FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZIPL v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 1501*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming persecution in Syria and Iraq – whether the Tribunal breached s.425 of the *Migration Act 1958* (Cth) by proceeding without a hearing in circumstances where the hearing invitation faxed to the applicant's adviser was not received, considered – applicant's nationality subject to question – Tribunal finding the applicant to be a citizen of Syria but not Iraq – no consideration of the applicant's claims in relation to Iraq – no consideration of the possibility that the applicant may have dual nationality – Tribunal overlooking a relevant consideration.

WORDS AND PHRASES – Transmit, transmitting.

Federal Magistrates Court Rules 2001 (Cth)
Migration Act 1958 (Cth), ss.36, 91R, 424A, 424AA, 425, 425A, 426A, 441A, 441AA, 441C, 441G

Al-Anezi v Minister for Immigration [1999] FCA 355
Jong Kim Koe v Minister for Immigration [1997] FCA 306
SZIPL v Minister for Immigration & Anor [2007] FMCA 643

Applicant:	SZIPL
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1432 of 2008
Judgment of:	Driver FM
Hearing date:	3 November 2008
Delivered at:	Sydney
Delivered on:	28 November 2008

REPRESENTATION

Solicitors for the Applicant: Mr R Turner

Solicitors for the Respondents: Mr G Johnson
DLA Phillips Fox

ORDERS

(1) A writ of certiorari shall issue quashing the decision of the Refugee Review Tribunal handed down on 27 September 2007.

(2) A writ of mandamus shall issue, requiring the Refugee Review Tribunal to redetermine the application before it according to law.

(3) The first respondent is to pay the applicant's costs and disbursements of and incidental to the application in the sum of $5,000 in accordance with rule 44.15(1) and item 1(c) of part 2 of schedule 1 to the *Federal Magistrates Court Rules 2001* (Cth).

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1432 of 2008

SZIPL
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. This is an application to review a decision of the Refugee Review Tribunal ("the Tribunal"). The decision was handed down on 27 September 2007. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa.

2. The applicant claimed to fear persecution in both Iraq and Syria. She originally claimed to be a citizen of Syria but later claimed to be a citizen of Iraq. An initial decision of the Tribunal in which the Tribunal found that the applicant was not a national of Syria but failed to make a finding on Iraqi nationality was set aside by this Court[1]. When the matter returned to the Tribunal the Tribunal found that the applicant was a citizen of Syria and rejected her claims in relation to that country. The Tribunal did not accept that the applicant was a

[1] *SZIPL v Minister for Immigration & Anor* [2007] FMCA 643

citizen of Iraq and did not consider her claims in relation to that country. Unfortunately, although the applicant was invited to a hearing before the Tribunal, she did not attend due to circumstances that will be discussed below. The Tribunal proceeded without a hearing.

3. The following statement of background facts is derived from the Minister's outline of submissions filed on 16 September 2008 and the applicant's outline of submissions filed on 30 October 2008.

4. The applicant was born in Syria on 30 January 1975.[2] She claims that both her parents are Iraqi nationals. She arrived in Australia on 17 April 2005.[3] She applied for a Protection (class XA) visa on 23 September 2005.[4] Her claims were set out in a statement accompanying the application.[5] The application was refused on 16 November 2005.[6]

5. The applicant applied to the Tribunal for review of the delegate's decision on 28 November 2005.[7] She gave oral evidence before the Tribunal on 6 February 2006.[8] The Tribunal signed its original decision on 23 February 2006.[9]

6. The Federal Magistrates Court ordered that the matter be remitted back to the Tribunal for reconsideration on 17 May 2007.[10]

7. The Tribunal wrote to the applicant and the applicant's advisor on 21 June 2007 advising them of the remittal.[11]

8. The Tribunal wrote to the applicant's advisor on 26 June 2007 inviting the applicant to attend a hearing on 14 August 2007. [12]

9. Neither the applicant nor her advisor replied to the letter.

10. Neither the applicant nor her advisor attended the hearing.

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[2] court book (CB) 2.
[3] CB 145.
[4] CB 2.
[5] CB 29.
[6] CB 55.
[7] CB 56.
[8] CB 102.
[9] CB 112.
[10] CB 126.
[11] CB 129.
[12] CB 133.

11. The Tribunal wrote to the applicant's advisor on 22 August 2007 extending an invitation to comment on further information to the applicant.[13] Neither the applicant nor her advisor replied to the letter.

12. The Tribunal proceeded to sign its decision on 17 September 2007, without taking further action to enable the applicant to appear before it, pursuant to section 426A of the *Migration Act 1958* (Cth) ("the Migration Act).[14]

13. The Tribunal sent a letter to the applicant notifying her of the outcome of its decision on 27 September 2007.[15]

The applicant's claims

14. The applicant claimed to fear persecution on the basis of her membership of the Assyrian Christian community in Syria, and because of her imputed association with the Iraqi Ba'ath Party. The applicant claimed that she would be unable to obtain education and employment in Syria because she was regarded as a stranger. In addition, the applicant claimed to fear persecution more broadly, on the basis of her gender and Christianity. These claims were set out in a statement attached to her protection visa application (PVA).[16]

The decision of the Tribunal

15. The Tribunal found that the applicant was a national of Syria[17], and did not accept the applicant's claims raised at the hearing of the previously constituted Tribunal that she was a national of Iraq and obtained her passport through bribery:

    a) The applicant provided significant evidence in her subclass 300 visa application attesting to her Syrian identity. The applicant's PVA and her application for a subclass 820 visa also attested to her Syrian nationality.[18]

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[13] CB 135.
[14] CB 144.
[15] CB 143.
[16] CB 29.
[17] CB 156.
[18] CB 155.

b) The applicant's step father was listed as a Syrian national. The Tribunal accepted the independent evidence that one of the ways Syrian nationality is acquired is through a Syrian father. This, the Tribunal held, was applicable even if he was not the applicant's biological father.[19]

c) The Tribunal accordingly found that there was no need for the applicant to obtain her passport through bribery[20].

16. Given the findings that the applicant was a Syrian national, the Tribunal proceeded to reject all of the applicant's claims:

a) The Tribunal rejected that the applicant was denied education and employment on the basis of her Iraqi nationality. In addition, the Tribunal held that the fact that the applicant lived in Iraq for twenty years, or the fact that her mother was an Iraqi national, would not affect her ability to obtain education and employment. This was because the applicant held valid Syrian identity documentation, and independent evidence indicates that there is no evidence of mistreatment for the thousands of Iraqis living in Syria[21].

b) The Tribunal held that the applicant was not subject to persecution from the Ba'ath Party in Syria. The Tribunal found that there was no evidence of continuing attention from the Syrian Ba'ath Party after being slapped in the face in 1998. As such, the Tribunal found that the slap in the face did not amount to serious harm or systematic and discriminatory conduct[22].

c) The Tribunal also held that there was no evidence to establish the applicant's claimed fear of persecution from fanatical Muslims and rejected her claims that authorities cannot protect her as a Christian, with independent evidence demonstrating that the Government generally respected the rights of freedom of religion[23].

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[19] CB 156.
[20] CB 156.
[21] CB 156
[22] CB 157
[23] CB 157

d) In addition, the Tribunal held that the applicant did not suffer persecution on the basis of her gender, relying on independent evidence highlighting equal opportunities for men and women[24].

e) The Tribunal also rejected the applicant's claim that there was no-one in Syria to protect her, accepting that the support from family as evidenced at the hearing would continue[25].

f) The Tribunal concluded that the applicant had not provided any further evidence regarding her current fear of returning to Syria[26].

The application and evidence

17. These proceedings began with a show cause application filed on 4 June 2008. The applicant continues to rely upon that application. The application contains the following grounds:

> *1. The Tribunal failed to carry out its statutory duty.*
>
> *Particulars*
>
> *a. The Tribunal failed to invite the Applicant to a hearing – s.425.*
>
> *b. The Tribunal failed to advise the Applicant of adverse information, explain why it was relevant and give her an opportunity to comment upon it – ss.424A, 424AA.*
>
> *2. The Tribunal failed to consider all integers of the Applicant's claims.*
>
> *Particulars*
>
> *a. The Tribunal considered that being slapped on the face during questioning did not constitute serious harm but did not go on to consider that such an assault could lead to a well-founded fear of persecution in the future.*
>
> *b. The Tribunal only considered the legal position of the treatment of women in Syria but failed to consider the actual treatment in society of women in Syria.*

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[24] CB 157.
[25] CB 158.
[26] CB 158.

3. *The Tribunal failed to properly apply the law to the facts as found.*

   Particulars

   a. *The Tribunal found that the Applicant acquired Syrian citizenship through her step-father. The evidence disclosed that Syrian citizenship is acquired only through a natural father.*

   b. *The Tribunal had evidence that the Applicant's mother and father are Iraqis.*

18. Ground 2(b) was not pressed. The applicant relies upon an affidavit by her solicitor made on 3 November 2008. In that affidavit, Mr Turner deposes that he resigned from the firm of McMahon's National Lawyers on 22 June 2007, that a liquidator was appointed to the firm on 2 October 2007 and that the practice closed its doors on 5 October 2007. I also received as evidence the court book filed on 27 June 2008, a supplementary court book filed on 4 July 2008 and a further supplementary court book filed on 28 August 2008. The applicant's solicitor objected to the receipt of the further supplementary court book. The documents in it are, however, fundamental to the issue concerning s.425 of the Migration Act as they concern the appointment of Mr Turner as the applicant's authorised recipient on 25 May 2007 and the postal, telephone and facsimile and e-mail addresses identified for him.

Submissions

19. The applicant contends that the hearing invitation issued by the Tribunal pursuant to s.425 of the Migration Act and an invitation to comment issued pursuant to s.424A of the Migration Act were not sent to the correct address advised by the applicant. More particularly, the applicant submits that the use of the facsimile number identified in the authorised recipient form[27] did not meet the requirements of s.441A(5) of the Migration Act because the transmission by facsimile requires receipt of the facsimile, not simply the sending of it. Further, the applicant contends that the Tribunal failed to complete its task of reviewing the applicant's claims by failing to consider whether the

[27] Further supplementary CB 2.

admitted fact of an assault on the applicant by the Syrian authorities might lead to a well-founded fear of further assaults amounting to serious harm. Finally, the applicant contends that the Tribunal erred in finding that the applicant was a Syrian, rather than an Iraqi national on the basis of material before it.

20. The Minister relevantly submits as follows:

> *First ground - failure by* [Tribunal] *to carry out statutory duty*
>
> *The applicant broadly alleges error under ss 424A, 424AA and 425 as part of this ground.*
>
> *Following the remittal of the applicant's case, the applicant was invited to appear at a second hearing before a reconstituted Tribunal. The letter sent by the* [Tribunal] *inviting the applicant to the hearing was sent to the applicant's nominated authorised recipient.*[28] *The applicant failed to reply to that invitation, and neither she, nor a representative on her behalf, attended the scheduled hearing set down for 14 August 2007. The* [Tribunal] *proceeded to apply s 426A and take no further measures to contact the applicant before making its decision.*
>
> *It is not pleaded by the applicant that the* [Tribunal]*, on remittal, failed to invite the applicant to appear at a further hearing, nor is it alleged that the* [Tribunal's] *attempt to notify the applicant of the second hearing listing was defective with respect to s 425 and s 425A of the Act. There is no error on the* [Tribunal] *in the applicant's failure to attend a hearing, per se.*
>
> *In accordance with s 441G(2), where the* [Tribunal] *was notified by the applicant of having appointed an authorised recipient, the* [Tribunal] *is taken to have given a document to the applicant by giving the document to the authorised recipient. The parameters of 'give' in s 441G(2) are contained in s 441A, and the* [Tribunal's] *method of sending the invitation letter complied with s 441A(5).*
>
> *As to whether there is any error under s 424A or s 424AA, no detail is provided by the applicant. The* [Tribunal] *sent a comprehensive s 424A letter to the applicant, setting out a number of evidential matters of concern to the* [Tribunal]. *It is not conceded that each matter put was required to be put to the applicant, as the letter raises question of evidence given by the*

[28] CB 133. See Further Supplementary Court Book pp 1-2.

applicant herself coming within the exception to s 424A(1) at s 424A(3)(b). There were no further matters that should have been put to the applicant either in writing, pursuant to s 424A(1). The [Tribunal] *cannot be said to have erred in relation to s 424AA as the applicant did not attend the hearing.*

The [Tribunal] *has fully complied with its statutory obligations in this case. Accordingly, the first ground should fail.*

Second ground - [Tribunal] *failed to consider all integers of the applicant's claims*

The applicant asserts that in its finding that the applicant being slapped in the face during questioning did not constitute serious harm under s 91R, the [Tribunal] *erred in not going further and asking itself the question of whether such an assault could lead to a well founded fear of persecution in the future. The applicant further asserts that the* [Tribunal] *only considered the legal position of women in Syria and did not consider the actual treatment of women in Syria.*

In relation to the first point, the applicant misconstrues the [Tribunal's] *findings. The* [Tribunal] *explicitly found that 'the applicant's evidence does not indicate that she received any continuing attention from the Syrian Baath Party after being questioned and slapped on the face'.*[29] *The* [Tribunal] *then goes on to find that it did not consider a slap in the face during questioning to have constituted serious harm, and further, that the applicant would not face serious harm upon her return to Syria. The* [Tribunal] *clearly contemplated future harm based upon past events, and was not satisfied that there was a real chance that such harm would eventuate.*

As to whether the [Tribunal] *was obliged to consider the actual status of women in Syria, this is a claim amounting to merits review, and cannot be entertained by the Court. In any event, in rejecting the applicant's claim that she would face mistreatment in Syria for being a woman, the* [Tribunal] *relied upon the applicant's own evidence of the lack of any mistreatment of the applicant in the past to substantiate its finding that there was not a real chance that the applicant would face harm in the future on the sole basis of being a woman.*

The [Tribunal] *considered the applicant's claims in full. The applicant's second ground should fail.*

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[29] CB 157.2.

Third ground - [Tribunal] *failed to properly apply the law to the facts as found*

The applicant claims that, as a question of fact, Syrian citizenship may only be passed on from a natural father to a child, and not from a step-father to a child, which is how the applicant claims the [Tribunal] *interpreted its independent evidence. The applicant's natural parents, it is claimed by the applicant, are Iraqi.*

The [Tribunal's] *finding as to the applicant's nationality appears at CB 156.2. The* [Tribunal] *concluded that the applicant's so-called step-father, …, a Syrian, was listed on all of the applicant's official documentation as her 'father'. The* [Tribunal] *concluded, in consideration of the evidence before it, that* [her step father was accepted as] *the applicant's father, and therefore able to pass Syrian nationality onto his daughter. It is evident that the* [Tribunal] *considered* [her claimed step father] *to be the applicant's natural father, as it set out an alternative finding in the terms 'even if … is not the applicant's biological father'.*[30] *In making this alternative finding, the* [Tribunal] *was satisfied that the country information supported the position that irrespective of whether* [her claimed step father] *was the applicant's natural father or step-father, his Syrian nationality would pass to his daughter as he is listed as the applicant's father on official documentation. The* [Tribunal] *rejected the applicant's evidence that her Syrian passports had been acquired through means of bribery.*[31]

Findings as to questions of foreign law, such as the interpretation of treaty obligations between states, are generally understood to constitute a question of fact reserved for the [Tribunal] *as part of its fact-finding function.*[32] *Even had the* [Tribunal] *erred in its consideration of the country information relevant to this question, which the first respondent does not concede, such an error would not constitute an error going to jurisdiction unless the Tribunal's finding was not open to it:* Australian Broadcasting Tribunal v Bond *(1990) 170 CLR 321, per Mason J at 355-356.*[33]

The third ground should fail.

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[30] CB 156.2.
[31] CB 156.3.
[32] See *SZGBY v Minister for Immigration* [2006] FCA 35 per Moore J.
[33] Although in a different factual context, see *SZGXK v Minister for Immigration & Anor* [2008] FMCA 822 per Smith FM at [37].

Reasoning

The Tribunal's statutory duty of communication

21. There is no doubt that, once Mr Turner was appointed as the applicant's authorised recipient on 25 May 2007, the Tribunal's obligation was to communicate with him on behalf of the applicant at one or other of the postal, telephone, facsimile or e-mail addresses given for him[34].

22. Section 441G of the Migration Act provides that:

> *(1) If:*
>
> > *(a) a person (the applicant) applies for review of an RRT‑ reviewable decision; and*
> >
> > *(b) the applicant gives the Tribunal written notice of the name and address of another person (the authorised recipient) authorised by the applicant to do things on behalf of the applicant that consist of, or include, receiving documents in connection with the review;*
>
> *the Tribunal must give the authorised recipient, instead of the applicant, any document that it would otherwise have given to the applicant.*
>
> *Note: If the Tribunal gives a person a document by a method specified in section 441A, the person is taken to have received the document at the time specified in section 441C in respect of that method.*
>
> *(2) If the Tribunal gives a document to the authorised recipient, the Tribunal is taken to have given the document to the applicant. However, this does not prevent the Tribunal giving the applicant a copy of the document.*
>
> *(3) The applicant may vary or withdraw the notice under paragraph (1)(b) at any time, but must not (unless the regulations provide otherwise) vary the notice so that any more than one person becomes the applicant's authorised recipient.*
>
> *(4) The Tribunal may communicate with the applicant by means other than giving a document to the applicant, provided the*

[34] *Le v Minister for Immigration* [2007] FCAFC 20

Tribunal gives the authorised recipient notice of the communication.

(5) This section does not apply to the Tribunal giving documents to, or communicating with, the applicant when the applicant is appearing before the Tribunal.

23. Sections 441AA provides:

If:

(a) a provision of this Act or the regulations requires or permits the Tribunal to give a document to a person; and

(b) the provision does not state that the document must be given:

(i) by one of the methods specified in section 441A or 441B; or

(ii) by a method prescribed for the purposes of giving documents to a person in immigration detention;

the Tribunal may give the document to the person by any method that it considers appropriate (which may be one of the methods mentioned in subparagraph (b)(i) or (ii) of this section).

Note: Under section 441G an applicant may give the Tribunal the name of an authorised recipient who is to receive documents on the applicant's behalf.

24. Section 441A provides:

Methods by which Tribunal gives documents to a person other than the Secretary

Coverage of section

(1) For the purposes of provisions of this Part or the regulations that:

(a) require or permit the Tribunal to give a document to a person (the recipient); and

(b) state that the Tribunal must do so by one of the methods specified in this section;

the methods are as follows.

Giving by hand

(2) One method consists of 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.

Handing to a person at last residential or business address

(3) Another method consists of 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:

(a) is at the last residential or business address provided to the Tribunal by the recipient in connection with the review; and

(b) appears to live there (in the case of a residential address) or work there (in the case of a business address); and

(c) appears to be at least 16 years of age.

Dispatch by prepaid post or by other prepaid means

(4) Another method consists of a member, the Registrar or an officer of the Tribunal, dating the document, and then dispatching it:

(a) within 3 working days (in the place of dispatch) of the date of the document; and

(b) by prepaid post or by other prepaid means; and

(c) to:

(i) the last address for service provided to the Tribunal by the recipient in connection with the review; or

(ii) the last residential or business address provided to the Tribunal by the recipient in connection with the review.

Transmission by fax, e‑ mail or other electronic means

(5) Another method consists of a member, the Registrar or an officer of the Tribunal, transmitting the document by:

(a) fax; or

> (b) *e-mail; or*
>
> (c) *other electronic means;*
>
> *to the last fax number, e‑ mail address or other electronic address, as the case may be, provided to the Tribunal by the recipient in connection with the review.*

25. The applicant and the Minister differ as to whether the applicable provision is s.441AA or s.441A in relation to s.441G. In my view, s.441AA is the applicable provision because s.441G does not state that communications to an authorised recipient must be by one of the methods specified in s.441A. Nevertheless, the Tribunal did use a prescribed method in the exercise of its discretion pursuant to s.441AA. Following Mr Turner's appointment as the applicant's authorised recipient on 25 May 2007 the Tribunal sent several important items of correspondence to him. On 26 June 2007 the Tribunal sent to Mr Turner by facsimile an invitation to the applicant to appear before the Tribunal[35]. The transmission log appearing at CB132 confirms that a transmission was successful. On 22 August 2007 the Tribunal sent to Mr Turner at the same facsimile number an invitation to comment pursuant to s.424A of the Migration Act[36]. The transmission log reproduced at CB 135 confirms that that transmission was also successful. The Tribunal later sent to Mr Turner at the same facsimile number an invitation to the handing down of the Tribunal's decision and the statement of the decision.

26. The practical problem is that none of the correspondence was in fact received by Mr Turner because he had left the firm and, after 5 October 2007, there was no one at the premises. Nevertheless, provided that the Tribunal met its statutory obligations in attempting to communicate with Mr Turner, there would be no jurisdictional error. The facsimile number used was the facsimile number identified in the authorised recipient form signed on 25 May 2007. This was one of five postal or electronic addresses identified in the authorised recipient form. Provided that the Tribunal used one of those addresses in accordance with the Migration Act, then the first ground must fail and the applicant

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[35] CB 133-134.
[36] CB 136-138.

is taken to have received the correspondence even though her authorised recipient did not receive it in fact.

27. Section 441A(5) is different from the other subsections in s.441A in that it uses the word "transmitting". There is no statutory definition of what "transmitting" means for the purposes of the subsection. Neither were the parties' representatives able to identify any relevant judicial interpretation. The applicant contends that an electronic communication is not transmitted until it is in fact received. The Minister contends that, at most, all that is required is a transmission that appears to have been successful.

28. In the absence of any statutory (or judicial) interpretation of the word "transmitting" in the context of s.441A(5) the word carries its ordinary and natural meaning. The Macquarie Dictionary (3rd edition) defines "transmit" (together with "transmitted" and "transmitting") as:

> *to send over or along, as to a recipient or destination; forward, dispatch, or convey*

or secondly,

> *to communicate, as information, news et cetera.*

29. The definition in the Australian Concise Oxford Dictionary (3rd edition) is similar. While there is, in the ordinary or natural meaning of the word "transmit" a concept of communication implying both dispatch and receipt, it is not inherent in the meaning of the word in the context of s.441A(5) that a facsimile, e-mail or other electronic communication must be seen and read by the intended recipient in order to be transmitted. It is, in my view, inherent in the use of the word in the subsection that the electronic transmission must be successful in that it must be received by a device providing the opportunity for the communication to be seen and read by the intended recipient. There is evidence that the relevant facsimile transmissions were received at the number identified for Mr Turner, the authorised recipient. In other words, a facsimile machine was operating successfully at the receiving end. In my view, that is all that is required to establish compliance with s.441A(5) of the Migration. While it is unfortunate that the hearing invitation and that the invitation to comment were not in fact seen by Mr Turner and that the applicant thereby lost important

opportunities, by virtue of the operation of s.441C of the Migration Act, the applicant is taken to have received those invitations and the Tribunal was entitled to proceed in the manner it did. That said, it is surprising that the Tribunal did not take the trouble to telephone Mr Turner. If it had done so, the problem would most likely have been overcome.

30. I reject the first ground of review.

Did the Tribunal consider all of the applicant's claims?

31. The Tribunal's finding in relation to this ground was as follows[37]:

> *The Tribunal has also considered the applicant's claim that she was accused by the Syrian Baath Party of belonging to the Iraqi Baath Party and was subsequently questioned and asked to join the Syrian Baath Party, which the applicant refused. The applicant told the previously constituted Tribunal that she was last questioned in 1998 and at that time she was slapped on the face. Thus, the applicant's evidence does not indicate that she received any continuing attention from the Syrian Baath Party after being questioned and slapped on the face. The Tribunal is not satisfied that some questioning and a slap on the face amounts to serious harm as required by s.91R(1)(b). Nor does the Tribunal accept that the applicant was the subject of systematic and discriminatory conduct by the Syrian Baath Party as required by s.91R(1)(c). The Tribunal is not satisfied that the applicant was the subject of persecution from the Syrian Baath Party in Syria. Nor is the Tribunal satisfied that there is a real chance that the applicant will face serious harm from the Syrian Baath Party upon her return to Syria, given that the last encounter with the Baath Party occurred in 1998.*

32. It was open to the Tribunal to conclude that a single slap on the face in the circumstances in which that was suffered by the applicant was not serious harm for the purposes of s.91R(1)(b) of the Migration Act. The Tribunal nevertheless needed to make a forward looking assessment of whether the applicant had a well-founded fear of persecution in the future. I accept the Minister's submission that the last sentence in the paragraph quoted above meets that obligation. Essentially, the Tribunal's reasoning was that there was not a real chance of the

[37] CB 157.

applicant suffering serious harm in the future given that the single incident complained of was not serious harm and occurred ten years ago. That was, in my view, sufficient consideration of the future risk of the applicant encountering physical harm. The applicant had made no claim of a risk of psychological harm and there was no medical evidence that called for consideration by the Tribunal of such a risk.

33. I reject the second ground of review.

The issue of nationality

34. The Tribunal was aware that the Tribunal as previously constituted had been found by this Court to have erred in failing to make a finding on nationality[38]. The applicant's protection visa claim asserted Syrian nationality but the applicant had claimed before the previously constituted Tribunal that she was in fact an Iraqi. The applicant had claimed that although she was born in Syria both of her parents were Iraqi nationals. She admitted her step father was a Syrian national. This was obviously an issue of significance and the Tribunal gave substantial attention to it. The Tribunal's findings and reasons on this issue were as follows[39]:

> *The Tribunal must first consider the applicant's claims in relation to her nationality. The Tribunal has attempted to obtain further evidence in relation to the applicant's claims relating to her nationality through the provision of a further opportunity to attend a hearing and in relation to an opportunity to comment on adverse information in writing. However, as indicated above, the applicant has not availed herself of either the opportunity to attend a hearing or to respond in writing to the Tribunal's s.424A letter. Accordingly, the Tribunal must assess the applicant's claims on the basis of the evidence before it. The applicant claimed that she is a national of Iraq and not a national of Syria. The applicant claimed that she obtained her passport as a result of bribery. The evidence before the Tribunal indicates that in an application for a visa made by the applicant she provided several original and certified documents attesting to her identity and status as a Syrian national. The applicant also provided a passport from the Syrian Republic indicating that she was issued that passport in the mid 1990s. The applicant also stated on that*

[38] *SZIPL v Minister for Immigration & Anor* [2007] FMCA 643
[39] CB 155-156.

application that she was a national of Syria and had no other nationality. In an application for another visa the applicant also stated that she was a national of Syria. In the application for a protection visa made the applicant also stated that she was a national of Syria and had no other nationality.

The applicant claimed in a statement attached to her protection visa application that her stepfather is a Syrian national and her mother is a national of Iraq. The applicant has stated in response to questions on all the above applications that her father is …. The documentation provided above also indicates that the applicant's father is listed as …. The Tribunal accepts that the applicant's mother is an Iraqi national as indicated on the family's Transcript of Civil Status Registration. However, the Tribunal does not accept that the applicant's father is anyone other than …, a national of Syria. The Tribunal accepts the independent evidence that indicates that one of the ways nationality in Syria is acquired is on the basis of a Syrian father (see for example, Freedom House, 'Women's Rights in the Middle East and North Africa: Citizenship and Justice'. See also United States Office of Personnel Management 2001, Citizenship Laws of the World*, March, p.192). On that basis, the Tribunal considers that even if … is not the applicant's biological father, he is regarded as her father on all official documentation and the applicant's status has been listed as a Syrian national on all of that documentation. The Tribunal does not accept that the applicant acquired her current passport through bribery. The Tribunal considers that the applicant has provided 2 passports, both of which are* prima facie *evidence of nationality of a particular country. As indicated above, the applicant has also provided several documents showing her status as a Syrian national. The Tribunal does not accept that there was any need for the applicant to acquire her passport through bribery. The Tribunal finds that the applicant is a national of Syria. The Tribunal does not accept the applicant's claim that she is a national of Iraq and not a national of Syria. Given the finding that the applicant is a national of Syria, the Tribunal has assessed her claims against Syria as her country of nationality.*

The applicant has claimed that she and her family resided in Iraq for many years and were forced to leave due to the fact that her stepfather was a Syrian national. The applicant also claimed that she is unable to obtain education and employment in Syria because she is not a Syrian national and is regarded as a "stranger" in Syria. The applicant has also claimed that she has previously been questioned by the Ba'ath party and that she fears

further questioning as a result of her refusal to join the party. The applicant also claims to fear harm generally because she is a woman and a Christian.

The Tribunal accepts that the applicant and her family resided in Iraq for many years and that they returned in 1994. The Tribunal accepts that the applicant may have had difficulty obtaining employment and education in Syria. The Tribunal has not accepted that the applicant is an Iraqi national and has found that the applicant is a Syrian national. The Tribunal does not therefore accept that the applicant was denied education and employment for that reason. The Tribunal does not accept that the fact that the applicant's mother was an Iraqi national or that she had lived in Iraq for many years would affect her ability to obtain employment and education, given that she was in possession of valid identity documentation showing that she is a national of Syria. While the Tribunal is prepared to accepts that the applicant may initially have been perceived as Iraqi given that she lived in Iraq for many years, has an Iraqi mother and may have spoken with an accent that differed from other Syrians, the Tribunal does not accept that the applicant could not readily have produced identification showing her status as a Syrian national. The independent evidence also indicates that there are many thousands of Iraqis living in Syria and there is no evidence of mistreatment, although they are not generally treated generously in terms of resettlement (US State Department Report on Iraqi refugees in Syria). The Tribunal does not therefore accept that the applicant was denied education or employment in Syria for a Convention reason. The Tribunal is also not satisfied that there is a real chance that the applicant would encounter difficulties in relation to employment or education for a Convention reason upon her return to Syria.

35. The Minister contends that the issue of the applicant's nationality was a question of fact for the Tribunal, that it was open to the Tribunal to find that the applicant was a Syrian national and that there is no basis for the Court to interfere. The applicant contends that the material before the Tribunal relevant to the issue of nationality was equivocal and that, in the circumstances, the Tribunal should have proceeded on the basis of habitual residence. However, it is plain from the wording of the Refugees Convention that a claim of being persecuted by reference to a country of habitual residence only arises where a claimant has no nationality[40]. It would only be if the Tribunal had been unable to

[40] See *SZIPL* at [12].

determine the issue of nationality that the Tribunal would have needed to consider a claim as against a country of habitual residence. The Tribunal considered whether the applicant was an Iraqi and not a Syrian as she had claimed. The Tribunal rejected that claim on the basis that the applicant had a Syrian step-father who had been accepted as the applicant's father by Syrian authorities and, by reference to the available information on the legal requirements of Syrian nationality, she was therefore a Syrian national. It was open to the Tribunal to reach that conclusion. However, the Tribunal appears to have proceeded on the basis that the applicant's claim was a "bundled" claim that she was Iraqi and not Syrian, as if the two were mutually exclusive. There does not appear to have been any consideration by the Tribunal of whether the applicant was an Iraqi national **as well as** a Syrian national. In my view, in order to complete its task, the Tribunal needed to consider the applicant's claims as to nationality as two distinct and unbundled claims, namely:

a) she was an Iraqi national; and

b) she was not a Syrian national.

36. The Tribunal dealt with the latter but I am not persuaded that the Tribunal dealt with the former. The Tribunal accepted that the applicant's mother is an Iraqi national. The Tribunal states that it referred to a publication entitled *Citizenship Laws of the World* by which it determined the applicant's Syrian citizenship. The Tribunal does not appear to have considered whether, by reference to that or any other information, the applicant was also an Iraqi national, having been born of an Iraqi mother. The Refugees Convention envisages that a refugee may be a national of more than one country[41] and also that a refugee may have more than one country of former habitual residence.[42] If the applicant is, in fact, a dual national of both Iraq and Syria, the Tribunal would, in my view, also have needed to consider the applicant's claims in relation to Iraq. If the Tribunal accepted those claims it may have also needed to consider whether, if the applicant returned to Syria, she might be at risk of forcible repatriation to Iraq and thereby subject to a well-founded fear of persecution.

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[41] *Jong Kim Koe v Minister for Immigration* [1997] FCA 306.
[42] *Al-Anezi v Minister for Immigration* [1999] FCA 355 at [21]-[22].

37. In my view, the Tribunal erred in asking itself the wrong question. Although the Tribunal stated that it had not accepted that the applicant is an Iraqi national and found that the applicant is a Syrian national, there was no consideration of the possibility of dual citizenship. In fact, there was no reasoned consideration of the possibility of Iraqi citizenship at all. Section 36(6) of the Migration Act requires that the determination of nationality be made solely by reference to the law of the relevant country. The Tribunal was confronted by two questions as to nationality and effectively answered only one of them[43]. This constitutes jurisdictional error[44]. This error entitles the applicant to relief in the form of the constitutional writs of certiorari and mandamus.

38. As to costs, the application having been granted, costs should follow the event. I see no reason to depart from the Court's scale of costs in relation to migration matters. I will order that the Minister pay the applicant's costs in accordance with that scale.

I certify that the preceding thirty-eight (38) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 28 November 2008

[43] albeit on the opposite basis to the first Tribunal which accepted that both the applicant's natural parents are Iraqi and was not satisfied that she is a Syrian national.
[44] *Minister for Immigration v Yusuf* (2001) 180 ALR 1