open to argue that this is a withdrawal of a previous s 379G(1) or 441G(1) notice and the appointment of a new person under s 379G(1) or 441G(1) (which would need to be in writing). If an applicant orally advises the Tribunal of a change of person as the authorised recipient, he or she is generally asked to confirm the new authorised recipient's name and address in writing.[54]

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[51] In *MZZDJ v MIBP* (2013) 216 FCR 153 the Full Federal Court found that the applicant's notice of an authorised recipient to the Department could be varied orally. This was followed by the Federal Circuit Court in *Singh v MICMSMA* [2020] FCCA 780, which found that an applicant could orally withdraw notice of an authorised recipient to the Tribunal.
[52] In *SZLWE v MIAC* [2008] FCA 1343 the applicant told the Tribunal at a hearing that he would like correspondence to be sent to him directly following the suspension of his migration agent. The Federal Court found that an authority given to an authorised recipient may be varied or withdrawn at any time: at [26]. See also *SZJDS v MIAC* (2012) 201 FCR 1 which illustrates that the courts will closely scrutinise the documentary evidence to determine whether an applicant has withdrawn or varied an authorised recipient.
[53] See *Von Kraft v MIMA* [2007] FMCA 244 where the Court followed *Le* and found that the Tribunal was obliged to correspond with the new authorised recipient following variation of the notice under s 379G(3).
[54] However, an applicant's failure to provide notice in writing will not necessarily result in an invalid appointment of a different person as authorised recipient if it is considered a variation.

What constitutes a withdrawal/variation?

8.8.16 Sections 379G(3) and 441G(3) contemplate two different types of conduct: withdrawal and variation.

8.8.17 A withdrawal operates on the entire written notice given under s 379G(1) or 441G(1) and consequently the written notice ceases to have effect.[55] A withdrawal can be made by the applicant or a person acting on instruction. An authorised recipient, who is not the agent of the applicant acting on instructions, cannot unilaterally withdraw the appointment of a person as an authorised recipient under s 379G(3) or 441G(3).

8.8.18 With a variation, the written notice given under s 379G(1)or 441G(1) remains in effect, but part of its content is altered.[56] Variation under s 379G(3) or 441G(3) can be permanent or temporary, it can be oral or in writing, and it can only be made by the applicant or the agent of the applicant where that person is acting within the authority given to him or her by the applicant, and not outside it.[57] An authorised recipient, who is merely the person authorised to receive documents and not also the agent of the applicant, cannot unilaterally vary the appointment of a person as an authorised recipient under s 379G(3) or 441G(3).

8.8.19 The s 379G(1) or 441G(1) notice may be varied by removing an address, where there is more than one address, as well as by substituting a different address.[58] Whether a s 379G(1) or 441G(1) notice has been varied so as to remove or change a previously notified address, or whether it is simply the expression of a preference for the use of a particular address, will depend on the circumstances.[59]

8.8.20 The subject of a withdrawal or variation under s 379G(3) or 441G(3) is the s 379G 441G written notice itself.[60] In *MZZDJ v MIBP*[61] the Full Federal Court found that the appellant's migration agent orally varied, on behalf of the appellant, the written notice which had been given under s 494D(1) [equivalent to ss 379G(1) and 441G(1)]. The Court rejected the Minister's submission that all the migration agent did by her oral statements was to express a preference to be notified in one of the ways contemplated by s 494B [equivalent to ss 379A and 441A]. The Court found that the oral variation was effective to alter the manner in which the Minister's delegate was required to notify the appellant's migration agent of the visa refusal decision. This applies equally to reviews under Part 5 and Part 7 of the Migration

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[55] *MZZDJ v MIBP* (2013) 216 FCR 153 at [31].
[56] *MZZDJ v MIBP* (2013) 216 FCR 153 at [32].
[57] *MZZDJ v MIBP* (2013) 216 FCR 153 at [33], [35].
[58] *MZZDJ v MIBP* (2013) 216 FCR 153 at [56].
[59] Note, the Court in *MZZDJ v MIBP* (2013) 216 FCR 153 confirmed previous authority that s 494B [ss 379A/441A] does not allow an applicant to express a preference for which address should be used; however on the particular facts, it rejected the Minister's submission that that was all the authorised recipient had done. If an address has not been removed by a variation, it would remain open, on previous authorities, for the Minister to use any one of the methods of notification in ss 494B [ss 379A, 441A]. See also *Bui v MIBP* [2015] FCCA 1931 where the Court found that the Tribunal led itself into error and thereby deprived itself of jurisdiction because it failed to give any consideration to a relevant piece of evidence about a changed email address.
[60] *MZZDJ v MIBP* (2013) 216 FCR 153 at [31].
[61] *MZZDJ v MIBP* (2013) 216 FCR 153.

Act. The Federal Circuit Court in *Singh v MICMSMA* followed *MZZDJ* in finding that an applicant's oral confirmation to a Tribunal officer that he did not have a migration agent amounted to a withdrawal of that agent's appointment as the applicant's authorised representative.[62]

8.8.21 When determining whether a s 379G(1) or 441G(1) notice has been withdrawn or varied under s 379G(3) or 441G(3) for the purposes of the correct address for notifications, the Tribunal takes into account any conduct that may amount to a withdrawal or variation of a s 379G(1) or 441G(1) notice, including any removal or change of address.[63]

Authority to appoint, vary or withdraw

8.8.22 While only *the applicant* (or someone acting as his or her agent) may notify the Tribunal of the appointment, variation or withdrawal of an authorised recipient,[64] there is no requirement that they do so personally, or sign a written notice themselves. If there is any doubt as to whether a third person has authority to appoint, vary or withdraw an authorised recipient on the applicant's behalf, the Tribunal may seek clarification from the applicant directly. This might arise, for example, if a migration agent informs the Tribunal that he or she has ceased to act for the applicant and no longer wishes to receive correspondence as authorised recipient.

8.8.23 As an authorised recipient cannot unilaterally withdraw his or her own nomination as an authorised recipient (i.e. other than under instructions), the Tribunal will continue to correspond with an authorised recipient even if the authorised recipient has notified the Tribunal that he or she no longer wishes to receive documents for the applicant.[65]

8.8.24 If the authorised recipient is a migration agent who has been sanctioned, the Tribunal remains obliged by virtue of ss 379G and 441G to continue to correspond with the agent as authorised recipient unless and until the applicant varies or withdraws that appointment. Nevertheless, in *Kim v MIAC* it was suggested that migration agents whose registration has been suspended or lawyers who have

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[62] *Singh v MICMSMA* [2020] FCCA 780 at [12], [43]–[48]. The applicant confirmed he didn't have a migration agent to a Tribunal officer when that officer was confirming the applicant's contact details. The review application had been remitted to the Tribunal by the Court for reconsideration, which meant that the Tribunal had cause to confirm the applicant's contact details.
[63] In *SZTMZ v MIBP* [2014] FCCA 2957 the Court found no evidence of any express withdrawal of the authorised recipient's authority and was of the view that the evidence before it, namely change of the applicant's new residential and postal address, did not support an inference that she had withdrawn the authorisation of the agent to act as her authorised recipient. See also *Singh v MICMSMA* [2020] FCCA 780 at [43]–[48] where the Court held that the applicant's oral confirmation that he no longer had a migration agent amounted to him withdrawing that agent's appointment as his authorised recipient.
[64] ss 379G(3) and 441G(3). See *Guan v MIAC* [2010] FMCA 802. In *Kaur v MIAC* [2013] FCA 448 the Court found the Tribunal had complied with the legislative framework in sending a hearing invite to the applicant's original migration agent in circumstances where the Tribunal had not received a change of contact details for the applicant or her new migration agent and where the last address for service that had been provided to the Tribunal was that of the applicant's original migration agent. See also *MZZDJ v MIBP* (2013) 216 FCR 153 at [35].
[65] ss 379G(3), 441G(3). See *Guan v MIAC* [2010] FMCA 802 at [24]–[27]. In *SZJSP v MIAC* [2007] FCA 1925 the Court made *obiter* comments that it may be that there can simply cease to be an authorised recipient if it is clear beyond question that the person who was an authorised recipient has abandoned that role. However, it would unsafe to rely on these comments in light of the judgment in *Guan.*

been struck off should not continue to act as authorised recipients.[66] In those circumstances, the Court indicated that the Tribunal may contact the applicant directly and invite him or her to vary or withdraw the appointment of authorised recipient.

Addressing correspondence to an authorised recipient where using post

8.8.25 In the case of correspondence given by prepaid post, the envelope in which the invitation is sent must be addressed to the authorised recipient at the authorised recipient's address.[67] If the envelope is correctly addressed, it is irrelevant whether the address block on the document itself is correctly addressed to the authorised recipient.[68]

8.8.26 The Court has found that it is not sufficient to address the envelope to the firm at which an authorised recipient may be employed.[69] In fact, as the firm itself is not the 'authorised recipient' and the name of the firm would not be considered part of the 'address', it is not strictly necessary to include the name of the authorised recipient's firm (if any) on the envelope at all.[70]

8.8.27 If the envelope is addressed to the applicant *care of* the authorised recipient's address, the Tribunal will not have given the document to the authorised recipient.[71]

8.8.28 The document will also not be given to the authorised recipient if it is sent in an envelope with the correct address but directed to a person other than the authorised recipient.

8.8.29 However a failure to comply with these addressing requirements will not necessarily result in jurisdictional error, or the applicant not being notified for the purposes of

[66] *Kim v MIAC* [2008] FMCA 1553 at [65].
[67] *MIAC v SZKPQ* (2008) 166 FCR 84. The Full Federal Court was considering the Ministerial obligations in ss 494D and 494B(4), however, its reasoning is equally applicable to the Tribunal's authorised recipient requirements . The Court found that it was irrelevant whether an address other than that of the applicant's authorised recipient appeared on the document being sent, and expressed the view that the scheme of the legislation indicated that the document ought in fact be addressed to the applicant at [22] and [25]. Followed in *SZKTM v MIAC* [2008] FMCA 215 at [20], and *Matete v MIAC* [2008] FMCA 573 at [14] (not disturbed on appeal: *Matete v MIAC* [2008] FCA 1876).
[68] *MIAC v SZKPQ* (2008) 166 FCR 84 at [22]. Note that a different view was expressed by Besanko J (with which Moore J agreed) in the earlier judgment of *SZFOH v MIAC* (2007) 159 FCR 199. In *SZKTM v MIAC* [2008] FMCA 215, Smith FM considered it appropriate to follow *SZKPQ* as the most recent judgment at [20]. However, Smith FM considered that even if the view in *SZFOH* were correct, the Tribunal's procedures were not attended by jurisdictional error because of any formal defect on the face of the letter, when the envelope was correctly addressed, received, comprehended and acted upon by the authorised recipient at [24]. Alternatively, relief should be refused in the exercise of the Court's discretion in such circumstances at [25]. This view on the primacy of the envelope was also followed in *Matete v MIAC* [2008] FMCA 573 at [14] in the context of reg 2.55(3)(c) (not disturbed on appeal: *Matete v MIAC* [2008] FCA 1876).
[69] In *SZJSP v MIAC* [2007] FCA 1925, the Tribunal sent correspondence to the firm at which the authorised recipient had been employed, but the name of the authorised recipient did not appear on the envelope. The Court found the notice was not sent to the authorised recipient as there was no evidence that the letter was sent in an envelope which named the intended recipient as the authorised recipient. This overturns the reasoning in *SZBLY v MIMIA* (2005) 219 ALR 707. See *SZCCZ v MIMA* [2006] FMCA 506, where the Court found that, following *Chen v MIMIA* [2005] FMCA 1000 and *VEAN of 2002 v MIMIA* (2003) 133 FCR 570, strict compliance was required in addressing a letter to the authorised recipient. In that case the applicant had provided only the name of a migration agent on the form and the Tribunal had sent the letter addressed to the company of which the migration agent was the principal. An appeal in this matter was dismissed: *SZCCZ v MIAC* [2007] FCA 1089.
[70] See *SZMKJ v MIAC* [2008] FMCA 1228, where the Court commented at [11] '…the name of the organisation at which the authorised recipient worked was immaterial to the lawful dispatch of the hearing invitation'. See also *Chintala v MIMA* (2006) 201 FLR 364 where the authorised recipient's firm was incorrectly cited in the address but the authorised recipient himself was correctly identified. The Court found the error was not critical to the Tribunal's compliance with its obligations to give the invitation to the applicant's authorised recipient.
[71] *VEAN of 2002 v MIMIA* (2003) 133 FCR 570; *Lee v MIMA* (2007) 159 FCR 181.

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the Migration Act.[72] For example, in *MIAC v SZIZO*, the High Court found that the Tribunal had not made a jurisdictional error in failing to give a hearing invitation to the authorised recipient, in circumstances where the authorised recipient was the applicant's daughter (and also an applicant), the invitation was received, the applicants attended the hearing and suffered no disadvantage. See above for further discussion.

Authorised recipients and persons in immigration detention

8.8.30 Where the applicant is in immigration detention, reg 5.02 provides that the document can be given to *either* the applicant or a person authorised to receive documents on his/her behalf. Although this suggests that notification requirements would be satisfied if correspondence were sent to the applicant rather than his or her authorised recipient if one has been nominated, there is some uncertainty over the interrelationship between reg 5.02 and those provisions requiring correspondence to be sent to an authorised recipient (ss 379G and 441G) where one is nominated.[73] In these circumstances, the Tribunal generally gives a copy of the invitation to the authorised recipient where one is nominated.

8.8.31 Regulation 5.02 does not prescribe the method of 'giving' a document to an authorised recipient, or the time in which such documents are taken to be received. On one view, reg 5.02 requires documents to be personally handed to the applicant or authorised recipient. The Tribunal's practice in relation to bridging visa detention cases, for example, is to generally fax or email correspondence to the detention centre with an instruction to an officer to hand the document to the applicant.[74] A copy is also generally given to the authorised recipient by email where available.

8.8.32 Some support for the Tribunal's practice can be seen in *SZQFJ v MIAC.*[75] In that case, the Tribunal sent a hearing invite to the authorised recipient and as the applicant was in immigration detention a copy was also sent to him at the detention centre. The Court found that in these circumstances there was nothing to indicate that the Tribunal failed to properly invite either applicant to a hearing in accordance with s 425.

When is a document sent to an authorised recipient received?

8.8.33 The deeming of receipt of notification to authorised recipients occurs in the same way as for notifications given directly to an applicant. If the Tribunal fails to correctly give notification to a properly appointed authorised recipient, notification may not

[72] s 441C(7) and *MIAC v SZIZO* (2009) 238 CLR 627.
[73] On one view ss 379G and 441G, which require a document to be given to the authorised recipient which would otherwise have been given to the applicant, may take precedence over reg 5.02. This is because the relevant provisions in respect of notification in the Migration Act would require the notice to be given in the way specified by the Migration Act, and ss 379G and 441G cannot be overridden by a regulation unless the Migration Act expressly provides as such. The Department appears to also take this view: Policy –Act – Code of procedure – Notification requirements – General guidance for all notifications – Notifying detainees (reissued 19/11/2016). This means that reg 5.02, in relation to authorised recipients, may only operate for giving documents to applicants in immigration where there is no prescribed method.
[74] This practice was upheld in *Ozturk v MIMA* (2001) 113 FCR 392.

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have occurred in accordance with the Migration Act or Regulations, even if the Tribunal also gives notification to the applicant themselves.[76]

8.8.34 However, if such an error was made on, or after 5 December 2008, and the authorised recipient nonetheless received the notification, then the authorised recipient (and therefore the applicant) is taken to have received the notification at the time he or she would have been taken to have received it under the deeming provisions in s 379C or 441C.[77] The only exception to this is if the authorised recipient can show that he or she actually received it at a later time, in which case he or she is taken to have received it at that later time.

8.9 Notification of multiple applicants – combined applications

8.9.1 The procedural obligations with respect to invitations and notices, such as those under ss 360 [Part 5 - migration] and 425 [Part 7 - protection] are owed equally to all applicants included in a combined review application. The Tribunal must therefore take care to ensure that it complies with obligations in relation to all review applicants and not just the primary applicant to the exclusion of family member applicants. For instance, all applicants, even if they have made no claims, must be invited to a hearing before the Tribunal and be given an opportunity to give evidence and present arguments.[78]

8.9.2 Although these procedural obligations are owed to each review applicant, ss 379EA [Part 5] and 441EA [Part 7] of the Migration Act provide that a document (such as a hearing invitation) given on or after 27 October 2008 to any one applicant in a combined application is taken to be given to each of the applicants in the combined application.[79] This means that the Tribunal can send a single document to one applicant in the combined application, provided the invitation (for example, to

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[75] *SZQFJ v MIAC* [2011] FMCA 665.
[76] Although this may not necessarily result in jurisdictional error, see *MIAC v SZIZO* (2009) 238 CLR 627.
[77] ss 379C(7), 441C(7). These provisions were introduced by the *Migration Amendment (Notification Review) Act 2008* (Cth) and apply to documents given, dispatched or transmitted on, or after, commencement date (5 December 2008).
[78] *MZWJY v MIMIA* [2005] FMCA 1027.
[79] ss 379EA and 441EA introduced by the *Migration Legislation Amendment Act (No 1) 2008* (Cth) apply in respect of reviews lodged on, or after, 27 October 2008, and any reviews which hadn't been decided as at that date. Prior to the introduction of ss 379EA and 441EA, the Tribunal communicated with review applicants in a combined application by: specifying at the top of the M1, M2 and R2 forms that the Tribunal would communicate with the first named review applicant unless otherwise requested, and that the first named review applicant was required to tell each of the other applicants the contents of any communication from the Tribunal; requiring the first named review applicant to undertake, in the signed declaration, that they would tell the other applicants of the content of any communications from the Tribunal; and requiring all other applicants to declare that they authorised the Tribunal to communicate with the first named review applicant about the application. This approach was upheld in *SZDLA v MIAC* (2005) 221 ALR 164; *MZWXH v MIMA* [2006] FCA 1322; *SZKDB v MIAC* [2007] FMCA 1036; and *SZIHI v MIAC* [2007] FMCA 1332. In a series of judgments, the Federal Court and Federal Magistrates Court have held that in the context of such forms, the sending of a single letter of invitation to the primary review applicant but inviting all family members satisfied the statutory requirements to invite all applicants. See *SZFCE v MIAC* [2008] FCA 966; *SZLMD v MIAC* [2008] FMCA 724 (an appeal was unsuccessful: *SZLMD v MIAC* [2008] FCA 1271; *SZLKD v MIAC* [2008] FMCA 446; *MZXSP v MIAC* [2008] FMCA 374; *SZIHI v MIAC* [2007] FMCA 1332; *SZKSQ v MIAC* [2008] FCA 1101 at [35]–[36], upholding *SZKSQ v MIAC* [2008] FMCA 420; *SZKDB v MIAC* [2007] FMCA 1036 which is consistent with earlier Federal Court authority in *Cabal v MIMA* [2001] FCA 546 at [15], *SZDLA v MIMIA* (2005) 221 ALR 164 and *MZWXH v MIMIA* [2006] FCA 1322 in upholding the Tribunal's practice of referring to all secondary applicants in relevant notices but only sending a copy to the primary applicant.

appear for hearing, or comment on adverse information) is expressed as extending to all applicants in the review.[80]

8.10 Common issues - method of dispatch and receipt

Prepaid post dispatched within 3 working days

What constitutes prepaid post?

8.10.1 Registered mail, express post and ordinary mail can each be regarded as 'prepaid post' for the purposes of ss 379A(4) and 441A(4) as all three methods involve paying the postage fee prior to dispatching mail.

Meaning of 'dispatched'

8.10.2 For documents sent by prepaid post, ss 379A(4) and 441A(4) require that it be dispatched within 3 working days of the date of the document. 'Dispatch' means the physical act of sending the document to the relevant address (irrespective of whether it is subsequently received at that address).[81] That is, a requirement to take steps that would ordinarily have the effect of getting the notification to the intended recipient.[82] However, it means more than preparing a letter for postage and placing it in the 'mail basket trolley'.[83] At the very least, it was necessary for the envelope to pass from the possession of the agency.[84]

8.10.3 Evidence such as a registered post sticker has been found to be evidence of dispatch.[85]

Within 3 working days

8.10.4 Whether a document has been dispatched within 3 working days is a question of fact. While no specific type of evidence is required to ascertain that a document has been dispatched, probative evidence such as the Tribunal's register of mail, Casemate and/or file records, will assist to demonstrate that the Tribunal has dated a document and dispatched it within 3 working days to the address provided by the

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[80] See *SZKHV v MIAC* [2009] FMCA 264 where the Court found that the Tribunal had complied with s 424A in respect of both applicants in a combined application by sending a single combined letter, in circumstances where the letter was clearly expressed to be an invitation to both applicants.
[81] *SZOBI v MIAC (No 2)* [2010] FCAFC 151 at [19]. In this case Stone and Jagot JJ rejected the appellant's argument that a direction on the envelope to return it to a specified address 'if not delivered within 7 days' was a condition or direction affecting the act of dispatch.
[82] *SZOBI v MIAC (No 2)* [2010] FCAFC 151 at [30].
[83] *Han v MIAC* [2007] FMCA 246 at [27]–[28], in relation to the equivalent Departmental requirement.
[84] *Han v MIAC* [2007] FMCA 246 at [27]–[28].
[85] See *Maroun v MIAC* [2009] FMCA 535 at [26]–[36] where the applicant claimed there was no evidence that the letter was 'dispatched'. The Court also found there was evidence the letter had been dispatched within the prescribed period, being 3 working days, in the form of evidence from the Department regarding its usual practice. In that case, however, the evidence included markings on a returned envelope that the Court found were more likely to be from Australia Post than the Department. See also *Gharti-Chhetri v MIAC* [2009] FMCA 375 and *SZNQO v MIAC* [2009] FMCA 694 at [91].

recipient. Accurate records and clear procedures should therefore be retained for this purpose.

8.10.5 For example, in *Han v MIAC,* the Court found that while there was evidence that the Departmental notification letter had been dated and dispatched by post, there was no evidence to confirm that it had been dispatched within 3 working days of the date of the document and accordingly that the Tribunal made a finding of fact that was not supported by any evidence and thereby fell into error as it denied itself jurisdiction to hear the review application.[86]

8.10.6 In contrast, in *Zhang v MIMA,* testimony that a letter was received in the mail room and sent by registered mail was sufficient to satisfy the Court that the letter was dispatched to the applicant by prepaid post within three working days of the date of the document.[87] Similarly, in *Bataju v MIBP,* testimony of usual practice and a dispatch log satisfied the Court that the letter was dispatched to the applicant by prepaid post within three working days of the date of the document.[88]

Time of receipt

8.10.7 If a notice is sent in accordance with ss 379A(4) and 441A(4), the 'deemed receipt' provisions, namely ss 379C(5) and 441C(5), in the Migration Act operate whether or not the recipient *actually* received the notice.[89]

Transmitting by fax, email, other electronic means

Meaning of 'by transmitting'

8.10.8 Where the Tribunal uses the method in ss 379A(5) and 441A(5) to give a document, the notification will need to be 'transmitted' to the last fax number, e-mail address or other electronic address provided to the Tribunal by the recipient in connection with the review. 'By transmitting' means 'by sending' and a person is taken to have received the document at the end of the day on which it is sent.[90] This applies equally to the sending of documents by fax. In *Shah v MIAC,* the Court applied ss 147 and 161 of the *Evidence Act 1995* (Cth) to find that, in the absence of conclusive evidence that the Tribunal's fax had not been received by the applicant's agent's fax machine, the fax had in fact been sent when the transmission logs

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[86] *Han v MIAC* [2007] FMCA 246.
[87] *Zhang v MIMA* (2007) 210 FLR 268 at [23]–[24].Undisturbed on appeal: *Zhang v MIAC* (2007) 161 FCR 419.
[88] *Bataju v MIBP* [2014] FCCA 2922.
[89] For example, in *MZYSZ v MIAC* [2012] FMCA 390 at [39], the Court found that despite an error by the post office in not delivering the hearing invitation, the applicant was taken to have received a hearing invitation 7 working days after the date of the document as result of s 441C.
[90] *Sainju v MIAC* (2010) 185 FCR 86 at [56]–[57] in relation to email notification provisions in relation to visa cancellation decisions, but the reasoning is equally applicable to email notifications by the Tribunal pursuant to ss 379A(5) and 441A(5). In *Singh v MIBP* [2015] FCA 220 the Court found that the reasoning in *Sainju* applies equally to whether a document has been 'transmitted' in the context of s 494C(5): at [31]–[32]. Although in *Singh v MIBP* [2015] FCCA 2531 the Court found that a fax must be *received* in order to be *transmitted,* this judgment should be treated with caution as it inconsistent with established Federal Court authority in *Sainju v MIAC* [2010] FCA 461 and *Singh v MIBP* [2015] FCA 220.

recorded it as having been sent.[91] Similarly in *Tsimperlenios v MIBP*, the Court applied s 161 of the *Evidence Act 1995* (Cth) and s 14(1) of the *Electronic Transactions Act 1999* (Cth) (ETA) to find that an email and its attachments were successfully transmitted having regard to a record of the email, the attachments dated on the day the email was recorded to have been transmitted and there being no evidence that other documents were prepared that day for that review application.[92] The Court held that, if that evidence was not sufficient to justify a finding that the email and attachments were transmitted, it would not be satisfied on the balance of probabilities that the Tribunal did not transmit them.[93]

Transmitting by fax

8.10.9 Service of a document by fax is effective if the document is forwarded to the fax number nominated.[94] The Court in *SZIPL v MIAC* noted:

> *The Tribunal may not know the location of the facsimile machine to which the facsimile number is allocated, nor will it know whether the facsimile has been read by any person. However, those considerations are irrelevant since the obligation of the Tribunal is to forward the document by facsimile to the fax number nominated ….If the evidence establishes that the document forwarded by transmission has been successfully transmitted to that number, the statutory obligation under s 441A(5) is satisfied'.*[95]

Transmitting by email

8.10.10 A document is transmitted via email if it is transmitted from the Tribunal's server.[96] If the email is returned as undeliverable or it is not received by the recipient, it does

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[91] *Shah v MIAC* [2011] FMCA 18 at [36]. In that case, the Court concluded that if the Tribunal has faxed a document, s 379C(5) will deem that document to have been received at the end of the day on which it was sent.
[92] *Tsimperlenios v MIBP* [2018] FCCA 229 at [35], [43], and [55]–[60].
[93] *Tsimperlenios v MIBP* [2018] FCCA 229 at [61].
[94] *SZIPL v MIAC* (2009) 112 ALD 468 at [29].
[95] *SZIPL v MIAC* (2009) 112 ALD 468 at [29].
[96] See *Tsimperlenios v MIBP* [2018] FCCA 229 at [25]–[62] for detailed discussion on transmitting emails and the type of evidence required to ascertain that an email has been transmitted. The Court noted that an email is transmitted from a computer that is part of a network that is linked to the internet; the transmission of the email consists of the steps by which data that comprises the email leaves the control of the transmitting network, and that it is possible that the transmitting network may send the email but the intended recipient, for reasons that are outside the control of the transmitting network, does not receive it which means that evidence by the intended recipient of an email that he or she did not receive the email is incapable by itself of contradicting or undermining evidence that the email in question was transmitted (at [35], [37]). The Court was satisfied that the Tribunal had successfully transmitted an email including its attachments by reference to a record of the email, the attachments dated on the day the email was recorded to have been transmitted and there being no evidence that other documents were prepared that day for the matter. The Court held that, if that evidence was not sufficient to justify a finding that the email and attachments were transmitted, it would not be satisfied on the balance of probabilities that the Tribunal did not transmit them. See also *Chowdhury v MIBP* [2015] FCCA 2981 at [31]. In that case the applicant argued that as his agent's office was closed on the day his decision was notified, the email notification must have 'bounced back' to the delegate. The Court held that whether the agent's office was closed or not is of no consequence, and that the applicant was taken to have received the notification when the decision was transmitted to the relevant mail server. The Court noted that the applicants had not provided any evidence to indicate there was any difficulty at the migration agent's host internet provider's point of receipt of transmissions, which may indicate that successful delivery was relevant to determining whether the document had been transmitted. Note however that in *MICMSMA v Lyu* [2021] FCCA 1604 at [22], [24] in relation to reg 2.55(8) the Court expressly considered whether successful delivery was required and, in circumstances where there was evidence that the email had not been delivered to the recipient, held that successful delivery was not required for an email to be transmitted.

not appear that it will affect whether it has been transmitted for the purpose of ss 379A(5) and 441A(5) as successful delivery is not required.[97]

8.10.11 An email is not sent to an office, or a computer terminal in an office, rather an email is sent to a mail server of the relevant internet service provider and can then be downloaded and accessed by a computer in an office.[98]

8.10.12 Subsections 379A(5) and 441A(5) are not prescriptive of the precise form of the address or the addressee of the 'covering email'- what is required to comply with the giving of a notice to a recipient by email, is to transmit it by email to the last email address provided.[99] For example, the Court in *Brar v MIAC* held that there is no error in circumstances where the salutation in a covering email is incorrectly addressed if the decision and notification letter are actually sent to the email address provided for the purpose of receiving documents.

Time of receipt

8.10.13 Although ss 14, 14A and 14B of the ETA provide default rules for determining the time and place of dispatch and receipt of electronic communications in relation to laws of the Commonwealth, the *Electronic Transactions Regulations 2000* (Cth) excludes the Tribunal's transmission of documents under ss 379A(5) and 441A(5) from the operation of ss 14, 14A and 14B of the ETA.[100]

8.10.14 Consequently, the deemed receipt provisions, namely ss 379C(5) and 441C(5), in the Migration Act prevail and an applicant is taken to have received a document at the end of the day on which the document is transmitted. The 'end' of a day in this context should be given its natural meaning as intending to deem receipt on that day but at its end.[101]

8.10.15 Sections 379C(5) and 441C(5) do not create a rebuttable presumption about receipt of the relevant document, but rather deem the recipient to have received it at the

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[97] *MICMSMA v Lyu* [2021] FCCA 1604 at [22], [24]. The Court was considering whether a document (a NOICC) had been transmitted to the recipient and held that the fact that the email was returned as undelivered was unfortunate but had no impact on the Tribunal complying with its obligation as what is required is transmission, not successful delivery. The Court concluded that by operation of reg 2.55(8) the recipient was taken to have received the document at the end of the day on which it was transmitted. This reasoning would appear to also apply to the equivalent provisions for the Tribunal.
[98] *Chowdhury & Ors v MIBP* [2015] FCCA 2981 at [31]–[33].
[99] *Brar v MIAC* [2012] FMCA 593. Although the Court was considering s 494B(5), its reasoning is equally applicable to ss 379A(5) and 441A(5).
[100] Prior to 25 May 2011, s 14 of the *Electronic Transactions Act 1999* (Cth) (ETA) dealt with time and place of dispatch and receipt of electronic communications in relation to law of the Commonwealth. Amendments to the ETA by the *Electronic Transactions Amendment Act 2011* (Cth) resulted in the deemed receipt of electronic communication provision being separated out from s 14 and renumbered to s 14A. While ss 379C(6) and 441C(6) of the Migration Act provided that ss 379C(5) and 441C(5) applied despite s 14 of the ETA, no associated amendment was made to ss 379C(6) and 441C(6), resulting in a disconnect between the excluding provisions in the Migration Act and the ETA. To address this unintended disconnect, the *Electronic Transactions Regulations 2000* (Cth) sch 1 (F2019C00345) was amended from 16 July 2013 by the *Electronic Transactions Amendment (Migration Exemptions) Regulation* 2013 (Cth) (F2013L01388) to include ss 379A(5) and 441A(5). As they became redundant, ss 379C(6) and 441C(6) were repealed by *Migration Legislation Amendment Act (No 1) 2014* (Cth) on 25 September 2014.
[101] *SZFKD v MIMIA* [2006] FMCA 49 at [19]. His Honour held that 'it is straining the language, and is inconsistent with the intent of the provision, to read it as providing for a deemed receipt also at the start of the day after its transmission': at [19]. In *Calimoso v MIBP* [2016] FCCA 1492 at [9] held that the words 'at the end of the day' have their plain, and ordinary meaning, and that there was 'no scope for a construction that was capable of meaning 'the following day.' Upheld on appeal: *Calimoso v MIBP* [2016] FCA 1335.

relevant time.[102] In *Shah v MIAC* the Court, having found that a document had been sent, applied the reasoning in *Sainju v MIAC* to find the document was deemed to have been received under s 379C(5) [s 441C(5)].[103]

Effect of resending the notice

8.10.16 Once a person is properly notified in accordance with one of the methods specified in s 379A or 441A, the prescribed period for response will not recommence if the applicant later receives a copy of the notification. A copy of the notification does not operate as re-notification so as to recommence the relevant time period.[104]

Calculating the time

Meaning of 'working days'

8.10.17 The calculation of several time periods under the notification and receipt provisions is expressed in terms of working days. Section 5 of the Migration Act defines a 'working day' in relation to a place, as any day that is not a Sunday, Saturday or public holiday in that place. In this regard, it should be noted that public holidays differ between Australian States and Territories.[105]

Calculating the working day period

8.10.18 The 3 working days within which documents must be sent are to be calculated in relation to the place of dispatch.[106] The 7 working days after which documents are taken to have been received are to be calculated in relation to the place of receipt.[107] Further, when calculating time for these purposes the relevant period does not include the day on which the calculation is said to begin.[108]

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[102] *Kaur v MIAC* [2010] FMCA 85 at [27]. See also *Tay v MIAC* (2010) 183 FCR 163 in relation to s 494C(5): at [25].
[103] *Shah v MIAC* [2011] FMCA 18. See also *MICMSMA v Lyu* [2021] FCCA 1604 at [22], [24]. The Court was considering whether a document (a NOICC) had been transmitted to the recipient and held that the fact that the email was returned as undelivered was unfortunate but had no impact as what is required is transmission, not successful delivery. The Court concluded that by operation of reg 2.55(8) the recipient was taken to have received the document at the end of the day on which it was transmitted. This reasoning would appear to also apply to the equivalent provisions for the Tribunal.
[104] *Kaur v MIAC* [2010] FMCA 85 at [31]. See also *MIAC v Abdul Manaf* (2009) 111 ALD 437 and *Zhang v MIAC* (2007) 161 FCR 419. Although in *ASE15 v MIBP* [2015] FCCA 2581 the Court found there could be more than one valid notification of a primary decision, this judgment should be treated with caution as there is no consideration of *Zhang* in which the Full Federal Court expressly noted that *H* related to circumstances where two different methods of notification were used, and held that the resending of a notification letter did not start time running again. It is also unclear why the Court did not consider the ratio in *Abdul Manaf* binding given the similar factual circumstances (i.e. resending a previously notified decision) and in light of that Court's findings that the first alternative basis discussed in *H* was to be preferred.
[105] For a list of public holidays in each State and Territory, see https://info.australia.gov.au/about-australia/special-dates-and-events/public-holidays.
[106] ss 379A(4)(a), 441A(4)(a).
[107] ss 379C(4)(a), 441C(4)(a).
[108] *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act) item 6, s 36(1), as it applies from 27 December 2011.

Correct address

Requirements

8.10.19 Where correspondence is handed to another person at the last residential or business address, dispatched by prepaid post or transmitted electronically, it must be to the last address or number provided:

- to the Tribunal;
- by the recipient;
- in connection with the review.

Is an address provided to the Department sufficient for tribunal notification?

8.10.20 Importantly, for Tribunal notifications the address must be one provided to the Tribunal, not the Department. Even if the applicant subsequently provides an address to the Department, the Tribunal is required to send correspondence to the address provided to the Tribunal by the applicant.[109] There also does not appear to be an obligation on the Department to notify the Tribunal of a new address which has been provided to it after an application for review has been made.[110]

Address provided by a third party

8.10.21 Principles of agency will permit the Tribunal to treat an address provided to it by a third party as having been provided by the applicant if that third party was duly authorised to act in that way on the applicant's behalf. For a further discussion of the principles of agency, see Chapter 32 – Migration agents and the tribunal.

When there is uncertainty as to the correct address

8.10.22 If there is any ambiguity as to the applicant's address or whether the applicant has changed address, the Tribunal may seek clarification prior to sending out any

[109] In *SZKHY v MIAC* [2008] FCA 206 the applicant notified various changes of residential address to the Department but not to the Tribunal. The Tribunal continued to correspond with the applicant at an address she had provided to the Tribunal. The Federal Court found that the Tribunal duly complied with ss 425 and 425A. See also *MZWNH v MIMIA* [2006] FMCA 237 in which the Tribunal sent correspondence to the only address provided to it, and not to any of the changes of address notified to the Department. The Court held, at [45]-[46], that at no stage did the applicant advise, as he was required to do, the Tribunal of any change of address. The Tribunal was entitled to have regard to the address which it believed to be the current address of the applicant, notwithstanding the fact that it clearly had in its possession an alternative address for correspondence which it had obtained from the Department. Similarly, in *SZNNL v MIAC* [2009] FMCA 714, the Tribunal invited the applicant to appear before it by letter addressed to the applicant at the address provided in the application for review. The applicant had notified the Department but not the Tribunal of a change of address. The Court found that the applicant was deemed to have received the invitation: at [26]. It held at [28] that an applicant must clearly notify the Tribunal of a change of address for service, and notwithstanding the applicant's statement that he notified the Department of his change of address, he was required to notify the Tribunal directly of his change of address.

[110] See for example *CQL19 v MICMSMA* [2019] FCCA 3460 at [58]–[62], where the Court found that there was no obligation on the Department to provide a change of address document to the Tribunal which had been directed to the Department after an application for review had been made to the Tribunal, being that it was not a document 'relevant to review' under s.418(3) [Part 7] (s.352(4) [Part 5]). See also *DLT16 v MIBP* [2020] FCCA 740 [24]–[28].

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review-related correspondence. However, in *SZOQY v MIAC*[111] where the applicant had misstated their address, the Court found no error in the Tribunal sending the notification to the applicant's actual address. The Tribunal generally seeks prior clarification of ambiguities where it appears that an applicant has made an error in giving their address to the Tribunal.

8.10.23 Ultimately, it is a question of fact as to which was the last address provided by the recipient to the Tribunal in connection with the review. For example, in *Somjich v MHA*[112] the applicant provided an email address in his review application and subsequently sent correspondence to the Tribunal using a different email address. The Court held that the onus is on the applicant to make it sufficiently clear that the email address provided is the one to be used by the Tribunal for the provision of documents.[113] The Court did not accept the last address from which the applicant communicated with the Tribunal was the last address 'provided to the Tribunal…in connection with the review' for the purposes of s 379A(5)(d) and found no error in the Tribunal sending correspondence to the first email address stated in the review application, given the applicant responded to a request for information sent to the first address and made no attempt to change his contact details with the Tribunal, notwithstanding the Tribunal invited him to do so and pointed out that he was using a different address to the one provided in his application for review.[114] In these circumstances, the applicant's action of sending an email from a different email address was not enough to give a clear indication that it was to be the last address provided by the applicant to the Tribunal in connection with the review.

8.10.24 In *SZNCO v MIAC*[115] the applicant gave one address in his review application, then subsequently faxed a further copy of the application giving a different address. The Court found no error in the Tribunal sending correspondence to the first address, finding that an applicant must clearly notify the Tribunal of a change of address for service; and the fax which referred to the second address did not contain any clear or explicit statement that the address specified in the application had been changed.[116] In *SZBHU v MIAC,*[117] the applicant sent a fax to the Tribunal indicating that 'he hoped to change his address to …'. The Court found that this was no more than an anticipated address at some unstated time in the future and did not constitute a change of address.[118]

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[111] *SZOQY v MIAC* [2011] FMCA 120.
[112] *Somijich v MHA* [2019] FCA 1921, which upheld the lower Court's judgment: *Somjich v MHA* [2019] FCCA 479 at [26] and [40].
[113] *Somijich v MHA* [2019] FCA 1921 at [57].
[114] *Somijich v MHA* [2019] FCA 1921 at [57]–[60].
[115] *SZNCO v MIAC* [2009] FMCA 645.
[116] Compare with *SZNJM v MIAC* [2009] FMCA 603 where the applicant nominated his home address as his address for service in the application for review. On the same day he also gave to the Tribunal a 'Change of contact details' form. The Tribunal sent correspondence to the new address and the Court found no error, commenting that it is a logical inference that the applicant's change of contact details form must be seen as a modification of the contact details provided in the application for review.
[117] *SZBHU v MIAC* [2007] FCA 1614.
[118] *SZBHU v MIAC* [2007] FCA 1614 at [45].

Must the address be provided in writing?

8.10.25 A residential or business address may be provided to the Tribunal orally or in writing, however, for evidentiary purposes, the Tribunal generally asks for confirmation in writing of any new address notified orally.[119] Regulation 4.39 also expressly permits an applicant to lodge an 'address for service' by giving the Tribunal notice *in writing* of an address at which documents relating to a review may be sent to the applicant.

Address provided for the purposes of judicial review

8.10.26 An address provided in the context of judicial review proceedings, such as an address provided to the Department, the Court, or to solicitors acting only for the Minister, will not amount to provision of an address to the Tribunal by an applicant in connection with the review.[120]

8.10.27 An address provided to the Court and the Department during the course of an application for judicial review of an earlier Tribunal decision will also not amount to provision of an address to the Tribunal by an applicant in connection with the review.[121]

8.10.28 Even if in some circumstances an address can be 'provided to the Tribunal' by providing it through an agent or intermediary acting for the Tribunal (such as solicitors acting for the Tribunal), when ss 379A and 441A is considered in the context of Part 5 and 7 of the Migration Act, the address must be provided 'in connection with the review' and the 'review' in question is the review by the Tribunal of a particular visa decision, and ss 379A and 441A has no application to Part 8 of the Migration Act which deals with judicial review.[122]

8.10.29 In relation to remittals of an application by a court to the Tribunal, an applicant may assume that notification of a change of address to solicitors for the Minister would suffice as notification to the Tribunal (however this would not be the case). To avoid confusion, the Tribunal generally writes to the last address given to the Tribunal in connection with the review *and* to any other address of which it is aware of from the Court or Department seeking confirmation of address details for the review.

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[119] *SZNZL v MIAC* (2010) 186 FCR 271 at [37]. Although this case concerned consideration of the Minister's obligations under s 494B(4), it would be equally applicable in the Tribunal context.
[120] *SZGLD v MIAC* [2009] FMCA 667 at [42]–[43]. In that case an address was given to the solicitors for the Minister who later also acted for the Tribunal during the judicial review proceedings. The Tribunal however, did not become a party to the proceedings until after the address was given.
[121] *SZMHJ v MIAC* [2008] FMCA 1432. In that case, relying on the fact that the Tribunal had not been a party to the litigation at the time when the address had been supplied, the Court took the view that it was not an address given to the Tribunal for the purposes of s 441A.
[122] *SZGLD v MIAC* [2009] FMCA 667 at [53].

Address provided prior to judicial review

8.10.30 Where an applicant has provided an address in connection with a particular review prior to judicial review, there is no reason why a remittal of that review application should undo that address given that the review upon remittal is a continuation of the review initiated by the review applicant.[123]

8.10.31 Similarly where an applicant has appointed an authorised recipient in connection with a particular review, that appointment continues until varied or withdrawn.[124]

8.10.32 Nevertheless, where it appears from Court related documents that the applicant or their representative's address has changed or that there is a change in the applicant's representation, the Tribunal generally seeks confirmation of address details for the review.

Multiple forms of addresses

8.10.33 If an applicant has provided the Tribunal with an address for service as well as a residential or business address, or electronic address, in connection with the review, there will be compliance with the Migration Act if the Tribunal sends correspondence to *any* one of those addresses.[125]

8.10.34 In the case of an applicant who has provided two of the same types of addresses in the application form, the Federal Court has held that the ordinary meaning of the word 'last' in s 494B, the Departmental equivalent of ss 379A and 441A, does not mean 'single' or 'only', rather, it means 'the most recent at the time in question'.[126] In *Maroun v MIAC,* where the appellant provided, in the visa application, his residential address in Lebanon as well as a residential address in Australia, the Federal Court found that the Australian address was the 'last' address as the appellant was physically present in Australia at the time of his visa application.[127]

8.10.35 While the Tribunal is not obliged to send the correspondence again to any alternative address held on the Tribunal or Departmental file, it may do so as a

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[123] *SZEPZ v MIMA* (2006) 159 FCR 291.
[124] ss 379G and 441G.
[125] See *SZKTR v MIAC* [2007] FMCA 1447 at [6] and undisturbed in [2007] FCA 1767 where the applicant changed postal address but the Tribunal continued to send correspondence to a residential address which remained unchanged. In *CER15 v MIBP* [2016] FCCA 329 the Court found no error in the Tribunal's hearing invitation being sent by email even though a residential address had also been provided. Sending two previous administrative letters by post (acknowledgment and Medicare letters) was not conduct that justified an expectation that future correspondence would also be sent by post, and there was no procedural unfairness in communicating with the applicant by two of the three means identified in his review application (at [12]–[20]) See also *Bajwa v MIAC* [2008] FMCA 915 and *SZNZP v MIAC* [2010] FMCA 423. In the context of notification by the Department, see *SZIHN v MIAC* [2008] FMCA 153 where the applicant provided both a residential address and a postal address. The Court held that the Minister was entitled to send correspondence to the residential address, as it was an address for the purposes of s 494B. Similarly, in *Pathania v MIBP* [2015] FCCA 932 the Court found the Minister was entitled to notify by post under s 494B despite the applicant having agreed to email communication and Minister having communicated by email up to that point. Upheld on appeal: *Pathania v MIBP* [2015] FCA 1262.
[126] *Maroun v MIAC* [2009] FCA 1284 at [36]. See also *Singh v MIAC* (2011) 190 FCR 552 at [40], where the Federal Court considered that there was no reason to suppose that the singular reference to 'the last business address' in s 494B(4)(c)(ii) did not include the plural, 'the last business addresses'.
[127] *Maroun v MIAC* [2009] FCA 1284. See also *Kim v MIMAC* [2014] FCA 390.

matter of courtesy where it has sent correspondence to the correct address but it is returned unclaimed or is considered unlikely to have been received.

Sending to a misstated address

8.10.36 If a misstated address is provided by the applicant and the Tribunal uses the address for notification, it will not amount to an error in notification.[128]

8.10.37 For example, in *Cheng v MIAC* the Court found that the notice of the delegate's decision was sent to the address provided in the visa application, notwithstanding that it was not in fact the correct address.[129] At the time of dispatch the incorrect address was the last postal and residential address provided to the Department for the applicant and it was open to the delegate to send the notification letter to that address.

8.10.38 Similarly, in *SZQYF v MIAC* the Court held that the incorrect address nominated by the applicant three times in his protection visa application was the address that complied with s 494B.[130] Although the Minister brought to the Court's attention an envelope, which it was believed could have been the envelope in which the protection visa application was sent, and which had the applicant's correct address details, the Court held that an address on the back of an envelope which may or may not have been the envelope containing the relevant documents could not trump the address placed three times in the protection visa application form as being the applicant's address.

Correcting misstated address

8.10.39 There will also be no error in addressing if the Tribunal makes a small deviation to correct an obviously misstated address.

8.10.40 For example, in *SZOQY v MIAC*[131] the applicant had provided the incorrect address of 'The Boulevard Street' and the Tribunal sent a hearing invitation to 'The Boulevard', which was the applicant's actual address. The Court held that it would be absurd to conclude that making a minor alteration to the advised address, which had the effect that the address was correctly cited, led to the outcome that the Tribunal had not complied with s 441A(4)(c).[132] Despite the fact that the applicant did not actually receive the invitation and did not attend the hearing, the Court held that there had been no breach of either s 425 or 441A, and that the invitation was deemed to have been received by operation of s 441C(4). This reasoning was

[128] See *SZUUR v MIBP* [2015] FFCA 2532 at [87] regarding the Tribunal sending a hearing invitation to a misstated address. Upheld on appeal: *SZUUR v MIBP* [2016] FCA 123.
[129] *Cheng v MIAC* (2011) 198 FCR 559. The Court held the Department's letter was sent in accordance with s 494B, that is, to the last residential address provided by the applicant and that there was no merit in the claim that the address was not provided by the applicant but by someone who assisted him with his application form. This reasoning is equally applicable to notifications sent under ss 379A and 441.
[130] *SZQYF v MIAC* [2012] FMCA 333. The reasoning in this case is equally applicable to notifications sent under ss 379A and 441.
[131] *SZOQY v MIAC* [2011] FMCA 120.
[132] *SZOQY v MIAC* [2011] FMCA 120.

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applied in *SZRVF v MIAC* where the Court held the Department had complied with s 494B(4), notwithstanding the delegate's addition of the suburb name to the address provided by the applicant, which had identified her suburb only by postcode.[133]

8.10.41 Other examples include:

- *BZADI v MIMAC* - where the applicant provided in his visa application a postal address which contained both a suburb name and the city name of Brisbane, and the Court found that the decision notification complied with s 494B(4), implicitly suggesting that the omission of the superfluous city name of 'Brisbane' in the notification address by the delegate was of no consequence.[134]

- *SZSUF v MIBP*[135] - where the applicant gave her postal suburb as 'Central Sydney' and the delegate sent the decision notification to 'Sydney'. The Court found that the omission of the word 'Central' was not such to amount to a failure to comply with s 494B(4) given that it was superfluous and the correct postal address was 'Sydney'.

8.10.42 An error in addressing will not necessarily frustrate the deemed receipt provisions if actual receipt can be shown (see above).[136]

Addresses provided incidentally

8.10.43 An address provided to the Tribunal incidentally, for example, in the form of letterhead, may in some circumstances be sufficient for the purposes of ss 379A and 441A.

8.10.44 In *Singh v MIAC*[137] the applicant's authorised recipient wrote to the Department using letterhead that contained a post office box address. The Department subsequently used this address to notify the authorised recipient of the decision. The Court held the delegate was entitled to send the relevant notices to the post office box address, as that was one of the last business addresses provided to the Minister by the authorised recipient.

8.10.45 This decision was upheld by the Full Federal Court although it is unclear whether the Court considered that an address provided incidentally on letterhead was an address provided in accordance with s 494B(4) [the Departmental equivalent to ss 379A(4) and 441A(4)], or whether it was simply an address available to the Minister to use under s 494A [the Departmental equivalent to ss 379AA and 441AA].[138]

[133] *SZRVF v MIAC* [2013] FCCA 764. See also *Cheng v MIAC* (2011) 198 FCR 559.
[134] *BZADI v MIMAC* [2013] FCCA 1358.
[135] *SZSUF v MIBP* [2013] FCCA 1963.
[136] ss 379C(7), 441C(7). This applies to all correspondence sent by the Tribunal on or after 5 December 2008.
[137] *Singh v MIAC* (2010) 239 FLR 287.
[138] *Singh v MIAC* [2011] FCAFC 27, see comments at [41]–[44].

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8.10.46 A similar view had been expressed in the context of notification by the Tribunal in *von Kraft v MIMA*, where Court held that the Tribunal may communicate with an authorised recipient at any 'address for service' or 'business address' in the authorised recipient's letterhead, notwithstanding that the address may be different to that provided by the applicant when nominating the name and address of their authorised recipient.[139] However, the Court's reasoning in that case appears to have been influenced by the previous communication between the Tribunal to the authorised recipient at the address in the letterhead.

Errors in addressing - postcode and street number

8.10.47 A reference to an incorrect postcode in a notification will not affect compliance with s 379A or 441A. In *SZKGF v MIAC*, the Full Federal Court observed there were cogent reasons for concluding the postcode is not part of the address and therefore use of an incorrect postcode does not result in non-compliance with the statutory provisions.[140] The Court endorsed the views in *SZLBR v MIAC*, in which the Court found that an address is properly identified by the street name and number, where relevant, and suburb and that the postcode is not an essential part of the identification of that physical location.[141] The Court in *SZKGF v MIAC* also observed that even if a postcode could be properly regarded as part of the address, use of an incorrect postcode would not necessarily amount to jurisdictional error.[142]

8.10.48 Applying *SZLBR v MIAC* and *SZKGF v MIAC*, the Court in *SZTQW v MIBP* found, in circumstances where the incorrect postcode specified by the applicant was replaced by the correct postcode for his suburb by the delegate, that notification was effective.[143]

8.10.49 The absence of a street number may not, in some circumstances, invalidate an address. In *Chizanne Kavanagh v Deputy Commissioner of Taxation*[144] the Federal Court accepted that 'Woolaston Rd Warrnambool VIC 3280' could constitute an address notwithstanding that no street number was supplied. The Court observed that not all streets or roads, particularly in country areas, have numbered properties in them. The absence of a number adjacent to a street or road name will not necessarily mean that it is not an address. It was sufficient, for the purposes of the

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[139] *Von Kraft v MIMA* [2007] FMCA 244.
[140] *SZKGF v MIAC* [2008] FCAFC 84 at [11]–[12]. This places in doubt the earlier view expressed in *SZIGT v MIMA* [2006] FMCA 569 at [16], in which the Court held that there must be strict compliance with the requirements in s 441A. In that case, the Court found that the Tribunal, by sending the invitation to the applicant with the wrong postcode (one digit was incorrect), had not correctly invited the applicant to appear.
[141] In *SZLBR v MIAC* (2008) 216 FLR 141. On appeal, a Full Court of the Federal Court agreed that there were cogent reasons for concluding that the postcode is not part of the address: *SZLBR v MIAC* [2008] FCAFC 85. However, in both cases the Court held that if this view were wrong, as there was no practical injustice or inconvenience to the applicant, relief should be declined. The position may be less clear where an applicant fails to appear for hearing or respond to an invitation which used an incorrect postcode. Note however in *MZYYE v MIAC* [2012] FMCA 1254 the Court found, in circumstances where an applicant failed to attend a hearing, that an error in the postcode did not in fact invalidate the service of the hearing invitation.
[142] *SZKGF v MIAC* [2008] FCAFC 84 at [12]; see also *SZLBR v MIAC* [2008] FCAFC 85.
[143] *SZTQW v MIBP* [2014] FCCA 2658, upheld on appeal in *SZTQW v MIBP* [2015] FCA 112. See also *SZTPT v MIBP* [2014] FCCA 2960 where the Court found no error in circumstances where the applicant provided an incomplete address for his agent, consisting only of a Post Office Box number, but the Tribunal inserted the suburb and postcode.
[144] *Chizanne Kavanagh v Deputy Commissioner of Taxation* (2007) 157 FCR 551at [13].

Income Tax Assessment Act 1936 (Cth), that the details supplied appeared to be an address and were regarded by the company's officers as an address.

8.10.50 If the Tribunal makes an error in the address, but the recipient nevertheless receives the correspondence, that person will be taken to have received the correspondence as if the deeming provisions in s 379C or 441C apply. The only exception to this is that if a person can show that he or she received the document at a later time, then he or she is taken to have received the document at the later time.[145]

Correct recipient

8.10.51 Generally speaking, the Migration Act and Regulations require notification to be given to the person who is the subject of the decision, unless that person has appointed an authorised recipient (see below) or is a minor and has a 'carer' (see below).

Aliases

8.10.52 Where an applicant has an alias, the Tribunal may notify them by any of their known names used in connection with their application.

8.10.53 In *MIAC v SZMTR*,[146] the visa applicant was named in the visa application as Ms ML. However, the delegate sent the decision notification to Ms ZH, being the name on the passport used by the applicant to enter Australia. The applicant had claimed that the name in the passport was not her real name. The Federal Court held the requirement was to notify the *person*, being a non-citizen, who has applied for a visa, at their correct address, by whatever name they used.[147]

Errors in name

8.10.54 Generally, a valid notification requires the notice to be addressed to the recipient as described or spelt. However, a minor error or incomplete transcription of the name may not invalidate the notification in every case. In determining whether the person has been correctly identified, it is relevant to take into account whether the person would recognise from the name that the notification is intended for them.

8.10.55 In *Naheem v MIMA*,[148] the applicant's name appeared in a variety of forms on different official documents. On the visa application form the applicant identified his given names as 'Mohamed Naheem' and his surname as 'Naina Mohamed Saibo'.

[145] ss 379C(7) and 441C(7), as inserted by *Migration Amendment (Notification Review) Act 2008* (Cth). These provisions apply to all correspondence sent by the Tribunal on or after 5 December 2008.
[146] *MIAC v SZMTR* (2009) 180 FCR 586.
[147] *MIAC v SZMTR* (2009) 180 FCR 586 at [27], [39]–[40]. The Full Court found that Minister had addressed the envelope for the purposes of ss 66(1) and s 494B(4) to ensure that it would come to the attention of the person who had applied for the visa, and indeed, notification was actually received by the visa applicant.
[148] *Naheem v MIMA* [1999] FCA 1360.

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In his application for review, his given names were identified as 'Naina Mohamed Saibo' and his surname as 'Mohamed Naheem'. The delegate's decision notification letter was sent by registered post in an envelope addressed to 'Mr Mohamed N N Mohamed Saibo'. The Court found that the letter was correctly addressed to the applicant and rejected the applicant's claim that he did not know that the letter was addressed to him as the applicant understood English and was aware from other correspondence that the Department abbreviated his name.

8.10.56 In *SZSWF v MIBP* the Court found in circumstances where the notification letter and envelope was addressed to the applicant by one of the forms of name she had used in connection with her visa application the delegate sufficiently addressed the envelope both for the purposes of ss 66(1) and 494B(4), to ensure that the notification letter would come to the attention of the applicant.[149] The Court was of the view that the name appearing on the envelope and letter, being the reversal of the applicant's given and family names, clearly identified the applicant and the order in which it appeared did not give rise to any implication that it was addressed to some other person.

Sending notices 'care of' a recipient

8.10.57 A notification will not be addressed to the correct person if it is addressed to another person 'care of' that person. For example, in *VEAN of 2002 v MIMIA* a Full Court of the Federal Court held that a notification addressed to an applicant 'care of' his authorised recipient was not correctly addressed to the authorised recipient as required by the Migration Act.[150]

8.10.58 However, for notifications sent on or after 5 December 2008, such an error will not necessarily mean that a person is not taken to have received the notification. If, despite the error in addressing the notice, the authorised recipient nevertheless actually received the notice, he or she is taken to have received it as if the deeming provisions in s 379C or 441C applied. The only exception to this is if that person can show that he or received the document at a later time, in which case he or she is taken to have received the document at the later time.[151]

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[149] *SZSWF v MIBP* [2015] FCCA 250 at [53].
[150] *VEAN of 2002 v MIMIA* (2003) 133 FCR 570.
[151] ss 379C(7) and 441C(7). The Revised Explanatory Memorandum to the Migration Amendment (Notification Review) Bill 2008 (Cth) that introduced these provisions states that the amendments were intended, in part, to address technical defects in notification identified in cases such as *VEAN of 2002 v MIMIA* (2003) 133 FCR 570: at 571.

Where the applicant is a minor

8.10.59 For documents dispatched or transmitted on, or after, 5 December 2008 where the applicant is a minor, subject to the exception discussed below, the Tribunal may comply with its notification obligations by giving the document to a carer of the minor, instead of the minor.[152] The Tribunal may do so if:

- the 'carer' is at least 18 years of age; and the Tribunal (i.e. a member or an officer of the Tribunal) reasonably believes that:
  - the 'carer' has day to day care and responsibility for the minor; *or*
  - the 'carer' works in or for an organisation that has day to day care and responsibility for the minor, and the carer's duties (either alone or jointly with another person) involve care and responsibility for the minor.

8.10.60 However, the Tribunal cannot give notifications by this method if the minor is part of a combined review application.[153] In these cases, ss 379EA or 441EA of the Migration Act operates, such that if the Tribunal gives a document to one person in a combined application, the Tribunal is taken to have given the document to all persons.

8.10.61 Where the minor has an authorised recipient, the Tribunal must give the notification to the authorised recipient instead of the minor or carer.

8.10.62 If the Tribunal sends a document to a carer of a minor, the Tribunal is taken to have given the document to the minor. However, the Tribunal is not prevented from also giving the minor a copy of the document.[154]

8.10.63 While the Tribunal is able to meet its obligations by giving documents to a carer of the minor instead of the minor, the Tribunal can also comply with its notification requirements by notifying the minor directly. The provisions relating to the notification of a minor via a carer provide an alternative means of notification and do not replace or invalidate the existing means of notifying the minor directly.[155]

Language requirements

8.10.64 There is no requirement that a notice be in the applicant's own language. In *Cuong Van Nguyen v RRT* the Court held in the circumstances of that case, that the notice in English was 'reasonable and appropriate'.[156] The Court noted that 'notice' does not equate with 'knowledge' and that it would be impracticable and inefficient to notify all applicants in their own language and that a recipient in the situation of the

[152] ss 379A(1A), 441A(1A), inserted by the *Migration Amendment (Notification Review) Act 2008* (Cth).
[153] ss 379A(1B), 441A(1B).
[154] ss 379A(6), 441A(6).
[155] ss 379A(1A), 379A(4) and 379A(5); ss 441A(1A); 441A(4) and 441A(5).
[156] *Cuong Van Nguyen v RRT* (RRT) 74 FCR 311.

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appellant would be alerted by the letterhead and form of the letter that it was an official document which called for translation or for the seeking of further information.

8.10.65 In *SZQBV v MIAC* the Court confirmed that the Tribunal is under no obligation to express its communications in any language other than English.[157] The Court held that it is the responsibility of applicants before the Tribunal to ensure that they understand the communications which pass between it and them, because it is their practical obligation to satisfy the Tribunal that they meet the criteria for the grant of a visa.

8.11 Notification prior to 10 August 2001

8.11.1 The notification procedures outlined above relate only to documents sent on or after 10 August 2001.

8.11.2 The notification procedures required by the Migration Act and Regulations have varied from time to time, with major legislative changes on 1 September 1994, 1 June 1999, 1 July 2000 and 10 August 2001.

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[157] *SZQBV v MIAC* [2011] FMCA 727 at [29].

Migration and Refugee Division Procedural Law Guide

Chapter 9: Giving and receiving documents by the Tribunal

Current as at 17 December 2021

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9. GIVING AND RECEIVING DOCUMENTS BY THE TRIBUNAL

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9. GIVING AND RECEIVING DOCUMENTS BY THE TRIBUNAL[1]

9.1 Introduction

9.1.1 The *Migration Act 1958* (Cth) (the Migration Act) contains a number of specific provisions relating to the receipt and handling of documents in the context of Migration and Refugee Division (MRD) Tribunal reviews. These include an obligation on the Secretary of the Department (the Secretary) to provide the Tribunal with relevant materials when a review application is made under Parts 5 and 7 of the Migration Act. There are also provisions which permit the Secretary and applicants to provide the Tribunal with information in a particular form. Additionally, the Tribunal has express and implied powers which can be used to *obtain* documents or information.

9.2 Documents given by the Secretary

9.2.1 Under ss 352(2) [Part 5 - migration] and 418(2) [Part 7 - protection] of the Migration Act, the Secretary must, within 10 working days of being notified of an application for review, forward a copy of the delegate's decision to the Registrar.[2] In addition, under ss 352(4) and 418(3), the Secretary must, as soon as practicable after being notified of the application, give to the Registrar each other document, or part of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of the decision.[3] Except in extreme cases where the document is so critical that not providing it means the Tribunal could not discharge its review obligation, it is for the Secretary to determine a document's relevance to the review and that generally the objective relevance of a document is not the test to be applied.[4]

9.2.2 While the Secretary's failure to provide the Tribunal with the relevant documents generally will not, in and of itself, be a jurisdictional error,[5] the Tribunal's lack of

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] s 352(2), reg 4.16 [pt 5] and s 418(2), reg 4.34 [pt 7]. If the application is for review of an Part 5-reviewable decision covered by s 338(4), the Secretary must comply with the requirements within 2 days after being notified: s 352(3).
[3] ss 352(4), 418(3).
[4] *SZOIN v MIAC* (2011) 191 FCR 123 at [54]–[55]. In *WAGP v MIMIA* (2006) 151 FCR 413 the Court observed that it would be a difficult task to demonstrate that the Secretary's view about the relevance of a particular document was erroneous: at [64].
[5] *SZOIN v MIAC* (2011) 191 FCR 123 where it was held that although regrettable medical reports relating to the applicant's mental condition were not made available to the Tribunal, the error on the part of the Secretary in complying with s 418(3) did not give rise to the result that the Tribunal's decision was tainted with jurisdictional error: at [66]. Application for leave to appeal in relation

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access to relevant material may reveal a jurisdictional error in its decision making process. For example, where the failure to provide information causes the Tribunal (even innocently) to mislead an applicant to mistakenly believe that a state of affairs exists, and that mistaken belief in turns affects the manner in which their case is conducted to their detriment.[6] However a failure to give the Tribunal documents that would have had no bearing upon its decision is unlikely to result in a jurisdictional error.[7]

9.2.3 The Secretary may also give the Tribunal written arguments relating to the issues arising in relation to the decision under review.[8] Submissions may be generic or relate only to a particular case. They represent the Department's view or argument on certain issues and are not legally binding upon the Tribunal.

9.2.4 A generic submission will usually contain country information and/or legal or factual argument relevant to a class of review applications. Where a submission is relevant to an individual case before the Tribunal, the Tribunal will generally consider the submission when making its findings and make reference to the submission in the decision record. If information contained in the submission would be the reason or a part of the reason for affirming the decision under review and does not fall within the statutory exceptions in s 359A(4) or 424A(3),[9] it may be necessary to put particulars of the information to the applicant under s 359A or 424A. The Tribunal may also generally discuss any issues arising from the submissions with the applicant at a hearing.[10]

9.2.5 The Secretary may be required by the Tribunal to make an investigation, or any medical examination, that the Tribunal thinks is necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination.[11] President's Direction - Conducting Migration and Refugee Reviews sets out matters to consider and procedures to follow when inviting the Department to provide a written submission.

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to whether the Secretary's failure to comply with s 418(3) can contribute to or result in jurisdictional error and if so in what circumstances was refused: *SZOIN v MIAC* [2011] HCATrans 242. See also *Muin v Refugee Review Tribunal* ([2002] HCA 30; *WAGP v MIMIA* (2006) 151 FCR 413 at [51]; *Matete v MIAC* [2008] FMCA 573.

[6] In *BBS15 v MIBP* (2017) 248 FCR 159 the Court followed *Muin* to find that a breach of s 418(3) was not, in and of itself, sufficient to constitute jurisdictional error by the Tribunal. In that case however there was a breach of the hearing obligation in s 425 because the applicant was led to believe that certain information before the delegate would be given to the Tribunal which was not, and the Tribunal's decision turned, in part, upon its perceived lack of corroborative evidence having been provided: at [106]. See also *BVC15 v MIBP* (2017) 255 FCR 471 at [46]–[49] where the Court held that the appellant was deprived of a fair opportunity to present his case in circumstances where the Tribunal had given him the impression that it had a copy of the departmental file but the Secretary had inadvertently not provided all documents to the Tribunal, including a statement relevant to his protection claims. The Court recognised that the Tribunal itself was unaware of the existence of the documents but that, had the appellant known that the document was not before the Tribunal, he would have taken further steps to bring the statement to the Tribunal's attention.

[7] In *AYZ16 v MIBP* [2017] FCCA 1444 at [17]–[25], the Court distinguished *BBS15* because the applicant had been put on notice by the Tribunal that it did not have documents that had been given to the Secretary, but that in any event the documents which were not provided could not have affected the Tribunal's decision because it turned upon an unrelated issue.

[8] ss 358(2) [pt 5], 423(2) [pt 7].

[9] ss 359A(1) [pt 5], 424A(1) [pt 7].

[10] ss 360(1) [pt 5], 425(1) [pt 7]. Note that where the Minister has certified that disclosure would be contrary to the public interest under s 376(1) [pt 5] or 438(1) [pt 7], the Tribunal has a discretion under s 376(3)(b) or 438(3)(b) to disclose or withhold information from the applicant. Additionally, for protection matters, the Tribunal may provide the applicant with a copy of a submission and direct under s 440 that further disclosure of the information be restricted if the Tribunal is satisfied that it is in the public interest that the information not be disclosed. Note that the equivalent power under Part 5 of the Migration Act (s 378) is narrower and is limited to restricting *publication* of the information only. See Chapter 31 – Restrictions on disclosing and publishing information for further information.

9.3 Documents from the applicant and other sources

9.3.1 The Migration Act provides for an applicant to give to the Tribunal a statutory declaration under Part 7 of the Migration Act, or a written statement , under Part 5 of the Migration Act, on any matter of fact that the applicant wishes the Tribunal to consider;[12] and written arguments relating to the decision under review.[13]

9.3.2 Outside these statutory provisions, the Tribunal has an implied general power to receive any material an applicant or another person seeks to put before it.[14] If that material is relevant to the review, the Tribunal is required to consider it, irrespective of the form in which it is provided. The Tribunal is not bound by rules of evidence[15] and so material submitted need not be sworn or even signed.[16]

9.3.3 The Tribunal may receive a request from the applicant to adjourn the review to provide documents or submissions. The Tribunal will have regard to any such request and consideration of the request may be put on the Tribunal's file or included in the decision record. Whether a further opportunity to submit material is granted is a matter for the Tribunal's discretion and, provided that discretion is exercised reasonably, there is little scope for jurisdictional error if the applicant's request is declined.[17]

9.3.4 The Tribunal has a number of express statutory powers and an implied general power that can be used to *obtain* information or a document from an applicant or other person (see further Chapter 11 – Power to obtain information). Alternatively, the Tribunal may take evidence from a witness pursuant to a request under s 361 [Part 5] or 426 [Part 7];[18] summon a person pursuant to s 363(3) [Part 5] or 427(3) [Part 7];[19] or take evidence on oath or affirmation at a hearing under s 360 [Part 5] or 425 [Part 7].[20] The Tribunal also has a general power to get any information that is considered relevant in conducting the review.[21] However, if the Tribunal gets such information, it must have regard to it, in making the decision on review.[22]

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[11] ss 363(1)(d) [pt 5], 427(1)(d) [pt 7].
[12] ss 358(1)(a), 423(1)(a).
[13] ss 358(1)(b), 423(1)(b).
[14] See *SZGBI v MIAC* [2008] FCA 599 at [26].
[15] ss 353(2) [pt 5], 420(2) [pt 7], as amended by the *Tribunals Amalgamation Act 2015* (Cth) (Amalgamation Act).
[16] *AZAAL v MIAC* [2009] FMCA 23 at [22] and *SBLF v MIAC* [2008] FCA 1219 at [36]–[37].
[17] See e.g. *SZMMJ v MIAC* [2008] FMCA 1698 where the Court found no error in the Tribunal's refusal to allow the applicant one month to obtain further documents in circumstances where two earlier opportunities to provide documents had been given; the applicant had failed to send any documents on those two occasions; the request was made on the last day before he was required to respond to the Tribunal's s 424A letter; the documents were unspecified; and, the Tribunal gave the applicant further time to provide documents until the handing down of its decision: at [62].
[18] See *SZGBI v MIAC* [2008] FCA 599 at [26].
[19] See Chapter 16 - Summons.
[20] *MIAC v SZKTI* (2009) 238 CLR 489 at [25] and *SZMBS v MIAC* [2008] FMCA 847 at [25]. The power to take evidence under oath or affirmation is contained in ss 363(1)(a) and 427(1)(a).
[21] ss 359(1) [pt 5], 424(1) [pt 7]. This power would normally be used to obtain information through the Tribunal's own research, e.g., from a book or the internet. If inviting a *person* to give information, the power in s 359(2) or 424(2) would usually be invoked, which has consequences if an applicant doesn't give the information before the time for giving it has passed such as the loss of entitlement to a hearing (see Chapter 11 – Power to obtain information for further information). Therefore, the Tribunal may on occasion use another statutory power or the implied general power.
[22] ss 359(1), 424(1). In *SZMGW v MIAC* [2009] FMCA 88 the Court found this required the Tribunal to engage in an active intellectual process, not merely refer to the information in the decision record.

9.4 Giving documents to the Tribunal

9.4.1 Sections 379F [Part 5] and 441F [Part 7] of the Migration Act specify the methods by which a person may give a document or thing to the Tribunal, if the person is required or permitted to do so in relation to a review.[23]

9.4.2 The specified methods are:

- by giving the document or thing to the Registrar or an officer of the Tribunal;
- by a method set out in directions under s 18B of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act);[24] or
- by a method set out in the *Migration Regulations 1994* (Cth) (the Regulations).

9.4.3 Except for the provision of an application form,[25] no methods for the giving of other documents are prescribed by the Regulations. Instead the President has given directions pursuant to s 18B of the AAT Act in the Practice Direction - Giving Documents or Things to the AAT specifying methods by which documents or things may be given to the Tribunal. The methods currently specified by the President are:

- by emailing it to the specified email address(es);[26]
- by sending it by pre-paid post to a registry of the AAT;
- by faxing it to the specified fax number(s);
- by giving it to a member of the AAT in the course of a hearing of the review; or
- by a registered user of the online application system submitting the document or thing using the online application system;
- by leaving it with any person who is performing duties for the AAT at a registry of the AAT;
- if given by or on behalf of the Secretary of the Department of Home Affairs, by another electronic means approved by the AAT.

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[23] ss 379F and 441F, as amended by the Amalgamation Act.
[24] For matters prior to 1 July 2015, ss 379F and 441F provided instead that the specified method was as set out by the Principal Member in directions under ss 353A and 420A of the Migration Act. Those provisions were amended by the Amalgamation Act in effect on and from 1 July 2015. The validity of the previous direction, and documents given under them were preserved: see the Amalgamation Act sch 9. Note that the methods specified in the pre 1 July 2015 Principal Member Directions and the post 1 July President's Direction are the same in substance.
[25] reg 4.11(1) [pt 5], reg 4.31AA(1) [pt 7].
[26] In *Nguyen v MIBP* (2016) 306 FLR 225, the Court accepted that, unless otherwise agreed between the parties, s 14A of the *Electronic Transactions Act 1999* (Cth) applied and electronic communication (email) sent to the Tribunal was only received at the time that it reached the Tribunal's electronic address and was capable of being retrieved. In that case, the Court accepted that the Tribunal's Outlook Mailbox had never received the applicant's email correspondence because the size of the email exceeded the permitted size limit and was rejected by the Tribunal's gateway server. A non-delivery report was sent from the Tribunal's email system to the applicant's email address confirming this: at [30]–[31].

9.4.4 In addition, Practice Direction - Migration and Refugee Matters sets out the Tribunal's expectations of applicants and their representatives in relation to the conduct of MRD reviews,[27] including timeframes for giving submissions and evidence to the Tribunal. All applicants and representatives are, for example, expected to:

- provide, on lodgment of an application for review, all relevant evidence and a detailed submission setting out claims, or, if this is not possible (where, for example, a representative is appointed after the application is lodged), to give all relevant material and submissions no later than 14 days from the date the application was lodged or the date the representative was appointed, whichever is the later day;
- lodge any additional submissions or documentary information, which were not earlier available, no later than seven days (or no later than one day for detention cases) before any scheduled hearing;
- identify clearly any changes to previous claims or any new or additional claims in any submission;
- make any post-hearing submissions within the period determined by the Tribunal.

9.4.5 For details on giving review applications to the Tribunal see Chapter 4 – Review applications.

9.5 Handling of counterfeit or altered travel documents

9.5.1 Occasionally, an applicant may give a passport or other travel document to the Tribunal which is either:

- a genuine passport but one which has been altered or which was fraudulently obtained; or
- a forged or fake passport.

9.5.2 In most cases, a passport falling within the first category will belong to the country which issued it. Documents falling within the second category will probably 'belong' to the holder.

9.5.3 However, for both categories, the Tribunal's powers and obligations in respect of the document is be limited by certain provisions pertaining to the handling of confidential information.

[27] The President has also issued the COVID-19 Special Measures Practice Direction – Migration and Refugee Division, which applies to the MRD during the COVID-19 pandemic. It makes changes to the operations and procedures of the MRD and to obligations of parties to reviews in response to the pandemic.

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Material obtained prior to 1 July 2015

9.5.4 For information and material obtained prior to 1 July 2015, s 377 [Part 5] or 439 [Part 7] of the Migration Act [28] apply to documents concerning a person, obtained by a Member or officer of the Tribunal in the course of performing functions or duties under the Migration Act. Under those sections, a Member or officer of the Tribunal is prohibited from divulging, communicating or making a record of information unless it is for the purposes of the Migration Act or, for the purposes of, or in connection with, the performance of a function, duty or exercise of a power under the Migration Act. A breach of either section is punishable by 2 years imprisonment.

9.5.5 It may be open to the Tribunal to release a passport or travel document to the Department for the purposes of investigating the possible commission of an offence relating to false papers etc. under s 234 of the Migration Act. However, s 234 does not contain any specific function, duty or power. It does not, in its terms, contain a power to seize documents or make investigations. It is simply an offence provision. It would be necessary to be satisfied that release of a passport in this situation is for 'the purposes of' (s 234) the Migration Act. Section 234 has application in relation to a forged or false document or a document which contains false or misleading information. A passport which has been fraudulently obtained may not necessarily be 'forged or false' (as it would have been issued by the correct authority) but may contain false or misleading information in a material particular.

Material obtained on or after 1 July 2015

9.5.6 For information and material obtained on or after 1 July 2015, ss 377 and 439 do not operate to prevent disclosure. Instead s 66 of the AAT Act applies to protect against, to a more limited degree, the production of, or access to a protected document or disclosure of protected information. Under s 66 of the AAT Act, current and former members, officers, staff and contractors of the Tribunal (entrusted persons) must not be required to produce or disclose the relevant material to a court, tribunal or another authority or person with the power to require production of documents or the answering of questions except so far as it is necessary for the purpose of carrying into effect the provisions of the AAT Act or another enactment conferring powers on the Tribunal (such as the Migration Act).[29] Further, an entrusted person must not be required to produce or disclose relevant material to a parliament if: it relates to a Part 7 reviewable decision *and* the production or disclosure is not necessary for the purposes of carrying into effect the provisions of the AAT Act or another enactment conferring powers on the Tribunal (such as the Migration Act).[30]

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[28] These provisions were repealed from 1 July 2015 by the Amalgamation Act. However, note that the transitional provision in item 15BB of sch 9 to that Act provides for the continued protection of confidential information by ss 377 and 439. If ss 377 and 439 applied to a person immediately before 1 July 2015, then those provisions continue to apply in relation to information or documents obtained before that day.
[29] s 66(1) of the AAT Act as inserted by the Amalgamation Act.
[30] s 66(2) of the AAT Act as inserted by the Amalgamation Act.

9.6 Documents in languages other than English

9.6.1 An applicant may submit documents in languages other than English. The mere fact that documents are not in English is not of itself sufficient to exclude their consideration.[31]

9.6.2 If the document is likely to be significant to the outcome of the review, there may be an obligation to have it formally translated.[32] The Tribunal may seek to identify those parts of the material that are relevant to the applicant's claims.[33]

9.6.3 If the gist of the document is ascertained and the proposition which the applicant wishes to draw from the untranslated material fully presented to the Tribunal, there is no general obligation to obtain translations of foreign language material.[34] The Tribunal may ask the applicant to read the document to the Tribunal during the hearing and have the interpreter interpret what the applicant says. Occasionally, the Tribunal may request an interpreter who is also an accredited translator to translate a minor detail, such as a date or a name on the document. Interpreters, however, may not necessarily be qualified to perform translations of documents.

9.6.4 If the Tribunal does not intend to obtain a translation of a foreign language document, this will generally be communicated to the applicant (although applicants should not assume that a translation will be obtained unless the Tribunal has explicitly stated that one will be). In this regard, the Tribunal's standard correspondence draws applicants' attention to the need to provide documents to the Tribunal in English.[35]

9.6.5 Even where the Tribunal may be under a duty to enquire or obtain a translation, failing to do so in circumstances where the result of the inquiry or translation could not

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[31] *X v MIMA* (2002) 116 FCR 319. See also *MZWKU v MIMA* [2006] FCA 996 at [19].
[32] See *NAQV v MIMIA* [2004] FMCA 535 where the Court noted at [19] that there may be cases where the RRT would be obliged to ensure that untranslated material critical to an applicant's case (particularly personal information) was taken into account. The Court also noted that translation costs could inhibit an applicant from providing evidence but noted that, by itself, this does not establish any jurisdictional error by the Tribunal. In *SZEUU v MIMIA* [2005] FMCA 947 the Court at [44] stated that there may be circumstances in which an expectation could be raised with an applicant that the Tribunal would have particular documents translated. This judgment however is to be compared with *MZWKU v MIMA* [2006] FCA 996 and *SZREI v MIAC* [2012] FMCA 718 where the Court at [30]–[31] held that no particular obligation arose on the Tribunal to take any additional step to obtain a translation of a document, or to suggest to the applicant that he should provide additional evidence about its relevance and background, in circumstances where the applicant or his agent did not draw the Tribunal's attention to the specific page in question or make any suggestion as to its particular contents or relevance to his claim.
[33] *MZWKU v MIMA* [2006] FCA 996. Where the information in the documents is summarised by the applicant during the hearing and taken into account, the Tribunal is not under an obligation to have the documents translated *per se*, at [14]–[16].
[34] *SZLSW v MIAC* [2008] FCA 1321 at [11]–[14] affirming *SZLSW v MIAC* [2008] FMCA 498 at [36]; *SZJHK v* MIAC [2007] FMCA 248 at [68]; *S14/2003 v MIMIA* [2003] FCA 1153 at [49]; *X v MIMA* (2002) 116 FCR 319; and *Cabal v MIMA* [2001] FCA 546. See also *BPN16 v MIBP* [2019] FCCA 916 where the Court did not find any error in the Tribunal's failure to place any weight on documents in a foreign language or to obtain translations because the Tribunal is under no general or unqualified duty to obtain translations of material provided by an applicant (at [217] and [242]) nor had the applicant asked the Tribunal to obtain translations (at [240]), the applicant had been put on notice that he needed to provide translations from the primary stage and had sufficient time to do so (at [227]–[229]), the 'gist' of the untranslated material was known to the Tribunal and the relevant claims were considered (at [236]–[238]) and there was no evidence as to the relevance of the untranslated documents such that obtaining their translations would have addressed the 'critical fact' that would enliven a duty to obtain a translation (at [242]-[243] and [246]).
[35] See *SZLSW v MIAC* [2008] FMCA 498 at [41]. Note however *SZRGW v MIAC* [2012] FMCA 701 where, notwithstanding that the Tribunal's invitation contained such a warning, the Court still found that the Tribunal erred in not accepting and obtaining its own translation of a document (or at least not giving the applicant a reasonable opportunity to do so himself) where there remained a critical issue and it was unclear whether the document being offered bore upon that issue: at [29]. Ultimately, it was an error within jurisdiction as, once translated and understood it did not add anything to the applicant's case. Undisturbed on appeal in *SZRGW v MIAC* [2013] FCA 100.

have affected the outcome of the Tribunal's review may not amount to a jurisdictional error.[36]

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[36] *SZRGW v MIAC* [2012] FMCA 701 at [36]. Undisturbed on appeal in *SZRGW v MIAC* [2013] FCA 100.

Migration and Refugee Division Procedural Law Guide

Chapter 10: Statutory duty to disclose adverse information

Current as at 17 December 2021

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10. STATUTORY DUTY TO DISCLOSE ADVERSE INFORMATION[1]

10.1 Introduction

10.1.1 Sections 359A [Part 5 - migration] and 424A [Part 7 - protection] of the *Migration Act 1958* (Cth) (the Migration Act) impose a statutory obligation to give applicants, in writing, 'particulars' of certain information which is adverse (in the sense that it would be the reason or a part of the reason for affirming the decision under review) and to invite them to comment on, or respond to, it. For the purposes of Part 5 and Part 7 of the Migration Act, references to 'the applicant' mean the person who has made the application for review.[2]

10.1.2 The wording of ss 359A and 424A is virtually identical. There are, however, some differences in the procedural framework of Part 5 and Part 7 of the Migration Act which impact on the operation of these provisions. These procedural differences are discussed below.

10.1.3 Sections 359A and 424A were significantly amended by the *Migration Amendment (Review Provisions) Act 2007* (Cth). These amendments apply to all review applications lodged on, or after, 29 June 2007. An application that was lodged prior to 29 June 2007 but which has subsequently been remitted for reconsideration by a court, or otherwise reconstituted, will not be subject to the amendments.

10.1.4 Significantly, the *Migration Amendment (Review Provisions) Act 2007* (Cth) also inserted provisions into the Migration Act (ss 359AA [Part 5] and 424AA [Part 7]) which gives the Tribunal a discretionary power to disclose information which would be the reason, or a part of the reason, for affirming the primary decision to an applicant **orally** at a hearing. If the Tribunal exercises the discretionary power in ss 359AA/424AA, it must follow certain mandatory procedures.

10.1.5 More recently, ss 359A/424A and 359AA/424AA were amended by the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) which introduced a power for the Tribunal to dismiss an application if the applicant fails to appear at a scheduled hearing. The amendments clarify that a reference in these sections to affirming a decision that is under review does not include a reference to the affirmation of a decision that is taken to be affirmed under ss 362B(1F) [Part 5] and

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] *SZPZH v MIAC* [2011] FMCA 407 at [25]; upheld on appeal in *SZPZH v MIAC* [2011] FCA 960.

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426A(1F) [Part 7], being the confirmation of an initial decision to dismiss an application for non-appearance.[3]

10.1.6 The Migration Act was also amended by the *Tribunals Amalgamation Act 2015* (Cth) from 1 July 2015. Relevantly, there is now a single Administrative Appeals Tribunal (AAT) with a Migration and Refugee Division (MRD). However, anything done by the previous MRT or RRT is taken to be conduct of the AAT from 1 July 2015. Accordingly, this extends to invitations for comment or response sent prior to 1 July 2015.[4]

10.2 The nature of the statutory obligation

10.2.1 The obligation to disclose information that would be the reason, or part of the reason for affirming the decision under review, contained in ss 359A and 424A may be discharged orally at the hearing (in accordance with s 359AA or 424AA), or in writing.

Disclosing adverse information orally at a hearing: ss 359AA and 424AA

10.2.2 For review applications made on, or after, 29 June 2007, the obligation under ss 359A(1) and 424A(1) to give the review applicant a written invitation to comment on 'information' does not apply where the Tribunal has given them clear particulars of the information and orally invited them to comment on or respond to it under s 359AA or 424AA.[5]

10.2.3 Sections 359AA and 424AA were introduced by the *Migration Amendment (Review Provisions) Act 2007* (Cth). Where the review applicant is appearing before the Tribunal to give evidence and present arguments, they permit the Tribunal to orally give to them clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review. This is a discretionary power.[6] Where the review applicant is a child, information given to the child's parent in their role as guardian is taken to be given to the child.[7]

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[3] Sections 359A(5), 424A(4) and 359AA(2), 424AA(2) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015).
[4] Schedule 9, item 15AC(1)(b) of the *Tribunals Amalgamation Act 2015* (Cth) (Amalgamation Act).
[5] ss 359A(3) and 424A(2A). The Full Federal Court in *SZMCD v MIAC* (2009) 174 FCR 415 confirmed that s 424AA does not to create a duty to take particular steps independently of the existence of a duty under s 424A, but is merely another method by which the obligations in s 424A may be discharged: at [2].
[6] *SZMCD v MIAC* (2009) 174 FCR 415 at [73]. See also *SZLTC v MIAC* [2008] FMCA 384, *SZMAX v MIAC* [2008] FMCA 723 at [10]; *SZMFZ v MIAC* [2008] FMCA 1085 at [49]; *SZMEK v MIAC* [2008] FMCA 1067 at [46] and *SZMIS v MIAC* [2009] FCA 167 at [13].
[7] *SZSHV as Litigation Guardian for SZSHW v MIBP* [2013] FCCA 1784. Upheld on appeal: *SZSHY v MIBP* [2014] FCA 212.

10.2.4 If, the Tribunal elects to discharge its obligation in ss 359A/424A by giving the review applicant information orally pursuant to s 359AA or 424AA, it must comply with the procedures set out in ss 359AA(1)(b)/424AA(1)(b).[8] That is, it must:

- ensure, as far as reasonably practicable the applicant understands why the information is relevant to the review *and* the consequences of the Tribunal relying upon such information;
- orally invite the applicant to comment on, or respond to, the invitation;
- advise the applicant that she/he may seek additional time to comment or respond to the information; and
- if the applicant does request additional time, and the Tribunal considers the applicant reasonably needs additional time - adjourn the review.

Each of these elements is discussed below ('Procedural requirements and issues')

10.2.5 Although the Tribunal's compliance with the oral provisions in ss 359AA or 424AA will turn upon what is actually said (or not said) during the hearing, decision records generally acknowledge that the oral procedures were used and correctly followed.[9]The term, 'information' for the purposes of s 424AA(1)(a) is given the same interpretation as that in s 424A(1)(a).[10] As a result, the High Court's consideration of the meaning of that term in *SZBYR v MIAC* is relevant when construing ss 359AA/424AA.[11]

10.2.6 While it is now well-established that the alternative provisions in ss 359A/424A and ss 359AA/424AA are complementary and should be read together,[12] procedural requirements, such as the obligation in s 359AA(1)(b)(iv) or 424AA(1)(b)(iv) to adjourn the review if the applicant seeks additional time, remain separate from, and are not imported into, the procedures in s 359A or 424A.[13] A Full Court of the Federal Court in *SZMCD v MIAC*[14] has confirmed that s 424AA (and by inference s 359AA) is a discretionary power which enables the Tribunal, if it considers it appropriate to do so, to give oral particulars of adverse information at a hearing that may otherwise need to be given under s 359A(1) or 424A(1).[15]

10.2.7 How and when the procedure might apply during a hearing will inherently be related to the circumstances of a particular case. There is no error in the Tribunal warning of the possible need for disclosure under s 359AA or 424AA early in the hearing, and

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[8] *SZMCD v MIAC* (2009) 174 FCR 415.
[9] In *SZQRV v MIAC* [2012] FMCA 353 the Court found the language used by the Tribunal in its decision record indicated that it followed the procedure set out in s 424AA of the Migration Act, even though no express mention was made of it. In this fashion the Tribunal used the facility available to it to discharge, orally at the hearing, its obligation pursuant to s 424A(1) of the Migration Act: at [45]-[46].
[10] *SZMCD v MIAC* (2009) 174 FCR 415 at [91].
[11] *SZBYR v MIAC* (2007) 235 ALR 609; Subsequently affirmed in *MIAC v SZGUR* (2011) 241 CLR 594.
[12] *SZMCD v MIAC* [2009] FCAFC 46 (application for special leave to appeal dismissed: *SZMCD v MIAC* [2009] HCATrans 211).
[13] *Cerenio v MIAC* [2013] FCCA 681 at [16].
[14] *SZMCD v MIAC* (2009) 174 FCR 415 (application for special leave to appeal dismissed: *SZMCD v MIAC* [2009] HCATrans 211).
[15] *SZMCD v MIAC* (2009) 174 FCR 415 at [86] and *Chen v MIBP* [2013] FCA 1137 at [20].

then after a process of questioning or discussing potentially adverse information with the applicant, telling the applicant what he or she needs to know in order to address the Tribunal's concerns that have become clear as a consequence of the questioning before giving disclosure under s 359AA or 424AA. Conversely, the Tribunal is also not bound to give notification under s 359AA or 424AA when it first questions an applicant about material information. Rather, this obligation arises when the Tribunal determines that the information may be the reason or part of the reason for affirming the decision under review.[16]

10.2.8 If the Tribunal chooses to give oral particulars of information but fails to comply with the statutory procedure, the Tribunal will not have the benefit of s 359A(3) or 424A(2A) (which provide that the Tribunal is not obliged to give particulars of information nor invite comment on them under s 359A or 424A, if it has complied with the procedure in s 359AA or 424AA) and there would remain an obligation to disclose the information in writing under s 359A or 424A.[17] In other words, ss 359AA/424AA is one way by which the Tribunal can satisfy the substance of what is required of it under ss 359A(1)/424A(1).[18] This also means that there is no error if the Tribunal does not disclose information that would fall within one of the exceptions in ss 359A(4)/424A(3) orally under ss 359AA/424AA[19] or fails to correctly follow the procedure in ss 359AA(1)(b) or 424AA(1)(b) in relation to material that is not required to be disclosed under s 359A or 424A.[20]

Disclosing adverse information in writing: ss 359A and 424A

10.2.9 Where ss 359A/424A applies, the Tribunal is required by ss 359A(1)/424A(1) to:

- give to the review applicant clear particulars of information that the Tribunal considers would be the reason, or a part of the reason for affirming the primary decision; [21]
- ensure, as far as is reasonably practicable, that the review applicant understands why the information is relevant to the review, and the consequences of it being relied on in affirming the primary decision;[22] and
- invite the review applicant to comment on or respond to it.[23]

[16] *SZTVW (No 2) v MIBP* [2014] FCCA 368.
[17] *SZMCD v MIAC* (2009) 174 FCR 415 at [74]–[75], [92].
[18] *SZMCD v MIAC* (2009) 174 FCR 415 at [90] and *SZSSP v MIMAC* [2013] FCCA 1445 at [24] which was undisturbed on appeal in *SZSSP v MIBP* [2014] FCA 103.
[19] *SZMIS v MIAC* [2009] FCA 167 at [11] and *SZMMP v MIAC* (2009) 174 FCR 514 at [55]–[56].
[20] In *SZNPU v MIAC* [2009] FMCA 963, the Tribunal attempted to disclose concerns or doubts about the applicant's claims, apparently using the procedure in s 424AA. The Court, (at [50]), rejected an argument that there was an error for failing to comply with the mandatory procedure in s 424AA(b) on the basis that there was no relevant 'information' for the purposes of s 424A, only 'thought processes'.
[21] The word, 'clear', was inserted by the *Migration Amendment (Review Provisions) Act 2007* (Cth) and applies to review applications lodged on or after 29 June 2007.
[22] The words, 'and the consequences of it being relied on in affirming the decision that is under review', was inserted by the *Migration Amendment (Review Provisions) Act 2007* (Cth) and apply to applications lodged on or after 29 June 2007.
[23] The words, 'or respond to', was inserted by the *Migration Amendment (Review Provisions) Act 2007* (Cth) and apply to review applications lodged on or after 29 June 2007.

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10.2.10 The Tribunal is also required by ss 359A(2)/424A(2) to:

- give the information and invitation to the review applicant by one of the methods specified in ss 379A [Part 5] or 441A [Part 7]; or
- if the review applicant is in immigration detention, by a method prescribed for the purposes of giving documents to such a person.

10.2.11 Sections 359A(4) and 424A(3) exempt certain categories of information from this requirement, namely:

- information which is not specifically about the review applicant, or another person, and is just about a class of persons of which the review applicant, or another person, is a member;
- information given by the review applicant for the purpose of the application;
- written information that the applicant gave during the process that led to the decision under review;[24] and
- non-disclosable information.

Each of these aspects are discussed in more detail below.

10.2.12 In addition, if information that would otherwise fall within the ambit of ss 359A(1)/424A(1) was given to the review applicant orally in accordance with ss 359AA/424AA, the Tribunal is not obliged to give the applicant the same information in writing.[25] See discussion above for further information.

10.2.13 Where information is given to the review applicant in writing pursuant to ss 359A/424A, there is no requirement that the written invitation be given prior to the hearing.[26]

10.3 Information that would be the reason, or part of the reason, for affirming the decision

10.3.1 To fall within the ambit of ss 359A/424A, the information must be 'information' of a particular kind, and it must be the 'reason or part of the reason for affirming the decision under review'.

10.3.2 Generally speaking, the term 'information' is to be given its ordinary meaning, namely 'that of which one is informed' or 'knowledge communicated or received concerning some fact or circumstance'.[27] 'Information' need not be contained in a

[24] For review applications made on, or after, 29 June 2007.
[25] ss 359A(3), 424A(2A).
[26] *Mfula v MIBP* [2016] FCCA 161 at [12].
[27] *SZASX v MIMIA* [2004] FMCA 680 at [18]. The Court's findings were undisturbed on appeal: *SZASX v MIMIA* [2005] FCA 68 (application for special leave to appeal dismissed: SZASX v MIMIA [2005] HCATrans 946).

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written document. A photograph may suffice.[28] Whether or not information is 'the reason, or a part of the reason' for affirming the primary decision depends on the criteria for the making of that decision in the first place.[29]

Thought processes

10.3.3 Thought processes, subjective appraisals and determinations of the Tribunal do not constitute 'information' and therefore do not fall within the scope of ss 359A/424A.[30] The Tribunal is also not required to reveal its mental processes or any of its provisional views on the merits of the application. For example:

- In *MIAC v SZHXF*, the Court found that the statement that the Tribunal placed 'great weight' on advice provided to it by a particular source because that source had been found in the past to be careful and reliable was not 'information' for the purposes of s 424A.[31] The views of the Tribunal as to the reliability of certain information or sources of information were found to be part of the evaluation or appraisal of the evidence itself and properly characterised as part of the Tribunal's reasoning or thought processes.[32]

- In *SZGIY v MIAC*, it was held that the Tribunal's drawing of an inference, from the date of the applicant's arrival in Australia and the date of her visa application, that the applicant had delayed in applying for protection was more appropriately described as part of the Tribunal's reasoning process than as 'information' for the purposes of s 424A(1).[33]

- In *MIAC v Brar*, the Court found that the inclusion of an inference or intermediate or final finding of fact in a s 359A letter would not lead to a conclusion that the Tribunal had not complied with s 359A.[34]

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[28] *SZESF v MIMA* [2007] FCA 6.
[29] *SZBYR v MIAC* (2007) 235 ALR 609 at [17].
[30] *Tin v MIMA* [2000] FCA 1109 at [54], *SZEEU v MIMIA* (2006) 150 FCR 214 at [206]–[207]. See also *Paul v MIMIA* (2001) FCR 396 at [95]; *VAF v MIMA* (2004) 206 ALR 471 at [24]; and *SZASX v MIMIA* [2004] FMCA 680 at [19]. The Court's findings were undisturbed on appeal: *SZASX v MIMIA* [2005] FCA 68. See also *NBKT v MIMA* (2006) 156 FCR 419 at [30]; *SZECF v MIMIA* (2005) 89 ALD 242; *SZBDF v MIMIA* (2005) 148 FCR 302 and *SZSOG v MIAC* [2014] FCCA 769 at [108]; upheld on appeal: *SZSOG v MIBP* [2014] FCA 1053 at [29]. In *VAAM v MIMA* [2002] FCAFC 120, the Full Federal Court held that the Tribunal's perception of lack of detail and specificity in the applicant's earlier statements did not constitute 'information'. See also *Applicant S301/2003 v MIMA* [2006] FCAFC 155 at [19] in which the Court, applying *WAGP v MIMIA* (2002) 124 FCR 276, held that the word 'information' did not encompass a failure to mention a matter to the Tribunal. In *SXSB v MIAC* [2007] FCA 319 at [22], the Court found that differences between the applicant's evidence at a first and second Tribunal hearing were not 'information', but that it was 'no more than an inference which the Tribunal drew from the way in which material, which is no doubt information, was provided to it'. In *SZBJH v MIAC* (2009) 231 FLR 148 at [119], the Court found that the Tribunal's view of the contents of a forged letter was not 'information'. In *SZSWV v MIBP* [2013] FCCA 2146 the Court found that information in the applicant's student visa application which conflicted with his claimed history of harm in Nepal was not in its terms a rejection, denial or undermining of the applicant's claims to be a person owed protection obligations, but was more in the nature of inconsistencies in his evidence, and as such was not 'information' that enlivened any obligation under s 424AA. The Court's findings were undisturbed on appeal: *SZSWV v MIBP* [2014] FCA 513.
[31] *MIAC v SZHXF* (2008) 166 FCR 298 at [13].
[32] *MIAC v SZHXF* (2008) 166 FCR 298 at [20]. See also *SZSCU v MIBP* [2013] FCCA 2261, where the Court found that information about the qualifications and experience of the authors of certain country information was not 'information' for the purposes of s 424A, as it was a part of the Tribunal's evaluation or appraisal of the country information.
[33] *SZGIY v MIAC* [2008] FCAFC 68 at [27].
[34] *MIAC v Brar* [2012] FCAFC 30 at [73].

- In *VAAM v MIMA*, it was held that the Tribunal's perception of lack of detail and specificity in the applicant's earlier statements did not constitute 'information'.[35]

10.3.4 In *MZZZW v MIBP*[36] the Full Federal Court found that the Tribunal's adopting of substantial parts of the first Tribunal's decision (specifically, the reasons for decision) was 'information' for the purpose of s 424A [s 359A] as it would have been a reason or part of the reason for the decision to affirm the delegate's decision and it would be more than mere disclosure of a proposed and prospective reasoning process. The Court's finding appears to be an expansion of the term 'information'.[37] Even if the Tribunal puts findings of the previous Tribunal and its proposed reliance on those findings to an applicant under s 359A or 424A, the Tribunal is still required to assess the evidence before it afresh in order to conduct a review (as required by ss 348 [Part 5] and 414 [Part 7]). Reliance upon the reasoning of a previous Tribunal may in some instances undermine a finding that the Tribunal has completed its task of conducting a review.

Inconsistencies, omissions, gaps

10.3.5 Inconsistencies, defects or a lack of detail or specificity in evidence identified by the Tribunal in weighing up the evidence are also not, of themselves, 'information' for the purposes of ss 359A(1)/424A(1).[38] The High Court in *SZBYR v MIAC* held:

> *However broadly 'information' be defined, its meaning in this context is related to the existence of* ***evidentiary material*** *or documentation, not the existence of doubts, inconsistencies or the absence of evidence… the relevant 'information' was not to be found in inconsistencies or disbelief as opposed to the text of statutory declaration itself (emphasis added).*[39]

10.3.6 This position was reiterated in *MIAC v SZGUR*, where the High Court concluded that the existence of 'inconsistencies' and 'contradictions' in an applicant's testimony and written submissions to the Tribunal was not 'information' of the kind to which s 424A is directed.[40] A similar view had been previously expressed in *WAGP v MIMIA*:

> *A conclusion on the part of the [Tribunal] that there is an inconsistency between two pieces of information is not, of itself, 'information' for the purposes of s 424A(1). It is no more than an observation made by the*

[35] *VAAM v MIMA* [2002] FCAFC 120.
[36] *MZZZW v MIBP* [2015] FCAFC 133 at [92]–[93].
[37] Note that if a Tribunal were to put to an applicant the findings of an earlier Tribunal under s 359A or 424A, it would generally also need to put the applicant on notice of its proposal to adopt those findings, as part of the Tribunal's explanation of the 'relevance and consequences' of it relying on the information.
[38] *SZBYR v MIAC* (2007) 235 ALR 609 at [18]. The Court endorsed the views of Finn and Stone JJ in *VAF v MIMIA* (2004) 206 ALR 471 at [24] and cases there cited. See also *A125 of 2003 v MIAC* (2007) 163 FCR 285; *SZGSI v MIAC* (2007) 160 FCR 506; *SZKFQ v MIAC* [2007] FCA 1432 at [24]; *SZEZI v MIMIA* [2005] FCA 1195; *SZGIY v MIAC* [2008] FCAFC 68 at [29]; *SZMAY v MIAC* [2008] FMCA 808 at [38]; *SZLSM v MIAC* (2009) 176 FCR 539 at [32] and *SZSOG v MIAC* [2014] FCCA 769 at [113]; upheld on appeal in *SZSOG v MIBP* [2014] FCA 1053 at [34]. In *SZMWT v MIAC* (2009) 109 ALD 473 at [29], the Court found that omissions the delegate noted in the protection visa application were not 'information'.
[39] *SZBYR v MIAC* (2007) 235 ALR 609 at [18].
[40] *MIAC v SZGUR* (2011) 273 ALR 223 at [9], [77]. See also *SZSRG v MIBP* [2014] FCCA 173. Upheld on appeal in *SZSRG v MIBP* [2014] FCA 550 at [8]–[9].

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> *[Tribunal] in dealing with a conflict between information given by the appellant, and a claim made by him in support of his application (i.e. his assertion that he had received repeated ultimatums to leave Iran).*[41]

10.3.7 Subsequently, in *SZTGV v MIBP*[42] the Full Federal Court, after detailed consideration of a number of Federal Court judgments as well as the High Court judgments of *SZBYR v MIAC*[43] and *MIAC v SZLFX*,[44] unanimously confirmed that 'information' is related to the existence of evidentiary material or documentation and not the existence of doubts, inconsistencies or an absence of evidence. What had *not* been said at a compliance interview, the assertion of a forensic principle that if the applicant's version were true then he would have mentioned it at that time, and a deduction by the Tribunal that because it was not mentioned at that time the account was false was found not to constitute information within the meaning of s 424A.[45] Similarly information relating to the absence of any threat to an applicant or his family from a drug dealer was also found not to constitute information within the meaning of s 424A.[46]

10.3.8 Nonetheless where the Tribunal perceives an inconsistency, omission or other deficiency in the evidence, consideration is given to whether there is some underlying information that may be relied on to support that conclusion.[47] In *Paul v MIMA*, Allsop J observed that the distinction between information gained by the Tribunal and the subjective thought processes of the Tribunal could become a fine one if the subjective thought processes were as they were because of the perceived importance of some piece of knowledge.[48] Those thought processes may reveal the relevance of the material, requiring the Tribunal to give particulars of the information underpinning the thought processes.

10.3.9 While inconsistencies, gaps and omissions are not of themselves 'information' for the purposes of ss 359A/424A, there are some circumstances in which they may give rise to the underlying information falling within ss 359A(1)/424A(1).

10.3.10 Prior to the High Court's judgment in *SZBYR*, a view was taken in lower courts that where there was a significant failure to mention a claim (i.e. an omission), the fact that the applicant had said so much but not more on a prior occasion, could be

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[41] *WAGP of 2002 v MIMIA* (2002) 124 FCR 276 at [33].
[42] *SZTGV v MIBP* (2015) 318 ALR 450. Note, this matter concerned three appeals from judgments dismissing applications for judicial review of Tribunal decisions which affirmed refusals to grant protection visas. As each appeal raised similar issues about the operation of ss 424A and 424AA, they were heard together.
[43] *SZBYR v MIAC* (2007) 235 ALR 609.
[44] *MIAC v SZLFX* (2009) 238 CLR 507.
[45] *SZTGV v MIBP* (2015) 318 ALR 450 at [102], [103].
[46] *SZTGV v MIBP* (2015) 318 ALR 450 at [134].
[47] See *SZJZB v MIAC* [2008] FMCA 848 at [53] where the Court found that while any appraisal of inconsistency between evidence of the applicant and his wife would not constitute information, consideration had to be given to whether any aspect of the evidence given by the wife (as distinct from inconsistencies between her evidence and that of her husband) was such as to give rise to the obligation under s 424A(1). Whilst at first instance the Court found that the information went to an inconsistency and was not information for the purposes of s 424A, the Federal Court on appeal in *SZJZB v MIAC* [2008] FCA 1731 found that the information went to the underlying claim. However, the proposition in the case remains the same- namely that any appraisal of inconsistency between evidence of a husband and wife would not constitute information for the purposes of s 424A except where it goes to the underlying claim.
[48] *Paul v MIMA* (2001) 113 FCR 396 at [95].

'information' for the purposes of ss 359A/424A.[49] In other words, while the perception of an omission could not be information, the Tribunal's knowledge of what the applicant did in fact say, and the fact that it did not include the particular claim, could be regarded as information. This was explained by Allsop J in *SZEEU v MIMIA*:

> *The information is the knowledge imparted to the Tribunal of a prior statement **in a particular form**. The significance given to it by considering it in the light of evidence is the product of mental processes. This significance and those mental processes are not information, but rather, are why the information is relevant for s 424A(1)(b) (emphasis added).*[50]

10.3.11 In *MIAC v A125 of 2003*, the Court noted that the High Court in *SZBYR* did not expressly overrule this reasoning in *SZEEU*, but stated that there was 'real question' as to whether the High Court's description of 'information' had the effect of impliedly overruling at least part of that earlier judgment.[51] Subsequent case law suggests that it may still have application.[52]

10.3.12 It has been suggested that whether omissions or gaps in evidence enliven ss 359A/424A obligations will depend on the way they are used by the Tribunal.[53] In *SZGSI v MIAC,* Justice Marshall (with Moore J generally agreeing) endorsed the view of Weinberg J in *NBKS v MIMA* in which his Honour stated:

> *…each case must depend upon its own particular circumstances. There is no reason in principle why an omission (which the Tribunal views as important, and which is plainly adverse to the applicant's case) should be treated any differently, when it comes to s 424A, than a positive statement. This is particularly so when, as the Tribunal's seems to have done here, it treats the omission as though it provides implicit support for a positive assertion that is detrimental to an applicant's case. It makes no difference whether the omission is to be found in a prior statement of an applicant, or as in this case, in a statement provided by a third party.*[54]

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[49] In *SZECF v MIMIA* (2005) 89 ALD 242 the Tribunal found the applicant had fabricated a claim on the basis that there was no reference to it in the applicant's detailed statement given to the Department. Justice Allsop held that the relevant information, for the purposes of s 424A, was that the applicant has said so much *and no more* in his statement to the Department. His Honour distinguished *NAIH of 2002 v MIMIA* (2002) 124 FCR 223, where Branson J held that the reason for the Tribunal's decision was not any information derived from the written statements in the Protection Visa application but rather the unconvincing nature of the applicant's oral evidence at the hearing in contrast with the persuasive nature of the cohesive account in his earlier written statement. Importantly, in *SZECF*, the Tribunal's conclusion in reliance on the information in the Protection visa application was not simply a lack of satisfaction as to the applicant's claims, but rather that the claim had been fabricated. See also *SZDKK v MIMIA* [2005] FCA 1203, *SZBUS v MIMIA* [2005] FCA 1223; *NAZY v MIMIA* (2005) 87 ALD 357. In *SZIKG v MIAC* [2007] FMCA 337, Raphael FM expressed the view that lack of evidence from internet searches carried out by the Tribunal was 'information' for the purposes of s 424A which did not fall within the exceptions specified in s 424A(3). Essentially the information was the fact that there was no information. The Court's findings were undisturbed on appeal: *SZIKG v MIAC* [2007] FCA 788.

[50] *SZEEU v MIMIA* (2006) 150 FCR 214 at [221].

[51] *MIAC v A125 of 2003* (2007) 163 FCR 285 at [73].

[52] In *SXSB v MIAC* [2007] FCA 319 at [25], for example, Besanko J noted that 'I have not attempted to express the distinction in precise terms and it seems to me to be a somewhat elusive one.'

[53] *SZGSI v MIAC* (2007) 160 FCR 506 at [6], [43].

[54] *NBKS v MIMA* (2006) 156 FCR 205 at [39]. In *NBKS* the Tribunal had done a search for the applicant's name using internet search engines and found that it did not appear in any context. This 'information' was used to conclude that the chance the applicant's AAT decision would come to the attention of Iranian authorities was remote.

10.3.13 The Federal Court in *SZMKR v MIAC* took the view that *NBKS v MIMA* remained good law following *SZBYR v MIAC*[55] and found that as was the case in *NBKS v MIMA*, the absence of evidence from someone who would have been expected to be able to provide such evidence, was treated by the Tribunal as an implicit positive statement, not merely as a gap.[56] The Court held that:

> *The Tribunal's statement that nothing in the DFAT reports confirmed the appellant's claims that he was a member of the Freedom Party or its joint Secretary in the Narsingdi district from 1994 to 1995 is a conclusion drawn from a reasoning process that relies on a number of implicit positive propositions.[57]…The result is that, because the Tribunal relied on the failure of the informant in Bangladesh to confirm the appellant's membership or office-holding in the Freedom Party as an implicit assertion that the appellant was not a member or office-holder of that party, the Tribunal was obliged to comply with s 424A(1) of the Migration Act in respect of that information.[58]*

10.3.14 The Full Federal Court's comments in *SZTGV v MIBP*[59] that the reasoning of the High Court in *SZBYR* and *SZLFX* is not readily reconcilable with that of the Full Federal Court in *SZEEU* and *NBKS* in relation to what constitutes 'information' for the purposes of ss 424A/359A and 424AA/359AA, illustrates the difficulties the Tribunal faces when complying with its obligations under these provisions.[60]

Information undermining the applicant's claims vs inherently 'neutral' information

10.3.15 In considering whether statements in a statutory declaration, which were found by the Tribunal to be inconsistent with the applicant's oral evidence, were the reason, or a part of the reason, for affirming the decision, the High Court in *SZBYR v MIAC* noted:

> *…Those portions of the statutory declaration did not contain in their terms a rejection, denial or undermining of the appellant's claims to be persons to whom Australia owed protection obligations. Indeed, if their contents were believed, they would, one might have thought, have been a relevant step towards rejecting, not affirming the decision under review.[61]*

10.3.16 Courts applying *SZBYR* have therefore found that information which directly and in its terms contains a rejection, denial or which inherently undermines the review

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[55] *SZMKR v MIAC* [2010] FCA 340 at [37].
[56] *SZMKR v MIAC* [2010] FCA 340 at [33].
[57] *SZMKR v MIAC* [2010] FCA 340 at [33].
[58] *SZMKR v MIAC* [2010] FCA 340 at [39].
[59] *SZTGV v MIBP* [2015] FCAFC 3 at [18].
[60] In *Springs v MICMSMA* [2021] FCA 197 at [23]–[28], while acknowledging and applying the existing authority in *SZBYR v MIAC* (2007) 235 ALR 609, the Federal Court raised its apparent difficulties with the High Court's reasoning in *SZBYR*, including that information must go 'in its terms'(i.e. explicitly, to the criteria) which seemed difficult to reconcile with the words 'or part of the reason' in s 359A/424A. The Court considered that those words 'or part of the reason' indicated that the concept of information must include integers of evidence conceptually below the level of a visa criterion.
[61] *SZBYR v MIAC* (2007) 235 ALR 609 at [17].

applicant's claims may be subject to ss 359A/424A, but information which is on its face neutral will not fall within ss 359A(1) or 424A(1).[62] Likewise, information that merely assists the Tribunal to make assessments of the applicant's credibility,[63] or in some cases, information which underpins an expert's opinion,[64] does not fall within the purview of ss 359A/424A.

10.3.17 The following cases are illustrations of this distinction:

- In *SZICU v MIAC* the relevant 'information' was said to be contained in the applicant's passport, which showed that he left India legally on a passport in his own name. The Court found that that information did not in its terms contain a rejection, denial or undermining of the appellant's claim to be a person owed protection obligations. On that question, the passport was found to be neutral. What was said to undermine the applicant's claims was country information which was not obliged to be disclosed because it fell within s 424A(3)(a).[65]

- In *MZXBQ v MIAC* the Court found that information going to the applicant's general credibility did not fall within s 424A. The Court noted that lack of credibility in itself does not necessarily involve rejection, denial or undermining of an applicant's claims.[66]

- In *SZGIY v MIAC* the Court agreed that information about the appellant's date of arrival in Australia was in itself neutral and so could not fall within s 424A(1), even though the information was used by the Tribunal to conclude that the applicant had delayed in lodging her protection visa application.[67] The Tribunal's use of those dates were part of the Tribunal's reasoning process.

- In *SZJBD v MIAC*,[68] the Court considered whether information about the founding and banning of Falun Gong was information which inherently

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[62] *SZICU v MIAC* (2008) 100 ALD 1 at [26]; *MZXBQ v MIAC* (2008) 166 FCR 483 at [29]; *SZGIY v MIAC* [2008] FCAFC 68 at [23], [25]; *SZMFI v MIAC* [2008] FCA 1894.Information that merely assists the Tribunal to make assessments of the applicant's general credibility or believability does not fall within the purview of ss 424A/424AA: see, for example, *SZNPJ v MIAC* [2010] FMCA 410 at [64]–[66]; upheld on appeal: *SZNPJ v MIAC* [2010] FCA 1233, application for special leave to appeal dismissed: SZNPJ v MIAC [2011] HCASL 47.
[63] *SZNPJ v MIAC* [2010] FMCA 410 at [66] The Court noted the fact that some information might cast doubt on the applicant's credibility, whether generally or in relation to a specific issue, was not to the point. Undisturbed on appeal: *SZNPJ v MIAC* [2010] FCA 1233 application for special leave to appeal dismissed: *SZNPJ v MIAC* [2011] HCASL 47.
[64] *Wu v MIAC* [2011] FMCA 14. The Tribunal sought advice of an independent expert as to whether the applicant had suffered domestic violence, providing him with the applicant's claims and 'confidential documents'. It was held that in the context of referrals to an independent expert under reg 1.23(1B)(b), the Tribunal will not fall foul of s 359A for not providing to an applicant information given to the expert because it is the expert's opinion rather than the information underpinning that opinion that would be the reason for affirming the decision. In contrast, in *Mohsin v MIBP* [2019] FCCA 3731 at [44]–[47] the Court found that the Tribunal had erred by not putting to the applicant dob-in information provided by his sponsor that alleged, among other things, that he was acting in a fraudulent manner to remain in Australia. The Court held that this was information for the purposes of s 359A as it impacted upon the Tribunal's preliminary finding that the applicant had not suffered relevant family violence. As this finding is what bound the Tribunal to refer the applicant to an independent expert under reg 1.23(1)(c), the Court considered it was part of the reason for affirming the decision. Although the Court characterised this as s 359A information, it could also potentially be inferred to be a breach of the Tribunal's s 360 obligation.
[65] *SZICU v MIAC* (2008) 100 ALD 1 at [26].
[66] *MZXBQ v MIAC* (2008) 166 FCR 483 at [29]. See also *BVE16 v MIBP* [2018] FCA 922 at [43]–[44] in which the Court agreed with *MZXBQ* and held that information which is relevant only to credibility is not information for the purposes of s 424A(1). It considered that the position is different though where information has a dual character, that is it goes to general credibility but also undermines particular claims.
[67] *SZGIY v MIAC* [2008] FCAFC 68 at [23], [25].
[68] *SZJBD v MIAC* (2009) 179 FCR 109.

undermined the applicant's claims to be a Falun Gong practitioner. The Court held that the Tribunal's conclusions that the applicant lacked knowledge of Falun Gong, did not involve any 'information' but were part of the Tribunal's thought processes. The factual statements were neutral as they did not tend for or against affirmation or rejection of the decision of the delegate as pieces of information in their own right. They only had that significance when matched with answers given by the applicant.[69] Accordingly, the Tribunal was not obliged to disclose the information under s 424A.

- In *Bhandari v MIAC*, the Court found there was nothing in the additional information from the education provider about the circumstances leading to the issue of a non-compliance certificate that amounted to a rejection, denial or undermining of the applicant's claims.[70] Rather there was an absence of information supporting his contentions as to whether there were exceptional circumstances leading to the non-compliance with the visa condition.

- In *Poonia v MIBP*, the Court found that a PRISMS record, which documented an applicant's history of undertaking educational courses, did not constitute or contain a rejection, denial or undermining of the applicant's claims to meet the requirement to be a genuine applicant for entry and stay as a student, which was the criteria in review.[71] The Court held that the information may be relevant in determining whether the applicant satisfies the relevant criteria, but that does not mean that the PRISMS record, it its terms, undermined the applicant's claim. Rather it would be the Tribunal's deliberations on what the record meant in relation to the applicant's intentions. However, where enrolment in a course is the relevant criteria under review, the PRISMS record may be 'information' for the purposes of s 359A(1).[72]
- In *Almomani v MIBP*, which concerned a Partner (Temporary) (Class UK) (Subclass 820) visa matter, the Court found that inconsistencies in evidence between the appellant and his sponsor as to why their relationship was not registered was not information that would attract the obligation in s 359A. The Tribunal when considering the social aspect of the claimed relationship had doubts as to why the appellant did not persuade the sponsor to register the relationship and whether, at the time, the sponsor was of the opinion that there was not yet a basis for registering the relationship. The Court found that these doubts arose from a synthesis of the evidence arising from the differences perceived in the appellant's and the sponsor's explanations and that the inconsistent information from the sponsor only acquired significance because of this synthesis. The Court held that there is no obligation to give particulars of information that acquires significance only as a result of the Tribunal's subjective synthesis of the evidence.[73]

[69] *SZJBD v MIAC* (2009) 179 FCR 109 at [104].
[70] *Bhandari v MIAC* [2010] FMCA 369 at [53].
[71] *Poonia v MIBP* [2016] FCCA 908 at [47]. Upheld on appeal: *Poonia v MIBP* [2016] FCA 1120 at [18].
[72] *Poonia v MIBP* [2016] FCCA 908 at [43]. Upheld on appeal: *Poonia v MIBP* [2016] FCA 1120 at [18].
[73] *Almomani v MIBP* [2020] FCA 264 at [47].

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10.3.18 In *Springs v MICMSMA*, the Federal Court highlighted its apparent difficulties with the reasoning in *SZBYR* that the information must 'in its terms' undermine an applicant's claims. The Court reasoned that the idea that information must go 'in its terms' (i.e. explicitly, to the visa criteria) was difficult to reconcile with the words of s 359A/424A that the information can be 'part of the reason' for affirming the decision under review.[74] The Court considered that the wording of ss 359A/424A explicitly accepts that information need not resolve the review application in its entirety and that the concept of information must include integers of evidence conceptually below the level of a visa criterion.[75] In the Court's opinion, the consequence of the reasoning in *SZBYR* is that it ignores this aspect of the provision. While the Court in *Springs* applied the existing authority in *SZBYR*, it provides a useful demonstration of the conceptual difficulties associated with determining what is information for the purpose of ss 359A(1) and 424A(1).

Role of the Tribunal's reasons when determining relevance of the information

10.3.19 The High Court in *SZBYR* also made clear that whether information would be the reason or a part of the reason for affirming the primary decision does not turn on 'the reasoning process of the Tribunal', or 'the Tribunal's published reasons'. The Court found that the use of the future conditional tense ('would be') rather than the indicative, strongly suggested that the operation of s 424A(1)(a) was to be determined in advance, and independently, of the Tribunal's reasoning on the facts of the case.[76]

10.3.20 Following the High Court's decision in *SZBYR v MIAC*, some courts found that even if the Tribunal's decision record made no mention of the information, it could be found to fall within s 359A or 424A. In *MZXBQ v MIAC*, the Federal Court, relying on the comments in *SZBYR*, found that it is not correct to determine whether particular information would fall within s 424A by reference to the Tribunal's reasons for decision.[77] Instead, the Court found that consideration should be given to the information's dispositive relevance to the claims advanced by the applicant.[78]

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[74] *Springs v MICMSMA* [2021] FCA 197 at [25].
[75] In *Springs V MICMSMA* [2021] FCA 197 a third party witness for the applicant gave evidence that they were of the opinion that the applicant, who had applied for a Distinguished Talent (Subclass 858) visa, had had an internationally recognised record of outstanding achievement, although the witness also stated that they were not familiar with the applicant or his work prior to his audition. The Court, with some hesitancy, accepted that the information that the witness was not familiar with the applicant did not fall within s 359A(1) as it did not 'in its terms' undermine the visa criteria that the applicant was seeking to satisfy (at [24]). While it implied that the applicant did not have an internationally recognised record, her evidence did not undermine the visa criteria without the requisite thought process of deduction that if the she was not familiar with the applicant, then he did not have the requisite internationally recognised record. This required deduction meant her evidence did not 'in its terms' undermine the visa criteria.
[76] *SZBYR v MIAC* (2007) 235 ALR 609 at [17]. See also *Awadallah v MIBP* [2015] FCCA 3126 at [39] where the Court applied *SZBYR v MIAC* and found that the relevant information fell within s 359A(1) solely on the basis of the hearing record, although it did not ultimately form part of the Tribunal's reasons. *SZBYR* overturned the reasoning in a range of cases preceding the High Court judgment, such as *SZEEU v MIMIA* (2006) 150 FCR 214 at [208]–[215], [155], [165], which indicated that, in determining whether s 359A(1)/s 424A(1) was engaged, the question was whether the information was at least 'a part' (that is, any part) of the reason for affirming the decision under review, even if only a minor or subsidiary part.
[77] *MZXBQ v MIAC* (2008) 166 FCR 483.
[78] *MZXBQ v MIAC* (2008) 166 FCR 483 at [27]. In *SZRRX v MIAC* [2013] FMCA 84 the Court accepted that third party evidence regarding whether the applicant's girlfriend had become pregnant, or even had had abortions, was not information that the Tribunal considered would be a reason or a part of the reason for affirming the decision under review where the Tribunal's decision record revealed no mention of the pregnancies or abortions and it was the applicant's claim to fear persecution because of his sexual orientation, not because he had a girlfriend who had been pregnant and had three abortions. The basis on which

10.3.21 Nevertheless, in *MIAC v SZLFX* the High Court found that there was no evidence or necessary inference that the Tribunal had 'considered' or had any opinion about the information in question, which was contained in a file note on the Tribunal file but not referred to in the Tribunal's decision. As the Tribunal's reasons showed that what counted against the first respondent were internal inconsistencies in his evidence, and did not refer to the information in question, the only inference available was that the Tribunal did not consider the information would be the reason or part of the reason for affirming the decision.[79] The High Court effectively upheld the approach taken by the Full Court of the Federal Court in *SZKLG v MIAC* which found, having regard to the word 'considers' in s 424A(1), that the obligation to proceed pursuant to s 424A arises only if *the Tribunal* forms the opinion that particular information would be the reason, or part of the reason, for affirming the relevant decision.[80] The conditional nature of the obligation indicated that the Tribunal must consider the question in advance of its decision, considering the information upon which it would act, should it decide to affirm the relevant decision.

10.3.22 Similarly, in *SZLPJ v MIAC*, the Federal Court found that the question of whether s 424A(1) is engaged requires an examination of the Tribunal's state of mind, not at the time of the Tribunal's decision, but rather at some anterior point, at which the Tribunal turns its mind to the particulars which must be provided.[81] In determining what the Tribunal's state of mind was at that anterior point, the Court accepted that the statement about the Tribunal's present state of mind made when it delivered its reasons for decision was sufficient to permit the drawing of an inference that the same state of mind existed at an earlier time. Accordingly, the Court drew an inference that the Tribunal did not at that earlier time or those earlier times, consider that information about another applicant who had made similar protection claims would be the reason or a part of its reason for affirming the decision that was under review.

10.3.23 In *SZMPT v MIAC*, consistently with the High Court's decision in *MIAC v SZLFX*, the Court was prepared to infer from the complete absence of any mention of the relevant information in the hearing, in the decision record or at any other stage in the course of the review, that the Tribunal did not consider the information to be relevant.[82] The Federal Court observed that it does not follow from *SZBYR v MIAC* that in making an assessment of whether s 424A(1) was engaged, a Court can never have regard to the reasons of the Tribunal. While the Tribunal's reasons are not to be the starting point, the Court, in making its assessment, may draw inferences from the Tribunal's reasons as to whether the Tribunal considered the information to be a reason for affirming the decision.[83]

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the question of the applicant's sexual orientation was settled was with reference to information that, contrary to his claim to have only had relationships with men, the applicant had had a girlfriend: at [60], [66]–[68].

[79] *MIAC v SZLFX* (2009) 238 CLR 507 at [24]–[26]. *SZLFX* was applied in *SZNBE v MIAC* (2009) 112 ALD 114 at [39]–[40].

[80] *MIAC v SZLFX* (2009) 238 CLR 507 affirming the reasoning of the Full Federal Court in *SZKLG v MIAC* (2007) 164 FCR 578 at [33].

[81] *SZLPJ v MIAC* (2007) 164 FCR 578 at [15]–[16].

[82] *SZMPT v MIAC* [2009] FCA 99. See also *SZMNP v MIAC* [2009] FCA 596 at [52].

[83] See also *SZLJF v MIAC* [2009] FCA 158 at [18] where the Court drew an inference from the Tribunal's reasons for decision, that an adverse conclusion drawn by a previous Tribunal about similar protection claims made by other applicants did not form part of the second Tribunal's thinking In *MZYLC v MIAC* [2011] FMCA 925 the Court held that in all the circumstances and

10.3.24 More recently, in *SZTGV v MIBP*[84] the Full Federal Court, unanimously confirmed that 'information' for the purposes of ss 424A/359A and 424AA/359AA does not extend to the 'prospective reasoning process' of the Tribunal, that 'information' must be information that 'would', not 'could' or 'might', be the reason or part of the reason for affirming the decision and that such 'information' necessarily involves a rejection, denial or undermining of the applicant's claims.

10.3.25 Following these authorities, where the Tribunal determines that it would not place weight on particular information that could, if accepted, undermine an applicant's claims, the Tribunal generally takes care to ensure that all the material, including the recording of the hearing, the decision record and review-related correspondence, do not suggest a different attitude in relation to the material. If some material indicated that the Tribunal might have placed weight on the information, it may undermine the position that it had not placed weight on the material, and lead to a finding that the information should have been put to the applicant under ss 359A/424A.. The following judgments are examples of situations where the Court has found the Tribunal has, and has not, placed weight on information:

- In *SZJOU v MIAC*,[85] the Tribunal stated that it had placed 'little weight' on evidence given by the applicant's wife which undermined his claims. This statement suggested that the Tribunal had placed some weight on the information and the Court found that the information was caught by s 424A after considering objectively whether the information could, at the stage it was given, undermine the applicant's case.[86]

- In contrast, in *SZOMJ v MIAC*, the Federal Magistrates Court, applying *SZLFX*, found it impossible that s 424A applied in circumstances where the Tribunal's decision statement expressly disclaimed giving any weight to particular information, and the Tribunal foreshadowed at hearing with the applicant that it would not be giving weight to the information.[87] The Tribunal had also set out in its reasons why it gave no weight to the information.[88]

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reading the Tribunal's decision as a whole it was clear that the Tribunal had no regard to, and in all probability no awareness of, material about the applicant's identity. Further, even if it had some awareness of this material, it was plain that the Tribunal paid it no regard. The Tribunal's decision was arrived at on the basis of materials to which it had referred to. Upheld on appeal: *MZYLC v MIAC* [2012] FCA 213 at [6]. In *SZQMZ v MIAC* [2012] FCA 1005 the Court at [67] found that the fact the Tribunal did not consider the influence of statements made by the applicant's sister during her application for review upon the applicant's credibility during his own application for review showed that the Tribunal did not consider the issue to be a part of the reason for affirming his decision. Although the Tribunal in the applicant's sister's case doubted her credibility because she did not know critical facts about the applicant's alleged detention, and while the Tribunal ultimately determined in the applicant's case that his claimed detention never occurred, the Tribunal reached that conclusion in relation to the applicant on independent grounds and not based upon any evidence from his sister ([62]–[63]).

[84] *SZTGV v MIBP* (2015) 318 ALR 450. See also *MIBP v SZTJF* [2015] FCA 1052.

[85] *SZJOU v MIAC* [2009] FMCA 24.

[86] *SZJOU v MIAC* [2009] FMCA 24 at [21]

[87] *SZOMJ v MIAC* [2010] FMCA 707. The Court stated that an inference that the Tribunal held a state of mind prior to the decision will almost always be drawn from an examination of the reasons subsequently given by the Tribunal, and that if the subsequent reasons show that it arrived at a decision without giving any attention or weight to the adverse information, then usually the Court will be unable to conclude that it answered the description of information giving rise to an obligation under s 424A(1): at [57].

[88] *SZOMJ v MIAC* [2010] FMCA 707 at [58]–[59]. See also *SZTKN v MIBP* [2014] FCCA 2213, where the Tribunal accepted that an applicant was unaware of the contents of a previous visitor visa application and was therefore unaware that information put forward in that application was 'false'. The Court found the Tribunal had 'made plain' that its adverse credibility finding against the applicant was derived from matters 'extensively set out' earlier in the decision record which contained no reference to the visitor visa application. It held there was no basis to draw an inference the Tribunal considered that the information in the visitor

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- In *Mazumdar v MIAC* the Federal Magistrates Court, also applying *SZLFX*, found that s 359A was not engaged where Tribunal did no more than address the applicant's application for review upon a factual assumption regarding non-compliance with a visa condition which the applicant had invited the Tribunal to adopt. The Court found that the Tribunal's reasoning showed it did not base its decision upon any information inconsistent with the case as presented by the applicant, and that it was the Tribunal's evaluation of the information given by the applicant, and not the PRISMS records which recorded his enrolment as cancelled, which provided the reason for affirming the delegate's decision.[89]

- In *Quadri v MICMSMA*,[90] the Federal Court held that the Tribunal's reasons indicated that its decision was informed, not by the contents of the PRISMS records on the Tribunal file, but by the appellant's own evidence given at the Tribunal hearing that he had discontinued his course of study and his failure to produce any evidence, such as a certificate of enrolment, to indicate that he was currently enrolled in a course of study. The Tribunal referred to the PRISMS records during the hearing but told the appellant it was unnecessary to take him to the PRISMS records because there was nothing in it which was different from what he had informed the Tribunal about his lack of enrolment. In this instance, the Court interpreted the Tribunal's reasons to mean that it did not consider that the information in the PRISMS records would inform its decision or any part of its decision to affirm the decision under review (rather it was the appellant's own evidence that informed its decision).[91]

- In *MZYIA v MIAC*[92] while the Tribunal did not rely on notes of interview from the applicant's student cancellation file, it made specific reference, in its reasons for decision relating to the applicant's protection visa application, to some of the information contained in the notes. The Federal Court held the Tribunal had made use of the information as part of its reasoning in refuting an important aspect of the appellant's claims. The Court found it followed that there was a point at which the Tribunal had reached the state of mind whereby it considered that the information in the notes of interview would be part of the reason for affirming the decision under review.[93]

- In *SZRRN v MIAC*[94] while the Court accepted the Tribunal's statement of reasons referred at length and in detail to the applicant's oral interview with the delegate, in circumstances where the applicant did not appear at the hearing as scheduled and the Tribunal was ultimately not satisfied as to the applicant's

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visa application formed part of the reason for affirming the decision under review: at [52]–[54]. Undisturbed on appeal: *SZTKN v MIBP* [2015] FCA 212.

[89] *Mazumdar v MIAC* [2012] FMCA 1170 at [58]–[59]. See also *Poonia v MIBP* [2016] FCCA 908 at [53]–[55], which was upheld on appeal: *Poonia v MIBP* [2016] FCA 1120.

[90] *Quadri v MICMSMA* [2020] FCA 246.

[91] Quadri v MICMSMA [2020] FCA 246 at [27]. The Court also noted that the appellant's own evidence is not information for the purposes of s 359A because of the exception in s 359A(4).

[92] *MZYIA v MIAC* [2011] FCA 642.

[93] The Court's reasoning suggests that if the Tribunal's decision refers to information obtained from a 3rd party (in this case the Department), in the absence of any indication that it was not considered to be relevant, there is a risk that a Court might infer that the information comes within s 424A.

[94] *SZRRN v MIAC* [2013] FMCA 3 at [34]–[48]. Undisturbed on appeal: *SZRRN v MIBP* [2014] FCA 77.

claims on the evidence before it, it found the statement of reasons did not disclose with any clarity that the Tribunal was minded to affirm the delegate's decision because of that information in the oral interview. The Tribunal's statement that it missed '*…the opportunity to discuss [those] issues in considerably greater detail*' was not language that suggested the Tribunal had relied on those issues for its decision, rather that there were gaps and defects in the applicant's evidence.

10.3.26 In relation to the scope of operation of s 424A(1), the Court in *SZTPW v MIBP*[95] held that to engage s 424A(1) the Tribunal must have had information in its mind as part of a chain of reasoning, the conclusion of which would be the affirmation of the delegate's decision, and that the Tribunal intended to affirm the decision on the basis of that reasoning.

10.3.27 Despite this more recent emphasis on the Tribunal's state of mind, there has been some varying applications of the High Court's interpretation of when ss 359A/424A is engaged. In the judgment of the Full Federal Court in *Khan v MIAC* it was held that if the information in question is such that it could not have been rejected at the outset as irrelevant, omission of any reference to it in the Tribunal's reasoning will not operate to exclude the obligation under s 359A [s 424A].[96]

10.3.28 In *MIAC v Saba Bros Tiling Pty Ltd*[97] the Federal Court commented (in *obiter*) that the information, at the time that it is given to the applicant under s 359A, must be rationally capable of being seen as information that would affect the decision under review. If, at the time the invitation is issued, the information is not rationally capable of being seen as information that would affect the decision under review, then the Tribunal's action in issuing the s 359A invitation is a nullity.[98]

10.3.29 To ensure there is a clear understanding of the Tribunal's state of mind, the Tribunal may make a clear and unequivocal statement in the decision record as to why it did or did not consider the information would be the reason, or a part of the reason, for affirming the decision under review.[99]

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[95] *SZTPW v MIBP* [2015] FCCA 259. Upheld on appeal in *SZTPW v MIBP* [2015] FCA 564 at [24]. See also the related judgment of *SZTPY v MIBP* [2015] FCCA 260. Upheld on appeal in *SZTPY v MIBP* [2015] FCA 565.
[96] *Khan v MIAC* (2011) 192 FCR 173, where the appellant's sponsoring restaurant sent a letter to the Department indicating that it wished to cancel its sponsorship of the appellant and alleging fraudulent behaviour by him and subsequently informing the department that his employment with them had ceased. Notwithstanding the absence of any reference to the letter in the Tribunal's decision record, the Full Federal Court held that this information was necessarily something which would be part of the reason for affirming the decision of the delegate. The information was relevant in this case and its absence from the Tribunal's reasoning did not exclude the Tribunal's obligation to comply with s 359A.
[97] *MIAC v Saba Bros Tiling Pty Ltd* (2011) 194 FCR 11.
[98] *MIAC v Saba Bros Tiling Pty Ltd* (2011) 194 FCR 11 at [41]–[43]. The Tribunal had issued an invitation under s 359A to comment on a sanction barring the applicant from nominating persons in relation to temporary visas for three months. However, the sanction had expired by that time, and as such was no longer relevant to the criteria for the grant of the visa. The Tribunal had, in its reasons, acknowledged that the information was not relevant to the decision.
[99] See also the comments of the High Court in *Applicant VEAL of 2002 v MIMIA* (2005) 225 CLR 88 at [12]: 'The Tribunal said, in its reasons, that it did not act on the letter or the information it contained. That is reason enough to conclude that s 424A was not engaged.'

Legal opinions and legislation

10.3.30 Legal opinions or views on the proper interpretation of a statutory provision are not generally regarded as 'information' for the purposes of ss 359A/424A.[100] Legislation and judgments cited in Tribunal decisions have also been held not to constitute 'information'.[101]

10.4 Exceptions to the obligation

10.4.1 Sections 359A(4) and 424A(3) provide statutory exceptions to obligation in ss 359A(1) and 424A(1). These exceptions are discussed in more detail below, however generally speaking, the Tribunal is not obliged to invite the applicant to comment or respond on information that: is just about a class of persons of which the applicant or another person is a member; the application gave for the purposes of the review or during the process that led to the decision that is under review (other than information provided orally to the Department); or that is 'non-disclosable information' within the meaning of that definition in s 5 of the Migration Act.

10.4.2 While the Tribunal is not obliged to invite the applicant to comment or respond on information which falls within one of the exceptions in ss 359A(4) or 424A(3), those sub-sections do not operate to prevent the Tribunal from doing so if it wishes.[102]

Information just about a class of persons

10.4.3 The requirement to provide particulars of information does not apply to information that 'is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member'.[103]

10.4.4 The majority in *MIMIA v NAMW* held that the reference in s 424A(3)(a) to a class of persons is not another criterion to be met, but is designed to underline the specificity required by precluding any argument that reference to a class could be taken as a reference to all individuals (including for example, an applicant) falling within it.[104]

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[100] *Carlos v MIMIA* (2001) 113 FCR 456 in which the Court held that advice merely reiterates the facts of the case and comments on the legal issues. Applied in *Reynolds v MIAC* (2010) 237 FLR 7 at [146].
[101] *SZASX v MIMIA* [2004] FMCA 680 at [23]. The Court's findings were undisturbed on appeal: *SZASX v MIMA* [2005] FCA 68. An application for special leave to appeal was also dismissed: *SZASX v MIMIA* [2005] HCATrans 946.
[102] In *MZYUM v MIAC* [2012] FMCA 710 the Court at [14] stated that, unlike s 424A(1) which imposed a positive obligation to put information to an applicant, in itself s 424A(3) did not impose upon a Tribunal an obligation not to give information that is described in that section, but merely described the information for which no positive obligation is imposed upon the Tribunal under s 424A(1). Although *MZYUM* was upheld on appeal in *MZYUM v MIAC* [2013] FCA 51 the Court found that the relevant information was more accurately excluded under s 424A(2A) rather than s 424A(3), however the outcome was the same as both provisions, neither in their terms or by implication, precluded the Tribunal from providing particulars of information and a further opportunity to comment merely because there was no obligation to do so: at [49]. An application for special leave to appeal to the High Court was dismissed: *MZYUM v MIAC* [2013] HCASL 105. In *Trinh v MIAC* [2013] FCA 611 the Court at [12] also held that the purpose of s 359A(4) was to limit the scope of the obligation in s 359A, but that it did not prevent the Tribunal from seeking from the applicant further information beyond the type of information to which the obligation in s 359A(1) applied.
[103] ss 359A(4)(a) [pt 5] and 424A(3)(a) [pt 7].
[104] *MIMIA v NAMW* (2004) 140 FCR 572 at [138]. See also *SZQSP v MIAC* [2012] FMCA 890 where the Court, following *NAMW*, observed that s 424A(3)(a) did not posit separate criteria but, essentially, the reference to 'class of person' required the information not to be 'specifically about the applicant', and that the double negative at s 424A(3) and s 424A(3)(a) meant that the obligation in s 424A(1) was subjected to the exemption of 'general' country information, that is, that it is not *in personam* information at [50].

The majority considered that this interpretation gave effect to the intention of the legislature when s 424A was enacted.[105]

10.4.5 One kind of information which may fall within this exception is general country information,[106] although it is clear that not *all* country information would be exempted. Country information about a specific person, if it is the reason or a part of the reason for affirming the decision under review, will need to be disclosed unless another exception applies. For example, in *Schwallie v MIMA,* the Federal Court found that s 424A was applicable to country information about a former government minister for whom the applicant claimed to have worked.[107]

10.4.6 In *SZRDX v MIAC* the Federal Magistrates Court considered the term 'person' for the purposes of s 424A(3)(a) and rejected an argument that it included the Republic of India and, by extension, a body politic or corporate. The Court held that as the paragraph refers to information that is not specifically about the applicant 'or another person', the context and particularly the use of the word 'other' indicated that 'person' was intended to mean a natural person.[108] However, a contrary approach was taken in *BBX17 v MIBP* in which the Federal Circuit Court held that a company was a 'person' for the purpose of s 424A(3)(a). The Court rejected the Minister's argument that information about a company (specifically its corporate structure and activities) was information about a class of persons, namely the employees of the company which included the applicant.[109] The Court did not consider the earlier authority of *SZRDX*.

10.4.7 In *SZRZX v MIAC*[110] the Federal Circuit Court found that the results of an internet search for a particular hospital, which showed that the hospital didn't exist, fell within the ambit of s 424A(3)(a). The applicants had submitted discharge slips from the particular hospital in support of their claims. The information for the purposes of s 424A(1) was that there was no record of the particular hospital. Due to the exception in s 424A(3)(a) the Tribunal was not required to disclose it pursuant to s 424A.[111]

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[105] *MIMIA v NAMW* (2004) 140 FCR 572, at [139]. Justices Merkel and Hely noted at [130] that although the Explanatory Memorandum made it quite clear that the information that must be provided under s 424A was intended to be equivalent to the information required to be given under s 57, s 424A is drafted differently and requires that particulars of the information described in s 424A(1) be provided unless they are excluded under s 424A(3). In their view that exclusionary approach resulted in the literal meaning of ss 424A(1) and (3)(a) not being equivalent to s 57(1)(b) because a literal interpretation of s 424A(3)(a) requires that both of the two criteria stipulated in the sub-section be met for the exclusion to apply. After reviewing relevant authorities, their Honours held that having regard to the intention of the legislature, which was for s 424A to replicate the effect of s 57(1), it was open to the Court to depart from the literal meaning of s 424A(3)(a): at [132]–[139].

[106] *W252/01A v MIMA* [2002] FCA 50; *NACL v RRT* [2002] FCA 643; *Tharairasa v MIMA* (2000) 98 FCR 281; *NARV v MIMIA* (2004) 203 ALR 494 at [54]; *SZNIU v MIAC* [2009] FMCA 573 at [22]. See also *VHAJ v MIMIA* (2004) 75 ALD 609 at [50], [71]. In *SZJJD v MIAC* [2008] FCAFC 93 at [13] the Court found that country information which was obtained by the Tribunal as a result of an enquiry prompted by the applicant's claims did not mean the information was about the applicant. Rather the information was about groups of persons (unionists, leftists, activists and members of the Movimiento de Participación Popular) of which the applicant was a member. Similarly, in *MIAC v SZLSP* (2010) 187 FCR 362 at [27], Kenny J found that a text about Falun Gong practices that was relied on by the Tribunal in evaluating the applicant's knowledge was excluded from the Tribunal's s 424A disclosure obligations despite not being identified.

[107] *Schwallie v MIMA* [2001] FCA 417 at [24].

[108] *SZRDX v MIAC* [2012] FMCA 838 at [26]–[28].

[109] *BBX17 v MIBP* [2019] FCCA 59 at [43].

[110] *SZRZX v MIAC* [2013] FCCA 54.

[111] Note that the Court did not consider the decision of the Full Federal Court in *NBKS v MIMIA* [2006] FCAFC 174. However that case would appear to be distinguishable in that the internet search in *SZRZX v MIAC* was not specifically about the applicant, or about any particular person. In contrast in *Shrestha v MHA* [2019] FCCA 1782 at [69]–[70] the Court found that the results of the

10.4.8 A decision maker's own personal knowledge or experience may constitute 'country information' and fall within the exception. In *DDX16 v MIBP*[112] the Federal Court considered a Tribunal member's comment at hearing that he had holidayed safely with family in Beirut and other parts of Lebanon. The Court held that the information revealed by the Member during the hearing was 'country information' which concerned the security of persons living in those places and accordingly fell within the s 424(3)(a) exception.[113]

10.4.9 If the information which the Tribunal considers is the reason, or a part of the reason, for affirming the decision only obliquely or tangentially refers to a specific person, it may still fall within the exception.[114] In *MIAC v SZHXF*, a Full Court of the Federal Court found that references to religious leaders or figures such as Mirza Ghulam Ahmad, Jesus Christ and the prophet Muhammad, were not information specifically about another person and so fell within the exception in s 424A(3)(a).[115] The references to these figures and material about how they were perceived by the Ahmadi faith, were said to be information about how others perceive those figures and the role that such a perception plays in the lives of those who hold it.[116] Further, in *ANN15 v MIBP* the Federal Circuit Court found that information about a Presidential candidate fell within the exception in s 424A(3)(a) because the Tribunal's reasons indicated that the candidate's significance was not in his achievement as an individual but was an example of the success of the political party.[117]

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Tribunal's internet search for a non-existent accounting firm which had vouched that the applicant was employed as claimed, did not fall within the exception in s 359A(4)(a) (equivalent provision as considered in *SZRZX*). The Court acknowledged that the internet search information was not specifically about the applicant but as it supported the proposition that the information provided by the accountants specifically about the applicant's employment was false, it did not fall within the exception. The Court also confirmed that it was 'information' for the purposes of s 359A(1) because it was about a state of affairs (i.e. that the accounting firm where the applicant had purported to work did not exist in the external world, and this would be a part of the reason for affirming the decision).

[112] *DDX16 v MIBP* [2018] FCA 838. An application for special leave to appeal to the High Court was dismissed: *DDX16 v MIBP* [2018] HCASAL 250.

[113] *DDX16 v MIBP* [2018] FCA 838 at [49]. An application for special leave to appeal to the High Court was dismissed: *DDX16 v MIBP* [2018] HCASAL 250.

[114] See *SZCCA v MIAC* [2008] FMCA 1362 at [29]–[30]. In that case, the Tribunal rejected claims about the applicant's political activities in Bangladesh by reference to independent evidence that the BNP was in power from 1979 until General Ershad seized power in March 1982, that General Ershad remained in power until 1990 and that he formed the Jatiya Party in 1986. See also *MZYPL v MIAC* [2012] FMCA 563, where the Tribunal used information from Google Maps and other internet searches (an article from The Guardian and information from blog sites) to assess the applicant's credibility. The Court found that the information did not enliven s 424A(1)(a) as it was exempt under s 424A(3)(a). In respect of the Google Maps and the blog site information, the Court found that it was clearly not related to the applicant or any other person. In relation to the information from The Guardian, the Court found that the information related to an unnamed detainee at a prison camp, and was not about the applicant or any other person with direct association or relevance to the applicant. See also *SZVCZ v MIBP* [2016] FCCA 2840 where the Tribunal referred to 'Pakistan's most prominent leaders' having attended Christian schools, and then referred to leaders such as the current Prime Minister and two out of Pakistan's five provincial governors. The Court found that the Tribunal had referred to these individuals as examples of members of a class of persons. On this basis, the reference was not specifically about the individual leaders in question and would fall within the exception in s 424A(3)(a). Upheld on appeal: *SZVCZ v MIBP* [2017] FCAFC 130 at [5], [67, [69], where the Court held that the information in question was clearly information that was not specifically about the appellant or another person, but was referred to as examples of 'prominent leaders'.

[115] *MIAC v SZHXF* (2008) 166 FCR 298.

[116] *MIAC v SZHXF* (2008) 166 FCR 298 at [22]. This reasoning was considered by a differently constituted Full Court in *SZJBD v MIAC* (2009) 179 FCR 109. The information in that case concerned the dates Falun Gong was founded and subsequently banned in China and the date that a warrant for the arrest of Master Li Hongzhi was issued. The majority judges thought *SZHXF* was indistinguishable. The majority reasoning in *SZJBD* sits conformably with *NBKC v MIAC* [2008] FMCA 1043 in relation to the Tribunal's reference to country information, including the reference to Li Hongzhi. The Court applied *SZHXF* but also found that the Tribunal relied on the applicant's own answers and its conclusion that her knowledge of Falun Gong was incommensurate with her claims. The Tribunal's appraisal of the evidence was not 'information' for the purposes of s 424A(1).

[117] *ANN15 v MIBP* [2018] FCCA 2345 at [15].

Information given by the applicant for the purpose of the application

10.4.10 Sections 359A and 424A do not apply to information that the applicant for review gave for the purpose of the application.[118] There are two elements to consider when determining whether information comes within this exception: (a) whether the information is given by 'the applicant'; and (b) whether it was 'given for the purposes of the application'.

Is the information given by 'the applicant for review'?

10.4.11 For information to fall within the exception contained in ss 359A(4)(b)/424A(3)(b), it must be information given to the Tribunal by the *review* applicant or his/her agent on his/her behalf.[119] This includes information given by a migration agent acting under the applicant's instructions,[120] an 'advisor' or friend acting with the consent or authority of the applicant,[121] or a parent in their role as guardian for an applicant child.[122] However, it may not include information which is given by a third party to the Tribunal which incidentally passes through the review applicant's hands as a mere conduit.[123]

10.4.12 Whether such information is given by the relevant person is a question of fact. In *Khan v MIAC,*[124] the applicant claimed that the Tribunal had failed to give him particulars of the attendance record issued by the education provider pursuant to s 359A [s 424A]. Although the attendance record was not provided to the Tribunal by the review applicant, the Court held that the gravamen of the information contained in the attendance record, being his attendance rate of less than 30%, had been separately provided by the applicant at the hearing.[125] In *Le v MIAC,*[126] the Court considered *Khan* and the earlier judgment of *Khergamwala v MIAC*[127] and found that there is a fine technical distinction between cases where the Tribunal relies on information obtained from a third party, and cases where it relies on the applicant's agreement or acceptance of such information. It was made clear that in the former

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[118] ss 359A(4)(b), 424A(3)(b).
[119] *SZEEU v MIMIA* (2006) 150 FCR 214.
[120] *SZIOQ v MIAC* [2007] FMCA 1292 at [16].
[121] *SZGSG v MIAC* [2008] FMCA 452.
[122] *SZLND v MIAC* [2008] FMCA 1047.
[123] In *SZOMT v MIAC* [2011] FMCA 3 at [29], documents obtained with the assistance of the review applicant's spouse were found to have been given for s 424A(3)(b) purposes because it was the review applicant who relied on them to support his claims and who provided them to the Tribunal. The Court commented that there may be circumstances in which information is given by a third party to the Tribunal which incidentally passes through an applicant's hands as a mere conduit but this was not such a case.
[124] *Khan v MIAC* [2009] FMCA 1185.
[125] *Khan v MIAC* [2009] FMCA 1185 at [22]. Also of note is *SZGQF v MIAC* [2008] FMCA 1042 at [32] where the Court took the view that the use of a NAATI translation obtained by the Tribunal of a Chinese language document submitted by the applicant did not invoke s 424A because the information in the document was provided by the applicant. In *SZQKO v MIAC* [2011] FMCA 821, the applicant claimed at hearing his name appeared on a Falun Gong website. On invitation by the Tribunal the applicant provided details of three websites, stating that he could not recall in which one he was named. On investigating these sites, the Tribunal concluded the applicant was not named in any of them. The Court found that as the applicant directed the Tribunal to search these websites, this was 'information' given by him and therefore it fell within the exemptions under s 424A(3)(b) and the Tribunal was not required to put the absence of his name from these sites to him for comment.
[126] *Le v MIAC* [2010] FMCA 460.
[127] *Khergamwala v MIAC* [2007] FMCA 690.

category of cases, the Tribunal must comply with s 359A whereas in the latter category, the provision will not be engaged.[128]

Evidence from a visa applicant who is not the review applicant

10.4.13 Information from a visa applicant, who is not also the review applicant, will not usually fall within this exception. This situation can commonly arise in reviews under Part 5 of the Migration Act involving offshore visa applications. In such cases, the Migration Act generally requires that an Australian sponsor, nominator or relative be the *review* applicant. However, the Tribunal will, in most cases, be required to consider whether the *visa* applicant satisfies certain regulatory criteria. The case law suggests that if the Tribunal takes *oral* evidence from the visa applicant, and that information would be the reason, or a part of the reason for affirming the delegate's decision, it would not fall within the exception and must be disclosed to the review applicant unless another exception applies.[129]

10.4.14 The exception would apply if *written* evidence from the visa applicant is provided to the Tribunal by the review applicant or his or her agent. For example, if the visa applicant completes a statutory declaration and this is submitted to the Tribunal by the review applicant, it may be said to be 'given by the applicant for review'.[130] However, if the same statutory declaration was forwarded directly to the Tribunal by the visa applicant, it would not fall within this exception.

Evidence from an applicant's witness

10.4.15 Oral evidence given by a witness called by a review applicant does not appear to fall within the exception in ss 359A(4)(b)/424A(3)(b). In *SZEWL v MIAC*, Rares J firmly expressed the view that information given orally by a witness, other than an applicant for review, cannot be information that the applicant gave for the purposes of the application for review and that the Tribunal erred in not putting adverse information from a witness to the applicant.[131] In reaching this position, Rares J considered that information given by a witness, from whom the applicant has requested the Tribunal take evidence, cannot be considered to be information given by the applicant to the Tribunal because it is the Tribunal who calls witnesses (not the applicant) and that 'self-evidently, the witness gave the information' and 'any

[128] *Le v MIAC* [2010] FMCA 460 at [10]. See also *Mazumdar v MIAC* [2012] FMCA 1170 where the Federal Magistrates Court at [60]–[62] suggested, in *obiter*, that an applicant's acceptance of PRISMS records indicating that his enrolment had ceased characterised those records as information falling within ss 359A(4)(b) in circumstances where the applicant had already given evidence to both the delegate and the Tribunal that he was not in fact enrolled at the relevant time.

[129] *SZECG v MIMIA* [2006] FCA 733. Although the Court in that case considered evidence of a witness, the reasoning would be applicable where the 'witness' is the visa applicant. The decision of Branson J in *SZECG* confirmed the *obiter* comments of Lee J (Tamberlin J agreeing) in *Applicant M164 of 2002 v MIMIA* [2006] FCAFC 16 that the exemption in s 424A(3)(b) does not apply to oral advice given by witnesses called by an applicant. See also *SZCNG v MIMIA* (2006) 230 ALR 555 at [64], and the comments of Kenny and Lander JJ in *MIMIA v Maltsin* (2005) 88 ALD 304 at [36] that '*it is the Tribunal not the applicant who 'obtains' or 'acquires' the evidence for the purposes of the review, whether or not that evidence is volunteered or compulsorily acquired'.* Note, however, that there exists a competing line of authority which suggests that where the witness evidence is called by the review applicant the exception would apply. See for example, *SZAQI v MIMA* [2006] FCA 1653 at [24]; *VBAM of 2002 v MIMA* [2003] FCA 504 at [44]; *SZIAT v* MIAC [2008] FCA 766 at [39]; *Chan v MIMIA* [2006] FMCA 1841 at [82] and *SZFYW v MIAC* [2008] FMCA 813 at [61].

[130] *SZCNG v MIAC* (2008) 230 ALR 555 at [48].

[131] *SZEWL v MIAC* (2009) 174 FCR 498 at [44].

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other construction of the section would make no sense'.[132] The same view (that evidence given by a witness is not likely to be information given by the applicant) was expressed by Branson J in *SZECG v MIMIA*,[133] which confirmed the *obiter* comments of Lee J (Tamberlin J agreeing) in *Applicant M164 of 2002 v MIMIA*.[134] There exists a line of authority which predates *SZEWL* and suggests that where the witness evidence is called by or at the request of the review applicant and taken with his or her consent the exception would apply.[135] However, the Federal Magistrates Court in a more recent judgment considering this issue, *Garcevic v MIAC*,[136] found 'much force' in the reasoning of Rares J in *SZEWL* and followed the position that oral evidence provided by a witness, who in this instance was put forward as a possible witness by the applicant to appear at the hearing, did not fall within the exception in ss 359A(4)(b). Therefore, a more conservative and cautious approach to treating oral evidence from a witness, irrespective of whether the applicant requested the Tribunal to take evidence from that witness, would be to follow *SZEWL* and consider that the exception in ss 359A(4)(b)/424A(3)(b) does not apply to such evidence.

10.4.16 It is generally accepted that *written* evidence or a prepared statement of a witness which is submitted by a review applicant or his or her agent to the Tribunal, in circumstances where the review applicant must be taken to have advance knowledge of the precise contents of such evidence, would come within the exemption.[137]

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[132] *SZEWL v MIAC* (2009) 174 FCR 498 at [45].
[133] *SZECG v MIMIA* [2006] FCA 733 at [19]–[23].
[134] *Applicant M164 of 2002 v MIMIA* [2006] FCAFC 16 at [99]–[102]. See also *SZCNG v MIMIA* (2006) 230 ALR 555 at [64], and the comments of Kenny and Lander JJ in *MIMIA v Maltsin* (2005) 88 ALD 304 at [36] that *it is the Tribunal not the applicant who "obtains" or "acquires" the evidence for the purposes of the review, whether or not that evidence is volunteered or compulsorily acquired.* In *SZHRD v MIMIA* [2006] FMCA 551 at [22]–[23] the Court held that evidence taken by the Tribunal over the telephone could not be regarded as evidence provided by a witness called or sought by the applicant to bring the information within s 424A(3)(b) when it was obtained in the absence of the applicant and which was not known by the applicant even though the applicant initially may have provided the statement by the witness to the Tribunal with an invitation to confirm it.
[135] *SZAQI v MIMA* [2006] FCA 1653 at [24]; *VBAM of 2002 v MIMA* [2003] FCA 504 at [44]; *SZIAT v MIAC* [2008] FCA 766 at [39]; *Chan v MIMIA* [2006] FMCA 1841 at [82]; *SZFYW v MIAC* [2008] FCA 1259 at [18]–[19]; and *SZLNU v MIAC* [2008] FMCA 1200 at [38]–[39]. See also the *obiter* comments in *SZECG v MIMIA* [2006] FCA 733 at [23] where Branson J also considered that specific information given by a witness at the request of an applicant may be information given by the applicant (e.g. where the applicant requests a witness to give specific information on a particular topic at the hearing such as evidence about the political affiliation of a particular person). However, her Honour doubted that s 424A(3)(b) discloses an intention that every piece of information that the Tribunal gleans from evidence of a witness called at the request of the applicant would fall within the exception and was not required to reach a concluded view on this question.
[136] *Garcevic v MIAC* [2012] FMCA 931 at [32]. See also [29]–[31] for a summary of authorities.
[137] *SZCNG v MIMIA* (2006) 230 ALR 555 at [48]. See also *Halkic v MIMA* [2006] FMCA 1646, *SZILK v MIMA* [2006] FMCA 1318, *SZFYW v MIAC* [2008] FMCA 813 at [57] and *SZMXN v MIAC* [2009] FMCA 509 at [25] where information in the form of factual allegations made to a psychologist and contained in his report, fell within the exception in s 424A(3)(b) as the report was supplied by the applicant to the Tribunal. Compare *MZXJA v MIAC* [2007] FMCA 375 where the Court held that a psychiatrist's report attached to a response to a s 424A letter by the adviser did not fall within the exception in s 424(3)(b) as it was information not from the applicant but from the psychiatrist and thus was not information given by the applicant. However, this judgment appears contrary to the weight of authority which indicates such information would fall within the exception in s 424A(3)(b).

Evidence from a parent/guardian

10.4.17 Evidence given by a parent or guardian, on behalf of an infant child, is distinguished from that given by a witness. In those circumstances, the evidence is taken to be given by the infant and would come within the exception.[138]

Evidence from review co-applicants

10.4.18 Where multiple review applicants make a combined application for review, each applicant individually has the benefit of ss 359A/424A and adverse material emanating from a co-applicant is not treated differently from adverse material from a non-applicant witness.[139] That is, information given to the Tribunal by one review applicant may have to be given to another co-applicant under ss 359A/424A if it is part of the reason for affirming the decision relating to the co-applicant. However, a single invitation issued to all applicants will generally suffice.[140]

Is the information 'given for the purposes of the application'?

10.4.19 The exception in ss 359A(4)(b)/424A(3)(b) extends only to information given for the purposes of the *review* application.[141] It does not include information given in the visa application.[142] Nor does it cover any other application the applicant may have made to the Tribunal. For example, an application for a fee waiver does not come within the exemption,[143] nor would information given in connection with an application for review of a different decision.

10.4.20 An additional exception, that contained in ss 359A(4)(ba)/424A(3)(ba), operates to exempt *written* information given by the review applicant during the process that led to the decision under review. See below for further discussion.

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[138] See *SZLSM v MIAC* (2009) 176 FCR 539. See also *SZEAM v MIMIA* [2005] FMCA 1367.
[139] *SZGSI v MIAC* (2007) 160 FCR 506 at [51]. Justice Marshall expressly acknowledged that he no longer adhered to the contrary view expressed in *MZWMQ v MIMIA* [2005] FCA 1263 (followed in *SZBYH v MIMIA* (2005) 196 FLR 309 or that of Young J in *Applicant M47/2004 v MIMIA* [2006] FCA 176). *MZWMQ* had been followed in *SZGTH v MIMA* [2006] FCA 1801 and in *SZCNG v MIMIA* (2006) 230 ALR 555. The Full Court's view in *SZGSI* effectively follows comments made in *obiter* by the Full Court in *SZBWJ v MIMIA* [2006] FCAFC 13, to the effect that where visa applications are made by members of a family unit under s 36(2)(b), that family member is making a separate application. Consequently, the Court suggested that where a secondary applicant who is a member of a family unit provides evidence to the Tribunal, that information is not given for the purpose of the application under s 424A(3)(b). Similarly, in the case of *MZXGB and MZXGC v MIAC* [2007] FCA 392, the Court held that even though the applicant wife had consented to the Tribunal using the evidence the applicant husband had already provided in his separate application for review in assessing her claims, that information obtained from the applicant husband at his hearing was not information given by the applicant wife in her separate application for review. The Court noted that as the applicant wife was not present at the hearing, she could not have known what information she was consenting to the Tribunal using. *SZGSI* was distinguished in *SZCOV v MIAC* [2008] FMCA 1171 on the basis that the evidence from the other applicant did not constitute a rejection, denial or undermining of the applicant's claims: at [71]–[75].
[140] *SZKDP v MIAC* [2007] FCA 1487 at [36]–[38]. See also *SZKDB v MIAC* [2007] FMCA 1036 at [30] and *SZIHI v MIAC* [2007] FMCA 1332 at [9].
[141] In *Kaur v MIBP* [2015] FCCA 3037 at [20] the Court found that a delegate's decision provided via the online lodgement system was given for the purposes of the review application.
[142] *MIMA v Al Shamry* (2001) 110 FCR 27 followed in *SZEEU v MIMIA* (2006) 150 FCR 214.
[143] Information provided to the Tribunal as part of a fee waiver application is not information provided for the purpose of the review application, and if the Tribunal wishes to use any information provided in such an application as part of the reason to affirm the delegate's decision, the s 359A obligation arises: *Rokolati v MIMIA* (2006) 203 FLR 258 .

'Adoption' or 'republication' of prior statements

10.4.21 If information is given *directly* to the Tribunal by the review applicant it will clearly fall within this exception. In *MIAC v You*, the Federal Court found that an applicant 'gave' the Tribunal information contained in the delegate's decision by attaching the decision to the application for review.[144] The Court indicated that whether or not the applicant's purpose or intention in giving the information was that the Tribunal rely on it is irrelevant where the information has physically been handed over.[145] However, if an applicant does not attach the decision itself to the application for review, but instead provides the Department file reference number or the date of the Department letter notifying of the decision, the applicant is not likely to have given the Tribunal information contained in the delegate's decision.

10.4.22 In circumstances where an applicant does not provide the delegate's decision to the Tribunal, there is no limitation on the Tribunal utilising its general power in ss 359(1)/424A(1) to request it from the applicant.[146] If the decision record is subsequently provided to the Tribunal, it will be 'given for the purposes of the application'.

10.4.23 A review applicant may also *indirectly* give the Tribunal information by referring to it to bring it within the exception in ss 359A(4)(b)/424A(3)(b). An applicant can be said to have 'given' information to the Tribunal for the purposes of the review application by 'adopting', 'incorporating' or 'republishing' the information.[147]

10.4.24 There is nothing in the text of ss 359A(4)(b)/424A(3)(b) which supports any distinction between information proffered by an applicant to the Tribunal of the applicant's own volition or elicited from an applicant by the answering of the Tribunal's questions.[148] Nevertheless, not every answer by an applicant to a question from the Tribunal will involve the applicant giving information to the Tribunal and the nature of the information, the question asked and the answer will all be

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[144] *MIAC v You* [2008] FCA 241.
[145] *MIAC v You* [2008] FCA 241 at [16]. This overturned the reasoning at first instance in *You v MIAC* [2007] FMCA 1064, where the Court held that merely attaching a copy of the delegate's decision to the review application was not 'adopting' the statements therein but was merely to identify it as the decision for which review was sought. The Court in *Lakhani v MIAC* [2013] FCCA 451 also found no error in the Tribunal's reliance upon information contained within the delegate's decision, in that case information from IELTS Australia and a document examiner, to conclude that the applicant's IELTS test scores had been altered. The Court rejected the applicant's argument that the Tribunal was obligated to put the original IELTS certificate and the document examiner's findings and report to him under s 359A, finding, at [24], that as the information from IELTS Australia and the document examiner was information contained in the delegate's decision, a copy of which the applicant had provided to the Tribunal, the information was exempt under s 359A(4)(b).
[146] See *Marasi v MHA* [2019] FCCA 3378 at [33] where the Court found that s 359(1) expressly authorises the Tribunal to 'get any information that it considers relevant' and this includes the delegate's decision record. The Court did not accept that there was any evidence to establish it was requested for an improper purpose.
[147] See *MIAC v You* [2008] FCA 241 at [13]. In *Bhandari v MIAC* [2010] FMCA 369 at [32]–[35], the Court found that evidence of an education provider's certification, was information given to the Tribunal by the applicant as it was referred to in the delegate's decision and was therefore outside the obligation in s 359A(1). In *CAR15 v MIBP* [2019] FCAFC 155 at [70]–[72] the Full Court in comments made in *obiter* noted that, in circumstances where, the appellant had made extensive references to the previous Tribunal decision (following remittal by a Court of the review application) in submissions to both the delegate and the Tribunal, the exceptions in ss 424A(3)(b) and (ba) applied to the previous Tribunal decision. This was because the appellant had in effect 'given' the previous Tribunal decision to both the delegate and Tribunal (despite not giving the complete decision record). The Court did not reach a conclusion on whether the previous Tribunal decision was in effect information for the purposes of s 424A(1).
[148] *SZTGV v MIBP* (2015) 318 ALR 450 at [24].

relevant to determining whether these provisions are engaged.[149] The question is ultimately one of fact.

10.4.25 There is also no principle that complex information or information about controversial facts cannot be given by an applicant to the Tribunal by a mere affirmation in response to a question by the Tribunal.[150] The complexity or simplicity of the information and whether the information relates to a controversial or undisputed fact are circumstances that inform the answer to the question whether ss 359A(4)(b)/424A(3)(b) will be engaged.[151]

10.4.26 In *NBKT v MIMA*,[152] a Full Court of the Federal Court found that it was possible for an applicant to adopt a prior statement in oral evidence at a Tribunal hearing. However, the Court emphasised the importance of giving careful consideration to the nature of the information and the circumstances in which it is communicated to, or elicited by, the Tribunal. The Court found that an applicant must do more than merely affirm the accuracy of a previous statement,[153] but artificial distinctions should not be drawn between information provided by way of 'evidence in chief' and answers to questions posed by the Tribunal.[154]

10.4.27 Prior to *NBKT*, a number of cases had suggested that information would only be 'given' for the purposes of the review application if it was volunteered or given without prompting.[155] However, in *SZDPY v MIMA*,[156] Kenny J rejected the appellant's contention that the information in question was not subject to the exemption in s 424A(3)(b) because it had been given in response to questions in the nature of 'cross examination' by the Tribunal.[157] Her Honour held that the Tribunal's questions were specific and arose, naturally enough, from the appellant's visa application, and the appellant gave direct answers.

10.4.28 Similarly, Allsop J in *SZHFC v MIMIA* said:

[149] *SZTGV v MIBP* (2015) 318 ALR 450 at [24].
[150] *SZTGV v MIBP* (2015) 318 ALR 450 at [25].
[151] *SZTGV v MIBP* (2015) 318 ALR 450 at [25].
[152] *NBKT v MIMA* (2006) 156 FCR 419.
[153] See also *SZHWF v MIAC* [2008] FMCA 1136.
[154] *NBKT v MIMA* (2006) 156 FCR 419 at [59]. Also in S*ZCJD v MIMIA* [2006] FCA 609, Heerey J held that the exception in s 424A(3)(b) would apply to information which is affirmed by an applicant for the purposes of the review, even if the information might also have been obtained by the Tribunal from another source. In *Kanagul v MIBP* [2014] FCCA 1219, Barnes J held at [77]–[78] that the applicant did not 'give' the information, namely two items of evidence from the sponsor, to the Tribunal and the exception in s 359A(4)(b) did not apply because, in contrast to the facts in *NBKT v MIMA*, the applicant did not positively avow or disavow the information when the information was put to him at hearing, the nature of the information was not simply uncontentious factual material and the applicant had not previously provided the information.
[155] *NAZY v MIMIA* (2005) 87 ALD 357; *SZBMI v MIMIA* (2006) 150 FCR 214 at [20], [219], *SZBUU v MIMIA* [2006] FMCA 197 at [74], [77]–[78]. See also *SZCNG v MIMIA* (2006) 230 ALR 555 where the Court found that the mere adoption of a statement of a third party by the applicant during the review process is not such as to result in the information being given by the applicant for the purposes of the review application at [66]. A similar conclusion was reached in *SZGMI v MIMA* [2006] FMCA 284. Compare *SZCJY v MIMIA* [2005] FMCA 1917, in which the applicant expressly referred to his protection visa application in his application to the Tribunal. The exception in s 424A(3)(b) was held to apply in this case. Upheld on appeal in *SZCJY v MIMIA* [2006] FCA 556; and *SZFKL v MIMIA* [2005] FCA 931, where inconsistencies between the claims submitted with the visa application and oral evidence was brought to the applicant's attention at the hearing and he confirmed to the Tribunal that he was satisfied of the accuracy of the information in his visa application. In this case it was held that the information came within s 424A(3)(b). See also *SZERV v MIMIA* [2005] FCA 1221 at [10]–[11]; *SZDVO v MIMIA* [2005] FMCA 1703 at [25]; and *SZFIM v MIMIA* (2005) 197 FLR 362 at [38] in which the Court held that the provision of the Department of Immigration file number on the review application form did not constitute 'republication' of the visa application for the purposes of the review.
[156] *SZDPY v MIMA* [2006] FCA 627.
[157] *SZDPY v MIMA* [2006] FCA 627 at [36]; approved by the Full Court in *NBKT v MIMA* (2006) 156 FCR 419.

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> *If the Tribunal, as here, puts an earlier statement or application to the applicant and asks questions about it, … the answers given to those questions will be information for the purposes of s 424A(3)(b). If the Tribunal then takes that information, that is, for want of a better expression, that raw information or data into account, nothing would prevent the operation of s 424A(3)(b). If, however, the importance placed by the Tribunal on the information previously given to the Department (which may have been repeated in answers to the Tribunal) is not merely the facts disclosed, but arises from the context or circumstances of it being given earlier, then s 424A(3)(b) may not prevent the requirement of a notice under s 424A(1) and (2).*[158]

10.4.29 The Tribunal's task is to determine whether the applicant has republished the whole or only part of a prior statement. For example:

- In *SZGGT v MIMIA*, Rares J held that the test of what has been republished should be what a reasonable person in the position of observing what is in the review application would understand has been interchanged.[159] The Court found that in that case such a person would have understood the applicant to have been referring only to his earlier explanation as to his circumstances in his country and not to his explanation of his Australian *sur place* claim on which he elaborated in different words. There was no incorporation of the entirety of the information contained in the departmental file and that defect in procedure was not cured by the fact that the Tribunal told the applicant that it would be in receipt of the departmental file.[160]

- In *SZGIY v MIAC*[161] the applicant said in her review application form that the delegate had not read her visa application carefully. A Full Court of the Federal Court found that a reasonable reader would have understood that the applicant was inviting detailed attention to her visa application. Information contained in the visa application about the applicant's date of arrival in Australia was therefore said to be information the applicant gave for the purposes of the review application.[162]

- In *Gajjar v MIAC*[163] the High Court considered what amounted to information 'given by the applicant for the purpose of the application' in s 57(c) [the Department's equivalent to ss 359A(4)(b)/424A(3)(b)] in the context of IELTS test results and held that by providing an IELTS test reference number in answer to a question on the application form, the applicant has 'given' the information about his/her test results even though the actual results were accessed through a third party.[164]

[158] *SZHFC v MIMIA* [2006] FCA 1359.
[159] *SZGGT v MIMIA* [2006] FCA 435 at [36].
[160] *SZGGT v MIMIA* [2006] FCA 435 at [50]–[51].
[161] *SZGIY v MIAC* [2008] FCAFC 68.
[162] *SZGIY v MIAC* [2008] FCAFC 68 at [24].
[163] *Gajjar v MIAC* (2010) 240 CLR 590.
[164] The Court's reasoning would appear to be equally applicable in similar situations for the purposes of s 359A(4) and arguably also to ss 359A(4)(b)/424A(3)(b) more broadly, at least where the purpose of the answers provided on the application form is

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- In *SZTGV v MIBP*[165] the Full Federal Court found the applicant had elected to provide submissions to the Tribunal dealing with issues set out in the delegate's decision and in so doing, that he gave to the Tribunal information relevant for the purposes of s 424A(1), being his admissions of the falsity of the information he supplied as part of his tourist visa application. As the applicant gave the information to the Tribunal in accordance with s 424A(3)(b), s 424A(1) was found not to apply.

10.4.30 Even if a person can be said to have 'republished' information so as to bring it within the exception in ss 359A(4)(b)/424A(3)(b), following the High Court judgment in *SZBYR v MIAC*,[166] the Tribunal considers whether the information given in its original form must be disclosed. Accordingly, if the Tribunal does not consider its decision, or any part of its decision, was informed by the information in its original form, and rather its decision was informed by the applicant's provision of that information, it may not need to be disclosed under ss 359A/424A. This will arise if the Tribunal clearly does not rely on the original information and instead relies only on the information that has been republished by the applicant, and this information would be exempted from disclosure on the basis of the exception in ss 459A(4)(b)/424A(3)(b).[167] Further, it is possible that an applicant's reproduction of information and the exception in ss 359A(4)(b)/424A(3)(b) operate to disengage the presently existing obligation in ss 359A(1)/424A(1) with regard to the original information.[168] Whether the obligation under ss 359A/424A is engaged will turn on the Tribunal's reasons for its decision, the factual circumstances of the matter and the content of the reproduced information.

Information given by the applicant, in writing, during the process that led to the decision under review

10.4.31 Written information given by the review applicant during the process that led to the decision under review is not information that must be given to an applicant under ss 359A/424A. Such information would include information given for the purposes of the visa application, or sponsorship application, or in the course of the visa

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apparent, and the applicant is aware of the particulars and evidentiary purpose, or relevance, of the associated information in question. However, it is important to note that the Court was considering s 57 and a specific factual scenario.

[165] *SZTGV v MIBP* (2015) 318 ALR 450.

[166] *SZBYR v MIAC* (2007) 235 ALR 609.

[167] See for example *Quadri v MICMSMA* [2020] FCA 246 at [27] where, in the context of PRISMS records for a student refusal, the Court held that s 359A was not engaged because the Tribunal's reasons indicated that its decision was informed not by the contents of the PRISMS records, but by the appellant's own evidence that he had discontinued his course of study, and the appellant's own evidence is not information for the purposes of s 359A: s 359A(4).

[168] See for example *Naikar v MIBP* [2019] FCA 502 at [36]–[38] which rejected the finding at first instance in *Naikar v MIBP* [2018] FCCA 2689 at [100] which had held that once the obligation in s 359A(1) is engaged, it would be contrary to the objects and purposes of the Migration Act to read the exception in s 359A(4)(b) as disengaging what is a presently existing mandatory obligation. The Federal Court held that the Tribunal was correct to find that based on the appellant's concession about his criminal history at hearing, it was unnecessary to put the same information from his criminal history which was on the file to the appellant under ss 359A. The Court went on to find that even if the Tribunal had failed to comply with s 359A, the error would not have been material as the appellant had not complied with the evidentiary requirements for a non-judicially determined claim of family violence.

cancellation process.[169] Written information given in connection with an earlier application, or cancellation, would not fall within the exemption.[170]

10.4.32 This exemption does not extend to information given orally to the Department. Recordings of interviews with departmental officers or written records of interviews or telephone conversations, for example, would not be exempt.

10.4.33 It is only information given by the *review* applicant that is exempted. Written information given by another visa applicant, sponsor, nominator, witness, third party or information obtained independently or generated by the Department would not be exempted. Similarly, information generated by the Tribunal itself, such as a decision on a related application, would not be exempted.[171]

Non-disclosable information

10.4.34 Information which meets the definition of 'non-disclosable' information under s 5 of the Migration Act is explicitly exempted from the obligation in ss 359A/424A. 'Non-disclosable information' as defined in s 5(1) of the Migration Act includes information 'whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence' and information or matters whose disclosure may be contrary to the national or public interest. See Chapter 31 – Restrictions on disclosing and publishing information for further discussion.

Dob-ins

10.4.35 The proper application of this exception was considered by the High Court in *MIAC v Kumar*[172] in the context of dob-in material provided to the Tribunal. The High Court observed that the definition of 'non-disclosable information' invites attention to the body of doctrine in private law concerned with the protection of confidential information, but expressed the need for caution in translating into public law such private law concepts. The translation must accommodate the scope and purpose of the Migration Act.[173]

10.4.36 The Court found that s 359A is designed to afford, to applicants, a measure of procedural fairness and, to informants, protection, lest without that protection, information be withheld and the Tribunal be denied material which assists the performance of its functions.[174] The preservation of the informant's disclosures in that case tended to advance, not obstruct, the operation of the Migration Act.

[169] See *ADA15 v MIBP* [2016] FCCA 291 at [5] where the Court held that the visa application was quintessentially part of the process that led to the decision under review, such that information contained within the visa application did not need to be given to the applicant under s 424A. Upheld on appeal: *ADA15 v MIBP* [2016] FCA 634.
[170] See *SZMOO v MIAC* [2008] FMCA 1581 at [36] where the Court rejected an assertion by the Minister's representative that information in earlier visitor visa applications could fall within s 424A(3)(b) or 424A(3)(ba) in relation to an application for review of a decision on a protection visa application.
[171] See, for example, *Singh v MIAC* [2010] FMCA 813 at [42]–[46] where the Court held in a case involving related visa refusal and sponsorship refusal review applications that s 359A imposed an obligation on the Tribunal to put to the applicants the information that it had affirmed the delegate's decision in relation to the application by the sponsor.
[172] *MIAC v Kumar* (2009) 238 CLR 448.
[173] *MIAC v Kumar* (2009) 238 CLR 448 at [19]–[21].

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Accordingly, it was sufficient compliance with s 359A(1) for the Tribunal to inform the applicant that it had received information, in confidence, which stated that his marriage was contrived for the sole purpose of his migration to Australia, and inviting his response without disclosing the identity of the informant.[175]

10.4.37 It flows from the judgment in *MIAC v Kumar*, that it is appropriate for the Tribunal to have some regard to private law principles in determining whether the disclosure by the Tribunal of information would found an action by a person for breach of confidence. But the mere fact that the private law would not protect some information, will not necessarily deny to that information the character of 'non-disclosable information', if the protection of that information would advance the operation of the Migration Act.

10.4.38 The judgment in *MIAC v Kumar* offers little practical guidance as to how to apply the definition of 'non-disclosable information' and it is not possible to define with precision the categories of information that will be caught by it. However, the requirements for an action for breach of confidence may be summarised as follows:[176]

- a plaintiff must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question;
- the information must have the necessary quality of confidentiality (and is not, for example, common or public knowledge);
- the information must have been received by the defendant in such circumstances as to import an obligation of confidence;[177]
- actual or threatened misuse of that information must have occurred; and
- it is a possible requirement that the unauthorised use would need to be to the detriment of the plaintiff.

10.4.39 When presented with this issue, the Tribunal considers whether the information in question is in fact confidential, or properly the subject of a national or public interest claim. In *Singh v MIBP*[178] the Court in *obiter* noted that the identity of an informer

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[174] *MIAC v Kumar* (2009) 238 CLR 448 at [23].
[175] *MIAC v Kumar* (2009) 238 CLR 448 at [34]. In *WZANC (No 2) v MIAC* [2012] FMCA 504 the Court applied *Kumar* and found that sufficient particulars of the confidential information were provided to applicant to enable him to properly answer allegations that he was a Sunni Muslim and not an Ahmadi as claimed, and it was not necessary for the Tribunal to disclose the informant's identity. Upheld on appeal in *WZANC v MIAC* [2012] FCA 1461. See also *Lam v MIAC* [2009] FMCA 1231 at [67] although the Court held that the failure on the part of the Tribunal to provide the applicant with a specific allegation that the review applicant and visa applicant had married gave rise to a breach of s 359A as the applicant should have been provided with clear particulars of all of the information that the informant provided: at [77].
[176] *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434.
[177] Note that in *Park v MIAC* [2009] FMCA 7 the Court found that information obtained from an informant in circumstances where that person neither sought nor was offered the protection of confidentiality was not imparted in circumstances importing an obligation of confidence: at [25]. However it is not clear that this reasoning has survived the High Court's decision in *MIAC v Kumar* (2009) 238 CLR 448; see also *Lam v MIAC* [2009] FMCA 1231, where the Court considered at [56] whether, in the circumstances, it was not an unreasonable inference to be asked to be drawn that the request for confidentiality was implicit where the call was anonymous and made to the 'dob-in' line at the Department but no specific request for confidentiality was made.
[178] *Singh v MIBP* [2015] FCCA 3095 at [14]–[15].

was the type of information that would ordinarily be the subject of public interest immunity, and the statutory regime provided for the Tribunal to act in a way that is fair and just accommodated preserving appropriate public interest immunity in accordance with the provisions of ss 375A and 376. The Court commented that the disclosure of an informant would ordinarily not be appropriate and would require special circumstances that outweighed the important public interest in protecting informants.

10.4.40 If the information clearly cannot not be characterised as non-disclosable information, the Tribunal discloses particulars of the information to the review applicant in accordance with ss 359A(1)/424A(1).[179]

10.4.41 If the information *may* be characterised as 'non-disclosable', consideration is given to whether it is possible to nonetheless disclose the substance or gist of the matter. This approach assists in affording the applicant procedural fairness while at the same time protecting any relevant public interest, including the interest in protecting informants.[180]

10.4.42 If sensitive information is released to an applicant or adviser, the Tribunal may consider making a written direction under ss 378 [Part 5] or 440 [Part 7] that the information not be published; or in the case of a protection matter, that the information not otherwise be disclosed.

Other restrictions on disclosure – ss 375A, 376, 438 and 503A

10.4.43 Sections 375A, 376, 438 and 503A of the Migration Act place restrictions on the disclosure of information by the Tribunal.

<u>Sections 375A, 376 and 438 restrictions</u>

10.4.44 Under s 375A [Part 5], the Secretary of the Department may certify that certain information is only to be disclosed to the Tribunal. Further information about assessing the validity of non-disclosure certificates under s 375A is contained in Chapter 31 – Restrictions on disclosing and publishing information.

10.4.45 The effect of such a certification is that the Tribunal is prohibited from disclosing the document and/or information in it to the applicant. In *MIBP v Singh*, the Federal Court found that where the obligations in ss 359A and 375A come into conflict, s 375A is the leading provision but that the aims of both ss 375A and 359A can usually be served without conflict.[181] In *Burton v MIMIA*, Wilcox J held that a valid s 375A certificate does not override the obligation to provide *particulars* of

[179] A failure to address this question may have the effect of denying the applicant procedural fairness: see *NAVK v MIMA* (2004) 135 FCR 567 at [108].
[180] *NAVK v MIMA* (2004) 135 FCR 567 at [107].
[181] See *MIBP v Singh* [2016] FCAFC 183 at [56]. It was also held that *Davis v MIMIA* [2004] FCA 686 was not correct to the extent it suggested that if there is a s 375A certificate, it has the effect that s 359A never gives rise to an obligation to provide particulars, or that there is no obligation to disclose the existence of the certificate to an applicant. An application for special leave to the High Court was dismissed: *MIBP v Singh* [2017] HCATrans 107.

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information under s 359A(1).[182] In doing so the Tribunal is **not** required to disclose specific documents that it may have in its possession; rather the obligation is to disclose only enough of the substance of the claim that may be the reason or part of the reason for affirming the decision so that the applicant can seek to answer the claim.[183] In *Burton*, Wilcox J also commented that the 'provision of particulars about information need not reveal the information itself, and certainly need not involve access to any particular document'.

10.4.46 In practice, it may be difficult in some circumstances to comply with s 359A without disclosing the information which is the subject of a s 375A certificate. There may be cases in which the Tribunal can do no more than provide information already disclosed by repeating what is set out in the delegate's decision.[184] However, the fact that information is summarised or paraphrased will not necessarily mean that it is not clearly particularised.[185]

10.4.47 If the Tribunal concludes that a s 375A certificate is invalid or has been wrongly issued, it cannot rely on it to prevent disclosure of the material under s 359A.

10.4.48 There is no provision equivalent to s 375A for reviews under Part 7 of the Migration Act.

10.4.49 The Tribunal has a discretion regarding disclosure in respect of documents or information that is certified under ss 376 [Part 5] and 438 [Part 7], and as such it is generally more straightforward to comply with both ss 376/438 and 359A/424A.[186]

Section 503A restrictions

10.4.50 Under s 503A, confidential information that has been communicated to an 'authorised migration officer' by a gazetted agency which is relevant to the exercise of a power under ss 501, 501A, 501B or 501C must not be divulged or communicated to another person except in limited circumstances. 'Authorised migration officer' in this context means a Commonwealth officer whose duties consist of, or include, the performance of functions, or the exercise of powers, under the Migration Act.[187] Department and Tribunal officers fall within this definition. Gazetted Agency means, in the case of an Australian law enforcement or intelligence body, a body specified in a Gazette Notice; or in the case of a foreign

[182] *Burton v MIMIA* (2005) 149 FCR 20 at [40]–[42]. Wilcox J noted that if Parliament had intended to make the obligation in s 359A(1) subject to s 375A one would have expected it to have done so but that it had not.
[183] *NATL v MIMIA* [2003] FCAFC 112 at [14]; *SZGUP v MIMA* [2006] FMCA 1130 at [34].
[184] In *Shah v MIAC* [2011] FMCA 18 at [57] the court commented that given that the Tribunal was unable to provide to the applicant any information contained in a statement (subject to a s 375A certificate) which had not already been disclosed, it could do no better than to repeat information from the statement which the delegate had considered dispositive and refer to information which the applicant had provided as indicating the context in which the evidence in the statement had significance.
[185] *Shah v MIAC* [2011] FMCA 18 at [57].
[186] See *WZANC (No 2) v MIAC* [2012] FMCA 504 where the Court found no error in the Tribunal putting the gist of confidential information to the applicant under s 424A, but not the identity of the informant, in circumstances where a notice had not been given by the Secretary under s 438(2) to the Tribunal. The Court held that, even if there was a technical breach of s 438(2) by reason of the Secretary's failure to notify the Tribunal of the confidential information, there was not, and could not have been, any practical injustice arising from the Secretary's failure or the Tribunal's failure to provide the informant's identity. What happened was what the Tribunal would have been entitled to do had notice under s 438(2) been given by the Secretary to the Tribunal. Upheld on appeal in *WZANC v MIAC* [2012] FCA 1461.

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law enforcement body, a foreign country specified in the Gazette Notice; or a war crimes tribunal established by or under international arrangements or international law.[188] A wide range of agencies have been gazetted for this purpose.

10.4.51 The Minister may declare in writing that the information may be disclosed to a specified tribunal,[189] however a member must not divulge or communicate the information[190] and must not be required to divulge or communicate the information to, or give the information in evidence before, the Federal Court or Federal Magistrates Court.[191]

10.5 Procedural requirements and issues

Giving 'particulars'

10.5.1 Sections 359A(1)(a) and 424A(1)(a), and their oral counterparts in ss 359AA and 424AA, require the Tribunal to give the applicant particulars of the relevant information.

10.5.2 This involves the applicant being supplied with sufficient particulars to enable them to meaningfully comment on the information.[192] In *SZMKR v MIAC,*[193] for example, the Court was considering an omission which was found to be information for the purposes of s 424A and held that merely passing on the full text of the reports from DFAT failed to comply with s 424A(1) as this did not convey to the applicant the implicit assertion on which the Tribunal relied. The applicant's response to the letter was also seen to demonstrate that he was unaware he had to deal with the proposition arising from the omission in the material.

10.5.3 Where the context or cumulative consideration of the adverse information would be the reason for affirming the review, the significance of the information might only be conveyed by providing the entirety of the adverse information to the applicant for comment. For example:

- In *Bani Hani v MIBP*[194] the Court held that it was not sufficient to comply with s 359A to only give extracts of the sponsor's detailed letters to the Department regarding the withdrawal and reinstatement of her sponsorship of the applicant for a Partner visa where it was clear from the Tribunal's reasons that the information it considered would be part of the reason for affirming the decision was contained in those letters and extended beyond the given extracts. The Court found that the Tribunal treated all of the sponsor's letters as her

[187] s 503A(9). 'Commonwealth officer' has the same meaning as in s 70 of the *Crimes Act 1914* (Cth): s 503A(9).
[188] s 503A(9). The applicable Gazette Notice is Notice Under Section 503A of the Migration Act 1958 - 2016/028, GAZ 16/001, dated 22 March 2016.
[189] s 503A(3).
[190] s 503(4A).
[191] s 503A(5A).
[192] *Nader v MIMA* (2000) 101 FCR 352.
[193] *SZMKR v MIAC* [2010] FCA 340.
[194] *Bani Hani v MIBP* [2016] FCCA 483.

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evidence and that the entirety of the letters needed to be put so as to give the applicant a meaningful opportunity to comment.

- In *SZGUJ v MIAC*[195] the Court held that despite a general suggestion in the s 424A invitation that the Tribunal had concerns about letters submitted because of identical letterhead, s 424A(1)(a) required particulars of each of the documents which might be found to have used that letterhead. The Court found that the sufficiency of a s 424A invitation should be found by reference to its content when considered in its context of contemporaneous circumstances, and not by hindsight reference to the response of its recipient.

- In *Khan v MIAC*[196] the applicant's sponsor wrote to the Department requesting cancellation of the sponsorship due to his 'fraudulent behaviour' and advised that his employment had ceased. There was no mention in the Tribunal's decision record of the accusations of fraud. The Full Federal Court unanimously held that if information in question is such that it could not have been rejected at the outset as irrelevant, omission of any reference to that information in the Tribunal's reasoning will not operate to exclude the obligation under s 359A. Accordingly, the Tribunal fell into error by not providing the applicant with 'clear particulars' of the contents of the sponsor's letter.

- In *Vyas v MIAC*[197] the Court found that the Tribunal fell into error as the particulars provided by it were not sufficient for the applicant to understand and usefully respond to an allegation of fraud, which was the unstated basis of the Tribunal's invitation to comment. The Court held that the applicant needed to understand that the information or inference she was being asked to respond to was that her IELTS test results had been fabricated and not simply that someone had examined the test and had formed a subjective opinion that she did not merit the test results that she had in fact achieved.

10.5.4 The fact that information may have been summarised or paraphrased does not mean that it has not been clearly particularised.[198] However, if the Tribunal's summary of relevant information is inaccurate in a significant respect, there is a risk a Court will find there has been a failure to provide 'clear particulars'.[199]

10.5.5 When putting to an applicant particulars of information obtained in another Tribunal review, there is generally no obligation to provide an entire evidentiary record of the information being relied upon from the other Tribunal review, provided that an

[195] *SZGUJ v MIAC* [2007] FMCA 134.
[196] *Khan v MIAC* (2011) 192 FCR 173.
[197] *Vyas v MIAC* [2012] FMCA 92.
[198] *Shah v MIAC* [2011] FMCA 18 at [57].
[199] See e.g. *SZONE v MIAC* [2011] FMCA 420 in which the Court found the manner in which the Tribunal recorded that it put information from the Department to the applicant under s 424AA did not accurately reflect the relevant information and the fact that the Tribunal subsequently sent a copy of that information to the applicant's advisor, did not rectify the failure as the information was not put to the applicant under s 424A. By way of contrast in relation to a typographical error, in *SZGSG v MIAC* [2008] FMCA 452 the Court held that notwithstanding the error in the country name in the Tribunal's s 424A letter, the Tribunal did not fail to give correct particulars as the applicant's response to the s 424A letter demonstrated that he clearly understood

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accurate representation of the information contained in the other file has been clearly particularised.[200] For example, in *Singh v MIBP* the Tribunal put adverse information to an applicant the particulars of which included evidence from a witness in another Tribunal matter.[201] The Tribunal had not listened to the evidence of the witness but rather relied upon the reproduction of their evidence in the other Tribunal's decision record. The Court considered that as there was no material difference between what was reproduced in the s 359A letter and what was said by the witness at hearing (having regard to the audio recording of what was said in the other Tribunal review and the decision record for the other review), that the Tribunal had not erred in its approach to discharging its obligation under s 359A.[202]In addition, in relation to conducting a review and considering the material more broadly, the way the Tribunal dealt with the information from the other review, including how it put it under s 359A and its consideration of the applicant's response, reflected it had actively engaged with the material and had not adopted the findings from the other Tribunal decision.[203]

10.5.6 The Tribunal is also not generally required to produce documents to the applicant, or identify the source of the information,[204] however some circumstances may arise where additional detail, such as the source of the information, is required to be disclosed.[205] For example, this was the case in *SZIJU v MIAC* where the Tribunal relied on an account of a telephone conversation between a Tribunal officer and a former employer of the applicant which was emailed to the member by the officer. The Tribunal's s 424A letter quoted part of the email without revealing the source. The Court found that the withholding of the full contents of the email deprived the applicant of knowledge of some of the particulars of information relied upon by the Tribunal.[206] This can be contrasted however with *Kaur v MIBP* in which the Court found no error in the Tribunal not enclosing copies of documents referred to in its s 359A invitation in circumstances where the applicant had already been provided

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why the information was relevant to the review and there was no indication that the error confused or in any way misled the applicant when he responded.

[200] *Singh v MIBP* [2021] FCCA 416 at [74]–[75].

[201] *Singh v MIBP* [2021] FCCA 416 at [30], [36]–[37]. The applicant provided a skills assessment and a letter from a 'Mr K' who confirmed that the applicant had undertaken more than 900 hours of work at Bakers Hut. The Tribunal put adverse information to the applicant; the particulars of the information included that Mr K gave evidence in another Tribunal proceeding (the reference number for that review was given), to the effect that he was aware false Bakers Hut references were circulating, but that only two volunteers completed 900 hours' work experience at his bakery whom he named and the applicant was not one of those named.

[202] *Singh v MIBP* [2021] FCCA 416 at [75]. In coming to this finding the Court also considered that the applicant had been on notice of the witness' evidence for a long time, that he had provided detailed submissions about the witness' evidence in the lead up to the hearing, was given the opportunity to answer questions about the evidence at the Tribunal hearing and had had the opportunity to request the Tribunal summon the witness.

[203] *Singh v MIBP* [2021] FCCA 416 at [59]–[64].

[204] *MIMIA v SZGMF* [2006] FCAFC 138 at [27]; *Nader v MIMA* (2000) 101 FCR 352; *SXRB v MIMIA* [2006] FCAFC 14; *NATL v MIMIA* [2002] FCA 1398, *SZOMB v MIAC* [2010] FMCA 742 at [22] and *SZOCE v MIAC* [2010] FMCA 1007 at [60] - upheld on appeal: *SZOCE v MIAC* [2011] FCA 133.

[205] In *Nader v MIMA* (2000) 101 FCR 352, it was held that the name of the source of the information was required for the applicant to adequately respond. In *SZKCQ v MIAC* (2008) 170 FCR 236, Buchanan J found that the Tribunal was required by s 424A(1)(a) to disclose the questions asked of the High Commission in Pakistan, as well as the responses received, in circumstances where what was not said in response to the questions was significant to the Tribunal's reasoning. The other members of the Court found this was just a breach of s 424A(1)(b), and it is not clear that Buchanan J's reasoning would be followed by other Courts.

[206] *SZIJU v MIAC* [2008] FMCA 51. Similarly, in *SZJDY v MIAC* [2007] FMCA 1760 the Tribunal was required to provide particulars of the context in which adverse information was obtained by the Tribunal from a third party. See also *Park v MIAC* [2009] FMCA 7 where the Court found that the identity of an informant and detail of the information received by that person should have been disclosed pursuant to s 359A. Note, however, that this finding was contingent on the Court's related finding that such information was not 'non-disclosable information' for the purposes of s 359A(4)(c) and s 5(1) of the Migration Act. This reasoning is probably overtaken by the High Court's subsequent decision in *MIAC v Kumar* (2009) 238 CLR 448.

with copies by the Department and it was clear that those were the documents that the invitation was referring to.[207]

10.5.7 'Information' cannot necessarily be clinically divorced from the context in which it appears, and how much of the surrounding context must also be disclosed will depend upon the facts and circumstances of each individual case.[208] For example:

- In *MZZVI v MIBP*[209] where the applicant husband claimed letters of financial support from his parents in relation to his student visa were not genuine and the Tribunal found that they were, and where this finding was critical to the Tribunal's disbelief of the applicant wife's claims, the Court held that a meaningful opportunity to comment or respond to the information required the Tribunal to provide the applicants with copies of the letters.

- In *DCP17 v MICMSMA* the Court held that the phrase 'clear particulars' is capable of incorporating source documents, and in some circumstances disclosure of source documents may be the only way of giving such particulars.[210] In this matter, the source documents were identity documents (provided by a third party informant) which the Court considered to be critical to the Tribunal's determination of whether the applicant had provided incorrect answers in his Protection visa application. As the genuineness of the documents were both an impetus and a determinative factor in the Tribunal's decision, the Court reasoned that they needed to be provided to the applicant.[211] Without them the applicant was not able to provide direct evidence that disputed their authenticity (for instance, they could not have the documents independently examined and put that information to the Tribunal in response) and therefore was not able to meaningfully respond to the information.[212] This judgment illustrates the type of material (e.g. source documents provided by a third party which form the primary basis for the decision) which may need to be put to the applicant for clear particulars to be put to the applicant.

- In *BYT20 v MHA* the Court held that, while the obligation is to provide 'information', an artificial distinction should not be drawn between a document and the information contained in it such that where photographs are in question, the requirement to give clear particulars may require the photographs themselves to be given to the applicant.[213] An applicant may only

[207] *Kaur v MIBP* [2016] FCCA 741. The Court at [16] also held that the fact that the applicant had been provided with those documents by the Department two years prior to the Tribunal hearing did not put any extra obligation on the Tribunal in respect of its s 359A invitation.
[208] *SZNKO v MIAC* (2010) 184 FCR 505 at [29].
[209] *MZZVI v MIBP* [2014] FCCA 2538.
[210] *DCP17 v MICMSMA* [2021] FCA 290 at [59].
[211] *DCP17 v MICMSMA* [2021] FCA 290 at [49].
[212] *DCP17 v MICMSMA* [2021] FCA 290 at [51].
[213] *BYT20 v MHA* [2020] FCCA 2191 at [63],[65]. This matter relates to an obligation under s 129(1)(b) to give particulars of information. The Court found at [63] that the obligation in s 129 is analogous to the obligation in ss 424A/359A. The applicant had been granted a Protection visa on the basis of being an Afghan national and the delegate cancelled the applicant's subsequent Subclass 155 visa under s 128 (relying on the ground in s 116(1)(d)) on the basis that the correct information was that the applicant was a citizen of Pakistan relying on, in part, on a Pakistani Computerised National Identity Card (CNIC) which

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be able to meaningfully respond by looking at the photographs in issue and then reviewing or comparing them.[214]

- In *SZNKO v MIAC*[215] the Tribunal had given the appellant particulars of the substance of a letter provided in connection with a different review that was similar to a letter provided by the appellant in support of his claims. The Court held that giving 'clear particulars' would require the Tribunal to also disclose details of who wrote the other letter and its date and that an opportunity to comment or respond would only be a meaningful opportunity if there had been disclosure of such particulars as to enable the appellant to put that other letter into context.

- However, in contrast, in *Sandhu v MIMAC*[216] the Court found the failure of the Tribunal to identify the source of adverse information when giving 'clear particulars' for the purposes of s 359A/359AA did not deprive the applicant of the ability to comment or respond meaningfully to the information in question.

10.5.8 Whether the information has been identified with sufficient specificity to satisfy s 359A(1)(a) is a matter of fact, degree and context depending on the circumstances.[217] The test is an objective one for which the surrounding circumstances must be taken into account.[218]

Explaining the relevance and consequences

10.5.9 In addition, ss 359A(1)(b)/424A(1)(b), and their oral counterparts in ss 359AA and 424AA, impose on the Tribunal an obligation to ensure, as far as is reasonably practicable, that the applicant understands why the adverse information is relevant to the review and that the applicant understands the consequences of the information being relied upon in affirming the decision under review. The Tribunal is required to give an applicant an adequate indication of why the information adversely affects their case such that they are in a position to respond to the invitation to comment.[219]

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contained a photograph which bore a strong resemblance to photos of the applicant that the Department held. The s 129 notice did not include the photographs.

[214] *BYT20 v MHA* [2020] FCCA 2191 at [68]. The Court reasoned at that 'the person the subject of an allegation that a person has a photograph that they think is a photograph of the other person could only usefully respond by looking at the photographs in issue and comparing them'.

[215] *SZNKO v MIAC* (2010) 184 FCR 505 at [25].

[216] *Sandhu v MIMAC* [2013] FCA 842.

[217] *Shah v MIAC* [2011] FMCA 18 at [56], following *MZXKH v MIAC* [2007] FCA 663 at [18]. In *Kaushal v MIAC* [2012] FMCA 1234 the Court found the substance and relevance of the information being put to the applicant by the Tribunal under s 359A was clear in circumstances where matters in dot point format in the s 359A letter relating to the issue of a false work experience claim were read together with the commentary that followed in the letter. The Court further held that the fact that a legislative instrument, IMMI 11/068, had only recently come into operation, and whether TRA was a relevant assessing authority at the time of the delegate's decision, was not information required to be put: at [113].

[218] In *MZYWJ v MIAC* [2012] FMCA 660 the Court held at [23] that a s 424A invitation which erroneously particularised '…a man named Mr Nitin…' instead of Mr Nitan Patel did not result in the letter failing to meet the requirements of s 424A as there had been extensive discussion about Mr Nitan Patel during the hearing; the difference between Mr Nitan Patel and another man was clearly explained later in the letter; and where the applicant in fact responded to the invitation with reference to information regarding Mr Nitan Patel. Upheld on appeal: *MZYWJ v MIAC* [2012] FCA 1384 at [25]. An application for special leave to appeal was dismissed: *MZYWJ v MIAC* [2013] HCASL 68.

[219] See for example *MZYFH v MIAC* (2010) 115 ALD 409 at [60], [62] and [65], where the Tribunal was found to have not met the equivalent obligation in s 424AA(b). For the Tribunal to simply state that information undermined an applicant's case was too general. Further, telling the applicant that the information 'could' form part of the reason for affirming the decision failed to ensure that he understood the view that the Tribunal had arrived at and misled him as to the gravity of the consequences. It is

Where the Tribunal is putting more than one piece of information to an applicant at the same time, the Tribunal generally separates the various strands of information and is careful to explain what, in relation to each of them, is the relevance of and would be the consequence of the Tribunal relying on each.[220]

10.5.10 In explaining the relevance and consequences, the Tribunal is not required by ss 359A(1)(b)/424A(1)(b) to provide a translation of its letter to an applicant who does not understand English. However, the Tribunal should be careful to use appropriate language and detail, bearing in mind the particular circumstances of the applicant including, for example, any disability.[221] In *SZJOH v MIAC* the s 359A invitation was criticised by the Federal Court, which noted that it was a letter written to a non-lawyer and a person not fluent or conversant with the English language.[222] The Court commented that at a minimum the letter should have clearly identified the source of the requirements being set forth and either extracted the relevant provisions or annexed a copy of the relevant regulations.[223]

10.5.11 The context of a case (for example, the prominent issues in the case and matters an applicant should be aware of from the delegate's decision record or a notice of intention to consider cancelling a visa), have been found to be relevant in determining the adequacy of the Tribunal's explanation of relevance. In *Louis-Jean v MIAC*[224] the Court considered that although the Tribunal did not expressly state that the information put under s 359A might be used to support a particular conclusion, the issue was prominent in the case and implicit in the delegate's decision record, such that the Tribunal had adequately explained the relevance of the information.

10.5.12 Furthermore, the clarity and detail of information provided pursuant to ss 359A(1)(a)/424A(1)(a) may be sufficient to establish compliance with ss 359A(1)(b)/424A(1)(b) without giving further explanation. There may be circumstances where the relevance of the information is self-evident from the information itself, even if the Tribunal has not taken independent steps to ensure that an applicant understands why particularised information is relevant to the review.[225]

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incumbent on the Tribunal to tell the applicant that the information particularised 'would' be the reason or part of the reason for affirming the decision, unless it is persuaded not to do so by the applicant's response. See also *SZONE v MIAC* [2011] FMCA 420 at [112] where the Court found that the Tribunal did not comply with s 424AA [s 359AA] as it put to the applicant that the information 'may be' the reason or part of the reason for affirming the decision under review instead of 'would'. Further, in *Shaikh v MIBP* [2014] FCCA 1011, while finding that the error was not fatal to the Tribunal's decision, the Court noted at [28] that the Tribunal had not properly applied s 359AA by using the words 'likely to be' to convey the relevance and consequence of the information to the applicant. In particular, the Court commented that the words 'likely to be' lacked the imperative sense of 'would be'. This may be compared with *Singh v MIAC* [2012] FMCA 1005 where the Court at [27] held that the Tribunal's use of the word 'will', rather than 'would', was sufficient to ensure that the applicant was aware of the gravity and relevance of the information and the consequence of its acceptance by the Tribunal.

[220] *SZNYL v MIAC* [2010] FCA 1282 at [25], [28].

[221] *Elrifai v MIMIA* (2005) 225 ALR 307 at [34]–[44].

[222] *SZJOH v MIAC* [2008] FCA 274.

[223] *SZJOH v MIAC* [2008] FCA 274 at [14].

[224] *Louis-Jean v MIAC* [2010] FMCA 710 at [30], [33]. The Court found that although the Tribunal had not expressly stated in its s 359A letter that the information provided in the letter might be used to support a conclusion that the applicant had behaved deceitfully towards the Department, it was clear that this was what the Tribunal had meant, given that the question of whether the applicant told the truth to the Department, or lied to the Department, was obviously a prominent issue in the case.

[225] See *Shah v MIAC* [2011] FMCA 18 at [67]. The Court in that case observed at [68] that the applicant's response indicated that he was under no misapprehension as to why the information notified to him was relevant to the review.

10.5.13 Sending the text of information relied upon will not generally be sufficient to discharge the Tribunal's obligations.[226] This is because the Tribunal is required to ensure that the written invitation itself adequately explains the relevance and consequences of the information being relied upon.[227] For example. in *SZQQA v MIAC*[228] the Court found the Tribunal erred when it failed to ensure that the applicant had an understanding of the relevance of his younger brother's claim and the consequences of such information being relied on by the Tribunal. The Court held that whilst the inconsistency between the applicant's and his younger brother's evidence was apparent on the face of the information the Tribunal put under s 424A, in explaining the relevance of the information the Tribunal only referred to inconsistencies in the applicant's own evidence. It was not clear that the Tribunal was seeking comments on matters other than the inconsistencies in the applicant's own evidence and the fact that the Tribunal discussed the younger brother's evidence with the applicant at the hearing did not obviate the need to comply with the requirement to give written notice in accordance with s 424A.

10.5.14 However, a typographical error will not necessarily lead to a conclusion that the relevance and consequences of the information has not been adequately explained.[229] For example, in *Dhiman v MIAC*[230] the Court found that an erroneous reference to cl 485.226 in the Tribunal's s 359A letter was no more than a typographical error and it could be inferred that it was clearly intended to be a reference to cl 485.224. The Court held that the error was a minor and insignificant departure in the context of all of the other information put to the applicant. It did not go to the substance of the information or the relevance of the information or to the practical consequences of reliance on the information which were accurately specified in the s 359A letter.

10.5.15 Further, it is not assumed that because the matter was discussed at the hearing, for example, the applicant already understands the relevance and consequences of the information.[231]

10.5.16 The obligation does not impose a subjective test; that is the Tribunal is not required to ensure that an applicant actually does understand the contents of the letter, or its consequences.[232] What is required of it is to ensure that, as far as is reasonably practicable, this occurs.[233]

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[226] *SZMKR v MIAC* [2010] FCA 340.
[227] *SZQQA v MIAC* [2013] FMCA 231.
[228] *SZQQA v MIAC* [2013] FMCA 231.
[229] *Dhiman v MIAC* [2012] FMCA 646. Undisturbed on appeal in *Dhiman v MIAC* [2012] FCA 1254 9 (application for special leave to appeal dismissed: *Dhiman v MIAC* [2013] HCASL 25).
[230] *Dhiman v MIAC* [2012] FMCA 646.
[231] See *SZLWA v MIAC* [2008] FMCA 952 at [45]. This may be compared with *SZMTJ v MIAC* (2009) 109 ALD 242 at [55], where the Court made *obiter* comments that the requirement imposed by s 424A(2) only fastens upon s 424A(1)(a) and s 424A(1)(c), whereas the obligation in s 424A(1)(b) can be discharged both in writing and at the course of discussion at the hearing. While these comments are non-binding, they may be persuasive for lower courts considering a contention that the Tribunal failed to adequately explain the relevance and consequences of adverse information being relied upon by the Tribunal. See also *SZTNL v MIBP* [2015] FCA 463 where the Court followed *SZMTJ v MIAC* in finding that regard may be had to circumstances beyond the content of the s 424A letter when considering compliance with s 424A(1)(b).
[232] *SZNOL v MIAC* [2009] FMCA 721 at [42]. Undisturbed on appeal: *SZNOL v MIAC* [2010] [2010] FCA 574. In *SZOCC v MIAC* [2010] FMCA 282 at [43], the Court noted that this obligation does not compel the Tribunal to continue to make sure that an applicant actually does understand in circumstances where an applicant refuses to accept any such understanding. However, in *Shah v MIAC* [2011] FMCA 18, the Court suggested at [66] that, subject to the condition of practicability, the Tribunal's duty to

10.5.17 Depending on the circumstances, it may be necessary to give the applicant some additional contextual information in order to ensure as far as reasonably practicable that he or she understands the relevance and consequences of it being relied on by the Tribunal. This is particularly likely to be necessary where the information is obtained through the Tribunal's own inquiries. For example, in *SZKCQ v MIAC,* a Full Court unanimously held that s 424A(1)(b) required the Tribunal, in explaining the relevance of information obtained from the High Commission in Pakistan, to put to the applicant not only the responses but also the questions posed.[234] In that case, what the relevant persons had *not* said in response to the particular questions asked was significant in the Tribunal's reasoning.[235] A similar approach has been taken in the Federal Magistrates Court in *SZJDY v MIAC*[236] and *SZIJU v MIAC*,[237] where the Tribunal was required to give the applicant contextual information, including details of the source or derivation of the adverse information and favourable information to ensure that the relevance of the adverse information was clearly explained.

10.5.18 In the case of invitations given orally, there is some suggestion that correspondence sent after the hearing may assist in ensuring that the applicant understands the relevance and consequences of the information.[238]

10.5.19 The Tribunal is under no obligation to issue a second ss 359A/424A invitation where the response to a ss 359A/424A is inadequate or incomplete.[239]

Invitation to comment or respond

10.5.20 Sections 359A(1)(c)/424A(1)(c), and their oral counterparts in ss 359AA and 424AA, require that the applicant be invited to comment on or respond to the information.[240]

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ensure that an applicant understands the information's relevance imports a subjective element which is not present in s 359A(1)(a). Whether a letter complied with s 359A(1)(b) accordingly required consideration of whether the applicant in fact understood the relevance of the information and, if not, whether the Tribunal had done all that was reasonably practicable to ensure they he or she did. Although in *Thirikwa v MIBP* [2016] FCCA 1501 the Court expressed a view that, it may be incumbent on and reasonably practicable for the Tribunal when utilising s 359AA to ask the applicant directly if they understood why the information was relevant and the consequences of it being relied upon and to seek a response, the reasoning of the Court's decision did not turn upon this view and it appears contrary to the Federal Court in *SZNOL v MIAC* discussed above.

[233] *SZJHJ v MIAC* [2008] FMCA 1044 at [90].

[234] *SZKCQ v MIAC* (2008) 170 FCR 236 .

[235] *SZKCQ v MIAC* (2008) 170 FCR 236 at [3]-[4], [79].

[236] *SZJDY v MIAC* [2007] FMCA 1760 at [28].

[237] *SZIJU v MIAC* [2008] FMCA 51 at [14]–[15]. See also *SZMCB v MIAC* [2008] FMCA 951. In that case s 424A(1)(b) was found to require that the Tribunal give a fuller description of its possible observations of the applicant's demeanour and probably also a copy of the relevant parts of the tape, in order to explain the relevance of information that the applicant at the department interview 'appeared hesitant', particularly when compared with his oral evidence given at the Tribunal hearing.

[238] In *SZNOL v MIAC* [2009] FMCA 721 the Court considered that a letter sent after the hearing at which the Tribunal invoked s 424AA assisted in compliance with s 424AA(b)(i). The Court's approach is consistent with *obiter* comments made in *SZMTJ v MIAC* (2009) 109 ALD 242 at [55] suggesting the equivalent obligation in s 424A(1)(b) can be satisfied through a combination of discussion at hearing and the letter itself.

[239] *SZNTE v MIAC* (2009) 113 ALD 522 at [27].

[240] In *Kaur v MIAC* [2012] FMCA 438 the Court applied the decision in *MIAC v Saba Bros Tiling Pty Ltd v MIAC* (2011) 194 FCR 11 to s 359AA [s 424AA] to find that the Tribunal failed to invite the applicant to 'respond to' adverse information for s 359AA(b)(ii) [s 424AA(b)(ii)]. While the Court's reasons make it clear that the question of compliance will depend on the facts, and that the absence of the words 'respond to' from the Tribunal's invitation at the hearing will not, in itself, be fatal, to avoid doubt it will usually be desirable to expressly invite a comment or response. In *Sandhu v MIAC* [2013] FMCA 140 the Court held nothing in *MIAC v Saba Bros Tiling Pty Ltd v MIAC* (2011) 194 FCR 11 supported the applicant's proposition that the Tribunal has to explain to an applicant the meaning of 'comment' or 'respond' and any difference between those terms. Undisturbed on appeal in *Sandhu v MIMAC* [2013] FCA 842.

10.5.21 There is no requirement in the Migration Act to specify the provision under which an invitation is sent.[241] Nor is there any requirement that the notice must be given in a review applicant's native language.[242]

Written invitations

10.5.22 A written invitation to comment on or respond to information under ss 359A(1)(c)/424A(1)(c) need not use certain words or a precise formula, but the essential character of the letter must satisfy the requirement that it be an invitation to comment on or respond to information.[243]

10.5.23 A written invitation under ss 359A(1)/424A(1) must be given to the applicant by one of the methods specified in ss 379A [Part 5] or 441A [Part 7] or where the applicant is in immigration detention by one of the methods prescribed for the purposes of giving documents to such a person. This requires the invitation to be in writing.[244] However, the Tribunal may exercise its discretion as to which of the available methods of giving the information and modes of comment / response (in writing or at an interview) will be used.[245] The Tribunal ensures that the method chosen is appropriate in the circumstances.

10.5.24 According to ss 359B/424B, the invitation must specify:

- the way in which the comments are to be given by the applicant;
- the period of time within which the comments are to be given if the comments are to be given otherwise than at an interview; and
- the time and place that the comments are to be given if the comments are to be given at an interview.

10.5.25 It has been held that not all instances of technical non-compliance with these obligations are fatal. For example in *SZEXZ v MIMIA* and *M v MIMA*, the Court held that while the period stipulated in the invitation was not correct in that it was *longer* than the prescribed period, it did not invalidate the Tribunal's decision.[246]

10.5.26 However, if any of these details are not specified in the invitation there will be a jurisdictional error if the defect leads to the applicant being denied natural justice as

[241] *Bakshi v MIBP* [2015] FCCA 2092.
[242] *BZAGU v MIBP* [2015] FCA 920 at [18] (application for special leave to appeal dismissed: *BZAGU v MIBP* [2015] HCASL 214).
[243] In *Shrestha v MIBP* [2014] FCCA 34, the Court found that a letter headed 'Invitation to Comment on or respond to Information', but which did not include any particular information for comment and referred to certain evidence which the applicant should provide, was not an invitation to give information pursuant to s 359. As there was no link to s 359C(1) or (2), the Tribunal was found to have failed to comply with its own statutory obligations under s 359C, compliance with which was necessary for the applicant to 'lose' the opportunity of a hearing by operation of s 360(2)(c).
[244] *SAAP v MIMIA* (2005) 228 CLR 294. McHugh J at [71] stated that the term 'must' in s 424A(1) compels the Tribunal to provide the information in writing and that this is so, even if the Tribunal puts the information to the applicant at an interview or when the applicant appears before the Tribunal to give evidence and present arguments. *SAAP* predated the introduction of s 359AA/424AA.
[245] *SAAP v MIMIA* (2005) 228 CLR 294 at [183], [65].
[246] *SZEXZ v MIMIA* [2006] FCA 449; *M v MIMA* (2006) 155 FCR 333.

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a result.[247] For example, if the Tribunal failed to specify the prescribed period for response and then relied upon the applicant's failure to respond in time to proceed to decision without inviting the applicant to a hearing, it is likely that a jurisdictional error would be established.

10.5.27 The Tribunal member, who is constituted as the Tribunal for the purposes of conducting the review, takes responsibility for the letter and its contents.[248]

10.5.28 The timing of a ss 359A/424A letter may depend on whether the information is received before or after the hearing, and also whether apprising the applicant of the information prior to attending the hearing might assist them to be able to respond to the issues which the information may raise.[249] Justices McHugh, Kirby and Hayne in *SAAP v MIMIA* held that s 424A applies before, during and after the applicants appear before the Tribunal hearing. Their Honours rejected the Minister's contention that Division 4 of Part 7 was intended to establish a sequential procedural process from which the Tribunal could not depart.[250] Further, in *SZKLG v MIAC,* a Full Court of the Federal Court confirmed that there is no express statutory basis for inferring any temporal requirements on the giving of an invitation under s 359A or 424A.[251] The Court rejected the contention that the Tribunal should have issued its s 424A letter prior to the hearing as the information was available to it at that time.[252]

<u>At interview or in writing?</u>

10.5.29 The written invitation under ss 359A/424A must specify the way the comments or response may be given.[253] The way in which comments or response are to be given is the way that the Tribunal considers appropriate in the circumstances and could be in writing, or at an interview conducted by telephone, video link or in person.[254]

10.5.30 When receiving comments orally rather than in writing, the prescribed period of notice is generally shorter than is the case if the invitation is to comment or respond in writing.

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[247] *MIAC v SZIZO* (2009) 238 CLR 627. In *SZKJI v MIAC* [2009] FMCA 1252, the Tribunal failed to give the full period of notice when it invited comments at an interview. Contrary to authority of the Federal Court in *SZDQL v MIMIA* (2005) 144 FCR 356 and *SZEXZ v MIMIA* [2006] FCA 449, the Court found that there was a breach of the notice provisions. However, relief was not granted as the applicant did not suffer a denial of natural justice.
[248] *SZUCH v MIBP* [2015] FCCA 3030 at [23]. In that case the Court did not take issue with the fact that the letter was signed by a Tribunal officer and not the Tribunal member. Upheld on appeal: *SZUCH v MIBP* [2016] FCA 185 although this issue was not raised in the appeal.
[249] Although note the observations of the Court in *SZDGB v MIMIA* [2006] FMCA 341 at [26] which suggest that the Tribunal should adopt the practice of sending s 424A [s 359A] letters to applicants at the time of hearing invitation if the Tribunal considers that it has adverse information before it which falls within s 424A. This view has not been adopted elsewhere.
[250] *SAAP v MIMIA* (2005) 228 CLR 294 at [60]–[63], [154]–[158], [185]–[202]. The contrary suggestion in *SZHLM v MIAC* [2007] FCA 110 does not appear correct.
[251] *SZKLG v MIAC* (2007) 164 FCR 578 at [34].
[252] *SZKLG v MIAC* (2007) 164 FCR 578 at [32]–[36]. See also *SZIOZ v MIAC* [2007] FCA 1870 at [67]; *SZMUO v MIAC* [2008] FMCA 1671 at [9]–[10] and *Singh v MIBP* [2014] FCCA 1778. In *Singh*, although the Court found that the Tribunal was not required to put information to the applicant in writing prior to the hearing, some of its comments suggest there *may* be circumstances in which the Tribunal's obligation to 'act in a way which is fair and just' (as per s 357A(3)) would require it to disclose certain information before a hearing, but the Court did not consider what those circumstances might be: at [105] and [112].
[253] ss 359B(1), 424B(1).
[254] ss 359B(2), 424B(2), 359B(3), 424B(3).

10.5.31 The legislation does not prevent the interview being conducted by someone other than the member constituting the Tribunal. Sections 364 [Part 5] and 428 [Part 7] authorise the taking of evidence by others on behalf of the Tribunal.[255]

10.5.32 It is open to the Tribunal to require evidence given at an interview to be under oath or affirmation.[256]

Oral invitations

10.5.33 If the Tribunal chooses to discharge its statutory obligation under ss 359A/424A by inviting the applicant orally at hearing to comment on, or respond to[257], the invitation, it must:

- advise the applicant that they may seek additional time to comment or respond to the information;[258] and
- if the applicant does request additional time, and the Tribunal considers the applicant reasonably needs additional time, adjourn the review.

10.5.34 The opportunity to comment or respond must be a 'meaningful one'[259] and the applicant must be positively advised that they may seek additional time in which to respond. While the Tribunal is not obliged to ritualistically repeat the words of ss 359AA(1)(b)(iii)/424AA(1)(b)(iii), only asking whether the applicant wishes to make a submission at the hearing, rely on previous submissions or have a short break do not involve the Tribunal actually advising the applicant that they may seek additional time and as such will not satisfy the procedural obligations.[260] Similarly, statements which merely implicitly convey that they may seek and be given additional time will also not suffice.[261] For example

- In *Shrivastava v MIBP*,[262] although the Court found that the availability of additional time was implicit in the Tribunal's questions, s 359AA required the Tribunal to expressly advise the applicant that he could seek extra time to comment or respond. Similarly in *Singh v MIBP*,[263] asking the applicant if he

[255] Note in *SZHKA v MIAC* (2008) 172 FCR 1, Gyles J expressed the view that the evident purpose of s 428 is to provide for a situation in which it is impractical for a member to hear evidence and would only be used in cases of necessity: at [30].
[256] See ss 363(1)(a) and 427(1)(a).
[257] In *Kaur v MIAC* [2012] FMCA 438 the Court applied the decision in *MIAC v Saba Bros Tiling Pty Ltd v MIAC* (2011) 194 FCR 11 to s 359AA [s 424AA] to find that the Tribunal failed to invite the applicant to 'respond to' adverse information for s 359AA(1)(b)(ii) [s 424AA(1)(b)(ii)]. While the Court's reasons make it clear that the question of compliance will depend on the facts, and that the absence of the words 'respond to' from the Tribunal's invitation at the hearing will not, in itself, be fatal, to avoid doubt it will usually be desirable to expressly invite a comment or response. with a stricter approach was adopted in *Shrivastava v MIBP* [2015] FCCA 483 however in which the Court found that the Tribunal's failure to expressly invite the applicant to 'respond' to the adverse information, having only invited him to comment on it, resulted in a jurisdictional error.
[258] ss 359AA(b)(ii) and 424AA(b)(iii).
[259] *MZYFH v MIAC* (2010) 115 ALD 409 at [33] citing *SZNKO v MIAC* (2010) 184 FCR 505 at [23], [27].
[260] *SZNKO v MIAC* [2010] FCA 297 at [29]–[31]; cited with approval in *SZGTV MIBP* [2015] FCAFC 3 at [56].
[261] *SZNKO v MIAC* [2010] FCA 297 at [31].
[262] *Shrivastava v MIBP* [2015] FCCA 483. The Court found that the Tribunal had failed to advise the applicant that he could seek extra time to comment or respond pursuant to s 359AA(b)(iii) – (now s 359AA(1)(b)(iii)).
[263] *Singh v MIAC* [2016] FCCA 3232 at [53]–[57] in which the Court applied the reasoning in *SZNKO v MIAC* [2010] FCA 297 and *SZTGV MIBP* [2015] FCAFC 3. Although a contrary view was taken in *Ahmed v MIBP* [2016] FCA 1029 at [66]–[67] in which the Tribunal's questions of whether the applicant would respond 'now' or in writing or request an adjournment to 'get a bit more time to provide comments' were sufficient to implicitly convey the advice, this is difficult to reconcile with the existing Federal Court authority in *SZNKO* and *SZTGV*.

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wanted a 'short break' or advising him that he could make a written submission did not amount to advising him, in the positive terms required, that he could seek additional information. This was the case notwithstanding that the applicant was represented by their migration agent during the hearing, it was apparent that the agent understood the question of a short break related to the adverse information that had just been put, or, that after having taken a break, the applicant advised the Tribunal that he would be relying on written submissions and his earlier oral evidence to provide his comments or response.

- In *SZPZJ v MIAC*[264] the Federal Court adopted a pragmatic approach in concluding that s 424AA(b)(iii) does not require the Tribunal to advise an applicant of the right to seek additional time separately and in relation to each piece of information, in circumstances where the Tribunal makes clear in a general statement that the invitation extends to all s 424A information. Also in that case, the Federal Court confirmed that the expression 'the review' in s 424AA(b)(iv) refers to a process that extends beyond any oral hearing that takes place in accordance with s 425(1) - that is, the reference in s 424AA to adjourning the review is to the whole process and not the oral hearing, and provided that it acts fairly and justly, the Tribunal need not adjourn an oral hearing where it considers that additional time is required for comment.[265]

- In *SZSWV v MIBP*,[266] the Court found no error in the Tribunal discussing information of potential concern with the applicant in the hearing and eliciting a response prior to formally putting the information to the applicant under s 424AA, in circumstances where no unfairness was disclosed and there was no suggestion that the applicant was taken by surprise or denied an opportunity to provide comment or responses.

10.5.35 Where a request for additional time is made, the Tribunal is not required to immediately adjourn the review without hearing further argument, evidence or any matter related to the review.

10.5.36 In relation to whether the period allowed for the response to the s 424AA invitation is reasonable, the Tribunal also has regard to the general direction in ss 357A(3)/422B(3) to act in a way that is 'fair and just'.[267] the Court in *MIBP v*

[264] *SZPZJ v MIAC* [2012] FCA 18 at [45]. See also *Mfula v MIBP* [2016] FCCA 161 in which the Court held that the Tribunal did not err in circumstances where it started to remind the applicant of their right to seek an adjournment but, due to an interruption, did not complete its statement or refer to an adjournment. As the applicant had been previously informed of his right to seek an adjournment during the hearing, notwithstanding the interruption the content and meaning of what was said complied with the requirements of s 359AA (at [16] and [17]).

[265] *SZPZJ v MIAC* [2012] FCA 18 at [50]–[51]. See also *ADA15 v MIBP* [2016] FCCA 291 in which the Court held that, once a request for additional time was made, the Tribunal was not required to immediately adjourn the review without hearing further argument, evidence or any matter related to the review. Where the Tribunal had given the applicant further time to respond to he information (and continued with the remainder of the hearing), the Court held that the Tribunal had effectively adjourned the review in accordance with s 424AA(1)(b)(iv) until at least the end of the granted period: upheld on appeal in *ADA15 v MIBP* [2016] FCA 634.

[266] *SZSWV v MIBP* [2013] FCCA 2146. Upheld in *SZSWV v MIBP* [2014] FCA 513.

[267] In *MIAC v SZMOK* (2009) 257 ALR 427 the Full Federal Court found that s 422B(3) (and by implication s 357A(3)) was an exhortative provision and does not contain a free standing obligation, but simply draws content from the other provisions of Division 4. For further discussion see Chapter 7 – Procedural fairness and the Tribunal. See also *SZNPU v MIAC* [2009] FMCA 963 at [70]–[71] and *SZNSI v MIAC* [2009] FMCA 1027 at [65] where the Court commented that if there is a lengthy list of

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SZTJF[268] found that the period was reasonable in light of the information that was in fact put to the applicant, and not other information that was not directly related to the respondent's claims or her credibility. In *SZLSX v MIAC*,[269] the applicant sought an adjournment of three months to respond to adverse information disclosed orally. The Tribunal declined this request and instead adjourned the hearing for approximately 1 month. The Court found that the length of time given was reasonable in all the circumstances. Similarly, in *SZMFY v MIAC* the applicant sought additional time to submit documentary proof from India in response to matters raised under s 424AA. The Court found no error in the Tribunal's refusal to grant the additional time on the basis that the relevant documentation would have had no bearing on the Tribunal's decision and the applicant did not suffer any practical unfairness.[270]

What constitutes a comment or response to a written invitation?

10.5.37 The legislation does not expressly define the terms 'comment' or 'respond' for the purposes of ss 359A and 424A and any material received following a written invitation is considered on a case by case basis. In *MIAC v Saba Bros Tiling Pty Ltd*[271] the Federal Court gave the terms broad meaning and held that a 'response' did not require substantive remarks or observations. It noted the Migration Act imposed no minimum requirement of content for a response or comment, and accordingly, any reply or answer directed to the information itself would constitute a response. In that case, the Tribunal had invited the applicant's solicitor to give comments on or respond to the information in question. The respondent's solicitor's letter 'noted' the 'adverse information', that this information had been put to the respondent and that he still wished to proceed with a hearing. The Court held that this constituted a response to the information in the Tribunal's invitation.[272]

10.5.38 *Saba Bros Tiles* was later distinguished in *Singh v MIBP*,[273] a case in which the applicant was invited to comment on or respond to information that he was not the subject of an approved nomination by his employer. The applicant's migration agent responded by letter confirming receipt of the Tribunal's invitation, advising that their office would be closed over the Christmas period and requested additional time to comment. The letter also advised that the applicant had an employer willing to sponsor him for another visa and that the new application would be lodged shortly, following which the applicant expected to withdraw his review before the Tribunal. The Court found no error in the Tribunal proceeding without a hearing in these circumstances (on the basis that the applicant had not provided a 'response' for the purpose of the s 359A invitation), distinguishing *Saba Bros Tiles* on the basis that the letter did not indicate that the applicant's agent had obtained instructions, that

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information, caution may direct, in the appropriate circumstances, that a letter should be sent to the applicant under s 424A(1) instead of using the oral power in s 424AA.
[268] *MIBP v SZTJF* [2015] FCA 1052 (application for special leave to appeal dismissed: *SZTJF v MIBP* [2016] HCASL 60).
[269] *SZLSX v MIAC* [2008] FCA 1357 at [11]–[15]..
[270] *SZMFY v MIAC* [2009] FCA 139 at [19]–[21].
[271] *MIAC v Saba Bros Tiling Pty Ltd* (2011) 194 FCR 11.
[272] *MIAC v Saba Bros Tiling Pty Ltd* (2011) 194 FCR 11 at [31]–[34].

the information had been assessed as adverse, or that the applicant still wanted an oral hearing.

10.5.39 *Saba Bros Tiles* was also distinguished in *COG18 v MHA*,[274] a case in which the self-represented applicant was invited to comment on information that answers in his protection visa application form were worded substantially the same as those given by another protection visa applicant living at his address. The applicant responded explaining that he had just read the email and requesting advice and assistance with his case. The Court found no error in the Tribunal proceeding without a hearing, distinguishing *Saba Bros Tiles* on the basis that the applicant's response was not directed to the information in the invitation, and the applicant did not refer to a hearing. Although not referring to *Saba Bros Tiles*, in *Kalakuntla v MHA*[275] the Court found that an email provided by an applicant to the Tribunal after a s 359A invitation was sent could not be regarded as a response as the email did not address the information put to the applicant under s 359A or make any reference to the invitation.

10.5.40 Where an applicant responds to an invitation by requesting further time which is then granted, the failure to provide comments or response during that additional period will also lead to the hearing entitlement being lost. [276]

Combined applications for review

10.5.41 Where the Tribunal has before it a combined review application, obligations under s 359A or 424A may be owed to each applicant in the combined application.[277] In *DZAER v MIBP*,[278] for example, the Court found the Tribunal did not properly provide the applicant wife an opportunity to comment on three pieces of adverse information from a Compliance Client Interview with the applicant husband. The Court noted that the mere fact that the applicant wife was not present during the interview did not

[273] *Singh v MIBP* [2016] FCCA 2229 at [23]–[28]. Additionally, as the applicant was given further time to comment or respond, the applicant's failure to do so within that further period also entitled it to proceed with review without the applicant appearing (at [29]–[30]). Findings upheld on appeal: *Singh v MIBP* [2017] FCAFC 105.
[274] *COG18 v MHA* [2019] FCCA 1092 at [129]–[136]. The applicant's email was received outside the prescribed period and followed a second email from the Tribunal inviting comment. The Court found that the Tribunal's second invitation to comment was not an extension of time under s 424B(4), as it was issued after the prescribed period in the first invitation expired, but was an opportunity to comment on, or provide, information to the Tribunal before it made the decision under s 423 (at [119]–[125]). The Court reasoned that, in any event, the contents of the email could not constitute a response or comment for the purpose of s 424A (at [128]).
[275] *Kalakuntla v MHA* [2019] FCCA 3663 at [17]–[20]. The applicants were invited to comment or respond to information that the Tribunal had refused the employer's nomination. The applicants sent an email to the Tribunal which established they knew that the review of the nomination had been unsuccessful, with the balance of the email concerning when the applicants would be able to leave Australia. The Court found that a fair construction of the email was that of acceptance of the inevitability of the failure of the review. The Court also noted that nothing the applicants could have submitted would have had any utility as their application had to be affirmed without a valid nomination. Therefore, it would have been futile to remit a review application that would subsequently have to be affirmed.
[276] *Singh v MIBP* [2016] FCCA 2229 at [29]–[30]. Findings upheld on appeal: *Singh v MIBP* [2017] FCAFC 105.
[277] In *SZONZ v MIAC* [2011] FMCA 490 the applicants' submitted that the oral evidence of each applicant constituted 'information' which had to be put to the other applicants for comment. The Court found that, insofar as matters from each applicant that amounted to 'information' which had to be put to the other applicant for the purposes of s 424A, those matters were put to each of the applicants at [174]. However, in *SZSOG v MIAC* [2014] FCCA 769, the Court found no basis to distinguish inconsistencies in evidence given by co-applicants from internal inconsistencies in the evidence given personally by one applicant. Such inconsistencies did not constitute 'information', and the Tribunal was not obliged to invite either co-applicant to comment on the evidence from which the inconsistencies arose at [108]. On appeal, the Federal Court confirmed that the Tribunal's conclusion that the accounts of the co-applicants lacked consistency or did not corroborate each other did not amount to a 'rejection, denial or undermining' of either applicant's claims and therefore did not amount to 'information' for the purposes of s 424A(1): *SZSOG v MIBP* [2014] FCA 1053.
[278] *DZAER v MIBP* [2015] FCA 568.

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necessarily mean that she could not provide meaningful comment on what was said during the interview.

10.5.42 The Tribunal carefully considers the relevance of any 'adverse information' to each review applicant's claims and the consequence of the Tribunal relying on it and ensures that this is explained in the letter, bearing in mind that these may be different for different applicants in the combined application.

10.5.43 In some cases, such as those where the review applicants have made different claims, the Tribunal may find that it is more convenient to comply with its ss 359A/424A obligations by sending separate letters to each applicant. However, this is not *required* by the Migration Act.

10.5.44 The Tribunal may send a single letter to all applicants. In *SZKHV v MIAC*, the Federal Magistrates Court found that the Tribunal complied with its statutory obligations by sending a single letter which was clearly expressed to be an invitation to comment to both review applicants in a combined application.[279] The Court commented that it would be absurd if the Tribunal was required to write a separate letter in respect of each applicant identifying, essentially, the same information in circumstances where the applicants nominated the same authorised recipient and the Tribunal's concern was in respect of the same information.[280]

Reconstituted reviews

10.5.45 Where a Tribunal decision has been set aside by a court and the matter remitted for reconsideration owing to a jurisdictional error, it does not follow that all the steps and procedures taken in arriving at that invalid decision are themselves invalid.[281] The Tribunal still has before it the material that was obtained when the decision that had been set aside was made and is obliged to continue and complete the particular review, not commence a new review.

10.5.46 The Full Federal Court in *SZEPZ v MIMA* held that insofar as s 424A(1)(a) refers to a state of mind or mental process of determining if the information is information that is the reason or part of the reason for affirming the delegate's decision, it must be taken to refer to the state of mind or mental process of the particular Member. However, the Tribunal must give the information by one of the methods in s 441A, all of which contemplate it being given by the Registrar or an officer of the Tribunal or an authorised person, as well as a Member. In that case, the previous Member had sent a s 424A letter. The relevance of the information remained the same for the Member who completed the review, and accordingly, there was no failure to comply with s 424A in relation to the making of the second decision.[282]

[279] *SZKHV v MIAC* [2009] FMCA 264. An appeal was dismissed: *SZKHV v MIAC* [2009] FCA 823.
[280] *SZKHV v MIAC* [2009] FMCA 264 at [54].
[281] *SZEPZ v MIMA* (2006) 159 FCR 291 at [39] (application for special leave to appeal dismissed: *SZEPZ v MIAC* [2008] HCATrans 91 at [305]). See Chapter 6 – Constitution and reconstitution for further discussion.
[282] In contrast, see *SZMFI v MIAC* [2009] FMCA 789 where the reconstituted Tribunal did not consider that information obliged to be disclosed by the previous Tribunal would be the reason or part of the reason for affirming the decision under review. Accordingly, there was no longer any requirement to disclose it under s 424A.

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10.5.47 It follows from this view that any information given to the Tribunal for the purposes of the review prior to the reconstitution is still before 'the Tribunal' following the reconstitution. Applying the reasoning in *SZEPZ v MIMIA*, the Federal Court in *SZDWB v MIAC*, found that evidence given by the applicant at the hearing before the original member still fell within the exception in s 424A(3)(b) after the original decision was set aside and remitted for reconsideration.[283]

10.5.48 The reasoning outlined above would be equally applicable where the Tribunal is reconstituted due to the unavailability of the original member or for the efficient conduct of the review. The Migration Act indicates that the Tribunal as reconstituted is to 'continue to finish the review' and may have regard to any record of the proceedings of the review made by the Tribunal as previously constituted.[284]

10.5.49 However, it should be noted that a different view of the Tribunal's position following a remittal or reconstitution was strongly expressed by Gyles J, with whom Gray J agreed, in *SZHKA v MIAC.*[285]

10.5.50 In that case, the Court was called upon to consider whether the Tribunal was obliged to conduct a fresh hearing under s 425 in circumstances where the Tribunal was reconstituted after a remittal. Whilst declining to decide generally whether, following a remittal, the Tribunal must conduct a *de novo* review or how such a review is to take place, Gyles J commented that 'it is difficult to see an escape from the proposition that once an administrative decision is set aside for jurisdictional error, the whole of the relevant decision making process must take place again… Mandatory statutory obligations must be carried out.'[286]

10.5.51 On this view, following a reconstitution, the Tribunal would be obliged to send a new s 424A letter if there is information that would be the reason or a part of the reason for affirming the delegate's decision, irrespective of whether that information and the relevance of it was previously put in a s 424A letter by the original member.

10.5.52 As the Court in *SZHKA* did not have to consider the matter directly, the views of Gyles and Gray JJ are non-binding *obiter dicta*. In contrast, the *ratio* of the unanimous Full Court judgment in *SZEPZ* appears to be that so long as an applicant has been given information that the member of the Tribunal who is to make the decision considers would be the reason, or part of the reason, for affirming the decision under review, s 424A will be satisfied. The obligation in s 424A could be satisfied by the Tribunal as originally constituted sending the letter. It appears that

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[283] *SZDWB v MIAC* [2008] FCA 92 at [14]. In *NBKB v MIAC* [2008] FMCA 1046 at [37] it was found to be 'well established' that when a matter is remitted to the Tribunal for reconsideration the evidence before the Tribunal as originally constituted does not lose its character as information presented '*to the Tribunal*' for the purposes of the review. See also *SZJHX v MIAC* [2007] FCA 1337 at [45]; *SZJXH v MIAC* [2007] FCA 1691 at [25].
[284] See ss 355(4), 355A(3) [pt 5]; ss 422(2), 422A(3) [pt 7].
[285] *SZHKA v MIAC* (2008) 172 FCR 1.
[286] *SZHKA v MIAC* (2008) 172 FCR 1 at [37], [22]–[24].

the judgment in *SZEPZ* remains the leading authority on the issue of the Tribunal's s.424A obligations following a remittal for the time being.[287]

Time periods for comment or response to a written invitation

10.5.53 The prescribed periods of time for the giving of comments or a response to a written invitation depend on a number of factors, including whether or not the applicant is in immigration detention, whether the comments are to be provided at an interview or by some other method and whether the invitation was sent before 1 July 2013 or on or after 1 July 2013.[288]

10.5.54 For invitations to provide comments or a response sent before 1 July 2013, reg 4.35 (protection) drew a distinction between comments to be provided from inside or outside Australia.[289] However, for primary decisions made on or after 1 July 2013 and for invitations to provide comments or a response sent on or after 1 July 2013, this distinction has been removed.[290]

10.5.55 The prescribed periods, operate from the time of receipt[291] of the ss 359A/424A invitation, and are set out in regs 4.17, 4.18 [Part 5 - migration] and regs 4.35, 4.35A [Part 7 - protection] of the Regulations.

10.5.56 In the case of comments to be given otherwise than at interview, the applicant has the full prescribed period to respond and comments may be provided at any time within the prescribed period.[292] However, where comments are to be given at an interview, the interview may be scheduled at any time within the prescribed period.[293]

10.5.57 A response to the invitation is taken to be given to the Tribunal when it is received at a registry of the Tribunal.[294] If the last day of the relevant prescribed period falls on a Saturday, on a Sunday or on a day which is a public holiday or a bank holiday in the place where the comments are to be given, the comments may be given on the first

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[287] Note that in *SZMRA v MIAC* [2008] FMCA 1570 at [23], the Federal Magistrates Court followed the approach in *SZEPZ* over that in *SZHKA* but did not expressly refer to or cite either judgment. See also *Mfula v MIBP* [2016] FCCA 161 at [14]–[15], in which the Court held that it was bound by *SZEPZ* but did not refer to or cite *SZHKA*.
[288] *Migration Legislation Amendment Regulations 2013* (No 1) (Cth) (SLI 2013, No 33), as amended by *Migration Legislation Amendment Regulations 2013* (No 2) (Cth) (SLI 2013, No 96), amended the *Migration Regulations 1994* by aligning prescribed periods in relation to invitations to provide comments or a response for reviews under Part 5 and Part 7 of the Migration Act. The alignment of the prescribed periods commenced on 1 July 2013 and applied to primary decisions made on or after 1 July 2013, and any invitation to provide comments or a response sent on or after 1 July 2013.
[289] In *SZKJV v MIAC* [2008] FMCA 26 the Court found that a s 424A letter directed to the applicant (who was in Australia) was inviting comment to be provided from a place *in Australia*. The Court found that it was not to the point that the applicant might have sought to respond by obtaining information from overseas because the notice did not in its terms require information to be provided from overseas. See also *SZQBA v MIAC* [2011] FMCA 725 where the Court applied *SZKJV v MIAC* to find the Tribunal did not request information under s 424(2) to be obtained from overseas. In *MZYMP v MIAC* [2011] FMCA 884 the Court found the distinction between reg 4.35(3) and 4.35(5) was based on where the person from whom the comment or response is to come is located and not where potential sources of information which may be needed might be located.
[290] SLI 2013, No 33 as amended by SLI 2013, No 96.
[291] See Chapter 8 – Notification by the Tribunal for discussion on when the applicant receives a document. See also *ABC World Pty Ltd v MIMIA* [2005] FMCA 934 for discussion on computing time periods.
[292] ss 424B(2), 359B(2).
[293] ss 424B(3), 359B(3).
[294] regs 4.17(6), 4.35(6).

day following which is not a Saturday, a Sunday or a public holiday or bank holiday in that place.[295]

10.5.58 The Court in *SZQQA v MIBP* held that there is nothing in the language of ss 424C(2)/359C(2) which imposes a restraint on the Tribunal from proceeding to make a decision on the review until after the time for giving comments or a response has passed in circumstances where the applicant has provided the comments or the response within the prescribed period.[296] There may however be circumstances in which the fact that the Tribunal made a decision before the expiration of the prescribed period would involve jurisdictional error. If, for example, an applicant wishes to provide more than one response and if the review is finalised prior to the expiry of the prescribed period, it may be argued that the Tribunal's invitation was not a genuine one.[297] In most cases, the material submitted by applicants in response to a ss 359A/424A invitation will be relevant to a central issue under consideration and will therefore be material the Tribunal is required to take into account.[298]

10.5.59 See the table below for prescribed periods.

Extensions of time

10.5.60 Under ss 359B(4)/424B(4), the Tribunal has a discretion to extend the period of time within which an applicant is to provide their comments or response where the invitation is to do so otherwise than at an interview. The Tribunal's discretion must be exercised reasonably.[299] The discretion may be exercised whether or not the applicant asks for an extension, however, in practice it would usually be the case that the applicant has asked. If an applicant does ask for an extension of time, it need not be in any particular form, although the Tribunal generally requests that applicants submit any request for an extension in writing for evidentiary purposes.

10.5.61 The period of time for the extension is at the discretion of the member, having regard to all the circumstances of the matter and the reasons given for the request.[300] This is because there is no prescribed further period for extensions of time. In *Bautista v*

[295] *Acts Interpretation Act 1901* (Cth) s 36(2).
[296] *SZQQA v MIBP* [2015] FMCA 231 at [255] and [266]. See also *Singh v MIBP* [2015] FCCA 2958 at [28], upheld on appeal: *Singh v MIBP* [2016] FCA 620.
[297] In *SZGPW v MIMIA* [2005] FMCA 1575, the Court indicated that the Tribunal may be entitled to complete its review on the same day as the last day comments could be received by the Tribunal in circumstances where the applicant had responded in a manner which would not have suggested that she wished to present further submissions or materials. Note, however, that these comments were arguably *obiter*.
[298] See *SZIVE v MIMA* [2007] FMCA 148 and *SZIVF v MIMA* [2007] FMCA 147. The Federal Magistrate in these related cases went as far as to say that there was an implied duty under s 424A to consider the material. Irrespective of the operation of ss 357A/422B, a failure to take into account relevant material can result in jurisdictional error consistent with the High Court's decisions in *Craig v State of South Australia* (1995) 184 CLR 163 and *MIMA v Yusuf* (2001) 206 CLR 323.
[299] See *Hossam v MIBP* [2016] FCA 1161 at [55] in which the Federal Court found that the Tribunal's decision not to extend the time under s 359B(4) within which to respond to a s 359A invitation was not unreasonable in circumstances where the appellant, who had an authorised recipient, had not made an application for an extension of time and no reason was apparent on the information before the Tribunal as to why the appellant might not have been able to comment. The authorised recipient had replied to the invitation stating only that he had been unable to contact the appellant but that he could be overseas (although movement records showed the appellant as onshore). While the Tribunal had not given reasons in its decision specifically addressing its consideration of the discretion, the considerations referred to by the Court established that the Tribunal had not acted unreasonably.
[300] *Bautista v MIBP* [2018] FCA 1114 at [78].

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MIBP, the Federal Court held that reg 4.18A(4) was invalid.[301] The Court reasoned that as reg 4.18A(4) provided that the prescribed period of time for the extension started when the person receives notice, depending on when further time was requested and the Tribunal actioned the request, the prescribed further period would be meaningless. This is because the original period to respond and the further period could overlap where an applicant requested further time early in the original period and the request was also granted early in the period. The Court held that this created potentially arbitrary results. Given that the other prescribed further periods for extensions use similar wording, they are also likely to be invalid.[302]

10.5.62 It is open to the Tribunal to grant a short extension if the applicant gives reasons justifying a short extension. Conversely, if the circumstances warrant, a long extension may be granted where the applicant requires one to respond to the invitation.

10.5.63 Where the comments/response are to be made at an interview, the Tribunal has a discretion under ss 359B(5)/424B(5) to change the time of the interview. The Tribunal may change the time to a later time within the prescribed period.[303] The Tribunal may also extend the period and change the time to a time within the extended period.[304] Given that the prescribed further periods for extensions of the time to give information at an interview[305] use similar wording to reg 4.18A(4), which was held to be invalid in *Bautista v MIBP*, they are also likely to be found to be invalid if considered by a court. This means that the Tribunal may extend the period at its discretion, having regard to the circumstances of the case.

10.5.64 The Tribunal appears to have the power to extend the period to respond, or extend the period in which an interview is to occur, on more than one occasion.[306] This is not free from doubt as the Federal Circuit Court in *Yang v MIAC*[307] and *SZUSR v MIBP*[308] proceeded on the basis that the period may only be extended once, although this does not appear to be the *ratio* of the judgments and would therefore not be binding on the Tribunal.[309] Having regard to the wording of the provision themselves, the Migration Act does not expressly prohibit the Tribunal from exercising its discretion to extend the period on one occasion only. Further, s 33(1) of the *Acts Interpretation Act 1901* (Cth) provides that where an Act confers a power,

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[301] *Bautista v MIBP* [2018] FCA 1114 at [53]. Regulation 4.18A(4) provided for, where the review application did not relate to a detainee, a prescribed further period of time of 14 days after the day the person received notice of the extended period (unless a shorter period of not less than one working day was agreed to).
[302] regs 4.18A(2), 4.18A(3), 4.35B(2).
[303] ss 359B(5)(a), 424B(5)(a).
[304] ss 359B(5)(b), 424B(5)(b).
[305] regs 4.18B(2), 4.18B(3), 4.18B(4), 4.35C(2).
[306] ss 359B(4), 359B(5), 424B(4), 424B(5).
[307] *Yang v MIAC* [2010] FMCA 890
[308] *SZUSR v MIBP* [2015] FCCA 3105.
[309] *Yang v MIAC* [2010] FMCA 890 at [32] and *SZUSR v MIBP* [2015] FCCA 3105 at [62]. In *Yang* for example, the applicant had requested an extension of time in which to provide information so that he could sit a further IELTS test in a few months. The Court held that even if the Tribunal had granted that extension, it could only be granted for a period of 28 days (which was the prescribed period at the relevant time), and as such, any extended period would have expired before the applicant had sat the further test. The applicant in this case did not request the Tribunal to exercise the power more than once, and the Court did not explicitly consider whether the legislation would have prevented the Tribunal from granting additional prescribed further periods (if such requests were made). As the initial request for a prescribed further period was refused, the Court did not need to decide whether the Tribunal had such a power.

that power may be exercised from time to time, which indicates that the Tribunal may use the power to extend on multiple occasions.[310] The preferred reading of the provision appears to be that the Tribunal may exercise its discretion to grant multiple extensions where, having regard to the reasons given for requiring an extension, it would be reasonable to grant them.

10.5.65 The Tribunal is not empowered to extend the period to respond to an invitation where the request for extension is received *after* the initial prescribed period has expired.[311] The Full Federal Court in *Hasran v MIAC* relied on the effect of s 359C(2) when read with ss 360(2), 360(3) and 363A to find that the gate closes on an applicant who fails to respond to a letter under s 359A within the prescribed time and that there is simply no discretion to extend the time to respond.[312] The equivalent provision in s 424B(4) [Part 7] is in the same terms as s 359B(4) and it is likely the Tribunal's power to grant an extension of time under that provision is also lost once the prescribed time has expired.

10.5.66 See the second table below for the prescribed periods for extending the time.

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[310] See *Bond Corp Holdings Ltd v Australian Broadcasting Tribunal* (1998) 84 ALR 669 at 678–679 where the Court held that where there was no contrary intention to displace the operation of s 33(1), a provision is interpreted to permit multiple exercises of the power.
[311] *Hasran v MIAC* (2010) 183 FCR 413 at [45]–[48]. This confirms earlier obiter comments in *M v MIMA* (2006) 155 FCR 333 and previous authority from the Federal Magistrates Court; *Xue v MIAC,* [2009] FMCA 421 at [45]–[46], *Usman v MIMIA* [2005] FMCA 966.
[312] *Hasran v MIAC* (2010) 183 FCR 413 at [45]–[48].

Prescribed period tables

Table of prescribed periods - invitations to provide comments or a response

PRESCRIBED PERIODS			
	BV Detainee - refusal or cancellation of bridging visa **Part 5 reviewable decision only**	**Other Detainee - all other review applications**	**Non-detainee - all review applications**
Comments to be given OTHER THAN AT AN INTERVIEW	2 working days after receipt of the invitation OR where applicant agrees in writing - not less than 1 working day after notice is received. *reg 4.17(2)*	7 calendar days after receipt of the invitation OR where applicant agrees in writing - not less than 1 working day after notice is received. *reg 4.17(3) – Part 5, reg 4.35(2) – Part 7*	14 calendar days after receipt of the invitation OR where applicant agrees in writing - not less than 1 working day after notice is received. *reg 4.17(4) –Part 5, reg 4.35(3) – Part 7*
Comments to be given AT AN INTERVIEW	Within 2 working days after receipt of the invitation. *reg 4.18(2)*	Within 14 calendar days after receipt of the invitation. *reg 4.18(3) – Part 5, reg 4.35A(2) – Part 7*	Within 28 calendar days after receipt of the invitation. *reg 4.18(4) –Part 5, reg 4.35A(3) – Part 7*

PRESCRIBED EXTENSION PERIODS		
	BV Detainee - refusal or cancellation of bridging visa **Part 5 reviewable decisions only**	**All other review applications- detainee and non-detainee**
Comments to be given OTHER THAN AT AN INTERVIEW	No prescribed period. Length of extension is at Tribunal's discretion. See *Bautista v MIBP* [2018] FCA 1114 which held that reg 4.18A(4) is invalid (the other prescribed periods for extensions of time are also likely to be invalid). *reg 4.18A(2)*	No prescribed period. Length of extension is at Tribunal's discretion. See *Bautista v MIBP* [2018] FCA 1114 which held that reg 4.18A(4) is invalid (the other prescribed periods for extensions of time are also likely to be invalid). *reg 4.18A(3), reg 4.18A(4) – Part 5* *reg 4.35B(2) – Part 7*
Comments to be given AT AN INTERVIEW	No prescribed period. Length of extension is at Tribunal's discretion. See *Bautista v MIBP* [2018] FCA 1114 which held that reg 4.18A(4) is invalid (the other prescribed periods for extensions of time are also likely to be invalid). *reg 4.18B(2)*	No prescribed period. Length of extension is at Tribunal's discretion. See *Bautista v MIBP* [2018] FCA 1114 which held that reg 4.18A(4) is invalid (the other prescribed periods for extensions of time are also likely to be invalid). *reg 4.18B(3), reg 4.18B(4) – Part 5* *reg 4.35C(2) – Part 7*

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Failure to respond or comment to a written invitation

10.5.67 If an applicant is invited to comment on, or respond to, information disclosed in a written invitation and does not do so within the prescribed period, the Tribunal may make a decision on the review without taking any further action to obtain the applicant's views on the information.[313] However, it is not obliged to do so, and may, subject to certain considerations, take further action to obtain the applicant's views on the information (for example, by sending a further invitation).[314]

10.5.68 If an applicant fails to respond to an invitation within the prescribed period (or as extended) he or she also loses any entitlement to appear before the Tribunal to give evidence and present arguments relating to the issues in the review.[315]

10.5.69 In the case of a Part 7 reviewable decision [protection], the Tribunal retains a discretion to nonetheless invite the applicant to a hearing. However, in the case of a Part 5 reviewable decision [migration], the court authorities confirm that once the applicant has lost their entitlement to a hearing, the effect of ss 359C(2), 360(3) and 363A is that the Tribunal has no power to invite the applicant to a hearing.

10.5.70 The Full Federal Court in *Hasran v MIAC* held that the language of s 363A clearly operates so as to remove any discretion which the Tribunal may have had to allow a person to do something where a provision of Part 5 of the Migration Act states that the person is not entitled to do it. In this case, the applicant's failure to respond to the Tribunal's letter under s 359A had the effect of attracting the cascading operation of ss 359C(2), 360(2)(c) and, critically, 360(3) which enlivened the application of s 363A, the effect of which was to provide that the Tribunal did not have power to permit the appellant to appear at an oral hearing.[316] This confirms earlier obiter comments in *M v MIMA,*[317] and *MIMA v Sun*,[318] as well as several cases.[319]

10.5.71 Although the Tribunal does not have any power to invite an applicant to a hearing following a failure of the applicant to respond to an invitation under s 359A, it will not necessarily amount to jurisdictional error if the Tribunal nonetheless proceeds with a hearing if the hearing has no effect on the exercise of the Tribunal's powers in making its decision.[320]

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[313] ss 359C(2) and 424C(2). In *Chung v MIBP* [2015] FCA 163, the Court confirmed that, as a consequence of the appellants' failure to respond to a s 359A invitation, the Tribunal could proceed to a decision without taking any further action to obtain their views on the information pursuant to s 359C(2). See also *Aoun v MIAC* [2011] FMCA 47 at [24], where the applicant had failed to respond to a s 359A invitation within time, but later wrote to the Tribunal requesting it delay its decision pending a further sponsorship application. The Tribunal declined to delay its decision on the basis of its (mistaken) view that the representative did not have the authority to make that request on the behalf of the applicant and also because there was no information contained in the letter to indicate that the sponsor's circumstances had changed materially. The Court found that, despite the fact that one of the two reasons given by the Tribunal for proceeding in the manner that it did was erroneous, the other of those reasons was sound and the exercise of the Tribunal's s 359C(2) discretion had not miscarried.
[314] *Diallo v MIAC* [2009] FMCA 642.
[315] ss 360(3), 425(3).
[316] *Hasran v MIAC* (2010) 183 FCR 413 at [26]–[29].
[317] *M v MIMA* (2006) 155 FCR 333 at [46].
[318] *MIMA v Sun* (2005) 146 FCR 498.
[319] *Lee v MIAC* [2007] FMCA 1802 at [22]; *Balineni v MIAC* [2008] FMCA 888; *Xue v MIAC* [2009] FMCA 421.
[320] *Yang v MIAC* [2010] FMCA 890 at [42]. The Court held that even if it did amount to jurisdictional error, it would exercise its discretion to refuse to grant relief (at [42]-[43]). However, in *Lokuwithana v MIBP* [2017] FCCA 176 the Court held that Tribunal's

10.5.72 When proceeding to make a decision without a hearing following an applicant's non-response to a s 359A or 424A invitation, the Tribunal ensures that the invitation was correctly issued, and that the information did in fact enliven ss 359A/424A to avoid a breach of s 360 or 425.[321] In circumstances where a s 359A invitation has been combined with an invitation to give information under s 359(2), the Tribunal exercises care to assess whether each part of the combined invitation was correctly issued prior to concluding that the applicant has lost their entitlement to a hearing (a failure to respond to a combined invitation may not result in the loss of the hearing entitlement, even where there was no error on the part of the Tribunal in one part of the combined invitation in circumstances where there was an error in the other part).[322] The Tribunal also ensures that the invitation meets the description of and may be properly characterised as an invitation under s 359A or 424A. If it does not, the Tribunal will be in breach of its statutory obligation under ss 359C(2)/424C(2), and the applicant will not lose the opportunity to attend a hearing in accordance with s 360 or 425.[323]

10.5.73 Even where a hearing is not offered, any response or comments made after the prescribed period by the applicant must be taken into account.

10.5.74 For discussion on making a decision without a hearing, see Chapter 23 – Making a decision without a hearing.

Reviews under Part 5 - where a hearing invitation has been issued prior to the failure to respond

10.5.75 If the Tribunal has already issued a hearing invitation and the applicant subsequently fails to respond to a s 359A invitation within the prescribed period, s 360(3) will operate with the effect that the applicant will no longer be entitled to attend the scheduled hearing and the Tribunal will be required to deny the applicant a hearing before it.[324]

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reliance upon evidence given by the applicant at a hearing, which it lacked the power to hold, operated unfairly against the applicant and resulted in jurisdictional error (at [115]–[121]).

[321] In *MIAC v Saba Bros Tiling Pty Ltd* (2011) 194 FCR 11 the Federal Court made *obiter* comments that the Tribunal's belief that information in the s 359A letter was relevant to the review lacked any possible rational foundation, and if the information, at the time the invitation is issued, is not rationally capable of being seen as information that would affect the decision under review, then the Tribunal's action in issuing the invitation is a nullity. In consequence, ss 359C(2), 360(2) and 360(3) did not apply.

[322] In *Reddy v MICMSMA* [2020] FCCA 15, the Federal Circuit Court found that while the Tribunal is entitled to send a combined ss 359A and 359(2) invitation, a failure to respond where one of the invitations is not properly issued will not allow the Tribunal to proceed on the basis that the entitlement to hearing under s 360 has been lost (at [54]–[59]). The Court considered that as the Tribunal's s 359A invitation was not properly issued in respect of s 359A information, it was not entitled to proceed on the basis that the applicant had lost their right to a hearing due to a failure to respond, even though there was no error in the s 359(2) invitation. The Court also considered the hypothetical situation of an applicant responding to part of the combined invitation, and noted that it would be absurd to find that an applicant had lost their entitlement to a hearing if they had not responded to the s 359(2) part of the invitation (which was not affected by error) but had responded to the s 359A part of the invitation (which was affected by error) (at 58)).

[323] In *Shrestha v MIBP* [2014] FCCA 34, the Court found that for the applicant to lose the opportunity of a hearing by operation of s 360(2)(c), the Tribunal's conduct must first comply with the requirements of s 359C(1) or (2). That is, a letter for the purposes of s 359 or s 359A must meet the description of an invitation to give information or invitation to comment on or respond to information, and therefore be linked to s 359C. As the essential character of the letter issued by the Tribunal in *Shrestha* did not satisfy this requirement, the Tribunal was found to have breached its obligation to act fairly in carrying out its statutory tasks, a necessary precondition for the applicant to 'lose' the opportunity of a hearing by operation of s 360(2)(c).

[324] *Giri v MIAC* [2011] FMCA 282 at [21], [29]. Upheld on appeal: *Giri v MIAC* [2011] 928.

10.5.76 Although there has been some suggestion that the Tribunal is not entitled to cancel a hearing invitation which had already been issued prior to the non-response,[325] the Federal Court judgment of *Giri v MIAC*[326] stands as authority for the proposition that s 360(3) is unconcerned with whether a hearing invitation has been issued or not, its sole concern being to prevent the applicant from ***attending*** a hearing. As s 360(3) removes any entitlement to attend a hearing, s 363A has the effect of preventing the Tribunal from permitting the applicant to attend a hearing.[327]

10.5.77 Following *Giri*, if an applicant fails to respond to a s 359A invitation within the prescribed period before the hearing has taken place, the Tribunal may advise the applicant that the hearing which has been scheduled cannot proceed.

Multi-Member Panels

10.5.78 In reviews where the Tribunal is constituted by more than one Member, different considerations arise in relation to the conduct of the review compared to cases where the Tribunal is constituted by a single member.[328] While there is no judicial consideration of this issue, it is likely that references to 'the Tribunal' in various sections in Part 5 and Part 7 of the Migration Act would generally be construed by a Court as references to each Member constituting the Tribunal for the purposes of the review.

10.5.79 On this construction, a ss 359A /424A obligation may arise if any one Member on the panel considers that information before the Tribunal would be the reason, or part of the reason, for affirming the decision under review, even if another Member on the panel takes a different view of the information. The power under ss 359AA/424AA to disclose adverse information orally at a hearing appears to be exercisable by any Member of the panel constituting the Tribunal.

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[325] In *Kumar v MIAC* [2010] FMCA 614 the Federal Magistrates Court held that the Tribunal was not required to cancel a hearing to which an applicant had already been invited following the non-response to an invitation issued under ss 359A and 359, and that cancellation of the hearing was a breach of s 360. The Court had distinguished *Hasran, M* and *Sun* on the basis that those cases all concerned the inability of the Tribunal to invite the applicant to attend a hearing where there had been a failure to respond within the prescribed period, rather than the power of the Tribunal to cancel an validly issued invitation to hearing. In *Giri v MIAC* [2011] FMCA 282 at [19], [23], [28] his Honour expressly rejected the view taken by the Court in *Kumar*, finding it was not supported by those cases. In *Nam v MIAC* [2011] FMCA 340 at [13] the Court also expressly disagreed with the Court in *Kumar*, finding the Court's analysis in *Giri* in accordance with the legislation and case law. This judgment was upheld by the Federal Court on appeal: *Giri v MIAC* [2011] FCA 928.

[326] *Giri v MIAC* [2011] FMCA 282; upheld on appeal: *Giri v MIAC* [2011] FCA 928.

[327] *Giri v MIAC* [2011] FMCA 282 at [19]–[21]. In *Nam v MIAC* [2011] FMCA 340 at [13] the Court agreed with his Honour's analysis in *Giri*. His Honour in *Giri* expressly disagreed with the contrary view taken by the Court in *Kumar.* On appeal, Greenwood J held in *Giri* at [46] that although there 'seems to be some force' in Driver FM's approach to ss 360, 363A and 359C in *Kumar*, the construction of these sections has been definitively established by the Full Court of the Federal Court in *Hasran*, and that that decision must be applied and followed. The view in *Giri* is also consistent with the reasoning in *SZEYJ v MIMIA* [2005] FMCA 1718 at [19]–[24] where, albeit in a case concerning a review under pt 7 of the Migration Act where there is no equivalent of s 363A, the Court held that the consequences of non-compliance with an invitation under ss 424/424A could arise at a later time than the issue of an invitation to attend a hearing. His Honour noted that the majority in *SAAP v MIMIA* (2005) 215 ALR 162 favoured an ambulatory rather than sequential approach to the construction of pt 7, div 4 enabling a ss 424/424A invitation to be issued after an invitation to hearing is issued. See also *Singh v MIBP* [2017] FCAFC 67 at [52], [53] and [56], where the Court agreed with the weight of authority in *Sun*, *M*, *Hasran* and *Giri* and found that, irrespective of whether a hearing invitation has already been issued, a review applicant has no entitlement to a hearing (and the Tribunal does not have power to permit the applicant to attend the hearing) if there has been non-compliance with an invitation under s 359A or s 359(2), as the operation of ss 359C(2), 360(3) and 363A has no temporal restriction and can take effect at any time.

[328] Note ss 356, 357 and 379 [pt 5] of the Migration Act which provided for multi-member panels in migration matters was repealed by the Amalgamation Act with effect from 1 July 2015. From this date, multi-member panels can be convened by the President of the Tribunal pursuant to ss 19A, 19B, and 19D of the *Administrative Appeals Act 1975* (Cth) (AAT Act) for reviewable decisions under both Parts 5 and 7 of the Migration Act.

10.6 Disclosing information that does not fall within s 359A or 424A

10.6.1 An invitation to comment or respond to material which is not 'information' for the purposes of s 359A or 424A is not an 'invitation' issued or made under those sections.[329] Nevertheless, the Tribunal may, on occasion, wish to write to the applicant and invite his or her comment on information which would fall within the exceptions in ss 359A(4) and 424A(3). Such information may include information that the applicant has given the Tribunal at hearing or general country information. While the Tribunal is not *required* to disclose such information in writing, nor is the Tribunal precluded from doing so if it so determines.[330] The Tribunal may, in the exercise of its discretion, invite an applicant for review to make supplementary submissions in relation to apparent inconsistencies, contradictions or weaknesses in his or her case which have been identified by the Tribunal.[331] The High Court has indicated that once the Tribunal proceeds to issue such an invitation, this may amount to a binding indication by the Tribunal that the review process will not be concluded until the applicant has had an opportunity to respond.[332]

10.6.2 This type of material may be incorporated into a ss 359A/424A letter or disclosed in a separate letter. The procedural obligations that attach to information falling within s 359A or 424A do not apply to information which is exempted by ss 359A(4) or 424A(3). For example, if the Tribunal discloses material to an applicant outside of s 359A or 424A, strictly speaking there are no prescribed periods in which an applicant must respond. A reasonable period would be sufficient. The Tribunal may, however, consider the prescribed periods for ss 359A/424A information to be reasonable in the circumstances.

10.6.3 The statutory consequences of a failure to comment on or respond to such information within time also do not apply. That is, an applicant will not lose his or her entitlement to appear for a hearing if he or she fails to respond to an invitation to comment on non-ss 359A/424A material within time. For this reason the Tribunal

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[329] *MIAC v SZGUR* (2011) 273 ALR 223 at [9] per French CJ and Kiefel J and [77] per Gummow J, Heydon and Crennan J agreeing (in respect of perceived inconsistencies and contradictions).
[330] In *MZYUM v MIAC* [2012] FMCA 710 the Court at [14] stated that, unlike s 424A(1) which imposed a positive obligation to put information to an applicant, in itself s 424A(3) did not impose upon a Tribunal an obligation not to give information that is described in that section, but merely described the information for which no positive obligation is imposed upon the Tribunal under s 424A(1). Although *MZYUM* was upheld on appeal in *MZYUM v MIAC* [2013] FCA 51 the Court in that case found that the relevant information was more accurately excluded under s 424A(2A) rather than s 424A(3), however the outcome in either case was the same as both provisions, neither in their terms or by implication, precluded the Tribunal from providing particulars of information and a further opportunity to comment merely because there was no obligation to do so, (at [49]). An application for special leave to appeal was dismissed: *MZYUM v MIAC* [2013] HCASL 105. In *Trinh v MIAC* [2013] FCA 611, the Court at [12] also held the purpose of s 359A(4) was to limit the scope of the obligation in s 359A, but that it did not prevent the Tribunal from seeking further information beyond the type of information to which the obligation in s 359A(1) applied.
[331] *MIAC v SZGUR* (2011) 273 ALR 223 at [9]. See also *SZLTG v MIAC* [2008] FMCA 835 at [32], *SZJHJ v MIAC* [2008] FMCA 104 at [81] and *SZNZT v MIAC* [2010] FMCA 478 at [126] where the Court found no error in putting to the applicant for comment in writing information which would not fall within s 424A. However in *Saba Bros Tiling Pty Ltd* (2010) 245 FLR 225, the Court held that the erroneous issuing of an invitation purportedly under s 359A itself amounted to jurisdictional error. However, the Court did not explain its reasoning in making this finding, and this view is not supported by the weight of authority. A subsequent appeal to the Federal Court turned on a different point and the Court did not make any comments on that issue: *MIAC v Saba Bros Tiling Pty Ltd* (2011) 194 FCR 11.
[332] *MIAC v SZGUR* (2011) 273 ALR 223 at [9].

may distinguish between s 359A information and 'other' information, either by disclosing it in separate letters, or under separate headings in the same letter.

10.6.4 The Tribunal may purport to disclose orally particulars of information under ss 359AA/424AA but if such information would not in fact be required to be disclosed under those sections or ss 359A/424A, no jurisdictional error would arise from the Tribunal's use of the process in these provisions.[333]

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[333] *SZNLS v MIAC* [2009] FMCA 908 and *SZSBR v MIMAC* [2013] FCCA 847. Upheld on appeal: *SZSBR v MIBP* [2013] FCA 1208.

Migration and Refugee Division Procedural Law Guide

Chapter 11: Power to obtain information

Current as at 17 December 2021

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11. POWER TO OBTAIN INFORMATION

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11. POWER TO OBTAIN INFORMATION[1]

11.1 Sources of power to obtain information and documents

11.1.1 It is well established that the Migration and Refugee Division (MRD) of the Tribunal follows an inquisitorial process of review, which enables it to actively investigate and obtain relevant information. In this context, the Tribunal has been found to have an implied general power to get or invite someone to produce a document or non-documentary information subject to any constraints found in the *Migration Act 1958* (Cth) (the Migration Act).[2]

11.1.2 The codes of procedure in Part 5, div 5 [migration] and Part 7, div 4 [protection] of the Migration Act contain a number of provisions which deal expressly with the Tribunal's powers to obtain information.

11.1.3 The focus of this Chapter is on the different methods for obtaining information in ss 359 and 424. The Migration Act was amended by the *Tribunals Amalgamation Act 2015* (Cth) from 1 July 2015. Relevantly, from this date there has been a single Administrative Appeals Tribunal (AAT) with a MRD. However, anything done by the previous Migration Review Tribunal (MRT) or Refugee Review Tribunal (RRT) is taken to be conduct of the AAT from 1 July 2015. Accordingly, this extends to requests for information sent prior to 1 July 2015.[3]

11.1.4 The express statutory powers to obtain information are regarded as discretionary and the Tribunal may choose which of its powers it will use, should it consider it appropriate to obtain information in relation to a particular review.[4] In limited circumstances, a failure to make reasonable enquiries to obtain information, in circumstances where there is critically important information that is readily available to the Tribunal and not to the applicant, may result in a jurisdictional error. For further discussion see below.

11.1.5 The primary difference between the express statutory powers lies in the consequences which flow if a person fails to comply with a request for information. Briefly:

- there is a compulsory summons process in ss 363 [Part 5] and 427 [Part 7] – a breach of which constitutes an offence punishable by imprisonment

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] *SZLPO v MIAC* (2009) 177 FCR 1 at [158]. The Court found that the obligation under s 414(1) [s 348(1)] to review a reviewable decision coupled with the power under s 415(1) [s 349(1)] to exercise all the powers and discretions conferred on the original decision-maker, confer this authority. See also *SZAYW v MIMIA* (2006) 230 CLR 486 at [7] and [23] where the High Court found that the Tribunal has certain implied powers without elaborating on what they might be.
[3] sch 9, item 15AC(1)(b) of the *Tribunals Amalgamation Act 2015* (Cth).
[4] *MIAC v SZKTI* (2009) 238 CLR 489 and *MIAC v SZNAV* [2009] FCAFC 109 at [21].

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- the Tribunal also has power to issue a formal *written* invitation under ss 359(2) [Part 5] and 424(2) [Part 7] – a failure to respond allows the Tribunal to proceed to make a decision without giving the applicant a hearing

- the Tribunal has the power to *orally* request information under ss 359(2) and 424(2) – a failure to provide the requested information will not result in the loss of any entitlements[5]

- the Tribunal has a general power to obtain information under ss 359(1) and 424(1) – a failure to provide the requested information will not result in the loss of any entitlements

- finally, the Tribunal may get information by an informal process under ss 348/414 – a failure to provide the requested information will not result in the loss of any entitlements.

11.1.6 The courts have also observed that because ss 349(1) [Part 5] and 415(1) [Part 7] confer on the Tribunal 'all the powers and discretions' conferred on the primary decision-maker, the Tribunal has the procedural power to obtain information in s 56 of the Migration Act.[6] This view departs from the previously held view that ss 349 and 415 conferred only the primary decision-maker's substantive decision-making powers and not the decision-maker's procedural powers, in view of the fact that the Tribunal has its own codes of procedure in Parts 5 and 7. It was thought that provisions such as s 56 applied only to the handling of primary 'visa applications' by the Minister or his delegate. This view of the Tribunal's procedural powers also presents some difficulties. For example, the prescribed periods of response to a formal written invitation to a person to provide information vary depending on whether s 56 or ss 359(2) or 424(2) is being used. However, as it is now accepted that the Tribunal may elect to choose one power over another, this view may make no practical difference if the Tribunal 'elects' to use its own procedural powers.

11.1.7 The Tribunal also has the power, under ss 363(1)(d) [Part 5] and 427(1)(d) [Part 7], to require the Secretary to arrange for the making of any investigation[7], or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination. For further discussion of this power, see Chapter 14 – Competency to give evidence.

11.1.8 For discussion on the Tribunal's summons power, see Chapter 16 – Summons.

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[5] Applicable to invitations given on or after 15 March 2009: *Migration Legislation Amendment Act (No 1) 2009* (Cth).
[6] *MIAC v SZKTI* (2009) 238 CLR 489 at [46] and *MIAC v SZNAV* [2009] FCAFC 109 at [21].
[7] In an application for urgent relief for an injunction to prevent his removal from Australia, the applicant contented Tribunal inquiries of DFAT and its subsequent publishing of DFAT's reply (which did not mention the applicant but it did mention his associate), placed him at risk of persecution: *MZXLD v MIAC* [2012] FCA 5. The Court noted that this matter was raised in *MZXLD v MIAC* [2009] HCATrans 282 and it adopted Crennan J's findings. Specifically, her Honour held that the Tribunal's processes are inquisitorial and that seeking information from relevant sources is an aspect of those processes at [1925]. Her Honour also considered the applicant's contention that it was incumbent upon the Tribunal to consider whether the making of such inquires or publishing the DFAT report might put the applicant at risk and accepted the Minister's submission that the Tribunal could only consider the material before it at the time of making its decision. Her Honour held that the applicant was given an opportunity to respond to the DFAT report and there was no evidence that extracts from the DFAT report were published at the time of the Tribunal's decision.

11.1.9 Sections 359 and 424 are almost identical in their content.[8] Subsection (1) provides that the Tribunal may get any information that it considers relevant. If the Tribunal gets such information, it must have regard to that information in making a decision on the review.[9] In their current form,[10] subsection (2) of the provisions provide, without limiting subsections (1), that the Tribunal may invite, either orally (including by telephone) or in writing, a person to give information.

11.2 What is 'information'?

11.2.1 'Information' in the context of ss 359/424 has the same meaning as in ss 359A/424A, namely, it relates to the existence of evidentiary material or documentation.[11]

11.2.2 The meaning of the word 'information' in ss 359 and 424 and specifically whether a 'document' could be said to be 'information' within s 424(2) was considered by the Full Federal Court in *SZLPO v MIAC*.[12] The Court found that the word 'document' and the word 'information' mean different things, although a document may convey information.[13] Accordingly, the Court found that s 424(2) did not apply to an invitation to a person to give the Tribunal a document. It may be noted that, although the Court in *SZLPO* was considering the pre-15 March 2009 version of s 424(2), its reasoning on this issue would appear to have application to ss 359(2) and 424(2) in their current form.

11.2.3 Applying this reasoning, the Court found that a request for an applicant's 'health examination results' was not a request falling within s 424(2). The factual circumstances of that case also suggest that the Court took the view that a request for an applicant's 'Departmental file' was not a request falling within s 424(2).

11.2.4 On this reasoning neither the express statutory power to invite a person to give information in ss 359(2)/424(2) nor the power to get 'information' in ss 359(1)/424(1) would authorise the Tribunal to invite or get a 'document'.[14] Instead, the Tribunal would have to use its implied general power arising from ss 348(1) and 349(1) [Part 5] and ss 414(1) and 415(1) [Part 7] to do so. If the Tribunal utilises the implied general power, no specific procedural obligations or consequences arise under the Migration Act.

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[8] Section 359 distinguishes between invitations to the Secretary and invitations to persons other than the Secretary in specifying the way a written invitation to provide information must be given. Section 424 does not draw that distinction, with the possible implication that it is not envisaged that the Tribunal would use its power under s 424(2) to invite the Secretary to give it additional information. Information from the Secretary may be obtained using the Tribunal's power in s 427(1)(d). There is an equivalent power in s 363(1)(d) for reviews under pt 5 of the Migration Act.
[9] ss 359(1), 424(1).
[10] Sections 359 and 424 were significantly amended by the *Migration Legislation Amendment Act (No 1) 2009* (Cth). Amendments made by that Act affect invitations to give information made by the Tribunal on, or after, 15 March 2009.
[11] *Nadan v MIBP* [2015] FCCA 2855.
[12] *SZLPO v MIAC* (2009) 177 FCR 1.
[13] *SZLPO v MIAC* (2009) 177 FCR 1 at [111].
[14] See *SZLPO v MIAC (No 2)* (2009) 255 ALR 435 where the Court appeared to accept the Minister's contention that information from DIAC was obtained pursuant to s 424(1).

11.2.5 This also means that the procedural implications that flow from a failure to respond to a formal written invitation under ss 359(2) or 424(2)[15] only arise if the invitation was to give 'information' (i.e. not a document). If the Tribunal is considering proceeding to a decision without taking further steps to obtain information or without holding a hearing, in circumstances where a recipient has failed to respond to a formal written invitation, the Tribunal should ensure that the invitation was, in truth, one given under ss 359(2) or 424(2) to provide 'information'.

11.2.6 The Federal Circuit Court in *Kaur v MIBP*[16] considered the issue of any unfairness that could arise from the loss of a hearing where the applicant responded to a s 359(2) [s 424(2)] request with information going towards an issue, but may not have provided the requested 'information' (and whether this would suggest against a construction of s 359(2) [s 424(2)] that would allow the loss of a hearing).[17] The Court found that a request for 'information demonstrating that the applicant was the subject of an approved business nomination that had not been ceased' was a valid invitation under s 359(2). The Court recognised the apparent difficulty which could flow from such a request, as the Tribunal's view of whether information provided by the applicant in response was 'information' which went to the request, and would be determinative of whether the applicant would have a right to a hearing.[18] However, the Court held that the s 359(2) letter sought information that could objectively demonstrate approval of the nomination, and as such there was no unfairness and it was a valid request under s 359(2).

11.3 What does 'person' mean in the context of sections 359 and 424?

11.3.1 In *SZLPO v MIAC*,[19] the Full Court of the Federal Court also considered whether the word 'person' in s 424(2) referred only to a 'natural person'[20] and not to corporations, polities or government departments. The Court did not find it necessary to determine this question, but expressed the view in *obiter dicta* that it did.[21] The Court's reasoning suggested that ss 359(2) and 424(2) may only be relied on to give an invitation to a natural person. Although the Court in *SZLPO* was considering the pre-15 March 2009 version of s 424(2), its reasoning would appear to have application to ss 359(2) and 424(2) in their current form.[22]

[15] See ss 359C(1), 424C(1), 360(2)(c), 425(2)(c).
[16] *Kaur v MIBP* [2016] FCCA 2235.
[17] *Kaur v MIBP* [2016] FCCA 2235 at [21]–[22]. Also see *Singh v MICMSMA* [2019] FCCA 2343 at [58]–[62] where the Court followed *Kaur* to find that there was no error in the Tribunal finding that the applicant had lost their entitlement to a hearing in circumstances where the Tribunal sent a s 359(2) invitation requesting information demonstrating the applicant had a skills assessment and the applicant responded attempting to explain why he couldn't demonstrate that he met the criterion.
[18] See ss 359C(1), 424C(1), 360(2)(c), 425(2)(c).
[19] *SZLPO v MIAC* (2009) 177 FCR 1.
[20] In other words, a human being.
[21] *SZLPO v MIAC* (2009) 177 FCR 1. Note, however, that in *SZJSH v MIAC* [2008] FMCA 1715, the Federal Magistrates Court made *obiter* comments that there was no reason to draw a distinction between obtaining information from a 'natural person' as distinct from 'non-persons' or 'organisations' at [90]. Being a unanimous judgment of a Full Federal Court, the views expressed in *SZLPO* would overtake those expressed in *SZJSH*.
[22] See *SZRKT v MIBP* [2016] FCCA 3106 at [80]–[84] where the Federal Circuit Court applied *SZLPO* to the current version of s 424, and held that an email sent by the Tribunal to the Department of Immigration and Border Protection was an inquiry to ascertain the appropriate contact point to request information, and even if it had been directed to a specific person in the

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11.3.2 Taken together with *SZLPO v MIAC (No 2),*[23] the Full Court's reasoning suggests that the source of the Tribunal's power to invite a corporation, organisation, polity or government department to give 'information' is either ss 359(1)/424(1) or the implied general power arising from ss 348(1) and 349(1)/ss 414(1) and 415(1). It is this implied general power arising from ss 348(1)/349(1) and ss 414(1)/415(1) which authorises the Tribunal to invite an organisation to give a 'document'. If the Tribunal utilises either of these powers, no specific procedural obligations or consequences arise under the Migration Act.[24]

11.3.3 A further consequence of this view is that the procedural implications that flow from a failure to respond to a formal written invitation under ss 359(2) or 424(2),[25] would only arise if the invitation was given to a natural person. If the Tribunal is considering proceeding to a decision without taking further steps to obtain the information or without holding a hearing, in circumstances where a recipient has failed to respond to a written invitation to give information, the Tribunal should consider whether the invitation was, in truth, one given under ss 359(2) or 424(2) to a 'natural person'.

11.4 General power to 'get information' under sections 359(1) and 424(1)

11.4.1 In *Win v MIMA*,[26] s 424(1) (and by implication s 359(1)) was described as 'an enabling provision' which empowers the Tribunal to take the initiative in getting any information it considers relevant. There is no limit to the type or range of information the Tribunal may 'get' under ss 359(1) or 424(1) apart from the requirement that the Tribunal consider it to be relevant. For example, the Tribunal is entitled to use its power under s 424(1) to get country information.[27]

11.4.2 Following the High Court's decision in *MIAC v SZKTI,* it also appears that there is no limitation on the manner in which the Tribunal 'gets' information under ss 359(1) or 424(1).[28] For example, the Tribunal may utilise this power to obtain information from a person by telephone, or in writing.

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Department, the essence of what was ultimately requested was directed to a government department (and not to a departmental officer in their private capacity, which would be a natural person) such that the requirements of s 424 did not apply.

[23] *SZLPO v MIAC (No 2)* (2009) 255 ALR 435.

[24] Note that the summons power in ss 363 and 427 could also be used in relation to a government department or organisation, if it is directed to a natural person within the department or organisation.

[25] See ss 359C(1), 424C(1), 360(1)(c), 425(1)(c).

[26] *Win v MIMA* (2001) 105 FCR 212 at [15].

[27] *NAHI v MIMA* [2004] FCAFC 10 at [11]. In *SZOAU v MIAC* [2010] FMCA 606 at [147]–[148], the Court made *obiter* comments that the term 'get' in s 424(1) requires some positive, proactive or forward looking action by the Tribunal, and that if information is already available to the Tribunal within its own library or databases and not obtained necessarily for the purpose of conducting the particular review, then it will not be information 'got' by the Tribunal within the meaning of s 424(1). However, the Court did not find it necessary to consider the matter fully in the circumstances of the case and it remains advisable for the Tribunal to have regard to any information before the Tribunal that is relevant to the review.

[28] *MIAC v SZKTI* (2009) 238 CLR 489 at [37]. See also, for example *SZNHC v MIAC* [2009] FMCA 1063 at [62]. The Court applied *MIAC v SZKTI* to the circumstances of the case and found that the requests for information, which included a request to the South African High Commission and a request through DFAT in Bangladesh to verify the authenticity of a supporting letter, were a valid exercise of the Tribunal's powers under s 424(1). See also, *SZQOS v MIAC* [2012] FMCA 262 where the Court also applied *MIAC v SZKTI* to the circumstances of the case and found that the existence of the power to obtain information by informal means using s 424(1) clearly indicates that it is not intended that the Tribunal must only obtain and rely upon

11.4.3 If the Tribunal gets any information pursuant to ss 359(1)/424(1) it must have regard to the information in making a decision on the review, even if it subsequently determines that the information is no longer relevant or that weight should not be placed on it. The Tribunal's consideration of any such information should be reflected in the decision record.

11.4.4 In *ATP15 v MIBP*,[29] the Federal Court considered whether the Tribunal was required 'in conducting the review' to have regard to information obtained in a separate application for review that was made by a different person. The majority held that s 424(1) did not apply to information that was sought and obtained by the Tribunal in conducting a review of an application made by someone else (that is, in a separate case) because that information was not 'gotten' in conducting the review of the first applicant. However, the Tribunal does have the power to obtain information from a different review applicant who is the subject of a separate review application and it would be a question of fact as to whether the Tribunal had done so in relation to a particular review (or both reviews). Therefore, ss 359 and 424 do not require the Tribunal to have regard to information that is obtained in relation to a second review application unless, on the evidence, that information was also obtained in relation to the first review.[30]

11.4.5 In *SZMGW v MIAC*,[31] the issue was whether the Tribunal had properly 'had regard to' a US Department of State report it had obtained under s 424(1). The Federal Magistrate found that the information which the Tribunal obtains in conducting a review may take many different forms and the degree of relevance of such information (or, of particular parts of a source of information) may well differ. The Court held that it cannot have been contemplated by the drafters of s 424 that any information, no matter how marginal its relevance, must be treated as a fundamental element in making the determination. However, the expression 'have regard to' requires more than the Tribunal being merely aware of the information. There must be a process of consideration of the information. The consideration given to the information must be realistic and genuine and involve the Tribunal in an active intellectual process.[32]

11.4.6 In *SZOAU v MIAC*[33] the Court found that 'have regard' requires more than just setting out the information in the decision record. The Tribunal must demonstrably

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information through procedures provided under ss 427 and 428 for taking evidence on oath at [41] (undisturbed on appeal in *SZQOS v MIAC* [2012] FCA 982).

[29] *ATP15 v MIBP* [2016] FCAFC 53. In that case, the Tribunal put to the first applicant under s 424A that another applicant (the second applicant), had made a separate review application, made similar claims for protection, travelled on the same flight to Australia and had provided the same residential address as the first. The second applicant was sent a similar letter by the Tribunal as a part of her review application. The majority held that there was no basis to conclude that the second applicant's response to her letter in the separate review proceeding was obtained in 'conducting the review' of the first applicant's case and therefore the Tribunal was not required to have regard to the second applicant's response in conducting the review of the first applicant's case.

[30] *ATP15 v MIBP* [2016] FCAFC 53 at [23].

[31] *SZMGW v MIAC* [2009] FMCA 88 at [58]–[60].

[32] See also *SZRLO v MIAC* [2013] FCA 825 where the Court found all that is required is that there must be some way in which it can be discerned from the decision record that the Tribunal engaged in an active intellectual process in relation to information obtained under s 424(1), so that the information can be said to have received the Tribunal's genuine consideration: at [52].

[33] *SZOAU v MIAC* [2010] FMCA 606.

engage with the information.[34] In *SZOYH v MIAC*[35] the Court found 'have regard to' requires the Tribunal to take the information into account and that it does not require the Tribunal to engage in some profound intellectual analysis of each and every piece of information before it. It held the Migration Act requires the Tribunal once having 'got' information, not to ignore it or overlook it. In this case, the Tribunal had before it two reports, one from 2005 and one from 2010, and in setting both reports out its reasons demonstrated it preferred the information from the 2010 report as being of greater relevance to the applicant's circumstances and as they may be viewed in the reasonably foreseeable future.[36]

11.4.7 An illustration of the importance of expressly addressing, in the decision record, any relevant information obtained by the Tribunal can be seen in *SZKUS v MIAC.*[37] In that case, an issue arose as to whether the Tribunal had properly 'had regard to' information it got in relation to a newspaper article submitted by the applicant. DFAT had contacted the newspaper's editor who confirmed that the article was published and provided additional information about the occurrence of the incident corroborating the appellant's central claim. The Federal Magistrate at first instance held that the Tribunal should be understood to have considered the material as it made a later request for further information to verify the response from the newspaper's editor. The Court on appeal, having considered the Tribunal's reasons for decision, found that the Tribunal had regard to part of the information but failed to have regard to information which was relevant to the incident central to the appellant's claim.

11.4.8 Not all contents of a response to a ss 359(1)/424(1) letter will necessarily be 'information' to which the Tribunal must have regard. In *MIAC v SZGUR*, the High Court held that the fact of an agent's request for the Tribunal to arrange a medical examination for the review applicant, made in response to a s 424 letter, was not 'information' of the kind contemplated by that section.[38]

11.5 Invitation to give information under sections 359(2) and 424(2)

Oral invitations to a person to give information – ss 359(2)/424(2)

11.5.1 Subsections 359(2) and 424(2), in their current form, make clear that the Tribunal has power to invite orally, including by telephone, a person to give the Tribunal information.[39] If the Tribunal gives an oral invitation under ss 359(2) or 424(2), no

[34] *SZOAU v MIAC* [2010] FMCA 606 at [48]. In that case, the Tribunal obtained two reports from DFAT regarding the grant of South Korean citizenship to North Koreans which contained contradictory information. Federal Magistrate Nicholls found (at [144]) that there was nothing in the Tribunal's analysis to show that it engaged in any intellectual process to identify the contradictions in the two reports, let alone resolve them.
[35] *SZOYH v MIAC* [2011] FMCA 1001.
[36] *SZOYH v MIAC* [2011] FMCA 1001 at [46].
[37] *SZKUS v MIAC* (2009) 112 ALD 433 at [23]–[25].
[38] *MIAC v SZGUR* (2011) 241 CLR 594 at [21], [34].
[39] *Migration Legislation Amendment Act (No 1) 2009* (Cth) amended the Migration Act to allow the Tribunal to give an oral invitation. The amendments apply to invitations given on or after 15 March 2009.

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particular procedure must be followed, and as a result of the judgment in *MIAC v SZKTI*,[40] this power overlaps somewhat with the general power in ss 359(1) and 424(1).

11.5.2 The express power to invite information orally might be used, for example, to: orally invite applicants appearing before the Tribunal to provide information after the hearing, make informal telephone enquiries regarding procedural matters, to clarify a point or confirm authorship of a written submission, obtain a spontaneous response from a person; obtain information from a third party where the only known method of contacting that person is by telephone, or obtain oral information from third parties at a hearing at the Tribunal's own instigation.

11.5.3 In *Huynh v MIBP*[41] the Federal Court found s 359(2) [s 424(2)] was engaged when the Tribunal indicated in a hearing invitation it 'may wish to take evidence from' the visa applicant, asked the review applicant for the telephone number on which it could contact the visa applicant during the hearing, and took oral evidence from the visa applicant; and that having determined to arrange for the visa applicant to give oral evidence, justice and fairness obliged the Tribunal to provide a meaningful opportunity to address issues of concern. What will amount to a meaningful opportunity will be fact dependent in each case.

11.5.4 Accordingly, while the Tribunal will not usually be obliged to take evidence from a visa applicant who is not also a review applicant, if it chooses to do so it will need to ensure that the opportunity is 'meaningful' in the sense discussed in the ss 360/425 cases. The extent to which this would apply to a 'disinterested witness' is unclear but a cautious approach should be taken.

11.5.5 It should be noted that there is no potential adverse consequence if a person does not respond to an oral invitation to give information. Sections 359C(1) and 424C(1), which enable the Tribunal to proceed to make a decision on a review, only apply to written invitations under ss 359(2) or 424(2).

Written invitations to a person to give information – ss 359(2)/424(2)

11.5.6 The Tribunal has the power to *formally* invite, in writing, a person to give information under ss 359(2) or 424(2). If the Tribunal chooses to utilise this power, the invitation must be given in a certain way (ss 359(3), 424(3)), contain certain information and give the prescribed period for response (ss 359B, 424B). Non-response to such an invitation has potential adverse implications for an applicant.

11.5.7 Administrative letters, such as an acknowledgment letter which includes a request that the applicant provide any information that it wants the Tribunal to consider, are

[40] *MIAC v SZKTI* (2009) 238 CLR 489.
[41] In *Huynh v MIBP* [2015] FCA 701 the Court held that while the Tribunal has a discretion as to the questions it will raise with a person whom it invites to give information at an interview, those questions must give effect to the requirement that the opportunity to give information is meaningful.

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advisory only and do not constitute an invitation under ss 359(2) or 424(2).[42] In *Kumar v MICMSMA* the Federal Circuit Court found that s 359(2) [s 424(2)] was not engaged by the Tribunal requesting in the hearing invitation that the applicant provide documents which they wish to rely upon.[43]

Giving the invitation

11.5.8 If the Tribunal chooses to give a formal written invitation to a person to provide information pursuant to ss 359(2) or 424(2), the invitation must be given by one of the methods in ss 379A or 441A (see Chapter 8 – Notification by the Tribunal for further discussion); or if the person is in immigration detention, by giving it to the applicant or a person authorised by the applicant in accordance with reg 5.02.[44] For a review of a decision under Part 5, an invitation to the Secretary of the Department must be given by a method in s 379B.[45]

11.5.9 The methods for giving a document in ss 379A and 441A include:

- giving the document by hand
- handing the document to another person at the last residential or business address provided to the Tribunal by the recipient in connection with the review
- dispatching the document by pre-paid post to the last address for service, residential or business address provided to the Tribunal by the recipient in connection with the review
- faxing, emailing or otherwise transmitting the document to the last number/address provided to the Tribunal by the recipient in connection with the review.

11.5.10 If the Tribunal wishes to invite a non-applicant to provide information, it is unlikely that the person will have directly provided the Tribunal with an address, fax number or email address in connection with the review. In some cases material may be before the Tribunal that contains an address or fax number for the recipient (e.g. a letterhead). However, usually this is provided to the Tribunal by the applicant rather than 'the recipient'. Whether or not an address or number could be said to be 'provided to the Tribunal by the recipient' in these circumstances is open to doubt.[46]

11.5.11 If the Tribunal wishes to give a formal written invitation to a person but does not have an address for the purposes of ss 379A or 441A available to it, it may not be

[42] *MIAC v SZNAV* [2009] FCAFC 109, applied in *SZNOE v MIAC* [2010] FMCA 838 where the Court held that the acknowledgment letter was an administrative exercise (at [47]). Both of these judgments applied to the pre-15 March 2009 version of s 424(2) but are equally applicable to the current version.
[43] *Kumar v MICMSMA* [2020] FCCA 2170 at [68]. The hearing invitation contained the follow sentence: "Please provide all documents you intend to rely upon in support of your case. Any documents or written arguments sent to use should be in English and if not then accompanied by a translation from a qualified translator."
[44] ss 359(3), 424(3).
[45] s 359(4).
[46] See similar considerations in relation to the provision of witness statements by an applicant: *SZCNG v MIMIA* (2006) 230 ALR 555 at [48], *Halkic v MIMA* [2006] FMCA 1646 and *SZILK v MIMA* [2006] FMCA 1318.

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possible to comply with the procedure in ss 359(3) or 424(3).[47] In these circumstances, the information should be obtained by an oral invitation or by utilising another power, for example, by requiring the Minister to make an investigation.

11.5.12 Alternatively, the Tribunal may telephone the recipient to confirm or obtain an address for the purposes of ss 379A or 441A. In *SZBQS v MIAC*[48] an invitation was sent to an address known to the Tribunal but which had not been provided to the Tribunal in connection with the particular review. Federal Magistrate Driver commented that the Tribunal should have called to confirm the address for the purposes of the particular review under s 441A(4).

Way of providing the information

11.5.13 Sections 359B and 424B of the Migration Act provide that a written invitation under ss 359(2)/424(2) must specify the way the information is to be provided, being the way the Tribunal considers appropriate in the circumstances. Usually, this will be at an interview or in writing. Strict compliance with ss 359B/424B requires the invitation to explicitly state the method of response.[49]

11.5.14 The Migration Act does not define 'interview' or provide for specific procedures to be followed at an interview. The Explanatory Memorandum for the Bill which introduced ss 359 and 424 stated, 'interview' does not mean appearance before the Tribunal. At interview, the applicant may be invited to give additional information or to comment on information provided by the Tribunal. The applicant does not have the right to give evidence and present arguments relating to issues arising in relation to the decision under review at an interview conducted pursuant to s 359 [s 424].[50]

11.5.15 The Tribunal appears to have power to take evidence on oath or affirmation pursuant to ss 363(1)(a) and 427(1)(a) at an interview. The Tribunal may arrange for an interview and a hearing pursuant to ss 360 or 425 to take place concurrently or consecutively on the same day.

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[47] Note that in *SZIAR v MIAC* (2008) 220 FLR 232 and *SZEWL v MIAC* [2008] FMCA 1495, Cameron FM held that any *initial* correspondence with a third party using an address obtained through the Tribunal's own records or researches may be taken to satisfy the requirements of ss 379A/441A in a purposive sense if a relevant address is subsequently provided and any further communications are sent strictly in accordance with ss 379A/441A. However, this authority should be approached with caution as it was decided prior to the High Court's decision in *MIAC v SZKTI* (2009) 238 CLR 489, and in the context of earlier authority suggesting that the Tribunal had no power to elect not to use the formal process in ss 359(2) and 424(2) where it sent a written invitation to a person, unless some other statutory power, like the summons power, was clearly being used.
[48] *SZBQS v MIAC* [2008] FMCA 812.
[49] Note, however, that a number of cases have found no error where the Tribunal did not strictly comply with this requirement but the manner of response could be inferred from the terms of the invitation or the conduct of the parties. See *SZLPO v MIAC* (2009) 177 FCR 1 at [129] and *SZLWQ v MIAC* (2008) 172 FCR 452, where the Court found that the recipient clearly understood that he was being invited to respond to the Tribunal's facsimile in kind, by facsimile and that the course of dealings between the parties had established this as their mutual and agreed method of communication. *SZLWQ* has been followed in *SZIAR v MIAC* (2008) 220 FLR 232; *SZEWL v MIAC* [2008] FMCA 1495 at [65], *MZXTQ v MIAC* [2008] FMCA 1692, *SZJSH v MIAC* [2008] FMCA 1715 and *SZMTQ v MIAC* [2009] FMCA 29 at [36].
[50] Explanatory Memorandum to the Migration Legislation Amendment Bill (No 1) 1998 (Cth).

Timing of response

11.5.16 The Migration Act provides for the *Migration Regulations 1994* (Cth) (the Regulations) to prescribe periods within which the interview is to take place or the information is to be otherwise provided. The prescribed period of time depends on a number of factors, including whether or not the applicant is in immigration detention, and the method by which the written invitation has been given. For invitations given before 1 July 2013, whether the information as sought from within or outside Australia was also a factor.[51]

11.5.17 In the case of information to be given otherwise than at interview, the applicant has the full period to respond and the information may be given at any time within the prescribed period.[52] Where information is to be given at an interview, the interview may be scheduled at any time within the prescribed period.[53]

11.5.18 The prescribed periods, which operate from the time of receipt of the ss 359(2)/424(2) invitation, are set out in regs 4.17–4.18 [general migration] and regs 4.35–4.35A [protection] of the Regulations and are summarised in the table below.

11.5.19 The time at which a person is taken to have received the invitation varies depending on the method in ss 379A or 441A which is used to give the invitation.[54]

11.5.20 If the last day of the relevant prescribed period falls on a Saturday, Sunday or on a day which is a public holiday or a bank holiday in the place where the information is to be given, the information may be given on the first day following which is not a Saturday, a Sunday or a public holiday or bank holiday in that place.[55] The term 'holiday' is defined for these purposes to mean either a day that is a public holiday in the place in which the correspondence is due to be received, or a day on which the place or office where the correspondence is due to be received is closed for the whole day (for example, the public service holiday between Christmas and New Year).[56]

Prescribed periods – invitations to provide information

11.5.21 For invitations issued after 1 July 2013, the prescribed periods for Part 5 and Part 7 invitations are the same, except where the invitation relates to a bridging visa detainee.

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[51] *Migration Legislation Amendment Regulations 2013* (No 1) (Cth) (SLI 2013, No 33), as amended by *Migration Legislation Amendment Regulations 2013* (No 2) (Cth) (SLI 2013, No 96), amended the Regulations by aligning Tribunal prescribed periods in relation to invitations to provide comments or a response. The alignment of the prescribed periods commence on 1 July 2013 and apply to primary decisions made on or after 1 July 2013, and any invitation to provide comments or a response sent on or after 1 July 2013.
[52] ss 359B(2), 424B(2).
[53] ss 359B(3), 424B(3).
[54] ss 379C [pt 5], 441C [pt 7].
[55] *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act) s 36(2). The Acts Interpretation Act applies to all Acts unless there is a contrary intention: Acts Interpretation Act: s 2. The Acts Interpretation Act also applies to legislative instruments, notifiable instruments and other instruments: *Legislation Act 2003* (Cth) s 13(1).

Prescribed periods – Part 5

11.5.22 Regulations 4.17 and 4.18 of the Regulations prescribe the periods for the provision of information under Part 5 of the Migration Act. Regulation 4.17 prescribes the period for response where a person is given a written invitation to provide information otherwise than at interview. Regulation 4.18 prescribes the period for response where a person is invited to provide information at interview.

11.5.23 The prescribed periods under both regs 4.17 and 4.18 may be different for cases where the decision under review is one under s 338(4) [refusal or cancellation of a bridging visa resulting in the applicant being in immigration detention]. For these cases, s 367(1) and reg 4.27 require the Tribunal to make its decision within a prescribed period of 7 working days. Where the prescribed period for information would end before the end of the 7 working day period prescribed by reg 4.27 or before an extension of that period (permitted under s 367(2)), then the prescribed period for information starts when the invitation is received and ends at the end of the reg 4.27 period/extended period.

Prescribed periods – Part 7

11.5.24 Regulations 4.35 and 4.35A of the Migration Regulations set out the prescribed periods for the provision of information under Part 7 of the Migration Act [protection]. Unlike invitations sent prior to 1 July 2013, there is no distinction between information to be provided from inside and outside Australia.[57] The table below sets out the current (post 1 July 2013) prescribed periods.

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[56] Acts Interpretation Act s 36(3).
[57] regs 4.35, 4.35A amended by SLI 2013, No 33, as amended by SLI 2013, No 96. For case law on the pre 1 July 2013 version of these provisions, and the distinction between obtaining information from inside and outside of Australia see *MZYMP v MIAC* [2011] FMCA 884; and *SZQBA v MIAC* [2011] FMCA 725 applying *SZKJV v MIAC* [2008] FMCA 26.

Table of prescribed periods – invitations to provide information

PRESCRIBED PERIODS			
	BV Detainee – refusal or cancellation of bridging visa ***Part 5 reviewable decision only***	**Other Detainee – all other review applications**	**Non-detainee – all review applications**
Information to be given OTHER THAN AT AN INTERVIEW	2 working days after receipt of the invitation OR where applicant agrees in writing - not less than 1 working day after notice is received. *reg 4.17(2)*	7 calendar days after receipt of the invitation OR where applicant agrees in writing - not less than 1 working day after notice is received. *reg 4.17(3) – Part 5* *reg 4.35(2) – Part 7*	14 calendar days after receipt of the invitation OR where applicant agrees in writing - not less than 1 working day after notice is received. *reg 4.17(4) – Part 5,* *reg 4.35(3) – Part 7*
Information to be given AT AN INTERVIEW	Within 2 working days after receipt of the invitation. *reg 4.18(2)*	Within 14 calendar days after receipt of the invitation. *reg 4.18(3) – Part 5* *reg 4.35A(2) – Part 7*	Within 28 calendar days after receipt of the invitation. *reg 4.18(4) – Part 5* *reg 4.35A(3) – Part 7*

Extending the period to give information

11.5.25 Under ss 359B(4)/424B(4), the Tribunal has a discretion to extend the period of time within which a person is to provide information where a formal written invitation has indicated that the information was to be given otherwise than at an interview. The Tribunal must not act unreasonably in the exercise of its discretion.[58] The discretion may be exercised whether or not the applicant asks for an extension, however, in practice it would usually be the case that the applicant has asked. If an applicant does ask for an extension of time, it need not be in any particular form, although the Tribunal generally requests that applicants submit any request for an extension in writing for evidentiary purposes.

11.5.26 The period of time for the extension is at the discretion of the member, having regard to all the circumstances of the matter and the reasons given for the request.[59] This is because there is no prescribed further period for extensions of time. In *Bautista v MIBP*, the Federal Court held that reg 4.18A(4) was invalid.[60] The Court reasoned that as reg 4.18A(4) provided that the prescribed period of time for the extension started when the person receives notice, depending on when further time was requested and the Tribunal actioned the request, the prescribed further

[58] See *Hossam v MIBP* [2016] FCA 1161 at [55] in which the Federal Court found that the Tribunal's decision not to extend the time under s 359B(4) within which to respond to a s 359A invitation was not unreasonable in circumstances where the appellant, who had an authorised recipient, had not made an application for an extension of time and no reason was apparent on the information before the Tribunal as to why the appellant might not have been able to comment. The authorised recipient had replied to the invitation stating only that he had been unable to contact the appellant but that he could be overseas (although movement records showed the appellant as onshore). While the Tribunal had not given reasons in its decision specifically addressing its consideration of the discretion, the considerations referred to by the Court established that the Tribunal had not acted unreasonably.
[59] *Bautista v MIBP* [2018] FCA 1114 at [78].
[60] *Bautista v MIBP* [2018] FCA 1114 at [53]. Regulation 4.18A(4) provided for, where the review application did not relate to a detainee, a prescribed further period of time of 14 days after the day the person received notice of the extended period (unless a shorter period of not less than one working day was agreed to).

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period would be meaningless. This is because the original period to respond and the further period could overlap where an applicant requested further time early in the original period and the request was also granted early in the period. The Court held that this created potentially arbitrary results. Given that the other prescribed further periods for extensions use similar wording, they are also likely to be invalid.[61]

11.5.27 It is open to the Tribunal to grant a short extension if the applicant gives reasons justifying a short extension. Conversely, if the circumstances warrant, a long extension may be granted where the applicant requires one to respond to the invitation.

11.5.28 Where the invitation indicated that the information was to be provided at an interview, the Tribunal has a discretion under ss 359B(5)/424B(5) to change the time of the interview to a later time within the initial prescribed period or within a further prescribed period.[62] The Tribunal may also extend the period and change the time to a time within the extended period.[63] Given that the prescribed further periods for extensions of the time to give information at an interview[64] use similar wording to reg 4.18A(4), which was held to be invalid in *Bautista v MIBP*, they are also likely to be invalid. This means that the Tribunal may extend the period at its discretion, having regard to the circumstances of the case.

11.5.29 The Tribunal appears to have the power to extend the period to respond, or extend the period in which an interview is to occur, on more than one occasion.[65] This is not free from doubt as the Federal Circuit Court in *Yang v MIAC*[66] and *SZUSR v MIBP*[67]proceeded on the basis that the period may only be extended once, although this does not appear to be the *ratio* of the judgments and would therefore not be binding on the Tribunal.[68] Having regard to the wording of the provision themselves, the Act does not expressly prohibit the Tribunal from exercising its discretion to extend the period on one occasion only. Further, s 33(1) of the *Acts Interpretation Act 1901* (Cth) provides that where an Act confers a power, that power may be exercised from time to time, which indicates that the Tribunal may use the power to extend on multiple occasions.[69] The better reading of the provision appears to be that the Tribunal may exercise its discretion to grant multiple

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[61] regs 4.18A(2), 4.18A(3), 4.35B(2).
[62] ss 359B, 424B.
[63] ss 359B(5)(b), 424B(5)(b).
[64] regs 4.18B(2), 4.18B(3), 4.18B(4), 4.35C(2).
[65] ss 359B(4), 359B(5), 424B(4), 424B(5).
[66] *Yang v MIAC* [2010] FMCA 890.
[67] *SZUSR v MIBP* [2015] FCCA 3105.
[68] *Yang v MIAC* [2010] FMCA 890 at [32] and *SZUSR v MIBP* [2015] FCCA 3105 at [62]. In *Yang* for example, the applicant had requested an extension of time in which to provide information so that he could sit a further IELTS test in a few months. The Court held that even if the Tribunal had granted that extension, it could only be granted for a period of 28 days (which was the prescribed period at the relevant time), and as such, any extended period would have expired before the applicant had sat the further test. The applicant in this case did not request the Tribunal to exercise the power more than once, and the Court did not explicitly consider whether the legislation would have prevented the Tribunal from granting additional prescribed further periods (if such requests were made). As the initial request for a prescribed further period was refused, the Court did not need to decide whether the Tribunal had such a power.
[69] See *Bond Corp Holdings Ltd v Australian Broadcasting Tribunal* (1998) 84 ALR 669 at 678–679 where the Court held that where there was no contrary intention to displace the operation of s 33(1), a provision is interpreted to permit multiple exercises of the power.

extensions where, having regard to the reasons given for requiring an extension, it would be reasonable to grant them.

11.5.30 The Tribunal is not empowered to extend the period to respond to an invitation when the request for the extension is received *after* the initial prescribed period has passed.[70]

11.5.31 Note that any information received after any time for giving information has expired but before the decision is finalised must still be taken into account.

11.5.32 The current (post 1 July 2013) prescribed periods for extending the time for providing information are set out in the table below.

Table of prescribed periods – Extension of invitation to provide information

PRESCRIBED EXTENSION PERIODS		
	BV Detainee – refusal or cancellation of bridging visa **Part 5 Reviewable Decision only**	**All other review applications – detainee and non-detainee**
Comments to be given OTHER THAN AT AN INTERVIEW	No prescribed period. Length of extension is at Tribunal's discretion. See *Bautista v MIBP* [2018] FCA 1114 which held that reg 4.18A(4) is invalid (the other prescribed periods for extensions of time are also likely to be invalid). *reg 4.18A(2)*	No prescribed period. Length of extension is at Tribunal's discretion. See *Bautista v MIBP* [2018] FCA 1114 which held that reg 4.18A(4) is invalid (the other prescribed periods for extensions of time are also likely to be invalid). *reg 4.18A(3), reg 4.18A(4) – Part 5* *reg 4 35B(2) – Part 7*
Comments to be given AT AN INTERVIEW	No prescribed period. Length of extension is at Tribunal's discretion. See *Bautista v MIBP* [2018] FCA 1114 which held that reg 4.18A(4) is invalid (the other prescribed periods for extensions of time are also likely to be invalid). *reg 4.18B(2)*	No prescribed period. Length of extension is at Tribunal's discretion. See *Bautista v MIBP* [2018] FCA 1114 which held that reg 4.18A(4) is invalid (the other prescribed periods for extensions of time are also likely to be invalid). *reg 4.18B(3), reg 4.18B(4) – Part 5* *reg 4.35C(2) – Part 7*

Consequences of a failure to respond to a written invitation

11.5.33 If a person is given a formal written invitation to provide information under ss 359(2) or 424(2) and does not do so within the prescribed period, the Tribunal may make a decision on the review without taking any further action to obtain the information.[71] However, it is not obliged to do so, and may, subject to certain considerations, take further action to obtain the information (for example, by sending a further invitation).

11.5.34 If a person fails to respond to a written invitation within the prescribed period (or as extended) the review applicant also loses any entitlement to appear before the Tribunal to give evidence and present arguments relating to the issues in the

[70] *Hasran v MIAC* (2010) 183 FCR 413 at [48]. This confirmed prior comments in *Xue v MIAC* [2009] FMCA 421 following *Usman v MIMIA* [2005] FMCA 966, *MIMIA v Sun* (2005) 146 FCR 498 at [51] and *M v MIMA* (2006) 155 FCR 333 at [52].
[71] ss 359C(1), 424C(1).

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review.[72] Although the legislation does not expressly specify as such, it would appear that this consequence only arises if the invitation is given to the review applicant (as opposed to a third party) and he or she fails to respond - although the plain words of ss 359C and 424C do not appear to be so limited.

11.5.35 In the case of a review under Part 7 of the Migration Act, the Tribunal still retains the discretion to invite the applicant to a hearing notwithstanding that they may have failed to provide the information requested of them within the prescribed period.

11.5.36 However, in the case of a review under Part 5 of the Migration Act, the language of s 363A operates to remove any discretion which the Tribunal may have had to allow a person to do something where a provision of Part 5 states that the person is not entitled to do so.[73] Therefore once the applicant has lost their entitlement to a hearing, the effect of ss 359C(1), 360(3) and 363A is that the Tribunal has no power to invite the applicant to a hearing. As the Tribunal lacks the power to hold a hearing, no new hearing invitations may be issued and, if the applicant had already been invited to a hearing but that hearing has not yet taken place, that hearing will be cancelled and the applicant informed that it will no longer be going ahead.[74]

11.5.37 A request by an applicant for an extension of time does not constitute a response to a request for information under ss 359(2)/424(2). In *Singh v MIBP*,[75] in finding that a request by the applicant for an extension of time did not constitute a response to the Tribunal's request for information of the applicant's competency in English, the Court distinguished *MIAC v Saba Bros Tiling Pty Ltd*[76] on the basis that that case was concerned with an invitation to 'comment or respond' pursuant to s 359C(2) and not an invitation to 'give information' pursuant to s 359C(1). Whether or not those provisions are engaged will largely depend on how the invitation was expressed.

11.5.38 The Courts have found that ss 359C(1) and 424C(1) apply in circumstances where an applicant responds to a written ss 359(2) or 424(2) invitation in time but does not provide the particular information requested or does not provide all of the requested information. For example, in *Singh v MICMSMA*[77] the applicant was invited under s 359(2) to provide information in writing as to whether he met cl.485.221 (which requires the provision of a skills assessment). The applicant's response to the invitation did not demonstrate that he met the criterion, instead he attempted to provide an explanation of why he could not provide a skills assessment. The Court was satisfied that the Tribunal was correct to proceed on the basis that s 359C(1)

[72] ss 360(3), 425(3). In *Shrestha v MIBP* [2014] FCCA 34, in circumstances where there was an administrative error by the Tribunal and a s 359A letter template was used instead of a s 359(2) letter template, the Court found that s 360 did not operate with the effect that the applicant was no longer entitled to a hearing, as the Tribunal had not complied with its statutory obligation under s 359C(1) to invite the applicant under s 359 to give information.
[73] *Hasran v MIAC* (2010) 183 FCR 413 at [26]. This confirms the views expressed in *M v MIMA* (2006) 155 FCR 333 at [46], and *MIMA v Sun* (2005) 146 FCR 498, for example.
[74] *Giri v MIAC* [2011] FMCA 282 at [21], [29]; upheld on appeal: *Giri v MIAC* [2011] FCA 928. Although this case concerned s 359A, the reasoning is equally applicable to ss 359/424. See also *Lokuwithana v MIBP* [2017] FCCA 176 at [115]–[121] where the Tribunal's reliance upon evidence given by the applicant at a hearing where the Tribunal lacked the power to hold the hearing operated unfairly against the applicant and resulted in jurisdictional error.
[75] *Singh v MIBP* [2014] FCCA 1403.
[76] *MIAC v Saba Bros Tiling Pty Ltd* [2011] FCA 233.
[77] *Singh v MICMSMA* [2019] FCCA 2343.

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applied and that the applicant had thereby lost any entitlement to appear before the Tribunal.[78]

11.5.39 As there is no s 363A equivalent for a review under Part 7, which means the Tribunal retains a discretion to hold a hearing even where s 424C(1) applies, these judgments about the loss of the hearing entitlement do not have the same level of significance for Part 7 matters.

11.5.40 While a plain reading of those sections, and judicial authority as discussed above, suggests that the applicant must provide 'the' specific information which has been requested, a strict application of those sections may, particularly in the case of a review under Part 5, lead to an unfair result. For example, the Tribunal could give a written invitation to provide information that is not in fact in existence or cannot be accessed by the applicant. Whether or not the Tribunal will have the power to hold a hearing after an applicant has failed to respond to an invitation under s 359 will depend upon how the invitation was expressed.

11.5.41 It should be noted that any response or information provided after the prescribed period by the applicant must be taken into account in all cases, including where the applicant has lost the entitlement to appear before the Tribunal.

11.6 Failure to inquire

11.6.1 The Tribunal is under no general *duty* to obtain information.[79] It is well established that the powers in ss 359 and 424 to get information or invite a person to give information are discretionary or permissive. Generally speaking, there is no obligation on the part of the Tribunal to use those powers.[80] Nor are those powers the source of any obligation on the Tribunal to go further and seek more information that might enhance, detract from or otherwise be relevant to information which it has already received.[81]

11.6.2 The Tribunal is not required to make an applicant's case for him or her, but may ordinarily decide a review on what the applicant puts forward.[82] It is for the applicant

[78] *Singh v MICMSMA* [2019] FCCA 2343 at [61]–[62].
[79] *MIAC v SZIAI* (2009) 111 ALD 15 at [25]; *MIMIA v SGLB* (2004) 207 ALR 12 at [43], [124]*; MIEA v Singh* (1997) 74 FCR 553 at 561; *SBBA v MIMIA* [2003] FCAFC 90 at [8]; *MIMIA v VSAF of 2003* [2005] FCAFC 73 at [20]; and *SZJCL v MIAC* [2007] FMCA 839 at [53].
[80] See *MIAC v SZIAI* (2009) 111 ALD 15 at [25]; *MIMIA v SGLB* (2004) 207 ALR 12 at [43], [124]; *MIEA v Singh* (1997) 74 FCR 553 at 561 and *SBBA v MIMIA* [2003] FCAFC 90 at [8]; *SJSB v MIMIA* [2004] FCAFC 225 at [16]; *MIAC v SZGUR* (2001) 241 CLR 594 at [20].
[81] *MIAC v SZGUR* (2001) 241 CLR 594 at [86]. The respondent in that case submitted information in relation to his medical conditions in response to a s 424(1) letter. The Court held that the Tribunal was bound to have regard to that information, but was not obliged to seek further information in relation to those conditions.
[82] *SZNWA v MIAC* [2010] FCA 470 at [41]; *SZLJK v MIAC* [2008] FMCA 694 at [26]. See also *SZMCE v MIAC* (2008) 105 ALD 508 at [22] where the Court rejected the applicant's argument that the Tribunal was obliged to make enquiries into the authenticity of a magazine article submitted by him. The Court observed that the Tribunal is not an adversarial cross-examiner but an inquisitor obliged to be fair. In an application for a review, it is for the applicant to advance whatever evidence or argument he wishes to advance, and for the Tribunal to decide whether his claim has been made out. Similarly, in *SZNBX v MIAC* (2009) 112 ALD 475, the applicant asked the Tribunal to contact his lawyer in Latvia to verify his claims. However, he did not provide the Tribunal with the lawyer's number. The Court found that the Tribunal's failure to enquire was not unreasonable, and that it was for the applicant to make his own case and provide sufficient information that would enable the Tribunal to come to a state of satisfaction: at [26]–[30].

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to make his or her own case.[83] In *SZMCE v MIAC*[84] the Court observed in this regard that the Tribunal is not an adversarial cross-examiner but an inquisitor obliged to be fair and that in an application for a review, it is for the applicant to advance whatever evidence or argument he wishes to advance, and for the Tribunal to decide whether his claim has been made out.

11.6.3 Generally speaking, the Tribunal is not obliged to investigate claims by making inquiries outside the material presented to it by the applicant.[85] However, in rare cases a failure to make an inquiry could give rise to jurisdictional error for failure to complete the review. The High Court has commented that it may be that failure to make an obvious inquiry about a critical fact, the existence of which is readily ascertained, could, in some circumstances, constitute a failure to review and therefore give rise to jurisdictional error.[86]

11.6.4 As a result, there may be cases where the Tribunal may be obliged to use its powers to obtain information where the Tribunal knows that there is readily available factual material, not already before the Tribunal, that is likely to be of critical importance in relation to a central issue for determination. The following cases are illustrations of where the courts have found that the Tribunal erred by failing to make an obvious inquiry about a critical fact which was readily ascertained:

- In *MIAC v Le*[87] the Court found that the Tribunal's failure to make enquiries of the delegate about an ambiguity in the primary interview constituted a failure to make a straightforward enquiry for information that was apparently readily available and relevant to critical issues and was therefore unreasonable.

- In *AMT15 v MIBP*[88] the appellant submitted a document which was addressed to him and purportedly authored by a Member of the Sri Lankan Parliament. The letter, if accepted, had the potential to corroborate the appellant's claims. The Tribunal gave no weight to the document due to its concerns about the appellant's credibility (which were not based on the letter itself). The Court

[83] *Prasad v MIEA* (1985) 6 FCR 155 at [169]–[170]; *SZBEL v MIMIA* (2006) 228 CLR 152 at [40]; *Re Ruddock; Ex parte Applicant S154/2002* (2003) 201 ALR 437 at [57] and [1]; *WAKK v MIMIA* [2005] FCAFC 225 at [73]; *MIMA v Lay Lat* (2006) 151 FCR 214 at [76]; and *Abebe v Commonwealth* (1999) 197 CLR 510 at [187].
[84] *SZMCE v MIAC* (2008) 105 ALD 508 at [22]. In that case, the Court rejected the applicant's argument that the Tribunal was obliged to make enquiries into the authenticity of a magazine article submitted by him. See also, *SZNBX v MIAC* (2009) 112 ALD 475 at [26]–[30].
[85] *SZGRK v MIAC* [2010] FCA 153 at [18]. The Court held that in the circumstances no duty could have arisen for it to make enquiries or seek to fill in gaps or further explore inconsistencies: at [25]. See also *SZNWA v MIAC* [2010] FMCA 21 at [163], upheld in *SZNWA v MIAC* [2010] FCA 470, where the Court held that there was no obligation to enquire as to the whereabouts of a penalty notice given by the applicant to her agent in circumstances where that document had not been produced to the Tribunal and it had been made clear that the Tribunal did not have a copy.
[86] *MIAC v SZIAI* (2009) 111 ALD 15 at [25]; *Prasad v MIEA* (1985) 6 FCR 155. In *SZMWI v MIAC* (2009) 111 ALD 160 the Court found that the Tribunal's failure to enquire constituted a form of *Wednesbury* unreasonableness, in circumstances where it rejected evidence of its own expert based on a suspicion which had not been put to the expert and there was no impediment to further enquiry from the expert. See also *SZNIL v MIAC* [2009] FMCA 883 where an applicant supplied the Tribunal with the telephone number for a witness whose statement the Tribunal rejected without contacting the witness; and *SZLGP v MIAC* (2009) 181 FCR 113 where the Court held that although the mere extension of an invitation by the applicant to conduct an enquiry was not of itself sufficient to make it an obligation, the circumstances of the case may be so. In that case the relevant circumstances giving rise to an obligation arose were that the Tribunal had before it Department file notes facilitating the making of the enquiry, the class of visa sought, and the impact of the inquiry on the assessment: at [49]–[50].
[87] *MIAC v Le* (2007) 164 FCR 151.
[88] *AMT15 v MIBP* [2018] FCA 366 at [45]–[47].

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held that it would have been 'relatively easy' for the Tribunal to have made direct or indirect enquiries of the member of the Sri Lankan Parliament, or to have asked questions about whether the author held the office to which the letter referred. Given there was no evidence that the letter was not authentic and it contained multiple contact details for the author, the Court found that the Tribunal had failed to exercise jurisdiction by not making these enquiries.

- In *SZELA v MIMIA*[89] the Tribunal was found to have unreasonably failed to make enquiries of the Document Examination Unit to clarify the source on which it based its advice that the applicant had provided a fraudulent document in light of a request for further particulars from the applicant.

- In *SZCAQ v MIMIA*[90] the Tribunal's failure to have regard to India's *National Security Act 1980* resulted in a denial of procedural fairness. The Court held that failure to make an enquiry that consists merely of checking the wording of foreign legislation written in English, readily available on the internet, will amount to a failure to accord procedural fairness.

- In *MZYID v MIAC*[91] the applicant claimed that he was close to Dr M, and submitted a letter from Dr M. At hearing the Tribunal indicated concern about a lack of evidence from this witness, and the applicant's advisor indicated that she had spoken to Dr M and that he had agreed to make himself available to give evidence. The advisor also indicated a desire to be informed of how the Tribunal intended to proceed and her willingness to provide any necessary further information. The Tribunal sought information from Dr M in a manner other than that suggested by the advisor, but received no response. The Court found that the Tribunal had fallen into jurisdictional error, but characterised this as a failure to inquire, rather than failure to call a witness.

- In *SZMYO v MIAC*[92] the Court held that the Tribunal denied the applicant a meaningful opportunity to respond to a s 424A invitation in circumstances where inconsistencies between his protection visa application and a summary of his airport interview were put to him for comment, he requested a 'full record of the Airport Interview – the actual questions asked and the actual recorded responses to enable him to respond to the Tribunal's letter' and the Tribunal did not make any enquires with the Department as to the existence of such a record. The Court found the possibility of a successful outcome for the applicant had the audio recording been before the Tribunal could not be discounted as the transcript of the audio recording was in significant respects different to the summary of the airport interview.

- In *SZRGW v MIAC*[93] the Court considered the High Court's qualification in

[89] *SZELA v MIMIA* [2005] FMCA 1068.
[90] *SZCAQ v MIMIA* [2006] FMCA 229.
[91] *MZYID v MIAC* [2010] FMCA 749.
[92] *SZMYO v MIAC* [2011] FCA 506.
[93] *SZRGW v MIAC* [2012] FMCA 701 at [29]. Ultimately, however, the error in this case was an error within jurisdiction as, once translated and understood, the document did not add anything to the applicant's case. Undisturbed on appeal in *SZRGW v*

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SZIAI to there being no general duty to inquire could encompass obtaining a translation of a potentially critical document. The Court held that in declining to accept an untranslated document that the applicant tried to submit during the hearing, even though the Tribunal had already accepted the applicant's factual claims as true – being that he was kidnapped – there remained a critical issue of the motivation of the kidnappers and, unless it was plain that the document offered by the applicant did not bear upon that issue, the Tribunal erred by not accepting it and obtaining a translation, or at least giving the applicant a reasonable opportunity to do so.

- In *Shah v MIBP*,[94] the Court held the Tribunal constructively failed to conduct a review by failing to undertake a further inquiry *at or near the date of its decision* to ascertain the applicant's enrolment details. Applying the principles in *SZRTF v MIAC*, the Court held the obligation to inquire arose because whether or not the applicant was enrolled was a time of decision criterion and a critical fact in the Tribunal's decision and, by accessing the PRISMS database five months prior to the decision but failing to make further inquiries, the Tribunal bound itself to information about a state of affairs at that time and prevented itself from addressing the question of whether the applicant was in fact enrolled at the time of decision. The Court inferred from the Tribunal's access of the PRISMS database prior to the decision that the inquiry as to the enrolment status was 'obvious' and the information was easily ascertainable.[95]

- In *CLK16 v MIBP*[96] the Court found that the Tribunal was not in a position to make any proper evaluation and reasoned assessment of the applicant's claim that he had been falsely accused and charged with explosives offences in Bangladesh because it had not made critical inquiries with the applicant's solicitor. The solicitor had written a letter to the applicant (provided to the Tribunal) stating it was not safe for him to return home due to the charges. The Court also considered that the Tribunal had not made inquiries with the relevant Bar Associations in Bangladesh. The Court found that, if obvious inquiries of the solicitor or Bar Associations about the genuineness of the letter had been made, the nature of any charges against the applicant could have been clarified. The Court appears to have proceeded on the premise that the any information obtained from the solicitor or Bar Associations would have been reliable.

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MIAC [2013] FCA 100. An application for special leave to appeal to the High Court was dismissed: *SZRGW v MIAC* [2013] HCASL 110. See also *WZANF v MIAC* [2010] FMCA 110 where the Court found that the Tribunal fell into jurisdictional error by failing to make enquiries in relation to the existence of a newspaper, the publication of the newspaper article, the possibility of obtaining a copy of the article and the existence and veracity of an 'authority to capture' at [106]–[109].

[94] *Shah v MIBP* [2014] FCCA 624.

[95] *Shah v MIBP* [2014] FCCA 624 at [45], [47]. While the Court's conclusion relied on the Tribunal having made the earlier inquiry of PRISMS, Judge Manousaridis noted in *obiter* at [46] that, in applying *MIBP v SZRTF* [2013] FCA 1377, the obligation to inquire at or immediately before the decision would have arisen even in the absence of the earlier inquiry. However, this judgment turns on its particular facts.

[96] *CLK16 v MIBP* [2017] FCCA 2582 at [57]–[59].

11.6.5 By way of contrast, the following cases are illustrations of where the courts have found that there was no duty to inquire:

- In *MZXRS v MIAC*, the Court found that any duty to inquire is limited to 'information' and not mere opinions, assessments, or evaluations by third parties and that there was no duty to contact the authors of a number of witness statements and affidavits provided to the Tribunal by the applicant because the substance of the matters relied upon by the appellant were already before the Tribunal in the affidavits and statements.[97]

- Similarly, in *SZFRB v MIAC* the Court found that, in circumstances where the Tribunal did not accept that a statutory declaration supported an applicant's claims, it was not obliged to examine and test the evidence of its author because this would not have made any difference and only confirm that he had provided it.[98]

- In *MIBP v SZRTF,*[99] the Court, overturning the lower court judgment held that the Tribunal had not erred by failing to inquire into the applicant's claim that she was pregnant, in the context of a claim to protection based on China's one-child policy. There was no material to indicate that the information that might be elicited by such an inquiry would be critical to the validity of the decision. For a fact to be critical to the review, relevance to the review alone is not enough – it must at least be decisive of, or crucially important to an anterior issue which provides a 'sufficient link' to the outcome of the review.[100]

- In *Singh v MIBP*[101] the Court found that there was no duty to inquire with the manager of a business about the applicant's completion of 900 hours of work experience, in circumstances where the applicant had already provided a letter from the manager attesting to the work experience. The Court found that there was nothing to indicate that the manager would do anything other than reiterate what was in his letter, and as there was evidence that the manager was party to the alleged fraud, he would have had no choice but to state that the work experience letter was genuine and deny he was involved in any scam.

- In *ALW15 v MIBP*[102] the Court found that there was no duty to make enquiries of the author of a document, which the appellant provided to the Tribunal, so that the Tribunal might not draw adverse inferences which arose naturally from the document. The document purported to be from the appellant's former employer and was dated after the appellant claimed his employer had been able to continue in the business due to ongoing threats. The Court held that this was not a case of the Tribunal not accepting evidence provided by the

[97] *MZXRS v MIAC* (2009) 106 ALD 305.
[98] *SZFRB v MIAC* [2010] FMCA 395 at [36]–[39]. See also *MZRTF v MIAC* [2013] FCCA 91 at [31], [39]–[41], [47].
[99] *MIBP v SZRTF* [2013] FCA 1377.
[100] *MIBP v SZRTF* [2013] FCA 1377.
[101] *Singh v MIBP* [2017] FCA 1285 at [67]–[68].
[102] *ALW15 v MIBP* [2018] FCA 190 at [20]–[21].

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appellant on a basis which could easily have been checked, which was a factor against finding there was a duty to enquire.

- In *Ashraf v MIBP*[103] the Court found that there was no duty to seek contact details from the Department for a manager of a business who denied in an interview with the Department that she had signed a letter stating the applicant had completed 940 hours of work experience. The Tribunal had the manager's contact details on file from the lengthy interview transcript, however did not turn its attention to the relevant passages referring to the manager's contact details. The Court held that the manager's contact details did not constitute a critical fact, they were merely relevant for the purposes of locating a witness in order to service a summons. Further, the Court held that it did not consider there to be a 'sufficient link' between any error by the Tribunal in failing to obtain the manager's contact details and the outcome of the review.

11.6.6 Accordingly, where there is no obvious avenue of inquiry leading to easily ascertainable and relevant facts the Tribunal has no duty to make further inquiries.[104] In *Hoang v MIAC*,[105] for example, the Court found that the Tribunal was under no duty to make inquiries about a home visit report prepared by the Department in relation to a claimed spousal relationship where there was no critical or central fact identified by the applicant which could have been easily ascertained by making those inquiries and those inquiries were not obvious. The question of whether an inquiry is 'obvious' must at least be resolved with reference to the particular circumstances of the case.[106]

11.6.7 Information cannot, however, be 'centrally relevant' when the only indications available at the time were that the information, even if obtained, would not have yielded a different (or useful) outcome.[107] In *SZMJM v MIAC*[108], for example, the Court held that an inquiry into the witness statements was not required as it would not have affected the outcome of the review or resolved the reasons for finding the applicant not credible. Additionally, there was no duty to inquire into a police report as it was not apparent that it was critical in any way to the Tribunal's conclusions as to the credibility of the applicant. Similarly, in *SZOEG v MIAC*[109] the Court found

[103] *Ashraf v MIBP* [2018] FCAFC 50 at [58]–[60]. An application for special leave to appeal to the High Court was dismissed: *Ashraf v MIBP* [2018] HCASL 283.
[104] *WZANF v MIAC* [2010] FMCA 110 at [97], [100]. See also *Aitra v MIBP* [2014] FCCA 910 where the Court rejected the applicant's argument that the Tribunal should have made enquiries to satisfy itself that the address on the letter notifying the applicant of the delegate's decision was visible through the window of the envelope before concluding that it did not have jurisdiction to review the application made out of time. The enquiries were not obvious enquiries and there was nothing before the Tribunal to suggest that the delegate's letter had been placed incorrectly in the windowed envelope (at [55]).
[105] *Hoang v MIAC* [2013] FCCA 89. The Court rejected the applicant's claim that there were doubts about the reliability of the report and that the Tribunal, in relying upon the report, should have first made further enquiries by obtaining relevant file and contemporaneous notes kept by the inspecting officers or by summonsing the officers to give evidence as to their method of operating and circumstances in which their report was prepared. The Court, at [57], found that while those may have been obvious enquires in the context of litigation in a court, where the rules of evidence applied, where there are no such rules or procedural boundaries, those inquiries were not so obvious.
[106] *SZOEG v MIAC* [2010] FMCA 412 at [101].
[107] *MIAC v Dhano* (2009) 180 FCR 510 at [154].
[108] *SZMJM v MIAC* [2010] FCA 309 at [43]–[44].
[109] *SZOEG v MIAC* [2010] FMCA 412 at [120]–[121], [154]. *S*ee also *SZNSK v MIAC* [2009] FMCA 1196 at [51]–[52] in which the Court held that the Tribunal was not under a duty to check the authenticity of a document in circumstances where had it concluded there was nothing on the record to indicate that any further inquiry could have yielded a useful result given that the

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that there was no duty to inquire into the witness statements as there was no sufficient link between the proposed inquiries and the ultimate outcome. Moreover, the Court held that the Tribunal is not obliged to embark on a continuous round of inquiry until a witness provides unambiguous evidence, or even evidence that assists the applicant.

11.6.8 The Courts will not generally find that there was an unreasonable failure to obtain information where the relevant information is already before the Tribunal, known to the applicant or reasonably within the applicant's own power to adduce.[110] For example, in *MZXRS v MIAC*,[111] the Federal Court found that the Tribunal was not obliged to contact the authors of various affidavits submitted by the applicant in order to verify the information given. The Court found that this went beyond an inquiry of the kind contemplated by the authorities because no information could readily have been obtained by the making of the inquiry. The substance of the matters upon which the applicant relied were already before the Tribunal in the affidavits and it was not suggested that there was any omission which should have been apparent to the Tribunal. Similarly, in *Tha Thi Nguyen v MIAC*[112] the review applicant, who was represented, had expressly indicated that she did not wish to call any witnesses, and the visa applicant did not give oral evidence but provided written materials to the Tribunal. The Court held that in those circumstances, the Tribunal's failure to take oral evidence from the visa applicant was not unreasonable and did not constitute jurisdictional error.

11.6.9 However, note that 'readily available' material is heightened in any assessment of unreasonableness where the enquiry to be made was only 'obvious' to the decision maker and not the applicant .[113]

11.6.10 It is also worth noting that, even where the Tribunal may be under a duty to enquire or obtain a translation, failing to do so in circumstances where the result of the enquiry or translation could not have affected the outcome of the Tribunal's review may not amount to a jurisdictional error.[114]

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document was a non-standard, unsigned photocopy. Whether the evidence suggested that a further inquiry by the Tribunal would have yielded a useful result was also considered in *Shah v MIAC* [2011] FMCA 18 at [109] in relation to contacting a document's author.

[110] *SZMXS v MIAC* [2009] FMCA 537 at [25]. In *SZMXS* Driver FM referred to Flick J's judgment in *SZIAI v MIAC* [2011] FCA 1372 which was later overturned in *MIAC v SZIAI* (2009) 259 ALR 429. However the point that there may be little duty upon a decision maker to enquire into facts well known to an applicant and facts within his power to adduce was left undisturbed by the High Court in *SZIAI.* Further, an appeal from the judgment in *SZMXS* was dismissed: *SZMXS v MIAC* [2009] FCA 1542. In *MIAC v MZYCE* (2010) 116 ALD 156 at [37]–[38], the Court held that the Tribunal, having put the applicant on notice that it may not accept the truth of allegations contained in newspaper articles, was not obliged to do what he had not, that is, take every opportunity to seek further information concerning their authenticity and persuade the Tribunal otherwise. See also *Cho v MIAC* [2010] FMCA 3 at [34]–[35] where the Court held that the Tribunal was under no obligation to make its own inquiries in relation to the applicants' earlier two visas as if the applicants had wanted the Tribunal to consider the material, they should have put it to the Tribunal for consideration.

[111] *MZXRS v MIAC* (2009) 106 ALD 305 at [30].

[112] *Tha Thi Nguyen v MIAC* (2010) 244 FLR 312.

[113] *SZGUR v MIAC* [2009] FMCA 750 at [171].

[114] *SZRGW v MIAC* [2012] FMCA 701 at [36]. Undisturbed on appeal in *SZRGW v MIAC* [2013] FCA. An application for special leave to appeal to the High Court was dismissed: *SZRGW v MIAC* [2013] HCASL 110. See also *MIBP v SZRTF* [2013] FCA 1377 at [39]–[40], [47].

11.6.11 In situations where the applicant has lost their entitlement to a hearing, the Tribunal may consider whether an obvious inquiry could be made on the basis of information before it.[115]

11.6.12 The Tribunal may not have 'constructive knowledge' of information just because it was provided by an applicant for an unrelated review application, , and therefore won't bound to have regard to it.[116]

11.7 Failure to comply with statutory procedures

11.7.1 If the Tribunal fails to strictly comply with the statutory procedures for obtaining information under ss 359/424, case law suggests that the manner in which the provision is breached and the consequences of that breach will be relevant to determining whether it has given rise to a jurisdictional error.[117] If the applicant was not disadvantaged or suffered no unfairness as a result of the breach, it is unlikely to give rise to jurisdictional error.

11.7.2 As discussed above, it is well established that the powers in ss 359 and 424 to get information or invite a person to give information are discretionary or permissive and generally speaking, there is no obligation on the part of the Tribunal to use those powers[118] although in rare cases a failure to make an obvious inquiry may result in jurisdictional error. Should the Tribunal decide to make inquiries to obtain information, it is for the Tribunal to choose which of its powers it will use.[119] As a result, it is unlikely, that any jurisdictional error would arise from a decision to obtain information informally rather than through the issue a formal written invitation.[120]

11.7.3 If the Tribunal gets information pursuant to ss 359(1)/424(1), it must have regard to that information. This statutory requirement reflects the Tribunal's common law obligation to have regard to relevant material in making a decision on a review.[121] A failure to have regard to relevant material, either pursuant to ss 359(1)/424(1) or the common law, may therefore result in jurisdictional error.

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[115] In *Khant v MIAC* (2009) 112 ALD 241, the Court held that the Tribunal's failure to make further inquiries about a critical fact in circumstances where the Tribunal proceeded to decision in the absence of a reply from the appellant to a s 359A/359(2) letter, coupled with the ease with which such inquiry could be made, the paucity of facts on an issue critical to the eventual finding (being whether the Tribunal was positively satisfied that there were no exceptional circumstances), meant that there was jurisdictional error for failure to conduct a proper review. *Khant* was distinguished in *Shah v MIAC* [2011] FMCA 18 at [112]–[113] where the applicant argued that the Tribunal should have contacted him following his failure to respond to a hearing invitation and non-attendance at the hearing. The Court found that the applicant's failure to respond to a hearing invitation was not of itself a critical fact, and the fact of his previous responses to the Tribunal's correspondence, but failure on this occasion, did not make it obvious that an inquiry should be made as to whether he wished to attend, particularly as the invitation had been sent without incident to a migration professional.

[116] See *Shrestha v MIBP* [2014] FCCA 2709 where the Court found the delegate did not have constructive knowledge of the contents of a skills assessment submitted by the applicant for another visa application. This judgment turned on the procedural provisions governing primary decision makers but the Court's reasoning would similarly apply to procedural provisions governing the Tribunal, such as ss 359 and 424.

[117] *MIAC v SZIZO* (2009) 238 CLR 627 at [35].

[118] See *MIAC v SZIAI* (2009) 111 ALD 15 at [25]; *MIMIA v SGLB* (2004) 207 ALR 12 at [43], [124]; *MIEA v Singh* (1997) 74 FCR 553 at 561; *SBBA v MIMIA* [2003] FCAFC 90 at [8]; *SJSB v MIMIA* [2004] FCAFC 225 at [16]; *MIAC v SZGUR* (2001) 241 CLR 594 at [20].

[119] See *SZQOS v MIAC* [2012] FCA 982 where the Court held at [29] that the use of 'may' in ss 424, 427 and 428 indicated that the Tribunal had a discretion to determine the means by which it obtained the material necessary for it to make its decision.

[120] *SZNFW v MIAC* [2009] FMCA 950 at [33].

[121] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 and *MIMIA v Yusuf* (2001) 206 CLR 231.

11.7.4 If the Tribunal chooses to invite a person in writing to provide information under ss 359(2)/424(2), the Migration Act makes provision for the Regulations to prescribe periods for response. However, a failure to give the prescribed period for response will not always, of itself, result in a jurisdictional error. In *SZEXZ v MIMIA*, the Federal Court found that a breach of s 424B by giving the applicant, in an invitation under s 424(2), *more* than the prescribed period to respond was not a jurisdictional error.[122]

11.7.5 In *SZLWQ v MIAC,* the Federal Court found that a failure to specify a period under s 424B(2) at all would not establish jurisdictional error, although it would mean that the facility in s 424C [s 359C] of proceeding to a decision in the absence of the information might not be available.[123] As a judgment of the Federal Court in its appellate jurisdiction, *SZLWQ* overtakes the reasoning of the Federal Magistrates Court in *SZKJT v MIAC* which indicated that a failure to give the correct prescribed period will result in jurisdictional error, even if the period specified by the Tribunal was longer than the prescribed period.[124]

11.7.6 The approach in *SZKJT* is now unlikely to be correct in light of the High Court's judgment in *MIAC v SZIZO*,[125] which suggests that where there has been a failure to comply with a purely procedural requirement in the Migration Act, a court should ascertain whether there has been a denial of natural justice in order to determine whether there has been a jurisdictional error. It is conceivable that a failure to specify a period of response, or an invitation which gives *less* than the prescribed period of response could be found to have denied the applicant a proper opportunity to present relevant material in support of his or her case. Accordingly, to the Tribunal takes care to ensure that the correct prescribed period is specified in all written ss 359(2)/424(2) invitations.[126]

11.7.7 There is also some uncertainty as to whether a failure to specify the manner of response in a formal written invitation under ss 359(2)/424(2) would, by itself, constitute a jurisdictional error. The judgment in *SZLWQ v MIAC* suggests that it may not if the course of conduct between the parties or the invitation itself clearly

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[122] *SZEXZ v MIMIA* [2006] FCA 449 at [49].
[123] *SZLWQ v MIAC* (2008) 172 FCR 452. This reasoning was followed in *MZXTQ v MIAC* [2008] FMCA 1692 and *SZMTQ v MIAC* [2009] FMCA 29 at [36] in relation to an email to DIAC requesting a file. See also *SZJSH v MIAC* [2008] FMCA 1715 where the Court was satisfied there was substantial compliance with ss 424(3) and 424B in relation to invitations given to DIAC and DFAT, given that email responses received by the Tribunal were received within the 28 day time period. In *obiter*, the Court commented that if there was a breach of ss 424 or 424B and this were the only jurisdictional error, relief should be refused. Similarly, in *SZMNS v MIAC* [2009] FMCA 256 found that failure to specify the correct time period for response did not amount to jurisdictional error in circumstances where the Tribunal did not rely on ss 424C/359C or 425(2)/360(2).
[124] *SZKJT v MIAC* [2008] FMCA 876 at [99]. Note that in this case, as in *SZBQS,* the recipient (DFAT) did not appear to have provided the Tribunal with an address in connection with *the* review. Whereas the Court in *SZBQS* found that this has the effect that the prescribed period did not apply, the Court in *SZKJT* did not appear to find this significant and held that the prescribed period did apply.
[125] *MIAC v SZIZO* (2009) 238 CLR 627 at [35].
[126] *SZKTI v MIAC* (2008) 168 FCR 256.

implies what manner of response is required.[127] This approach has been followed in *SZIAR v MIAC*[128] and *SZEWL v MIAC*.[129]

11.7.8 It is reasonably clear that reliance on a failure to respond in time to a written invitation to make a decision on the review without inviting the applicant to a hearing, in circumstances where the invitation did not strictly comply with the formal procedure, is likely to result in jurisdictional error. The error in these circumstances is more likely to be characterised as a breach of the hearing obligation in ss 360 or 425 than a breach of ss 359 or 424.[130] For example, in *Shrestha v MIBP*[131], in giving the applicant a letter which did not meet the description of an invitation to give information under s 359, the Tribunal was found to have erred by denying the applicant a hearing.

11.8 Invitations to give *additional* information prior to 15 March 2009

11.8.1 The amendments to ss 359 and 424 made by the *Migration Legislation Amendment Act (No 1) 2009* were intended to address a series of judgments by the Full Federal Court, commencing with *SZKTI v MIAC* which interpreted those sections in their previous form, as requiring a written invitation in every case where the Tribunal wished to invite a person to give information, unless some other statutory power was being utilised.[132]

11.8.2 It was held that the elements which engaged s 424(2) were:

- an invitation
- to a person
- to give information
- which was additional information.[133]

[127] *SZLWQ v MIAC* (2008) 172 FCR 452. See also *SZLPO v MIAC* (2009) 177 FCR 1 at [129], [160], where the Full Federal Court found there was sufficient compliance with the statutory provisions where the Tribunal's invitation either referred to a 'copy' of certain documents or the 'receipt' of the information, implying that a response in writing was required.
[128] *SZIAR v MIAC* (2008) 220 FLR 232. In this case, the Court found that the Tribunal's emails to the recipient provided an email address to which to reply and sufficiently identified the way in which to give the requested information. The failure of the Tribunal's emails to specify a period within which to reply did not amount to jurisdictional error, at [33].
[129] *SZEWL v MIAC* [2008] FMCA 1495. In this case, the Court found, given the nature of governmental communications and the fact that a written report was provided, that a request for a report in writing was implied by the Tribunal in its email to DFAT and concluded there was no breach of s 424B, at [64]–[65].
[130] See *MIAC v SZNAV* [2009] FCAFC 109 at [22].
[131] *Shrestha v MIBP* [2014] FCCA 34.
[132] See *SZKTI v MIAC* (2008) 168 FCR 256 at [41], [51], [53]. In *SZKTI v MIAC*, the Tribunal telephoned the author of a letter submitted by the review applicant. A Full Court of the Federal Court held that the telephone call amounted to an invitation to provide additional information thus engaging s 424(2) and the Tribunal was not permitted to get additional information from a person without complying with the code of procedure set out in s 424(2), 424(3) and 424B. The reasoning in *SZKTI* was found to be correct by a differently constituted Full Court in *SZKCQ v MIAC* (2008) 170 FCR 236. *SZKTI* and *SZKCQ* were distinguished in a number of cases where the Tribunal was found to have utilised a different statutory power to obtain the information. See, for example, *SZBYH v MIAC* [2008] FCA 1157 at [33]–[37]; *El Drayhi v MIAC* [2008] FMCA 1484; *SZMBS v MIAC* [2008] FMCA 847 at [25]; and *SZGBI v MIAC* [2008] FCA 599.
[133] *SZKCQ v MIAC* (2008) 170 FCR 236. In that case the Tribunal was found to have breached ss 424(2)–(3), when it orally invited the applicant to provide specific additional information at the hearing and the nature of the information was such that it

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11.8.3 Further, there was no room for any election by the Tribunal to extend such an invitation informally under s 424(1), although the obligation under s 424 did not apply to information provided by way of evidence or argument in an oral hearing. [134]

11.8.4 The reasoning in these cases was thought to have significant implications for the Tribunal's ability to make informal enquiries. For example, the Federal Magistrates Court in *MZXTA v MIAC*,[135] commented that 'post *SZKTI*' any inquiry with an applicant's doctor as to the applicant's fitness to appear before the Tribunal would not be a simple administrative matter because the Tribunal could not simply telephone the doctor and ask him to disclose information about the applicant. Such a request had to be in writing.

11.8.5 However, the scope of ss 359(2) and 424(2) was narrowed somewhat by the Full Court of the Federal Court in *SZLPO v MIAC*[136] which considered the meaning of the words 'additional information'. In that case, the Court unanimously found that ss 359(2)/424(2), in their previous form, applied only to an invitation to provide information additional to that previously given to the Tribunal *by the invitee*.[137] This finding severely curtailed the range of requests for information which were caught by the provisions and therefore required compliance with the formal procedures.

11.8.6 The Court in *SZLPO* made a number of other significant findings clarifying some issues left unresolved by *SZKTI* and *SZKCQ*. In particular, it found that ss 359(2) and 424(2) did not apply to invitations to provide the Tribunal with a 'document' and probably only applied to invitations to 'natural persons'. These findings overturned the reasoning of a number cases heard in the lower courts and are discussed in further detail above.[138]

11.8.7 The line of authority flowing from the Full Federal Court's decision in *SZKTI* has now been overturned by the High Court, which heard appeals from *SZKTI* and *SZLFX*.[139] In *MIAC v SZKTI*, the High Court found that the Full Court erred in construing s 424(2) as limiting the generality of s 424(1) and no jurisdictional error arose from the Tribunal telephoning a person and obtaining information orally. Although ss 359(2) and 424(2) were subsequently amended, the High Court's decision now makes clear that both before and after 15 March 2009, the Tribunal could opt to use the general, facultative power in ss 359(1) or 424(1) to obtain information from a person or the specific, formal power to give a written invitation to a person under ss 359(2) or 424(2).

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would have to be provided *after* the hearing as it was to come from Pakistan. A third Full Court in *SZLFX v MIAC* [2008] FCAFC 125 at [1] agreed with the bench in *SZKCQ* that the decision in *SZKTI* was not plainly wrong.

[134] In *SZKJT v MIAC* [2008] FMCA 876, the Federal Magistrates Court observed with reference to the statutory code in div 4 pt 7 that the capacity to 'present arguments' appears to be that of the applicant and not anyone else at [49].

[135] *MZXTA v MIAC* [2008] FMCA 1201 at [12].

[136] *SZLPO v MIAC* (2009) 177 FCR 1 at [99]–[100].

[137] See also *SZLUC v MIAC* [2008] FCA 1319 where the Federal Court found that when the Tribunal asked an applicant to provide an English language translation of a document, it was not a request for 'additional information', but for information that had already been provided, to be provided in a different form.

[138] The approach to ss 359(2) and 424(2) in *SZLPO* was similar, in some respects, to that taken by Siopis J in *SZLTR v MIAC* [2008] FCA 1889. In that case, his Honour found indications that s 424(2) only applied in limited circumstances, i.e. where the recipient of the invitation had previously given information to the Tribunal in relation to the review then being conducted by the Tribunal, and he or she had provided his or her address to the Tribunal, or was able to be handed the invitation personally: at [33].

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[139] *MIAC v SZKTI* (2009) 238 CLR 489.