FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v SZNVW [2010] FCAFC 41

Citation:	Minister for Immigration and Citizenship v SZNVW and Anor [2010] FCAFC 41
Appeal from:	SZNVW v Minister for Immigration and Anor [2009] FMCA 1299
Parties:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZNVW and REFUGEE REVIEW TRIBUNAL**
File number(s):	NSD 96 of 2010
Judges:	**KEANE CJ, EMMETT AND PERRAM JJ**
Date of judgment:	10 May 2010
Catchwords:	**MIGRATION** – judicial review – jurisdictional error – protection visa – applicant claimed to be suffering from procrastination and other psychological impairments when he gave evidence at a hearing before the Refugee Review Tribunal – the tribunal rejected this evidence – whether the tribunal fell into jurisdictional error by not complying with s 425 of the *Migration Act 1958* (Cth) **EVIDENCE** – hearsay – factual findings of an administrative tribunal contained within its reasons – admissible for non-hearsay purpose in judicial proceedings to prove the reasons of the tribunal – subsequently admissible to prove the truth of the findings via s 60(1) *Evidence Act 1995* (Cth)
Legislation:	*Evidence Act 1995* (Cth) ss 59, 60, 136 *Migration Act 1958* (Cth) ss 414, 420, 422B, 424, 425 *Migration Amendment (Review Provisions) Act* 2007 (Cth)
Cases cited:	*Alphapharm Pty Ltd v H Lundbeck A/S* [2008] FCA 559 cited *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 cited *Harrington-Smith v Western Australia* (2003) 130 FCR 424 cited *Lardil, Kaiadilt, Yangkaal, Gangalidda Peoples v Queensland* [2000] FCA 1548 cited *Minister for Immigration and Multicultural Affairs v Wang*

(2003) 215 CLR 518 cited
Minister for Immigration and Multicultural and Indigenous Affairs v SCAR (2003) 128 FCR 553 distinguished
NAIS v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 470 cited
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152 cited
SZFDE v Minister for Immigration and Citizenship (2007) 232 CLR 189 considered

Date of hearing:	31 March 2010
Date of last submissions:	31 March 2010
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	88
Counsel for the Appellant:	S B Lloyd SC with T Reilly
Solicitor for the Appellant:	DLA Phillips Fox
Counsel for the First Respondent:	N J Williams SC with S Prince
Solicitor for the First Respondent	No appearance
Counsel for the Second Respondent	The Second Respondent did not appear

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 96 of 2010**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
Appellant

AND: **SZNVW**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **KEANE CJ, EMMETT AND PERRAM JJ**
DATE OF ORDER: **10 MAY 2010**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The decision of the magistrate be set aside.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 96 of 2010**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Appellant**
AND:	**SZNVW** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**KEANE CJ, EMMETT AND PERRAM JJ**
DATE:	**10 MAY 2010**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

KEANE CJ:

1 On 7 May 2009 the delegate of the Minister for Immigration and Citizenship (the Minister) rejected an application by the first respondent (the respondent) to this appeal for a Class XA protection visa under the *Migration Act 1958* (Cth) (the Act). The basis for the application was the respondent's apprehension of persecution on religious grounds in Pakistan. After the rejection of the respondent's application, the respondent applied to the Refugee Review Tribunal (the Tribunal) for the review of the decision of the delegate.

2 On 29 June 2009 the Tribunal rejected the respondent's application for review. The Tribunal did not accept the respondent's account of his reasons for apprehending that he would be subject to religious persecution in Pakistan: in particular, the Tribunal "did not find the applicant to be a truthful or credible witness".

3 The respondent then applied to the Federal Magistrates Court of Australia (the magistrate) for writs of certiorari and mandamus directed to the Tribunal and the Minister

respectively. The respondent's contention was that the Tribunal had not complied with the requirements of s 425 of the Act.

4 The magistrate was of the opinion that the Tribunal's decision was made upon the erroneous assumption of fact that the respondent's evidence before it was not adversely affected by a mental impairment and this false assumption was apt to affect the Tribunal's conclusions: see the primary judgment at [63]. The magistrate held, by reason of material concerning the respondent's emotional and mental state which was placed before the magistrate but which was not before the Tribunal, that "the Tribunal was deprived of the opportunity to assess the evidence given by the [respondent] in the light of his diagnosed mental impairments, and that the [respondent] was denied a '*real and meaningful*' opportunity to participate in the hearing and to have his evidence fairly assessed by the Tribunal in the light of his impairments" (at [64]). On this footing, the magistrate concluded that the Tribunal fell into jurisdictional error by failing to comply with s 425 of the Act.

5 The Minister appeals to this Court from the decision of the magistrate. The principal issue in the appeal concerns the operation of s 425 of the Act. It is therefore convenient to set out its terms before turning to consider in greater detail the reasoning of the magistrate and the arguments agitated on the appeal to this Court.

6 Section 425 of the Act provides:

> **Tribunal must invite applicant to appear**
>
> (1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.
>
> (2) Subsection (1) does not apply if:
>
> (a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or
>
> (b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or
>
> (c) subsection 424C(1) or (2) applies to the applicant.
>
> (3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.

7 Section 425, as it is currently worded, was introduced to the Act by the *Migration Legislation Amendment Act (No 1) 1998* (Cth). The explanatory memorandum states, rather blandly, that:

> 118 New section 425 entitles an applicant to have the opportunity to appear before the Refugee Review Tribunal, by requiring the Tribunal to invite the applicant to appear before it, unless new subsection 425(2) applies. When subsection 425(2) applies, an applicant is not entitled to appear before the Tribunal.

The reasoning of the learned magistrate

8 It is necessary to refer first to the reasons of the Tribunal. The Tribunal summarised the position before it relevantly as follows:

> 113. The applicant arrived in Australia on 14 February 2006 on a student visa to study a Master of Philosophy degree in English Literature at Sydney University. The applicant told the Tribunal that he completed three semesters of the four semester course but was unable to complete the fourth semester for financial reasons. The applicant applied for a protection visa on 19 March 2009 a day after he was detained as an unlawful citizen. When the Tribunal put to the applicant that the fact that he had been studying in Australia since February 2006 and only applied for a protection visa after he was detained may indicate to the Tribunal that his claims that he was known for his secular opinion and had been threatened may not be true he claimed that his delay in applying for protection was because he was suffering from the psychological state of procrastination. To support his claim that he was suffering from the psychological state of procrastination he submitted to the Tribunal a 'Standard Health Event' document dated 10 June 2006 from Patricia Subirat.
>
> 114. The Tribunal has considered the 'Standard Health Event' document but places no weight on it for the following reasons.
>
> 115. The Standard Health Event document consists of six typed lines. Ms Subirat doesn't provide details of her qualifications. Ms Subirat in the document reports the symptoms the applicant told her he had experienced. Ms Subirat stated that the applicant reports experiencing long standing depressive symptoms and reports behaviours such as procrastination. Ms Subirat has not suggested she did any independent testing of the applicant. Ms Subirat states that the applicant appears to have anhedonia but this conclusion appears to have been based on the acceptance of everything the applicant told her rather than any independent testing. Ms Subirat states that she discussed options for treatment with the applicant and that the applicant advised that he wished to commence counselling/therapy. The statement states that the applicant only wanted a review with a psychiatrist at a later date if necessary. At the hearing the applicant told the Tribunal that he didn't know he had a psychological problem until he went to see Ms Subirat and she told him he had one. The Tribunal is of the view that if the applicant had experienced long standing depressive symptoms as he has claimed he would have sought treatment earlier than two days before the hearing. The Tribunal is also of the view that if the applicant was currently experiencing depressive symptoms he would have wanted to see a psychiatrist as soon as possible. There is no medical evidence before the Tribunal to suggest that the applicant suffers from procrastination or depression.

9 It is apparent from this passage that the issue of the respondent's alleged psychological impairment was raised by him before the Tribunal. The respondent sought to rely upon his psychological problems to explain aspects of his evidence. In this regard the Tribunal said:

> 124. The applicant claimed that he has provided different accounts of when he was employed as a lecturer because of his psychological state. He claimed that the incidents that happened to him in Pakistan were traumatic and that this has affected his psychological state and could have caused him to make mistakes in relation to his employment. The Tribunal does not accept this explanation as it does not accept the claims the applicant has made in relation to the incidents that happened to him in Pakistan.
>
> 125. The applicant also made a general claim about his present psychological state and the fact that he is depressed because of what has happened to him in Australia. The Tribunal accepts that the applicant could be feeling depressed because he has not completed the course he had enrolled in. The Tribunal accepts that being detained pursuant to the Migration Act could also lead to feelings of depression. However the Tribunal has no medical evidence before it to suggest that the applicant's present psychological state has affected his memory or his ability to recall what he did or what happened to him in Pakistan.

10 The Tribunal proceeded to conclude adversely to the respondent:

> 126. The Tribunal has considered cumulatively the explanations the applicant has provided to the Tribunal to explain the problems with his evidence. The Tribunal has considered the applicant's psychological state, his memory problems and the fact he didn't have access to his education and employment documents. Even considering these matters cumulatively the Tribunal is not satisfied that they overcome the problems the Tribunal had with the applicant's evidence. The Tribunal is of the view that the inconsistencies between the information the applicant provided in his protection visa application, the information he provided at the hearing and the information he provided in his student visa application in relation to his employment as a lecturer indicates he is not a truthful witness.
>
> …
>
> 128. Taking into account all of the evidence the Tribunal finds that the applicant is not a witness of truth. The Tribunal does not accept that the applicant was known for his secular opinion. The Tribunal does not accept that the applicant was harassed, socially persecuted or threatened. The Tribunal does not accept that Islamist fanatics wanted to harm him and get rid of him. The Tribunal is of the view that the applicant has fabricated these claims in order to strengthen his claim to a protection visa.
>
> …
>
> 135. Taking into account all of the evidence, in particular the credibility of the applicant and the country information, the Tribunal is not satisfied that there is a real chance the applicant would face treatment amounting to persecution for a Convention reason if he returns to Pakistan now or in the reasonably foreseeable future. The Tribunal is unable to be satisfied that the applicant

has a well founded fear of persecution for any Convention reason.

11 Some five and a half months later a psychologist and psychiatrist made further observations concerning the effect of the respondent's mental or emotional impairments upon his demeanour, memory and consistency. On the basis of these later observations, the magistrate found that the respondent "probably gave his evidence to [the Tribunal] when suffering from mental impairments affecting his memory, ability to recall details, and capacity to engage in discussions about his history and opinions" (at [47]).

12 The magistrate went on to conclude (at [64]-[65]):

> I accept the submission of the Minister in the present case that the evidence now before me does not indicate that the applicant was entirely unfit to attend the Tribunal's hearing and answer its questions, whether on 12 June 2009 or at a later date. However, I am satisfied with the benefit of the additional evidence now before the Court, that the Tribunal was deprived of the opportunity to assess the evidence given by the applicant in the light of his diagnosed mental impairments, and that the applicant was denied a *'real and meaningful'* opportunity to participate in the hearing and to have his evidence fairly assessed by the Tribunal in the light of his impairments.
>
> Importantly to the grant of relief in this situation, the Tribunal in its reasoning and its ultimate decision has plainly given a great deal of weight, even overriding weight, in arriving at its adverse conclusions about the applicant's credibility upon matters of demeanour, memory, and consistency. In relation to all of these matters, the applicant was denied a fair opportunity of having the Tribunal assess whether those defects were attributable to a mental impairment, or to concerns about veracity.

13 The magistrate, in reaching his conclusion, referred to four decisions of the High Court (to which I too shall refer in due course), but it is fair to say that the principal authority on which the magistrate relied is the decision of the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 (*SCAR*).

14 In *SCAR* the applicant gave evidence to the Tribunal in a vague and confused manner. Unbeknown to the Tribunal, the applicant had recently received news of his father's death and in the opinion of a psychologist was "in no condition to handle [the interview by the Tribunal]". This Court said at [33], [37]:

> Pursuant to s 425 of the Act the Tribunal is under a statutory obligation to issue an invitation to an applicant to attend a hearing. That indicates a legislative intention that an applicant is to have an opportunity to attend an oral hearing for the purpose of

> giving evidence and presenting argument. The invitation must not be a hollow shell or an empty gesture: *Mazhar v Minister for Immigration and Multicultural Affairs* (2000) 64 ALD 395 at [31].
>
> …
>
> On the other hand, it is also clear that s 425 of the Act imposes an objective requirement on the Tribunal. The statutory obligation upon the Tribunal to provide a 'real and meaningful' invitation exists whether or not the Tribunal is aware of the actual circumstances which would defeat that obligation. Circumstances where it has been held that the obligations imposed by s 425 of the Act have been breached include circumstances where an invitation was given but the applicant was unable to attend because of ill health: *NAHF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 128 FCR 359. They also include circumstances where the statements made by the Tribunal prior to the hearing have misled the applicant as to the issues likely to arise before the Tribunal: *VBAB v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 121 FCR 100. They also include circumstances where the fact or event resulting in unfairness was not realised by the Tribunal. For example, circumstances such as where the applicant was invited to attend and did attend before the Tribunal, but was effectively precluded from taking part because he could not speak English and a translator was not provided or was inadequate: *Tobasi v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 322; *W284 v Minister for Immigration and Multicultural Affairs* [2001] FCA 1788.

15 It is worth noting that the magistrate made no finding, and indeed on the evidence could have made no finding, that the respondent's psychological condition denied him the opportunity to give such evidence and present such arguments in support of his application as he thought appropriate. There was no suggestion that his condition impaired in any substantial way his capacity for rational decision-making in his own interests so far as the presentation of his case was concerned.

The grounds of appeal

16 The first ground of the Minister's appeal is that the magistrate erred in proceeding to assess the respondent's evidence before the Tribunal as if he were a person suffering from a genuine impairment at that time. The psychiatric and psychological assessments of the respondent made some five and a half months after the Tribunal hearing were said to be an insufficient basis for the magistrate's finding of fact as to the effect of the respondent's psychological deficits upon the Tribunal's assessment of his credibility. The second ground of the Minister's appeal is that the magistrate erred in concluding that the respondent's psychological disorder, or more precisely the possible effects of his disorder upon his ability to give evidence and present arguments, was such as to deny the respondent a fair opportunity to present his case in conformity with s 425 of the Act.

Discussion

17 The first ground of appeal depends on the contention that the magistrate could not reasonably have regarded the evidence of the respondent's mental and emotional difficulties placed before him as an accurate indication of the respondent's condition when he presented his case to the Tribunal. This contention is not compelling: there was nothing to suggest that the respondent's psychological problems had altered for the worse since his Tribunal hearing. One may, therefore, put to one side the Minister's first ground of appeal. But even if the impugned finding of fact by the magistrate is accepted, it is clear that the present case differs markedly from *SCAR*.

18 In *SCAR* the Tribunal was oblivious of the facts which established that the applicant did not have a full and fair opportunity to present his case. The reasons of the Tribunal in the present case show that the respondent did, in fact, seek to rely upon his psychological problems first to explain his delay in applying for a visa, and then as a possible explanation for what might otherwise be thought to be unsatisfactory aspects of his evidence. Accordingly, this is not a case where the Tribunal was oblivious to the problem said to vitiate its jurisdiction.

19 More importantly, evidence that the respondent's psychological difficulties might explain an unconvincing performance during the hearing before the Tribunal is hardly apt to establish his unfitness to "give evidence and present arguments." It may be accepted that the Tribunal might have taken a different view of the credibility of the respondent's account of his circumstances in Pakistan if the further evidence relating to the respondent's psychological deficits and their impact on his ability to give persuasive evidence had been placed before the Tribunal. But the absence of that further evidence does not establish that the hearing before the Tribunal proceeded on a false assumption about the respondent's ability to "give evidence and present arguments relating to the issues arising in relation to the decision under review".

20 In my respectful opinion, s 425 of the Act did not require the Tribunal to press the respondent to call further evidence of his psychological problems or to expand his arguments relating to the ramifications of his problems for any aspect of the case he sought to present. Nothing in this Court's decision in *SCAR* supports the contrary view, and in the recent

decision of Gilmour J in *SZMSA v Minister for Immigration and Citizenship* [2010] FCA 345, especially at [20] – [25], the contention that an applicant's psychological difficulties were such as to deprive him of the "meaningful opportunity" required by s 425 of the Act was rejected, correctly in my respectful opinion, on the footing that the applicant's condition was not shown to be such as to deny him the capacity to give an account of his experiences, to present argument in support of his claims, to understand and to respond to questions put to him.

21 It is convenient at this point to notice a number of other provisions of the Act which inform one's understanding of the nature of the hearing contemplated by s 425 of the Act. In this regard, s 414 provides:

> **414 Refugee Review Tribunal must review decisions**
>
> (1) Subject to subsection (2), if a valid application is made under section 412 for review of an RRT-reviewable decision, the Tribunal must review the decision.
>
> (2) the Tribunal must not review, or continue to review, a decision in relation to which the Minister has issued a conclusive certificate under subsection 411(3).

Section 420 (Inserted by the *Migration Reform Act 1992* (Cth)) provides:

> **420 Refugee Review Tribunal's way of operating**
>
> (1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.
>
> (2) The Tribunal, in reviewing a decision:
>
> (a) is not bound by technicalities, legal forms or rules of evidence; and
>
> (b) must act according to substantial justice and the merits of the case.

Section 422B provides:

> **422B Exhaustive statement of natural justice hearing rule**
>
> (1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
>
> (2) Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.
>
> (3) In applying this division, the Tribunal must act in a way that is fair and just.

Section 424 provides (in part):

> **Tribunal may seek information**
>
> (1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.
>
> (2) Without limiting subsection (1), the Tribunal may invite, either orally (including by telephone) or in writing, a person to give information.
>
> …

22 None of these provisions of the Act affords support for the view that the Tribunal is duty-bound to press an applicant to call further evidence on an issue or to seek an adjournment of the hearing to enable him to do so, or to seek out such evidence itself. In those cases where the applicant is not disabled by his psychological deficits from giving evidence and presenting arguments, the hearing required by s 425 of the Act is not nullified by a mere failure by an applicant to present his case in the best possible light.

23 It is settled that proceedings before the Tribunal are not adversarial in nature. In *Minister for Immigration and Multicultural Affairs v Ji Dong Wang* (2003) 215 CLR 518 at [71], it was said by Gummow and Hayne JJ that:

> In adversarial litigation, findings of fact that are made will reflect the joinder of issue between the parties. The issues of fact and law joined between the parties will be defined by interlocutory processes or by the course of the hearing. They are, therefore, issues which the parties have identified. A review by the Tribunal is a very different kind of process. It is not adversarial; there are no opposing parties; there are no issues joined. The person who has sought the review seeks a particular administrative decision - in this case the grant of a protection visa - and puts to the Tribunal whatever material or submission that person considers will assist that claim. The findings of fact that the Tribunal makes are those that it, rather than the claimant, let alone adversarial parties, considers to be necessary for it to make its decision. Those findings, therefore, cannot be treated as a determination of some question identified in any way that is distinct from the particular process of reasoning which the Tribunal adopts in reaching its decision.
> (footnotes omitted).

These observations were cited with approval by Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ in *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 (*SZFDE*).

24 *SZFDE* was concerned with whether a party's rejection of the Tribunal's invitation under s 425(1) caused the Tribunal to fall into jurisdictional error in circumstances where the

party's refusal was induced by the fraud of a migration agent, Mr Hussain. It was the unanimous view of the High Court that (at [31] - [32]):

> The importance of the requirement in s 425 that the Tribunal invite the applicant to appear to give evidence and present arguments is emphasised by s 422B. This states that Div 4 'is taken to be an exhaustive statement of the requirement of the natural justice hearing rule in relation to the matters it deals with.'
>
> An effective subversion of the operation of s 425 also subverts the observance by the Tribunal of its obligation to accord procedural fairness to applicants for review. Given the significance of procedural fairness for the principles concerned with jurisdictional error, sourced in s 75(v) of the Constitution, the subversion of the processes of the Tribunal in the manner alleged by the present appellants is a matter of the first magnitude in the due administration of Pt 7 of the Act.
> (footnotes omitted).

Later in their reasons in *SZFDE* their Honours said (at [49]):

> The fraud of Mr Hussain had the immediate consequence of stultifying the operation of the legislative scheme to afford natural justice to the appellants.

25 In *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 McHugh, Gummow, Callinan and Heydon JJ held that the requirements of s 425(1) had not been satisfied in circumstances where the Tribunal member was disposed to doubt aspects of the applicant's evidence and the translation of the evidence presented, but stated she would send questions to the applicant and await his response. In fact, no such questions were sent and the application was refused. Their Honours stated, at [27]:

> One aspect of the overall duty to review was the duty to invite the appellant to give evidence and present arguments: s 425(1). The duty to review therefore entailed a statutory duty to consider the arguments presented and in that way to afford the appellant procedural fairness. That implied that if the Tribunal thought that the arguments had been presented so inadequately that the review could not be completed until further steps had been directed and performed, it could not be peremptorily concluded by the making of a decision before that direction was complied with or withdrawn.

26 Although their Honours did not discuss the scope of s 425(1) in detail, they said, at [32] – [33], that:

> The failure to complete the review process was a failure to comply with the duty imposed by s 414(1) to conduct the review and the duty under s 425(1) to hear from the appellant. […] that part of the process of review which involved participation by the appellant, as provided for in s 425(1), had not been concluded.

27 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 concerned inordinate delay on the part of the Tribunal. In allowing an appeal against a decision made by the Tribunal, Callinan and Heydon JJ observed that (at [171]):

> The first respondent also accepted that s 425(1), by implication, refers to a hearing where the evidence given is to be given proper, genuine and realistic consideration in the decision subsequently to be made.

28 The final High Court decision cited by the magistrate in the present case was *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152. This case concerned an Iranian seaman who had jumped ship in Port Kembla, who then applied for a protection visa. The Tribunal informed the applicant that it could not make a decision in the applicant's favour on the material before it. After inviting the applicant to appear, the Tribunal failed to (at [3]):

> …challenge what the appellant said, express any reaction to what he said, or invite him to amplify any of the three particular aspects of the account he had given in his statutory declaration, and repeated in his evidence, which the Tribunal later found to be "implausible".

29 In allowing the applicant's appeal, the High Court discussed the operation of s 425 (at [37]):

> Suppose (as was the case here) the delegate concludes that the applicant for a protection visa is a national of a particular country (here, Iran). Absent any warning to the contrary from the Tribunal, there would be no issue in the Tribunal about nationality that could be described as an issue arising in relation to the decision under review. If the Tribunal invited the applicant to appear, said nothing about any possible doubt about the applicant's nationality, and then decided the review on the basis that the applicant was not a national of the country claimed, there would not have been compliance with s 425(1); the applicant would not have been accorded procedural fairness.

30 None of the decisions of the High Court to which reference has been made affords support for the view that a hearing does not conform to the requirements of s 425 of the Act merely because the applicant might, if better advised, have chosen to present a more compelling case.

31 In this Court, neither side sought to argue that *SCAR* was wrongly decided, however, it may be noted that the statement of principle in *SCAR* on which the magistrate relied in the present case has not commanded universal assent. Thus in *SZFDE* Graham J said (at [212]):

> In so far as the Full Court in *SCAR* may have found that s 425(1) required more of an invitation to appear before the Tribunal than compliance with the terms of the Act, it was, in my opinion plainly wrong and should not be followed. The statute does not impose any additional obligation requiring an invitation to be "real and meaningful" or, simply, "meaningful".

32 It is not necessary for the disposition of this appeal to enter upon the controversy raised by Graham J as to the correctness of the reasoning underlying the decision in *SCAR*: cf *SZFDE* at [93]-[94] per French J as his Honour then was. In *SCAR*, in the paragraph immediately preceding the paragraphs cited by the magistrate in the present case, the following statement appears:

> It is clear that s 425 of the Act does not require that the Tribunal actively assist the applicant in putting his or her case; nor does it require the Tribunal to carry out an inquiry in order to identify what that case might be: *Chen v Minister for Immigration and Multicultural Affairs* [2001] FCA 1671.

33 Similarly, in *NAMJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 76 ALD 56, at [51]-[52], Branson J observed that it was unlikely that the legislature intended that a hearing before the Tribunal could not proceed by reason of "some measure of psychological stress and disorder in the applicant."

34 It was not demonstrated that the Tribunal was wrong to regard the respondent as a witness who was not worthy of belief. It has not even been shown that the Tribunal was wrong to attribute the respondent's poor performance before it to dishonesty rather than to the effects of his psychological problems. At the highest for the respondent it may be said that more information relating to his psychological problems might have led to a different view of his credibility. To say only that it is possible that a different view might have been taken of the respondent's credibility had more information been made available to the Tribunal as to his psychological problems is to fall short of demonstrating that the respondent was denied a "real and meaningful" opportunity of giving evidence and presenting arguments in support of his application. In this case, in contrast to *SCAR*, it has not been established, as a fact, by the evidence subsequently adduced before the Magistrate, that the Tribunal's adverse view of the

respondent's credibility reflects an impaired opportunity for him to give evidence and present arguments.

35 In summary to this point, there is nothing in the text of s 425, or in the statutory context in which it appears, or in the authoritative judicial exegesis of s 425, to suggest that it was the intention of the legislature that the Tribunal should take upon itself the role of ensuring that all possibly arguable lines of argument which might be available to an applicant in any given case are pursued to the applicant's best advantage.

36 There was, in my respectful opinion, no foundation for the magistrate's ultimate conclusion that "the applicant was denied a fair opportunity of having the Tribunal assess whether those defects [in addition to demeanour, memory, and consistency] were attributable to a mental impairment, or to concerns about veracity." The Tribunal was not obliged to conduct an inquiry to discover whether the respondent's case might be better put or supported by other evidence. The applicant had the opportunity to adduce such evidence as to his psychological state and its impact on his "demeanour, memory and consistency", as he wished. There is no suggestion that his capacity to make decisions in his own interests in that regard was impaired by his condition.

37 The present case falls well outside the authority of this Court's decision in *SCAR*. The further evidence subsequently adduced before the magistrate was not apt to, and was not found to, demonstrate an unfitness to "give evidence and present arguments" at the hearing. Nor was this a case where the integrity of the hearing under s 425 was subverted by a want of an appreciation on the part of the Tribunal that the respondent's presentation of his case might have been adversely affected by an impaired mental state of which the Tribunal was oblivious.

38 In my respectful opinion, the magistrate's decision cannot be sustained; the learned magistrate erred in concluding that the Tribunal failed to comply with s 425 of the Act.

Orders

39 The appeal should be allowed and the decision of the magistrate set aside.

I certify that the preceding thirty-nine (39) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Keane.

Associate:

Dated: 7 May 2010

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 96 of 2010**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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Appellant

AND: **SZNVW**
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REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **KEANE CJ, EMMETT AND PERRAM JJ**
DATE: **10 MAY 2010**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

EMMETT J:

40 This appeal from orders of the Federal Magistrate's Court concerns a decision of the second respondent, the Refugee Review Tribunal (**the Tribunal**), affirming a decision of a delegate of the appellant, the Minister for Immigration and Citizenship (**the Minister**). The decision made by the delegate was to refuse the grant of a Protection (Class XA) visa under the *Migration Act 1958* (Cth) (**the Act**) to the first respondent (**the Visa Applicant**).

41 The Visa Applicant is a citizen of Pakistan. He arrived in Australia in February 2006 on a student visa to study at a university in Sydney. He completed three of four semesters but, for financial reasons, was unable to complete the fourth semester. In March 2009, the day after he was detained as an unlawful non-citizen, the Visa Applicant applied for a protection visa. Following refusal by the Minister's delegate, the Visa Applicant sought review of the delegate's decision by the Tribunal.

42 The Tribunal wrote to the Visa Applicant indicating that it was not disposed to decide the review in the Visa Applicant's favour on the basis of the material before it and therefore invited the Visa Applicant to appear before the Tribunal to give evidence and present arguments relating to the issues. The Visa Applicant accepted the Tribunal's invitation. In the course of the hearing, the Tribunal put to the Visa Applicant that the fact that he had been studying in Australia since February 2006, but did not apply for a protection visa until after he was detained, might indicate to the Tribunal that his claims to fear persecution if he returned to Pakistan may not be true. The Visa Applicant responded that he was suffering from the psychological state of procrastination and in support of that assertion submitted to the Tribunal a "Standard Health Event" document dated 10 June 2006. The Tribunal considered that document but placed no weight on it for reasons that it gave.

43 Following the Tribunal's decision to affirm the delegate's rejection of his application for a protection visa, the Visa Applicant commenced a proceeding in the Federal Magistrates Court seeking Constitutional writ relief in respect of the Tribunal's decision. After a hearing before the Federal Magistrates Court, at which the Visa Applicant adduced further evidence as to his psychological condition, the Federal Magistrates Court ordered that the Tribunal's decision be set aside and that the Tribunal be directed to hear and determine the Visa Applicant's application for review according to law. The Visa Applicant then appealed to the Federal Court and the Chief Justice directed that the appeal be heard by a Full Court.

44 The basis for the decision of the Federal Magistrates Court was that the Tribunal had failed to comply with s 425 of the Act and that that failure constituted jurisdictional error. Section 425 of the Act relevantly provides that, in conducting a review of a decision of the Minister, the Tribunal must invite an applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review.

45 While the Visa Applicant attended a hearing before the Tribunal, the Federal Magistrates Court concluded, on the basis of additional evidence as to the Visa Applicant's diagnosed mental impairments, that the Tribunal had been deprived of the opportunity to assess the Visa Applicant's evidence in the light of his impairments. The Federal Magistrates Court concluded that the Visa Applicant had been denied a real and meaningful opportunity to participate in the hearing before the Tribunal and to have his evidence fairly assessed by

the Tribunal in the light of his impairments. The Federal Magistrates Court observed that, in arriving at its adverse conclusions about the Visa Applicant's credibility, the Tribunal had placed a great deal of weight upon matters of demeanour, memory and consistency and concluded that, in relation to all of those matters, the Visa Applicant was denied a fair opportunity of having the Tribunal assess whether those defects were attributable to a mental impairment rather than lack of veracity.

46 In his notice of appeal, the Minister raised two grounds as follows:

- The Federal Magistrates Court erred in proceeding to assess the Visa Applicant's evidence before the Tribunal as if he were a person suffering from a genuine impairment at that time.
- The Federal Magistrates Court erred in concluding that the Visa Applicant's psychological disorder and the possible affects of that disorder upon his ability to give evidence and present arguments was such as to deny him a fair opportunity to present his case in conformity with s 425 of the Act.

47 The Federal Magistrates Court placed considerable store on the decision of the Full Court in *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553. The Minister did not invite the Court to hold that that decision was clearly wrong. However, the Minister invited the Court to distinguish the decision. In that case, an applicant had given evidence to the Tribunal in a vague and confused manner in circumstances where, unknown to the Tribunal, that applicant had recently received news of the death of his father, such that he was in no condition to give evidence and present arguments to the Tribunal.

48 Whether or not the decision is correct, the Federal Magistrates Court in the present case made no finding that the Visa Applicant's psychological condition denied him the opportunity to give such evidence and present such arguments in support of his application as he thought appropriate. It was not suggested that the Visa Applicant's psychological condition impaired in any way his capacity to make rational decisions in his own interests in relation to the presentation of his case. Indeed, he adduced evidence as to his condition of procrastination, albeit as a justification for having delayed some three years before making an application for a protection visa.

49 I have read the reasons of the Chief Justice in draft and agree, for the reasons given by the Chief Justice, that the appeal should be upheld. I agree with the conclusion of the Chief Justice that there was no foundation for the ultimate conclusion of the Federal Magistrates Court. The Visa Applicant had the opportunity to adduce such evidence as he considered appropriate as to his psychological state and its impact on his demeanour, memory and consistency. The Tribunal was not obliged to conduct an inquiry to discover whether the Visa Applicant might have been able to put his case better or support it with other evidence.

50 The appeal should be upheld. The orders of the Federal Magistrates Court should be set aside. In lieu of those orders, there should be orders that the proceeding in the Federal Magistrates Court be dismissed with costs. The Minister is entitled to his costs if he seeks an order to that effect.

I certify that the preceding eleven (11) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Emmett.

Associate:

Dated: 10 May 2010

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 96 of 2010**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Appellant**
AND:	**SZNVW** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**KEANE CJ, EMMETT AND PERRAM JJ**
DATE:	**10 MAY 2010**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

PERRAM J:

51 This appeal gives rise to two questions. The first is whether the learned Federal Magistrate erred in finding, as a fact, that the respondent was suffering from mental impairments affecting his memory at the time of his hearing before the Refugee Review Tribunal ("the Tribunal"). The second question is whether, assuming that finding not to have been in error, it justified the conclusion which his Honour then reached, namely, that the Tribunal had failed to give the respondent a "real and meaningful" opportunity to participate in a hearing before it thus failing to comply with s 425 of the *Migration Act 1958* (Cth) ("the Act"). That conclusion had the attendant consequence that the Tribunal's determination was liable to be set aside.

52 The respondent is from Pakistan and is an applicant for a protection visa. That application was refused by a delegate of the Minister. He then applied for a review of that decision in the Tribunal but it affirmed the delegate's decision. The essence of its reasoning

was that it did not believe his account because it generally thought him a dishonest witness. The Tribunal was, in particular, critical of his having given different versions of the dates on which he claimed to have been employed by universities in Pakistan. Before the Federal Magistrate, however, evidence was tendered, apparently without objection, from a clinical psychologist who expressed the opinion, *inter alia*, that:

> [The respondent] reported and displayed the following dominant symptoms;
>
> …
>
> ***Memory deficits***
>
> [The respondent] claims that he has become increasingly forgetful and is finding it hard to concentrate. This difficulty was responsible for him 'missing out' important dates during his RRT hearing. He had written the date of this hearing on the envelope he carried to help him remember, just in case he was queried about the hearing at our meeting.

53 No such evidence was before the Tribunal. The learned Federal Magistrate concluded that it did "reflect an opinion" by the clinical psychologist about the cause of the respondent's memory difficulties at the time of the hearing before the Tribunal.

54 The Minister challenged this finding. He pointed to other parts of the evidence which were before the Federal Magistrate which supported a contrary conclusion. However, an appeal to this Court is by way of re-hearing: *Branir v Owston Nominees (No 2)* (2001) 117 FCR 424 at 434-435 [20] per Allsop J (Drummond and Mansfield JJ concurring); *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 533 [75] per Gleeson CJ and Gummow J; *Seven Network Ltd v News Ltd* (2009) 262 ALR 160 at 188 [87] per Dowsett and Lander JJ (Mansfield J agreeing at 165 [1] and 181 [67]). The function performed by a rehearing is the correction of error: "We cannot however simply substitute for his Honour's findings of fact those findings which we would have made had we been the judges on review who determined this matter at first instance" (*Cabal v United Mexican States* (2001) 108 FCR 311 at 362 [224] per the Court).

55 The error said by the Minister to have been committed by the learned Federal Magistrate was to give the clinical psychologist's report too much weight in light of the fact that it was not shown that the history of symptoms reported by the respondent to her and set out in the report were true. That history, of course, formed part of the matters upon which

her expert opinion was based. Consequently, it was relevant, in a non-hearsay way, for it disclosed the matters upon which the opinion was based: *Ramsay v Watson* (1961) 108 CLR 642 at 649 per the Court; *Wigmore on Evidence* (vol VI) §1720 pp 110-113; *Lee v The Queen* (1998) 195 CLR 594 at 604 per the Court; *English Exporters (London) Ltd v Eldonwall Ltd* [1973] Ch 415 at 423 per Mcgarry J; *Cross & Tapper on Evidence* (11th ed, 2007) p 579. At common law it was, accordingly (and subject to the basis rule), admissible for that non-hearsay purpose. Likewise, its admission for that purpose would not have entailed its admission for the hearsay purpose of proving the truth of that history: *Ramsay v Watson* at 649 per the Court. Section 60(1) of the *Evidence Act 1995* (Cth), however, reverses the common law position. It provides:

> The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.

56 Consequently, the respondent's report of his history as set out in the clinical psychologist's report was not only evidence identifying the matters upon which she relied in forming her opinion but also evidence of the truth of those matters: *Alphapharm Pty Ltd v H Lundbeck A/S* [2008] FCA 559 at [761]-[783] per Lindgren J. Section 136 of the *Evidence Act* permits a court to limit the use to which such evidence may be put but no such order was sought by the Minister from the learned Federal Magistrate and, in fact, no such order was made. It follows that the respondent's reports of his symptoms as set out in the clinical psychologist's report were evidence that he did in fact suffer from those symptoms.

57 It would have been permissible for the Federal Magistrate to have taken into account the hearsay nature of the history in assessing the weight to be given to it and, hence, to the opinion itself. The permissibility of such a cause is well established: see *Harrington-Smith v Western Australia* (2003) 130 FCR 424 at 432 [39] per Lindgren J; *Lardil, Kaiadilt, Yangkaal, Gangalidda Peoples v Queensland* [2000] FCA 1548 at [16] per Cooper J.

58 However, to say that such a line of reasoning is available is not to say that it is mandatory. The Minister submitted that the Federal Magistrate erred in not taking that course because the Tribunal itself had disbelieved the respondent's claim to have memory difficulties. There are, I think, two problems with that argument. *First*, it is circular – the evidence of the clinical psychologist went, in part, to explaining why the Tribunal's disbelief of the respondent was unwarranted. *Secondly*, the Minister's argument impermissibly

assumes that the Tribunal's conclusion that the respondent did not have memory problems was itself evidence deserving of decisive, or at least, significant weight. The Tribunal, however, was not a primary witness as it had not been in Pakistan at the universities at which the respondent claimed to have lectured and it was not qualified as an expert to express an opinion about his memory deficits. Viewed as a source of testimony, its rejection of the respondent's account of his memory problems was itself, at least before the Federal Magistrate in that Court's original jurisdiction, a hearsay opinion from an unqualified witness. In that regard, it is worth noting that the Tribunal's conclusions have a very different status in judicial review proceedings than do the findings of a trial judge in judicial proceedings.

59 Generally speaking, the factual findings of an administrative decision maker, such as the Tribunal, are "previous representations" to which the hearsay rule in s 59(1) of the *Evidence Act* applies therefore rendering them inadmissible in judicial proceedings to prove the truth of the fact found. Of course, the reasons of the Tribunal had the direct non-hearsay relevance of proving what it was that the Tribunal's reasons were which will almost invariably be a relevant issue in judicial review proceedings. Again, however, the effect of s 60(1) of the *Evidence Act* will be to render the Tribunal's reasons, once admitted to prove what its reasons were, as evidence of the truth of findings contained in those reasons unless a limiting order is made pursuant to s 136 *Evidence Act*.

60 It is not plain that the Tribunal's reasons were, in fact, in evidence before the Federal Magistrate. However, I proceed on the assumption – favourable to the Minister – that they were. That assumption is in the Minister's favour because if the reasons were not in evidence they had no status whatever (unlike judicial reasons). The assumption is properly to be made because the reasons of the Tribunal do appear to have been annexed to an affidavit of the respondent and because the Federal Magistrate evidently treated them as if they were. For similar reasons I also proceed on the basis that no order was made pursuant to s 136 of the *Evidence Act* limiting the evidential uses to which those reasons could be put.

61 Making those assumptions the contest becomes, therefore, one between the respondent's hearsay history and the Tribunal's unqualified hearsay opinion that the respondent did not have memory problems. I see no particular reason why, as a matter of

principle, the Federal Magistrate had to afford the Tribunal's evidence about the respondent's memory problems more weight then the respondent's evidence about them. Indeed, having perused the Tribunal's reasons with some care I feel bound to observe that its degree of disbelief in almost anything put by the respondent leaves in my mind the distinct impression that the value of the Tribunal's reasons *as testimony* may be somewhat limited. For example, the Tribunal rejected material from another psychologist on the basis that the psychologist had not set out her qualifications even though it was not suggested that she was not a psychologist and even though she was the psychologist provided by the Commonwealth to the respondent in immigration detention. That exceptional reasoning raises real questions in my mind as to the quality of the decision making process undertaken. It is not necessary to pursue this further: it suffices only to say that a case for giving the Tribunal's view of things decisive weight is not made out.

62 In any event, if the Minister had wished to establish before the Federal Magistrate that the respondent was lying about the history it was open to the minister to cross-examine him on his affidavit to suggest that his account was false, to seek to prove the matters which were before the Tribunal and which apparently led it at least not to believe the respondent and, more generally, to embark upon the usual measures which attend the taking of such course in civil proceedings. None of this was done. That being so I can discern no reason why the Federal Magistrate's decision to accept the opinion of the clinical psychologist involved giving excessive weight to the respondent's history.

63 In those circumstances, I do not think that error is shown merely by the fact that the learned Federal Magistrate did not give less weight to the opinion because of the hearsay nature of the evidence upon which it rested. My conclusion in that regard is also buttressed by the fact that the Minister chose not to seek an order limiting the use of the evidence under s 136 and because the psychologist herself was not cross-examined – as easily she could have been – to show that her opinion rested entirely on the respondent's reports and was not also the product of an assessment on her part of his demeanour or other matters purely within the scope of her professional expertise. I would reject the Minister's first ground of appeal.

64 I turn then to the second question. The learned Federal Magistrate found, as a fact, that the respondent "was suffering mental impairments at the time of his hearing with the

Tribunal" specifically "affecting his memory, ability to recall details and capacity to engage in discussion about his history and opinions".

65 The Tribunal, for its part, found the respondent's evidence unsatisfactory on a number of fronts not all of which related to the respondent's memory. For example, the Tribunal was willing to conclude that he was not giving truthful evidence when he claimed that Islamic fanatics had verbally threatened him, almost beaten him and shown him a gun. That dishonesty was to be discerned because the Tribunal was of the view that:

> if Islamist [sic] fanatics well-known for their violent attacks by armed gunman and suicide bombers had wanted to harm the applicant and get rid of him they would have done more then threaten him.

66 Apart from such matters, however, it is also tolerably clear that the Tribunal was significantly influenced by testimony given by the respondent about the dates of his employment as a lecturer at three institutions in Lahore, Pakistan. These were Government College University, Beacon House National University and the Pakistan School of Fashion Design. The respondent gave three accounts of dates upon which he was employed at each of these institutions. The first was on his application for a student visa lodged sometime before 2 January 2006 (when such a visa was, in fact, granted), the second on his application for a protection visa provided on 20 April 2009 from circumstances of immigration detention and the third at the actual hearing before the Tribunal on 12 June 2009. These accounts all varied. The fruits of the Tribunal's endeavours in this regard were set out in its reasons in the following terms:

> In his protection visa application the applicant claimed he was a lecturer at Government College University Lahore from January 2002 until May 2004. At the hearing he claimed he lectured at Government College University from January 2002 until May 2003. In his student visa application he claimed he lectured at Government College University from January 2003 until August 2004.
>
> In his protection visa application the applicant claimed he was a lecturer at Beacon House National University Lahore from September 2003 until May 2004. At the hearing he claimed he lectured at Beacon House National University, September 2002 until September 2003. In his student visa application he claimed he lectured at Beacon House National University from October 2003 until June 2004.
>
> In his protection visa application the applicant claimed he was a lecturer at Pakistan School of Fashion Design Lahore from September 2004 until May 2005. At the hearing he claimed he lectured at Pakistan School of Fashion Design, September 2003 until May 2004. In his student visa application he claimed he lectured at Pakistan School of Fashion Design from September 2004 until June 2005.

67 The Tribunal put its concerns about these inconsistencies to the respondent. His explanation was that he did not have access to his certificates of employment whilst in the detention centre as they were with the Department with whom he had lodged his visa application. The Tribunal rejected this explanation thus:

> The Tribunal is of the view that if the applicant had been appointed and employed as a university lecturer in Pakistan he would have remembered when he had been appointed and how long he worked for and would not have needed access to the documents he provided to the Department in order to provide a consistent account of his employment.

68 The Tribunal did not seek the certificates itself. It next considered the respondent's argument that he was not good with dates. This it was able to reject on the basis that he was lying since he was, in fact, good with dates. This adeptness could be discerned, so the Tribunal reasoned, from the respondent's success at recalling, *inter alia*, the date upon which his brother was married and the year in which his sister departed Pakistan.

69 The Tribunal then moved to the respondent's contention that his difficulties with dates were also related to his psychological condition of depression. The Tribunal would have none of this. It despatched the argument this way:

> The applicant claimed that he has provided different accounts of when he was employed as a lecturer because of his psychological state. He claimed that the incidents that had happened to him in Pakistan were traumatic and that this has affected his psychological state and could have caused him to make mistakes in relation to his employment. The Tribunal does not accept this explanation as it does not accept the claims the applicant has made in relation to the incidents that happened to him in Pakistan.
>
> The applicant also made a general claim about his present psychological state and the fact that he is depressed because of what has happened to him in Australia. The Tribunal accepts that the applicant could be feeling depressed because he has not completed the course he had enrolled in. The Tribunal accepts that being detained pursuant to the Migration act [sic] could also lead to feelings of depression. However the Tribunal has no medical evidence before it to suggest that the applicant's present psychological state has affected his memory or his ability to recall what he did or what happened to him in Pakistan.

70 It will be apparent that the learned Federal Magistrate's conclusion that at the time of the Tribunal's hearing the respondent was suffering from mental impairments affecting his memory somewhat dented the force of these conclusions. The Minister's riposte was that the

respondent could have led evidence before the Tribunal to show that he was suffering from such a deficit or he could have sought a further adjournment on the grounds of stress (he had, in fact, already obtained one such adjournment). Consequently, it could not be said that there had not been a fair hearing: memory deficits may well have beset the respondent but he still had the capacity to point out the existence of those deficits to the Tribunal. Indeed, so the Minister argued, it was plain that he *had* pointed them out and just as plain that the Tribunal had rejected their existence.

71 The respondent submitted, and the Federal Magistrate found, that the existence of the memory deficits meant that the Tribunal had been denied the opportunity to assess his evidence in the light of those deficits and hence that the respondent was denied a "real and meaningful" opportunity to participate in the hearing and to have his evidence assessed by the Tribunal in the light of his impairment.

72 Section 425(1) of the Act provides:

> **Tribunal must invite applicant to appear**
>
> (1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.

73 In *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 the Full Court interpreted this provision as requiring an invitation to be given which was real, meaningful and not merely formalistic. Such a proposition might be regarded as uncontroversial. However, *SCAR* has been a running source of debate in this Court because of its further conclusions that an invitation might be deprived of that quality if the ensuing hearing was frustrated by a lack of fitness on the part of an applicant to represent him or herself and that this was so even if, as was the case in *SCAR* itself, the lack of fitness was not known to the Tribunal. Some judges of this Court have wondered how the Tribunal can breach its duty to issue an invitation under s 425 by reason of a state of affairs of which it is ignorant. The competing views are set out in *Minister for Immigration and Multicultural Affairs v SZFDE* (2006) 154 FCR 365 at 389 [94] per French J and 416-417 [211]-[212] per Graham J, a decision which was reversed, of course, by the High Court in *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189. There is no doubt, however, that *SCAR* presently represents the established jurisprudence of this Court. It has not been

reversed and continues in force: see, for example, *SZHKA v Minister for Immigration and Citizenship* (2008) 172 FCR 1 at 4 [5] per Gray J and 10 [26]-[27] per Gyles J. This Court was not invited to depart from it and, indeed, as these reasons will attempt to show the High Court's decision in *SZFDE* indicates that its operation may be somewhat more orthodox than it first appears. For completeness, no argument was advanced in this case that the insertion of s 422B(3) into the Act by the *Migration Amendment (Review Provisions) Act 2007* (Cth) – which requires the Tribunal, in carrying out the procedures under Part 7 to do so in a way which is "fair and just" – impacts on the continuing relevance of *SCAR:* cf. *Minister for Immigration and Citizenship v SZMOK* (2009) 257 ALR 427 at 432 [18] per Emmett, Kenny and Jacobson JJ.

74 *SCAR* does not directly decide the issue to which this case gives rise. This is so because the learned Federal Magistrate did not find that the respondent was not fit to represent himself. Such a finding, by contrast, was reached in *SCAR* and was at the heart of its reasoning. Instead, the learned Federal Magistrate reasoned this way:

> In my opinion, *SCAR* stands as binding authority for an underlying principle going beyond the issue of fitness to "*represent himself before the Tribunal*" on the day of a hearing, which was raised by the facts of that case (see [13]-[16] and [40]-[41]). The broader foundation of the Full Court's decision is pointed to by the analogous circumstances that their Honours identify in [37] above. These include categories of jurisdictional error where a substantial error of translation has prevented the applicant meaningfully communicating his evidence to the Tribunal, where it assessed his evidence upon false assumption as to his evidence, and where this materially affected the outcome (see authorities such as *Perera v Minister for Immigration & Multicultural Affairs* (1999) 92 FCR 6, *VWFY v Minster for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1723, *M175 of 2002 v Minister for Immigration & Citizenship* [2007] FCA 1212, *SZGYM v Minister for Immigration & Citizenship* [2007] FCA 1923, and *SZJBD v Minister for Immigration & Citizenship* [2009] FCAFC 106 at [73]). Plainly, such a jurisdictional error affecting a hearing of a Tribunal does not usually, if ever, have the drastic and irremediable effects which concerned Branson J. The important consideration of fairness, which in my opinion the Full Court's judgment in *SCAR* points to, **is that a significant impairment to communication at a hearing arising from language or mental state should be taken into account by the Tribunal when assessing the person's evidence, and that the Tribunal should not make its decision based upon a false assumption that the impairment did not exist.** If the Tribunal does make a decision upon a false assumption as to the opportunity enjoyed by the applicant at the hearing under s.425, and if this has materially affected the Tribunal's conclusions, the Tribunal has failed to exercise its jurisdiction according to law.
>
> (emphasis added)

75 It is not difficult to see how SCAR might tempt one to that conclusion. However, I respectfully differ from Smith FM because I do not think that the analysis turns on whether an applicant was, or was not, afforded a fair hearing; rather, it depends upon a characterisation of the quality of *the invitation* given to an applicant in light of the hearing which, in fact, took place. Put another way, did the Tribunal conduct a review. So much follows from *SCAR* itself (at 562 [41]):

> Given the findings of fact made by the primary judge that the respondent was not in a fit state to represent himself before the Tribunal it is clear that the invitation he received under s 425 of the Act was not a meaningful one. Through no fault of the Tribunal it was not aware of this. Even so, the Tribunal did not comply with s 425 of the Act. It did not extend a meaningful invitation to the respondent. The respondent did not receive the fair hearing required by the Act. Consequently the Tribunal made a "jurisdictional error".

76 One of the curiosities of the Act is that whilst it requires, through s 425, that the Tribunal invite an applicant to a hearing (at least where the Tribunal is minded to refuse the application on the materials before it) there is no express concomitant obligation, having issued such an invitation, in fact to conduct such a hearing. Section 414 imposes the basal requirement that the Tribunal conduct a "review" but that need not involve a hearing. Had there been an express obligation contained in Part 7 Division 4 to conduct a hearing then when the Tribunal considered, on the material before it, that the application should be refused, it is not hard to imagine that it would readily have been inferred that the hearing thereby required had to be a hearing in substance and not merely in form.

77 Viewed through that prism it is easy to see how such an obligation has ended up being grafted – not onto the hearing for which the statute does not provide – but on the invitation to that hearing for which it does. This has the consequence, of which *SCAR* is but an example, that concepts which really relate to the efficacy of hearings – such as fitness for trial and the ability to comprehend trial process – become transplanted from their origin as such into the alien soil of rules concerned with invitations to hearings. In some ways this is a surprising outcome. It is, for example, contrary to ordinary English usage – one would not say that having received an invitation to a wedding that one had not been invited simply because the marriage was called off. So too, there are conceptual difficulties in a doctrine which makes the validity of a legal act – here the invitation – a function of events postdating it and disconnected from the person issuing it.

78 Those kinds of considerations made it possible, for a time, to think that *SCAR* was something of a high watermark from which the tide of legal reasoning was gently ebbing. In *Minister for Immigration and Multicultural Affairs v SZFDE* (2006) 156 FCR 365 a majority of this Court thought that *SCAR* did not mean that no invitation had been issued to an applicant who was deceived by third party fraud into thinking attendance before the Tribunal was unnecessary (and whose application was therefore dismissed). Allsop J did not think *SCAR* extended so far (at 400-401 [134]); Graham J was of the view that *SCAR* was incorrectly decided: (at 417 [212]). The dissenting judge in *SZFDE*, French J, took a different view. His Honour's focus was on the effect of the fraud on the decision making process revealed by Part 7 of the Act (at 399 [128]); the case was, his Honour held, "not about unfairness" a comment which has some significance for the present proceedings. Those dissenting remarks were expressly vindicated by the unanimous decision of the High Court on appeal: *SZFDE* v *Minister for Immigration & Citizenship* (2007) 232 CLR 189 at 205 [47]. French J referred to *SCAR* (at 388-389 [92]-[94]), not as applying to the case before him, but rather to where the decision making process was successfully impugned by matters in respect of which the decision maker had no role. His Honour's ultimate conclusion was thus (at 391 [101]):

> What emerges from the authorities referred to above is that procedural unfairness, not attributable to a decision-maker, *may* arise in connection with the making of a decision when a person's exercise of the right to be heard before the decision is made, **is compromised or lost** through no fault of that person. That circumstance does not however establish a *sufficient* condition for a finding of procedural unfairness.
>
> (emphasis added)

79 The High Court allowed an appeal from the Full Court's decision and in the process approved the statement above that the focus had to be on the operation of the statute. Consistently with French J's comment that the case was not about *unfairness* the High Court distanced its reasoning from analyses having their origins in civil process. The Court adopted (at 201 [30]) the statement of Gummow and Hayne JJ in *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at 540-541 [71]:

> In adversarial litigation, findings of fact that are made will reflect the joinder of issue between the parties. The issues of fact and law joined between the parties will be defined by interlocutory processes or by the course of the hearing. They are, therefore, issues which the parties have identified. A review by the Tribunal is a very different kind of process. It is not adversarial; there are no opposing parties; there are

> no issues joined. The person who has sought the review seeks a particular administrative decision – in this case the grant of a protection visa – and puts to the tribunal whatever material or submission that person considers will assist that claim. The findings of fact that the tribunal makes are those that it, rather than the claimant, let alone adversarial parties, considers to be necessary for it to make its decision.

80 The lynchpin of *SCAR* is the importance it places upon the invitation referred to in s 425(1). Of this, the High Court said in *SZFDE* (at 201 [31]:

> The importance of the requirement in s 425 that the tribunal invite the applicant to appear to give evidence and present arguments is emphasised by s 422B. This states that Div 4 "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with".

81 The Court reasoned that the fraud which duped the applicants into failing to appear before the Tribunal "subverted" the operation of s 425 and, hence, the Tribunal's obligations of procedural fairness (at 201 [32]):

> An effective subversion of the operation of s 425 also subverts the observance by the tribunal of its obligation to accord procedural fairness to applicants for review. Given the significance of procedural fairness for the principles concerned with jurisdictional error, sourced in s 75(v) of the Constitution, the subversion of the processes of the tribunal in the manner alleged by the present appellants is a matter of the first magnitude in the due administration of Pt 7 of the Act.

82 Furthermore, the 'subversion' of the intended operation of s 425 meant that the Tribunal had not only failed to accord the applicant procedural fairness but had also failed to "discharge… its imperative statutory functions with the respect to the *conduct of the review*" (at 206 [51], emphasis added): that is, its duty to conduct a review under s 414 of the Act.

83 There are, for present purposes two aspects of these observations which warrant particular emphasis. *First*, the question is not whether the applicant has, or has not been treated fairly; rather, it is whether the process contemplated by s 425 has been "subverted". *Secondly*, that subversion matters because if established it undermines the due administration of Part 7. The Parliament having expunged notions of fairness from Part 7 by declaring its procedures to be exhaustive statement of the requirements of natural justice – s 422B – it follows that the only issue arising in a s 425 context is whether the process contemplated by Part 7 has been carried into effect. The fairness – one way or the other – of that process is not germane to that inquiry. That, of course, is consistent with both the Full Federal Court's decision in *SCAR* and the High Court's decision in *SZFDE*, for in neither of those cases could

it be said that the applicant had been treated unfairly by the Tribunal. It is not possible to say, in the circumstances, that *SCAR* is one of those cases which marks some outer limit from which a retreat is now being beaten. On the contrary, it appears to be consistent with the central reasoning in *SZFDE.* Because there was no argument about it, there is no necessity to comment on the impact of s 422B(3) on this analysis. A view is that it may be unavailable to have an impact on the continuing relevance of SCAR: see *Minister for Immigration and Citizenship v SZMOK* (2009) 257 ALR 427 at 432 [18] per Emmett, Kenny and Jacobson JJ.

84 The present case comes then with two difficulties. The first is the fact, agreed by both parties, that the respondent's disability was somewhat less in extent than that which afflicted the applicant in *SCAR;* the second, that the respondent's impairment would not have prevented him, at least at a theoretical level, from seeking evidence of the impairment's existence to put before the Tribunal.

85 The first difficulty gives rise to questions of degree and practical judgment but the authorities do not necessarily require total unfitness. The passage quoted from French J in *SZFDE* above explicitly contemplates the "compromise" of the quality a substantive hearing in juxtaposition to its loss. Less tangentially, in the related field which deals with the effect of substandard translations on the Tribunal's hearings, it is accepted that translation problems will result in a failure to conduct a review both when it is possible to say that the applicant has, in substance, not given evidence (*Singh v Minister for Immigration and Multicultural Affairs* (2001) 115 FCR 1 at 6 [27] per the Court; *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6 at 17 [21] per Kenny J) but also, more importantly, when errors made by the translator were material to adverse conclusions drawn by the Tribunal (*Soltanyzand v Minister for Immigration and Multicultural Affairs* [2001] FCA 1168 at [18] per the Court; cf. *Appellant P119/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 230 at [18] per Mansfield and Selway JJ).

86 Thus the Tribunal may be held to have conducted no review in a variety of circumstances falling short of complete incapacity on the part of an applicant to conduct a hearing. That observation directs attention to the second difficulty, namely, the admitted capacity of the respondent to point out to the Tribunal the existence of his memory difficulty and the fact the he did so. No doubt, the point could have been presented in a better fashion

by the respondent to the Tribunal (as it was before the Federal Magistrate). But that underscores that what went wrong was the manner in which the respondent ran his case. If that default could be linked to his memory problem then it might be possible to say the review function had been stultified (for example, by means of an argument that the respondent *forgot* to tell the Tribunal that he had memory problems). But it was not suggested that the respondent's failure to seek to put on medical evidence of his memory problem was caused itself by that memory problem.

87 That being so, I do not think it can be said that the Tribunal's review function was stultified or frustrated. The respondent suffered the misfortune of not running his case as well as he might have. Regrettably though that outcome might appear to be, this Court is bound to conclude that "a person whose conduct before an administrative tribunal has been affected, to the detriment of that person, by bad or negligent advice or some other mishap should not be heard to complain that the detriment vitiates the decision made": *SZFDE* at 207 [53] per the Court. Whatever disquiet one may feel about the Tribunal's reasons, now to permit review effectively for an error in presentation would be to create a most unwholesome precedent.

88 I agree with the orders proposed by the Chief Justice.

I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate:

Dated: 10 May 2010