FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZQOY v MINISTER FOR IMMIGRATION & ANOR *[2012] FMCA 289*

MIGRATION – Persecution – review of Refugee Review Tribunal decision – visa – protection visa – refusal.

ADMINISTRATIVE LAW – Allegation that Refugee Review Tribunal's decision affected by jurisdictional error by reason that it denied the applicant procedural fairness, ignored her claims, did not believe her, made findings unsupported by the evidence, failed to have regard to relevant material, took an irrelevant consideration into account and was overbearing.

ADMINISTRATIVE LAW – Refugee Review Tribunal – when *functus officio.*

Migration Act 1958, ss.425, 430, 430B, 430D, 474, 477, 477A, 486A
Migration Legislation Amendment Act (No.1) 2008
Migration Legislation Amendment Act (No.1) 2009

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476
Minister for Immigration and Citizenship v SZJSS (2010) 243 CLR 164
Swift v SAS Trustee Corporation [2010] NSWCA 182
Minister for Immigration & Citizenship v SZMDS (2010) 240 CLR 611
SZQCN v Minister for immigration & Citizenship [2011] FMCA 606
Minister for Immigration and Citizenship v SZKKC (2007) 241 ALR 523
Semunigus v Minister for Immigration & Multicultural Affairs (2000) 96 FCR 533

Applicant:	SZQOY
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1924 of 2011
Judgment of:	Cameron FM
Hearing date:	22 March 2012

Date of Last Submission:	22 March 2012
Delivered at:	Sydney
Delivered on:	19 April 2012

REPRESENTATION

The Applicant appeared in person

Counsel for the First Respondent:	Mr D. Godwin
Solicitors for the Respondents:	DLA Piper Australia

ORDERS

(1) A writ of certiorari issue directed to the second respondent quashing its decision dated 27 July 2011.

(2) A writ of mandamus issue directed to the second respondent requiring it to determine according to law the application for review dated 5 April 2011.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1924 of 2011

SZQOY
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant is a citizen of Nepal who arrived in Australia on 12 September 2008 as the dependent spouse of an overseas Nepali student. The applicant remained in Australia after her husband returned to Nepal in January 2011. On 17 January 2011 she lodged an application for a protection visa claiming that she had had an inter-faith relationship in Nepal. She claimed that she became pregnant as a result and that her parents forced her to have an abortion. She claimed to fear persecution in Nepal on the basis of these events. She also said that her marriage had been a sham and implied that she had arranged her student dependent visa to escape her circumstances in Nepal.

2. On 10 March 2011 a delegate of the first respondent ("Minister") refused the applicant's application for a protection visa. The applicant then applied to the second respondent ("Tribunal") for a review of that departmental decision. She was unsuccessful before the Tribunal and has applied to this Court for judicial review of the Tribunal's decision.

3. In these judicial review proceedings the Court's task is to determine whether the Tribunal's decision is affected by jurisdictional error as that is the only basis upon which it can be set aside: s.474 *Migration Act 1958* ("Act"); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

4. For the reasons which follow, the Tribunal's decision will be set aside and the matter remitted to be determined according to law.

Background facts

5. The facts alleged in support of the applicant's claim for a protection visa are set out on pages 4-12 of the Tribunal's decision. Relevant factual allegations are summarised below.

6. The applicant made the following claims in a statement attached to her protection visa application and at a hearing before the Tribunal on 15 June 2011:

   a) she and her family were Hindu;

   b) she had a relationship with a Muslim Bangladeshi man from mid-2006 to about December 2006. Her family and friends were unaware of the relationship at the time;

   c) she fell pregnant in late 2006 as a result of the affair. In her culture, being pregnant and unmarried was considered a sin;

   d) when she told her parents that she was pregnant they beat her, told her that she had brought shame on the family and forced her to have an abortion in early 2007. They also verbally abused and threatened her partner which caused him to "ditch" her and return to Bangladesh for fear of being harmed. Everyone who knew her asked her why she had to go out with a Bangladeshi man instead of a Nepalese man;

   e) her parents sent her to live with a married couple, who were also her distant relatives, from the time of the abortion until her departure for Australia in September 2008. She later said that the couple were her parents' neighbours but then said that they were

her father's acquaintances who lived about an hour away from her parents' home. She was confined to a small room in the house;

f) she could not remember anything about the abortion because she was depressed. She did not know whether any checks or tests were done to confirm that she was in fact pregnant; whether she was given any medication or anaesthesia; how long she stayed at the medical centre; whether the abortion was performed by medication or by some other procedure; whether she stayed overnight at the medical centre; or whether she took any medication before she went there;

g) she was only one or two months pregnant at the time of the abortion so, physically, she did not appear to be pregnant and people would not have known by looking at her that she was. She did not tell anyone about her pregnancy or abortion and did not believe that her parents would have either because of the shame associated with unmarried pregnancies and because it could result in adverse consequences for her younger siblings;

h) about a month after the abortion she ceased attending college as well as all contact with her relatives and friends. She no longer had her parents' support and they had not made any contact with her since shortly after her abortion in early 2007;

i) she became depressed because of the humiliating treatment she had received from the people in her area. She suffered endless discrimination, lived in constant fear, was subjected to selective harassment and was socially ostracised because of her relationship with a foreign Muslim man;

j) the only person who helped and supported her during this time was her friend's aunt, whom she had known for about a year at the time of her pregnancy. They had a mother/daughter relationship and her friend's aunt encouraged her to go overseas so that she could live a normal life. She gave her Rs.700,000 and arranged for her visa to come to Australia;

k) if she returned to Nepal she would have to live on her own, single, unsupported and without the protection of a male relative,

which would leave her open to being abused. Because of her history, her family would not support her and the police would refuse to protect her. She would not be able to support herself financially as she would not be able to get a job in Nepal, would not have the opportunities which were available to her in Australia and had only a year 11 education;

l) although she supported the monarchy she was not actively involved in politics in Nepal. Even so, while she was in college some people became aware of her pro-monarchy views and verbally abused her. In order to protect herself, she concealed her support for the monarchy and concentrated on her studies;

m) if she returned to Nepal she would face problems from both the Maoists and the monarchists. They would treat her badly because of her history; and

n) she delayed lodging her protection visa application because, variously, she was unaware of the existence of refugee visas in the beginning; her husband advised her that there would be other solutions and applying for refugee status would affect his student visa; she did not know anyone else in Australia and had limited English and, not knowing what to do or where to go, she followed her husband's suggestions; and her agent in Nepal told her that her visa allowed her to stay in Australia for a long time so she did not "even think of any other avenues".

7. In post-hearing submissions dated 28 June 2011 the applicant's advisers expressed her claim for protection as being based on the following grounds:

a) her membership of a particular social group of Nepali women who entered into an inter-faith relationship;

b) her membership of a particular social group of Nepali women who became pregnant out of wedlock and underwent an abortion;

c) her membership of a particular social group of Nepali women who have been subjected to family violence;

d) her membership of a particular social group of Nepali women who are single and without protection of a male relative; and

e) her holding a pro-monarchy political view.

The Tribunal's decision and reasons

8. After discussing the claims made by the applicant and the evidence before it, the Tribunal found that it was not satisfied that the applicant is a person to whom Australia has protection obligations under the *United Nations Convention relating to the Status of Refugees 1951*, amended by the *Protocol relating to the Status of Refugees 1967* ("Convention"). The Tribunal's decision was based on the following findings and reasons:

a) because her evidence on the subject was vague and lacking in detail, the Tribunal did not accept that the applicant had had an abortion. Specifically, the applicant did not know whether the medical centre staff performed any test to confirm that she was pregnant before they performed the abortion, whether the abortion was done by medication or by some other procedure, or whether she had stayed overnight at the medical centre. The Tribunal was of the firm view that the applicant was unaware of this basic information because she had not had an abortion in 2007. It found that she fabricated this allegation to establish her claim to be a refugee. As the Tribunal did not accept that the applicant had had an abortion in early 2007, it did not accept that she was pregnant in late 2006 and, accordingly, was not satisfied that there was a real chance that she would face persecution in Nepal by reason of her membership of the group "Nepali women who became pregnant out of wedlock and underwent an abortion";

b) given its finding that the applicant had not fallen pregnant, the Tribunal did not accept that she had suffered violence from her family and relatives because of her pregnancy. Consequently, the Tribunal was not satisfied that there was a real chance that the applicant would be persecuted in Nepal by reason of her

membership of the group "Nepali women who have been subjected to family violence";

c) the Tribunal's adverse view of the applicant's credibility was reinforced by the following matters:

   i) it was implausible that the applicant's friend's aunt, who had only known her for about a year, would give her such a large sum of money, even as a loan;

   ii) the applicant gave inconsistent evidence. She initially claimed that none of her family or friends knew about her relationship with the Bangladeshi man but later said that people asked her how she could go out with him, indicating that people knew about the relationship. Also, at the hearing the applicant claimed that at the time of the abortion she stayed with a married couple who were her distant relatives. She subsequently said that they were her parents' neighbours and, finally, that they were her father's acquaintances;

   iii) the applicant claimed that her parents did not publicise her pregnancy because it would have brought shame to their family and would have adversely affected her younger sister's future. She claimed that, nevertheless, people still became aware of it because of the way her parents scolded her. The Tribunal considered it quite implausible that the applicant's parents would have scolded her for her pregnancy in such an indiscreet way given the very sensitive nature of the matter; and

   iv) the Tribunal was of the firm view that if the applicant was a genuine refugee she would not have waited two and a half years before lodging her application for a protection visa. The Tribunal found that the applicant's explanations for the delay were unconvincing and was of the firm view that she suffered no persecution in Nepal and only applied for a protection visa because she wanted to stay in Australia after her (false) husband had departed;

d) given its finding that the applicant was not a credible witness, the Tribunal did not accept her claims about having had a relationship with a Muslim Bangladeshi man. The Tribunal was therefore not satisfied that the applicant faced a real chance of persecution in Nepal by reason of her membership of the group "Nepali women who entered into an inter-faith relationship";

e) having rejected the applicant's essential claims as fabrications, the Tribunal:

   i) found that the applicant's relationships with her father and her other male relatives were usual loving ones and that her parents did not abandon her. Consequently, the Tribunal found that on her return to Nepal the applicant would not be a single woman unsupported by a male relative; and

   ii) did not accept that because of her inter-faith relationship, subsequent pregnancy and abortion the applicant would be treated adversely by Maoists and monarchists and that in order to avoid this she would not be able to reveal her pro-monarchy views or engage in any activities in support of the monarchy;

f) the Tribunal accepted that the applicant was a supporter of the monarchy in Nepal and that, before she came to Australia, she was verbally abused by some college students because of her pro-monarchy views. However, the Tribunal found that this did not amount to serious harm and, hence, did not constitute persecution;

g) in any event, the Tribunal was of the firm view that the applicant would not engage in any political activity or express any political views in Nepal to the extent that she might attract any persecutory reaction. The Tribunal noted in this regard that the applicant gave evidence that she had never been involved in politics in Nepal, did not know the names of the pro-monarchy political parties or groups in Nepal and had concentrated on her studies only. Because of this history, the Tribunal was of the firm view that the applicant would not engage in politics or express any political views in Nepal, not because she feared harm from any source but

because of her lack of interest in politics and lack of any active political activity in the past; and

h) the applicant made general claims about the corruption and lack of security, employment and opportunities in Nepal. In the Tribunal's view, these difficulties were not specific to the applicant but related to the general socio-economic-political conditions that existed in Nepal. As such, the Tribunal found that they were not Convention-related.

9. At around the time the Tribunal made its decision, the applicant's advisers sent a further submission containing additional potentially relevant evidence. The Tribunal refused to consider this material on the basis that it was *functus officio*.

Proceedings in this Court

10. The grounds of the application commencing these proceedings were pleaded as follows:

> *1. I do not agree with the purported decision of the Tribunal Member on the ground of denial of procedural fairness and natural justice. It is contended that jurisdictional error is evident in the way in which the Tribunal failed to make a proper genuine and realistic assessment of my fear on return to Nepal.*
>
> *2. I believe the Tribunal is not generous as the Tribunal Member did not believe me in my claims that my friend's aunt gave me the very large sum of money, which I spent to come to Australia. I argue that the Tribunal Member's disbelief in relation to financial assistance that I received from my friend's aunt is the reflection of his own view and the Tribunal Member in my case should not think other people like him in term of generosity.*
>
> *3. I argue that the Tribunal Member ignored my substance of claims and the Tribunal Member regarded me that I was not a credible witness based on no specific evidence. The fact is that I was pregnant after I had an affair with my Bangladeshi Muslim boyfriend and I was suffering violence from my parents and the relatives. I told the Tribunal Member about the length of my pregnancy based on my guess work because my pregnancy was not medically tested*

due to cultural issues, so I was unable to know the exact length of my pregnancy but my pregnancy was noticeable.

4. *It is contended that the Tribunal Member did not believe my claims that I was pregnant and I was forced to terminate my pregnancy as the Tribunal Member lacked the understanding of attitudes and practices relating to pregnancy test and abortion in Nepal are influenced by social, cultural and religious factors. Thus there was a failure to have regard to relevant material which was so fundamental that it went to jurisdiction.*

5. *The Tribunal Member has heavily relied upon cross examination of myself to highlight seeming inconsistencies and then to discount my evidence on that basis. Overbearing nature of the comments made by the Tribunal Member clearly coloured the whole of my evidence. The substantial conclusion reached by the Tribunal was an irrelevant consideration and taking an irrelevant consideration into account to cast a shadow on my credibility was a jurisdictional error.*

11. At the hearing of this application the applicant raised additional allegations to the effect that the Tribunal had failed to believe her and had had no basis not to.

12. The Minister also raised an issue concerning whether the Tribunal was *functus officio* at the time it received the applicant's advisers' further submissions on 27 July 2011.

Tribunal denied the applicant procedural fairness

13. The first allegation made in the application is that the Tribunal denied the applicant procedural fairness and that this could be discerned from what was alleged to have been its failure to undertake a proper, genuine and realistic assessment of her claims to fear persecution in Nepal.

14. This allegation was not particularized and in her oral submissions at the hearing of this application the applicant provided no additional detail. This failure to provide particulars of the claim is significant because without specifics, this allegation may be an invitation to engage in impermissible merits review: *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at 175-177 [30]-[36]; *Swift v SAS Trustee*

Corporation [2010] NSWCA 182 per Basten JA at [45]. However, assuming that it is not, the summary of the facts before the Tribunal and the summary of its reasons for decision set out earlier in these reasons clearly disclose that the Tribunal undertook a logical and reasonable assessment of the applicant's claims based on the evidence which was available to it. Moreover, that assessment was plainly a bona fide one which reflected a conscientious discharge of the Tribunal's statutory duty to conduct a review of the applicant's claim to be entitled to a protection visa.

15. For these reasons, the first allegation in the application is not made out.

Tribunal was not "generous"

16. The second allegation in the application appears to be that the Tribunal lacked a generous heart and thus could not understand that the aunt of the applicant's friend would have lent her Rs 700,000 as she alleged. This allegation is no more than an invitation to the Court to substitute a factual conclusion reached by the Tribunal with another preferred by the applicant. The Court has no power to do this as its role is restricted to determining whether the Tribunal has properly applied the law in conducting its hearing and reaching its decision. Further, it is not empowered to conduct another inquiry into whether, on the evidence, different factual conclusions should have been reached and whether the applicant met the criteria for the grant of a protection visa. If the finding in question was illogical or unreasonable in the sense discussed in *Minister for Immigration & Citizenship v SZMDS* (2010) 240 CLR 611 then an error of law would have occurred. However, that is not the case here as the relevant finding of the Tribunal was reasonably open on the evidence.

Tribunal ignored claims and made findings without evidence

17. The third ground of the application appears to allege that the Tribunal ignored the substance of the applicant's factual claims surrounding her alleged pregnancy and did so because it did not believe her even though it had "no specific evidence" to contradict her claim to have been pregnant as a result of her claimed affair with the person she described as her "Bangladeshi Muslim boyfriend". At the hearing of

this application the applicant expanded on this allegation by submitting that the Tribunal had erred because it had no basis on the evidence to conclude that her claims concerning her boyfriend, pregnancy and abortion were not true. She asked rhetorically: how could the Tribunal tell what was true and what was not?

18. It was not necessary for the Tribunal to have the specific evidence to which the applicant refers, which would presumably be something which directly and specifically contradicted her claims, such as a negative pregnancy test, before it could conclude that certain evidence was not to be accepted. In this case, the Tribunal had regard to the applicant's own evidence concerning the termination of the alleged pregnancy to conclude that the alleged abortion had not occurred and thus that the applicant had never been pregnant in the first place. As long as there was sufficient evidence for the Tribunal to make the findings of fact which it expressed then, absent other vitiating factors – such as bias – which are not present here, those factual findings cannot be reviewed by this Court. In this case, the relevant findings made by the Tribunal were reasonably open on the evidence and thus not demonstrative of reviewable error on the Tribunal's part.

Tribunal failed to have regard to relevant material

19. In the fourth ground of the application the applicant alleged that when it came to reaching conclusions on her claims concerning her pregnancy, the Tribunal should have had regard to Nepalese social, cultural and religious factors but did not. The applicant alleges that this was relevant material and that the failure to have regard to it was fundamental and went to jurisdiction.

20. The applicant has not demonstrated how Nepalese social, cultural and religious factors, assuming they had not been taken into account as she alleges, would have been relevant to the Tribunal's factual findings concerning the alleged termination of her pregnancy, which was the foundation on which it based its conclusions on her claims associated with or arising out of that alleged pregnancy. Assuming that these matters had not been taken into account by the Tribunal, the applicant has not demonstrated how such a failure could possibly have deprived her of a successful outcome before the Tribunal. That is to say, the

Tribunal was not required to consider such matters when deciding whether the applicant had been pregnant and had terminated any such pregnancy because they were irrelevant to its reasoning and taking them into account would not have affected its conclusions on those issues.

Tribunal was overbearing and took an irrelevant consideration into account

21. The final pleaded ground of review took objection to the questions which the Tribunal put to the applicant during the course of its hearing. The Tribunal was obliged by s.425 of the Act to put the applicant on notice of matters arising out of the delegate's decision which might have been determinative of the review. In this case that principally meant its scepticism of her claims. That the applicant was asked questions and was perhaps pressed on particular issues represented the Tribunal's attempts to clarify these points and to give the applicant the opportunity to address its concerns about them. It does not emerge from the summary of the Tribunal's hearing set out in its decision record that its questioning was overbearing as the applicant alleges. In this regard, it should also be noted that the applicant was represented at the Tribunal hearing by a professional adviser from a firm of solicitors. Absent any other evidence on this point, such as a sound recording of the Tribunal hearing or a transcript of it, there is no basis to conclude that the Tribunal acted in such a way that the applicant was prevented from giving all the evidence and making all the arguments which she wished to make, which would be the only consequence of the Tribunal's conduct which would be relevant to this allegation.

22. This ground also appears to allege that the Tribunal's assessment of the applicant's credit was an irrelevant consideration. It is true that the applicant's credibility was not something which the Act required the Tribunal to consider but it was, nevertheless, a factual matter of some importance which was relevant for the Tribunal to take into account when considering whether it was satisfied that she met the criteria for the grant of a protection visa.

Tribunal did not believe the applicant

23. At the hearing of this application the applicant submitted that the Tribunal had not believed her no matter what she said. This submission was not expressed as a claim of possible bias in the form of prejudgment and so must be understood as a complaint about the Tribunal's factual findings and, in particular, its finding concerning the applicant's credibility. As already observed, the Court is not empowered to substitute its view of the facts for that of the Tribunal and, except in exceptional circumstances which are not present in this case, cannot set aside a decision of the Tribunal by reason of its fact finding. For these reasons, these submissions made at the hearing do not disclose a basis on which the Tribunal's decision should be set aside.

Functus officio

24. Based on the evidence contained in the Court Book and the affidavit of Marina Sara Osmo affirmed 25 January 2012, I find that the presiding Tribunal member completed the decision the subject of these proceedings at 14:32 on 27 July 2011 and at 14:34 took a step in the electronic management of the review which alerted the Tribunal's registry that the decision was ready to be published to the applicant and, I infer, the Minister's department. I also find that the applicant's advisers faxed a submission to the Tribunal at 16:57 on 27 July 2011, more than two hours after the presiding member had made his decision and arranged for it to be published. I further find that the presiding member saw the further submission on 27 July 2011 and, on the relevant form, ticked the box adjacent to the statement:

> *This material should be forwarded to the Registry Manager for response as I have decided there is no jurisdictional error in this matter and the case cannot be reopened.*

I infer that this occurred at some time between 16:57 and 18:34 on 27 July 2011 when, I find, the decision was notified to the applicant's advisers by fax.

25. In relation to the timing of the decision, I accept that there was no reason for the applicant's representatives to suppose, as appears from

the last paragraph of their post-hearing written submissions of 28 June 2011, that the Tribunal was going to hold a second hearing or delay making its decision once it had received those submissions. Consequently, subject to the following discussion, there was no unfairness in the Tribunal proceeding to make a decision without hearing further from the applicant or her representatives.

26. Returning to the question of whether the Tribunal was *functus officio* at the time the advisers' submissions were received, s.430 of the Act relevantly provides:

> ***430 Refugee Review Tribunal to record its decisions etc.***
>
> *(1) Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:*
>
> *(a) sets out the decision of the Tribunal on the review; and*
>
> *(b) sets out the reasons for the decision; and*
>
> *(c) sets out the findings on any material questions of fact; and*
>
> *(d) refers to the evidence or any other material on which the findings of fact were based.*
>
> *(2) A decision on a review (other than an oral decision) is taken to have been made on the date of the written statement. …*

27. The Minister submitted that the point at which the Tribunal became *functus officio* was to be determined by reference to s.430(2), notwithstanding that s.430(2) ostensibly expresses nothing on that subject and appears to be concerned only with determining on which day a Tribunal decision is made, which is not necessarily determinative of when the Tribunal has discharged its function.

28. The Minister referred in this regard to the decision of Smith FM in *SZQCN v Minister for Immigration & Citizenship* [2011] FMCA 606, which was relevantly to the effect that s.430(2) provides that a Tribunal decision is taken to have been made at the first moment of the day whose date it bears, regardless of when on that day it was actually signed or even whether it was signed on some earlier day, although a back-dating of the decision would be an abuse of power. The Minister

submitted that his Honour's construction of the Act ascribed to the parliament the unlikely intention of deeming a decision-maker to be *functus officio* even before his or her statement of reasons had been completed. He submitted that a better construction of the provision was that a Tribunal decision is final at the point when the presiding member has conveyed it to the Tribunal registry for publication to the applicant.

29. In *SZQCN*, Smith FM gave some historical context to s.430:

> *The procedures of the Tribunal in relation to the completion of its jurisdiction by the making of a legally operative decision have changed in its practice and legislation over its lifetime. Under normal administrative law principles, and absent any specific legislation defining the commencement time of a legally operative decision, a 'decision' made under a statutory power to decide a matter takes operative effect only when some act of 'communication or manifestation' of the decision has occurred (see authorities cited by Higgins J in* Semunigus v Minister for Immigration & Multicultural Affairs *(2000) 96 FCR 533 at [67]-[68]).*
>
> *The judgments in* Semunigus *accepted that these principles applied to a decision of the present Tribunal which was made at a time when the Migration Act referred only to the Tribunal having 'made' a decision, and then required it to give the applicant a copy of a written statement setting out the decision and its reasons (see s.430 in its terms prior to 1999). Their Honours held that no decision was 'beyond recall' prior to publication of the decision, in the absence of any specific provision governing the time when the Tribunal became* functus officio *(see Spender J at [13], Higgins J at [75] and [78], and Madgwick J at [103]).*
>
> *Under the procedures at one time followed by Commonwealth administrative tribunals who were in the same position, certainty was given to the point of time when irrevocable publication of a decision occurred, by the tribunal emulating the practice of courts and appointing a hearing purely for the purposes of publishing its decision. Express provision for such a procedure by the present Tribunal was inserted in the Migration Act* by Migration Legislation Amendment Act (No. 1) *1998 (Cth), which commenced in December 1998. Under these amendments, unless the Tribunal had given an oral decision at its hearing, it was required to give notice of an intended 'handing down' of a Tribunal decision, and was then required to publish the decision by giving a copy to the applicant or his agent and the Secretary*

(if they attended) "on the day, and at the time and place, specified in the notice*". It was then provided that* "the date of the decision is the date on which the decision is handed down*" (see previous s.430B(2) and (4)). An alternative provision allowed the Tribunal to give* "an oral decision*", and deemed the decision to be notified on that date (s.430D). An implication of these provisions was that the Tribunal became* functus officio *at the precise time when the 'handed down' occurred or an oral decision was announced.* (at [44]-[46])

30. His Honour expressed the view at [47] that over time the handing down procedure became administratively inconvenient for the Tribunal because a series of cases pointed out that the Tribunal was bound to recall and reconsider its decision and reasons if further material was submitted between the time the decision was completed and the time it was handed down. In reaching this conclusion, his Honour had regard to submissions made by the respondent Minister. Relevantly, those submissions were quoted as having said:

> *4. Purpose of s 430(2). The purpose of s 430(2) is not immediately evident on its face. However, the Revised Explanatory Memorandum to the Migration Legislation Amendment Bill (No.1) 2008 (**revised EM**) makes clear that the purpose of s 430(2) is to identify the day on which the decision is made for the purposes of determining notification of the Tribunal's decision. At paragraph 54 the EM provides that s 430(2):*
>
> > *"…relates to the [insertion of ss 430A to 430C] which will remove the requirement in the Act to hand down decisions of the RRT and replace the existing procedures for notifying the parties of a Tribunal decision with a **simpler procedure**". In other words, it was considered necessary to insert s 430(2) so as to make clear the day the decision was taken to be made for the purpose of the notification provisions in Division 5 of Part 7 of the Act".*
>
> *5. The legislature did not suggest that the purpose of s 430(2) was to make clear the day on which the Tribunal becomes functus officio.*
>
> *6. Legislative and policy context. However, the revised EM also makes clear that the legislature regarded the new*

> *s 430(2) as effectively replacing the former s 430B(4). At paragraph 57 the revised EM states:*
>
> > *"A decision of the RRT, other than an oral decision, is taken to have been made on the date of the written statement prepared under subsection 430(1) of the Act. Currently, subsection 430B(4) provides, in effect, that in cases where a decision of the RRT is to be handed down, the date of the decision is the date the decision is handed down.* ***As existing section 430B and the handing down requirement is being removed (item 20), it is necessary to insert a provision – new subsection 430(2) – which specifies a date for when an RRT review decision is taken to have been made."***
>
> (emphasis in original)

Section 430B(4) provided that:

> *The date of the decision is the date on which the decision is handed down.*

31. The argument implicitly advanced by the Minister in *SZQCN* (see *SZQCN* at [50]) was that the replacement of s.430B(4) with the new s.430(2) indicated that s.430(2) identified when the Tribunal had discharged its function. That argument presupposed that the previous s.430B(4) performed such a function, however, there is no basis to make that assumption. Section 430B provided for the handing down of the Tribunal's decision at a specified time and place and by specified methods but s.430B(4) had nothing to say about when the Tribunal had performed its function, other sub-sections of s.430B providing a means by which to determine when the decision had been communicated. As s.430B(4) did not provide for the point at which the Tribunal was *functus officio,* it cannot be reasoned by analogy that s.430(2) currently performs such a role.

32. Moreover, s.430(2) was not intended to perform such a role. This can be seen when the relevant legislative history is considered.

33. In his submissions in *SZQCN*, the Minister referred to the revised explanatory memorandum to the Bill which was antecedent to the *Migration Legislation Amendment Act (No 1) 2008*. However, that revised explanatory memorandum tells only part of the story. When it

was first introduced into the parliament the *Migration Legislation Amendment Bill (No 1) 2008*, relevantly contained not only amendments to ss.430 to 430D but also amendments which were proposed to ss.477, 477A and 486A, the provisions concerned with time limits on review applications to the High Court, the Federal Court and this Court in migration matters. The proposals to amend those limitation provisions were expressed in the explanatory memorandum to the Bill in its original form to have partly arisen out of the decision in *Minister for Immigration and Citizenship v SZKKC* (2007) 241 ALR 523 where it was held that under the Act as it then stood, hand delivery was the sole effective method of notifying an applicant of a written decision of the Tribunal. Gyles J described the consequence of that finding to be

> *…to virtually render nugatory the time limit provided by s.477 of the Migration Act …* (*SZKKC* at 524 [1])

34. The original explanatory memorandum to the *Migration Legislation Amendment Bill (No 1) 2008* expressly linked the amendments to ss.430 to 430D with the amendments which were proposed to ss.477, 477A and 486A. As the outline in the original explanatory memorandum said:

> *Schedule 1 of the Bill will amend the Act to reinstate effective time limits for applying to the courts for judicial review of migration decisions and streamline the procedures for notifying parties of a decision of the Migration Review Tribunal and the Refugee Review Tribunal by, amongst other things, removing the requirement for the tribunals to "hand down" their decisions.*

Specifically in relation to the insertion of s.430(2), which was item 19 of sch.1 to the Bill, (the first) para.54 of the original explanatory memorandum said, in part:

> *The amendment in this item is also relevant to items 30–35 of this Schedule* [the proposed amendments to ss.477, 477A and 486A] *which will reinstate effective and uniform time limits for applying for judicial review of migration decisions in the Federal Magistrates Court, the Federal Court and the High Court.*

35. In relation to the amendments proposed to s.477, the provision which concerns this Court's time limit for review proceedings under the Act,

(the first) para.93 of the original explanatory memorandum relevantly said:

> *… the new 35 day period will commence to run from the time "the decision is taken to have been made" rather than from the time of actual notification (which is currently the case under subsection 477(1)). This will eliminate the difficulties associated with the* SZKKC *decision and provide greater certainty about when time starts to run for the purpose of judicial review. At present, the time limit runs from the date of actual (as opposed to deemed) notification of the decision under challenge. Actual notification creates uncertainty because it can be difficult to establish when an applicant is actually notified. By contrast, where the relevant date is the date of the decision, the decision-maker's statement of reasons will establish the date on which time begins to run. See items 6 and 19 in this regard, which provide that a decision of the MRT and the RRT is taken to have been made on the date of the written statement prepared under subsections 368(1) and 430(1) of the Act respectively.*

Similar statements were made in paras.101 and 109 about the proposed amendments to ss.477A and 486A.

36. While the Bill was before the parliament the amendments proposed to ss.477, 477A and 486A were deleted because it was believed that they would not operate appropriately and the government wanted to give more consideration to how to "reinstate effective time limits for all judicially reviewable decisions": Senator Evans, Minister for Immigration and Citizenship, *Hansard*, Senate 27 August 2008, p.3833; see also Supplementary Explanatory Memorandum to Migration Legislation Amendment Bill (No 1) 2008, paras.6 and 7.

37. Consequently, by the time the revised explanatory memorandum considered in *SZQCN* was circulated, the amendments proposed to ss.477, 477A and 486A had been deleted, as had the references to the link which the proposed s.430(2) had to the question of effective time limits for the commencement of judicial review proceedings, quoted above at [34]. Relevantly, the outline in the revised explanatory memorandum simply said:

> *Schedule 1 of the Bill will amend the Act to streamline the procedures for notifying parties of a decision of the Migration Review Tribunal and the Refugee Review Tribunal by, amongst*

other things, removing the requirement for the tribunals to "hand down" their decisions.

38. Although there may be difficulty in using the legislative intention underlying one statute to assist in the understanding of another, nevertheless, the *Migration Legislation Amendment Bill (No 2) 2008* which became the *Migration Legislation Amendment Act (No 1) 2009* sheds light on the context in which s.430(2) was introduced. That Act introduced redrafted amendments to ss.477, 477A and 486A. One of the provisions introduced by those amendments was s.477(3)(b) which relevantly provides:

> *(3) In this section:*
>
> ***date of the migration decision*** *means:*
>
> *(a) …*
>
> *(b) in the case of a written migration decision made by the Migration Review Tribunal or the Refugee Review Tribunal—the date of the written statement under subsection 368(1) or 430(1) …*

That definition is also employed in ss.477A and 486A as amended.

39. In paras.62 and 63 of the explanatory memorandum to the *Migration Legislation Amendment Bill (No 2) 2008*, the link between the amendments to ss.477, 477A and 486A and the earlier insertion of s.430(2) was made clear:

> *… for migration decisions made by the Migration Review Tribunal and the Refugee Review Tribunal ('the Tribunals'), the Full Federal Court held in* Minister for Immigration and Citizenship v SZKKC *[2007] FCAFC 105 ('*SZKKC*') that the time period for seeking judicial review of a Tribunal decision will begin to run only if the applicant is personally served with the written statement of reasons of the Tribunal by a person authorised by the Registrar of the Tribunal. It would be expensive and impractical for the Tribunals to implement the practice of personally serving a written statement of the reasons for the decision. As a result, the time limits for seeking judicial review of a migration decision in subsection 477(1) are not currently effective.*

> *The change to the 'date of the migration decision' from which time commences to run for the purpose of time limits for seeking judicial review of a migration decision, will provide greater certainty and overcome the practical difficulties associated with personally serving a written statement of reasons. Item 2 of this Schedule inserts a definition of "date of the migration decision"*

40. In light of this history, to which Smith FM was apparently not taken, I cannot agree with his Honour's statement in *SZQCN* at [50] that s.430(2) was intended to operate not only as a provision governing the calculation of time for the purposes of time limits on judicial review and otherwise, but also to deem a point in time when a valid decision of the Tribunal takes legal effect and is incapable of recall or reconsideration. One of the effects of the amendments made by the *Migration Legislation Amendment Act (No 1) 2008* was to repeal provisions which provided a means to determine when the Tribunal was *functus officio* but neither that Act nor the *Migration Legislation Amendment Act (No 1) 2009* replaced those earlier provisions.

41. Given the legislative history of s.430(2), I conclude that the expressed legislative intention of providing a simpler procedure for the notification of Tribunal decisions to applicants concerned only the commencement of the limitation period, not the discharge of the Tribunal's function. The mischief to which the repeal of the then ss.430A, 430B and 430C, the related insertion of s.430(2) and amendments to ss.477, 477A and 486A were addressed was the finding in *SZKKC* which rendered the relevant time limits under the Act "virtually … nugatory". As a result, I see no reason to imply into s.430(2) an operation which it does not express, namely one which bears on when the Tribunal discharges its review function.

42. Consequently, I respectfully disagree with Smith FM's conclusion in *SZQCN* that s.430(2) provides that a Tribunal decision is deemed to have taken legal effect at the first point of time on the date specified in the statement as the date of its making.

43. Because s.430(2) is concerned with when the limitation period for judicial review starts to run and not with when the Tribunal has completed its task, it does not prevent an enquiry to determine when, in a particular case, the Tribunal became *functus officio*. In this regard, it was held in *Semunigus v Minister for Immigration & Multicultural*

Affairs (2000) 96 FCR 533 that in the absence of any specific provision governing the time when the Tribunal became *functus officio* no decision was 'beyond recall' prior to publication of the decision: see *SZQCN* at [45]. Further, in that case Madgwick J held and Spender J appeared disposed to agree that a Tribunal decision was not beyond recall until it had been sent to the applicant or the Minister. In this case there was no direct evidence to the effect that the presiding member could have recalled his decision at any point prior to its despatch but I infer that he could have. Nothing in Ms Osmo's affidavit suggests that the presiding member could not have spoken to the Tribunal's registry and countermanded the electronic instruction to send out the decision. In this regard it is significant that the decision was sent under cover of a letter signed by the same Tribunal officer who electronically recorded the finalisation of the file at 18.39 on 27 July 2011, shortly after the fax sending the letter and the decision had been despatched. That is to say, the despatch of the decision was not the product of an automated and irreversible process but was effected through the actions of a Tribunal officer.

44. Because this final step was not taken until after the applicant's solicitors had sent their further submissions, the Tribunal was not *functus officio* at the time those submissions were received. Consequently, the presiding member erred when he concluded that the matter was concluded at the time he saw the additional submission. Such a conclusion had the result that the Tribunal did not consider the information supplied by the applicant's advisers on 27 July 2011 which, importantly, included a medical certificate concerning the alleged abortion together with a letter from her "aunt". That information was not so insignificant that the failure to take it into account could not have materially affected the decision. Consequently, the Tribunal should have considered it and its failure to do so amounted to jurisdictional error.

Conclusion

45. In this matter the Tribunal's decision was affected by jurisdictional error.

46. Consequently the matter will be remitted to the Tribunal to be determined according to law.

I certify that the preceding forty-six (46) paragraphs are a true copy of the reasons for judgment of Cameron FM

Date: 19 April 2012