FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZLTF v MINISTER FOR IMMIGRATION & ANOR *[2009] FMCA 401*

MIGRATION – Persecution – review of Refugee Review Tribunal decision – visa – protection visa – refusal – Tribunal failed to invite the applicant to give evidence and present arguments on an issue determinative of its review – Tribunal's finding on that matter affected by jurisdictional error – the fairness and justice in the conduct of the Tribunal's review which s.422B(3) requires are concepts comparable with procedural fairness and natural justice – Tribunal failed to act in a way which was fair and just – Tribunal's decision independently supported by another, unimpeached finding – Tribunal's decision not quashed.

Migration Act 1958, ss.420, 422B, 425

SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs (2006) 228 CLR 152
SZHKA v Minister for Immigration & Citizenship [2008] FCAFC 138
VBAP of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 965
SZLLY v Minister for Immigration & Citizenship [2009] FCA 185
Minister for Immigration & Multicultural & Indigenous Affairs v NAMW (2004) 140 FCR 572
SZMOK v Minister for Immigration & Citizenship [2008] FMCA 1710
Sun Zhan Qui v Minister for Immigration & Ethnic Affairs [1997] FCA 324
Minister for Immigration & Multicultural Affairs v Eshetu (1999) 197 CLR 611

Applicant:	SZLTF
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 233 of 2009
Judgment of:	Cameron FM
Hearing date:	24 April 2009

Date of Last Submission:	24 April 2009
Delivered at:	Sydney
Delivered on:	4 May 2009

REPRESENTATION

Counsel for the Applicant:	Ms B. Tronson
Counsel for the Respondents:	Mr P. Cleary
Solicitors for the Respondents:	Clayton Utz

ORDERS

(1) The application be dismissed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 233 of 2009

SZLTF
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant is a citizen of China where, he claims, he was a school teacher in a village in Fujian province where he helped to organise a teachers' union and where he participated in a strike. The applicant claims to fear persecution in China because of his association with the union and his desire to uphold justice.

2. After his arrival in Australia on 21 March 2007, the applicant lodged an application for a protection visa. This was refused by the Minister's delegate on 23 June 2007. The applicant then applied to the Refugee Review Tribunal ("Tribunal") for a review of that departmental decision. The applicant was unsuccessful before the Tribunal and has applied to this Court for judicial review of the Tribunal's decision.

3. The Tribunal decision the subject of these proceedings is the second such decision relating to the applicant. There was a previous Tribunal

decision signed on 25 October 2007 which was quashed by order of this Court on 1 September 2008.

4. For the reasons which follow, the application will be dismissed.

Background facts

5. The facts alleged in support of the applicant's claim for a protection visa are set out on pages 4 – 13 of the Tribunal's decision (Court Book ("CB") pages 124 – 133). Relevant factual allegations are summarised below.

6. In his protection visa application, the applicant claimed that:

   a) he had been a high school teacher for over 20 years in a Fujian village;

   b) the change in China in 1990 from a centrally-planned economy to a market economy made his working conditions less protective, particularly as he was not an official employee of the school;

   c) he and other teachers requested higher wages and better working conditions and the school responded with threats;

   d) in 2006 he and other teachers formed a union, gathered 200 members and conducted a strike on 5 September 2006, Teacher's Day, which went for five days in total. The applicant and some other teachers were sacked by the school;

   e) he and the other sacked teachers went to the education department in Jiangjing and although they were promised that the department would sort things out, nothing was done. The group then went to the higher authorities in Fuqing city, but were told to go back to the authorities in Jiangjing. They refused to leave and were removed by security. The authorities threatened to have them arrested if they continued to appeal;

   f) the applicant claimed they then decided to appeal to Beijing secretly, however, they were arrested on *en route* and gaoled for three months, never making it to Beijing. When imprisoned he was tortured and treated cruelly; and

g) he asked his family to bail him out and to get him a visa to come to Australia. His family continued to be harassed by authorities after his departure from China.

7. At the first Tribunal hearing the applicant made the following claims:

a) he completed 11 years of education, worked as a farmer for two years and then started working as a mathematics teacher in 1985. He did not need to complete any training to become a teacher;

b) in July 2006 a teacher colleague passed out during class from bleeding in her stomach. The school did not give any help or assistance and wanted to sack that teacher. He later said that he also had a problem concerning low pay, indeed that it was his main problem;

c) school management ignored their grievances and after their failed attempt to appeal to Jiangjing, they decided to stage a "sit-in" and stop teaching for five days from 5 September 2006, also known as "Teachers' Day";

d) they continued to appeal to higher authorities including the education department in Fuqing municipality and on 15 December 2006 they lodged a written submission with Fujian provincial government by writing a letter of grievance. This letter was returned and, although they wanted to appeal further to Beijing, several people were arrested by police before they went there;

e) they were sentenced to three months' re-education and did hard, manual labour in the prison, were often beaten by guards and on one occasion the applicant was hit by a guard and he required more than a dozen stitches to his head. He later said that he was only in the labour camp for little more than two months as he was bailed out before the sentence was complete;

f) he went to an agent who bailed him out of prison and arranged for a visa for him to travel to Australia. He spent 200,000RMB borrowed from relatives and friends;

g) after he was bailed out of prison he lived at a friend's house and was afraid the government would harass him. His family members are still often harassed and they dare not return home;

h) when asked about his work as a teacher, the applicant said that he only taught algebra and other teachers taught different components in mathematics. He also said that in China maths teachers only teach algebra and geometry;

i) the Tribunal noted his previous evidence that without any formal training he became a teacher after being a farmer. The applicant said that that was not correct and that he had some training and claimed that:

    i) he did not receive any formal teacher's training but was trained on the job; and

    ii) in 1995 there was a major shortage of teachers and the local authorities conducted interviews and those who passed the interview became teachers;

j) when the Tribunal noted that his previous evidence was that he became a teacher in 1985, he said that there was a shortage of teachers in 1985, not 1995;

k) when asked about the organisation of the teachers' union, the applicant claimed that it was organised by five people, including himself. He also said that Teachers' Day was actually 10 September 2006. He had not worked since then as he was sacked after the strike;

l) the main aim of his activities in the union had been to get better treatment for teachers, he was fighting for social justice and did not want to be a teacher again;

m) when asked about his arrest, the applicant claimed that he was arrested by the PSB and taken to Fuqing City prison. He also said that as far as he knew two people were arrested and, noting that there were five organisers, some had escaped. He provided two documents to the Tribunal, a letter from three of the organisers and a school teacher identification card;

n) he was detained on 5 December 2006 until his family arranged for an agent to bail him out on 20 February 2007, although the case against him had not finished;

o) when asked how the police allowed him to depart China, the applicant said that the agent arranged from him to leave through different channels, he obtained a visa and bribed border security officials at the airport; and

p) if he returned to China, he said that he would continue to strike for teachers and uphold justice.

8. The Tribunal considered a letter dated 5 July 2007, submitted to the Tribunal as originally constituted, signed by three people purporting to be teachers, "Mr C", "Mr L" and "Mr S", all who claimed to have been participants in the September 2006 strike which was organised by the applicant. The letter largely contained allegations made by Mr C who claimed to be a teacher from the same village school and an important member of the school's labour union. He claimed that the September 2006 strike was organised by the applicant and subsequently all of them became the target of the Fuqing police. Mr C also claimed that in March 2007, he met a member of the applicant's family in the street who told him that the applicant had been forced to leave China.

9. The applicant appeared before the Tribunal as secondly-constituted:

a) when asked who organised the teachers' union, the applicant said it was "hard to say" but that he and a handful of fellow named teachers were its main organisers, claiming that they were dismissed from the school, were in hiding and that he had lost contact with them;

b) when the Tribunal put to him that Mr C had said in his letter that it was the applicant who had organised the strike, he said that four of them had organised it and that he had only been one of the main members. He also said that all three co-leaders were arrested and sentenced to three months' gaol;

c) the Tribunal noted that Mr C's letter only referred to the applicant having been gaoled and in response the applicant said that the letter had meant to refer to all of them. He also said that Mr C

knew that the applicant was in Australia and that he needed to highlight him. He said that it was not necessary for Mr C to talk about himself because Mr C's purpose was to ask the Australian government to protect the applicant;

d) when asked by the Tribunal why he obtained a passport in March 2006, before the alleged strike, the applicant said that a passport could be convenient and that he intended to visit Hong Kong;

e) the applicant said that he was able to complete the formalities required for his visa and other relevant documents while in gaol as his family gave his passport to an agent and he communicated with the agent through his family; and

f) the applicant also said that the main reason he left China was that he had lost confidence in the authorities, his wages were inadequate and he did not have freedom of speech.

The Tribunal's decision and reasons

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

a) the Tribunal had difficulty with the applicant's claim to be a mathematics or algebra teacher at a school, noting that before the Tribunal as first constituted he presented only a little evidence of being able to teach it, tending to revert to examples of basic arithmetic. However, the Tribunal accepted that he was a maths teacher at a village school that operated outside the state school system. The Tribunal noted that the applicant had always claimed that the school was not state-run;

b) given its finding that he was not employed within the official school system, the Tribunal found it incongruous that the applicant and other dissatisfied teachers would consider state

bodies such as those governing state schools as being responsible for, or capable of, changing or reforming the working conditions in the school where he worked or that they would have expected any support or had expectations of making progress in pursuing their professional grievances by taking them to officials in Beijing;

c) the Tribunal thus found that the context in which the applicant and others were supposedly arrested by police in December 2007 was not plausible;

d) not resting its decision solely on implausibility, the Tribunal further concluded that a number of the applicant's claims relating to the claimed strike and its aftermath were plainly undermined by inconsistencies, noting that:

   i) the applicant named three other people as leaders of the union who planned and staged the strike, however, in the letter provided in support of his claims three witnesses indicate that he was their leader and organiser of the strike. The applicant then said that he and the others organised it together and denied he led the strike alone, casting doubt on the reliability of the letter;

   ii) he gave inconsistent dates to the previously constituted Tribunal as to when the strike took place, first stating that it took place for five days from 5 September 2006 identifying that as Teacher's Day and later stating that Teacher's Day was actually on 10 September 2006;

   iii) he gave inconsistent evidence about what happened to his fellow strike "leaders" saying that they all went into hiding and no one knew anything about them but also said that someone in his family had met Mr C walking in the street;

   iv) the applicant identified four leaders at most to the secondly constituted Tribunal, however, spoke of five leaders with the Tribunal as constituted on the first occasion;

   v) he stated to the secondly constituted Tribunal that all four leaders were targeted, however, told the first constituted

Tribunal that he and one other leader had been arrested. Further, the 5 July 2007 letter indicated that the applicant alone was arrested and targeted by the authorities; and

vi) when asked why the letter appeared to be inconsistent with his evidence about the activities and experiences of his co-organisers, the applicant said it was not necessary for them to talk about themselves. The Tribunal was not impressed by his explanation for this discrepancy;

e) in light of this inconsistent evidence, the Tribunal did not accept that the applicant was involved in any union or strike, that he was dismissed over a strike or any other show or imputed expression of political opinion, noting that although it was highly improbable that teachers would have taken their grievances to state authorities given the fact that the school was not an official state school, the main reason for its rejection of the applicant's claim to have gone to state authorities was that it did not accept that he joined or created the teachers' union, or joined or led a strike of teachers at his school;

f) further, the Tribunal did not accept that the applicant was gaoled at the time he claimed or that he has even been detained in Convention-related circumstances, noting that:

i) the claimed conditions giving rise to the applicant's supposed arrest were found by the Tribunal not to have existed;

ii) the applicant's evidence concerning the arrest was not consistent; and

iii) he did not respond convincingly to questions about how his Australian visa, travel ticket and itinerary were arranged while in gaol and was vague about how he was able to sign documents;

g) although the Tribunal accepted that the applicant required ten stitches for a head injury he suffered, it did not accept that the injury was inflicted by the police or in the circumstances claimed;

h) further, the Tribunal did not accept that any special measures were undertaken to help the applicant leave China without the authorities intervening and found he departed on a valid, non-cancelled passport issued to him in his own name, noting independent evidence cited by the first constituted Tribunal concerning the vigilance of Chinese authorities in preventing the emigration of persons wanted by the police;

i) the Tribunal found that the main, essential and significant reason for the applicant coming to, and seeking to remain in, Australia was that his pay in China was unsatisfactory, a reason given by the applicant himself;

j) given his evidence that he obtained his passport for a proposed trip to Hong Kong prior to the alleged events in question, the Tribunal found that the applicant's departure from China was the fulfilment of the kind of interest in going abroad that had motivated him to apply for a passport in the first place, completely independent of the claimed circumstances;

k) the Tribunal did not accept that, since his departure for Australia, the applicant's family has been questioned by the authorities in relation to him and gave no weight to the letter signed by Mr C and others, concluding that it was the product of disingenuous solicitation by or on behalf of the applicant;

l) the Tribunal found that the applicant no longer wanted to be a teacher because of that job's poor pay and conditions, not because of any Convention-related reason. Consequently, it was not satisfied that the applicant would need to avoid being a teacher to avoid attracting Convention-related persecution;

m) further, the Tribunal was not satisfied that the applicant involved himself in China to any significant extent in upholding justice or union activities, or that he would be inclined to become involved in such activities or attract such a profile, real or imputed in the future. These conclusions were made by the Tribunal in light of its finding that he has not been involved, or genuinely interested, in such activities even as a remedy for whatever social and economic difficulties he claims to have endured; and

n) in light of the above, the Tribunal concluded that the applicant had been an unreliable witness to a very significant extent.

Proceedings in this Court

11. The grounds of the amended application were pleaded as follows:

> *(1) The Second Respondent breached section 425 of the Migration Act 1958 (Cth).*
>
> *(2) The Second Respondent breached section 422B(3) of the Migration Act 1958 (Cth).*

Breach of s.425

12. In his amended application, the applicant particularises his allegation that the Tribunal breached s.425 of the *Migration Act 1958* ("Act") as follows:

> *(a) The Second Respondent found that it was "incongruous", and therefore implausible, that the Applicant and his co-organisers of the teachers' union would have taken their complaints to the authorities when the school was a "village school".*
>
> *(b) This was a matter which was "not of an insubstantial nature" and which was considered by the Second Respondent to be in issue.*
>
> *(c) This finding played a part in the Second Respondent's decision on the application for review.*
>
> *(d) The question of the plausibility of the Applicant and others taking their complaints to the authorities was not raised by the delegate of the First Respondent.*
>
> *(e) This question was not put to the Applicant by the Second Respondent.*

13. The applicant deposed in his affidavit affirmed 23 March 2009 that the Tribunal member did not tell him at the hearing that he thought it was implausible or incongruous that the applicant went with other teachers to the government to complain that his school principal had ignored their protests about the unfair dismissal of a sick teacher or that they

had taken their complaints to the government. He further deposed that until he received the Tribunal's written decision he did not know that the Tribunal did not believe that he and his colleagues had taken their complaints to the government. The applicant was not cross-examined on that affidavit.

14. The applicant submitted that the question of whether the applicant and others took their concerns to government bodies, in circumstances where he was employed in a non-government school, was an issue relevant to the decision under review and thus attracted obligations under s.425. Relying on *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 228 CLR 152 and on what Besanko J had said in *SZHKA v Minister for Immigration & Citizenship* [2008] FCAFC 138 at [115], the applicant submitted that the Tribunal erred by not bringing this to the applicant's attention in accordance with that section.

15. The Minister submitted that there was no need for the Tribunal to identify the applicant's alleged appeals to government authorities as a s.425 issue because, in his decision, the delegate had rejected the entirety of the applicant's claims, thereby putting every aspect of his claims in issue.

16. In *SZBEL's case*, the High Court made it clear that the delegate's decision or the Tribunal's statements or questions during a hearing can sufficiently indicate to an applicant that everything he or she says in support of the application is in issue. In this case, the delegate relevantly said that he did not accept that the applicant had worked as a teacher or that he had faced harassment because he had organised a teachers' union. The delegate rejected all the applicant's related allegations.

17. Significantly, the Tribunal reached a different conclusion on one of these matters, saying at para.64 of its decision that it accepted "[a]lbeit with some difficulty" that the applicant had retrained to become some kind of mathematics or algebra teacher at a school. By accepting that the applicant was, indeed, a teacher, the Tribunal thereby made an issue which had not been significant before the delegate significant to, and indeed determinative of, its decision. That issue was that the applicant

took his complaints to government bodies although the school where he worked was a non-government institution.

18. In the circumstances of this case, it is not enough to say that the delegate's decision had put everything in issue. The delegate's decision was based on one premise while the Tribunal's was based on another. In the absence of an invitation from the Tribunal to address the issue identified above, the applicant could not have known that this matter, which was irrelevant to the delegate's decision and not even referred to by him, would take on a determinative significance in the Tribunal's mind.

19. In such circumstances, s.425 required that that issue be put to the applicant so he could give evidence and present arguments in relation to it. As the High Court said in *SZBEL*:

> …*where, as here, there are specific aspects of an applicant's account, that the Tribunal considers* may *be important to the decision and may be open to doubt, the Tribunal must at least ask the applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted.* (at 166 [47]) (emphasis in original)

20. However, based on the applicant's unchallenged evidence, I find that the Tribunal did not alert the applicant to the determinative significance of him making complaints to government bodies although his school was not a government school nor give him an informed opportunity to give evidence and present arguments in relation to this issue. Consequently, I conclude that the Tribunal failed to meet its obligations under s.425 and that it erred as a result.

21. In addition to his submissions that he had no relevant s.425 obligation because his delegate had put all the applicant's allegations in issue, the Minister submitted that, in any event, the Tribunal's statements in question were no more than an expression of its reasoning process, which attracted no s.425 obligations. This argument cannot be accepted. It is true, as submitted by the Minister, that s.425 did not oblige the Tribunal to invite the applicant to give evidence or to present arguments on its conclusion that his allegations on this aspect of his claim were implausible. However, that does not affect the finding that the issue which the Tribunal relevantly considered had not been

identified to the applicant so he could address it. The Tribunal's consideration of the issue, which was in any event compromised by the failing which has been identified, does not have the effect of insulating the underlying jurisdictional error from review.

22. Nevertheless, the Tribunal's decision rests on more than one basis. Certainly, it did not accept that the applicant and his colleagues seriously expected to make any progress with their complaints by taking them to government bodies, rejecting such allegations as implausible. However, as the Tribunal went on to say at para.68 of its decision, it did not rely solely on implausibility in reaching its findings in this matter. It also considered the applicant's claims relating to the claimed strike and its aftermath and found them to be undermined by inconsistencies. Indeed, although at para.76 of its decision the Tribunal again referred to the implausibility that the applicant and his colleagues would have taken their grievances to state authorities, it went on to say that "the main reason" why it did not accept that the applicant went to the state authorities was that it did not

> *… accept that he joined or created the teachers' union or joined or led a strike of teachers at his school.*

23. What the Tribunal expressed to be "the main reason" for its decision provides a separate basis for its decision. That basis was independent of its finding that it was inherently implausible that the applicant and his colleagues approached government authorities. The independent quality of "the main reason" for the Tribunal's decision is underlined in para.91 of its decision record where it concluded that the applicant had not previously been involved in political activities such as union action, even as a remedy for whatever social or economic difficulties he claimed to have endured, because he was not genuinely interested in such activities.

24. The applicant submitted that notwithstanding that its decision was based on two determinative findings, the Tribunal's breach of its duty under s.425 affected the entirety of its decision not just part of it. It was submitted that the Tribunal's decision was one based on credibility findings and that it was difficult to distinguish separate strands of reasoning applicable to the credibility aspects associated with each of the grounds relied upon by the Tribunal when reaching its decision.

The applicant submitted that once credibility is damaged it affects everything with the result that North J's reasoning in *VBAP of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 965, considered below, is not applicable to these proceedings.

25. However, a review of the Tribunal's decision discloses that this argument cannot succeed. The Tribunal reached a decision in relation to the question of whether the applicant had approached government authorities not by reference to his overall credibility but by reference to the plausibility of that particular allegation. By contrast, the Tribunal's rejection of the applicant's allegations that he was involved in a union and in a strike, and dismissed as a consequence, was based on the inconsistencies which the Tribunal identified in his evidence relating to those issues. Other findings followed from this conclusion. Thus, in my view it cannot be said that the two bases of the Tribunal's decision were so related by intermediate credibility findings that they should not be regarded as separate and independent grounds for the Tribunal's decision.

26. Further, although in the penultimate paragraph of its findings and reasons the Tribunal did express the conclusion that the applicant was an unreliable witness, that finding does not provide support for the applicant's argument on this point. It is apparent that this statement is a final reflection on the entirety on the applicant's case, not an intermediate finding which led to the two principal findings on which the Tribunal's decision was based. As such, it does not have the effect of binding together the two bases of the Tribunal's decision such that they do not stand independently.

27. In such circumstances, *VBAP's case*, and the cases which have followed it, are authority for the proposition that the Court must uphold the Tribunal's decision because, notwithstanding that one basis of the Tribunal's decision is affected by jurisdictional error, the decision can be supported on a separate and independent basis that is not so affected. That is to say, although the Tribunal failed to meet its s.425 obligations in relation to its conclusion regarding the implausibility of the applicant's approach to government authorities, its decision was independently grounded on the Tribunal's credit-based rejection of the applicant's claim to have been involved in union activities at all. As a

result, absent any other reason to set it aside, the Tribunal's decision must stand.

Breach of s.422B(3)

28. In addition to relying on the particulars to the first ground of the amended application, the applicant particularised his allegation that the Tribunal had breached s.422B(3) as follows:

> *The Second Respondent failed to act in a way that was fair and just in applying section 425 of the Migration Act 1958 (Cth).*

29. Section 442(B) provides:

> *(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) …*
>
> *(3) In applying this Division, the Tribunal must act in a way that is fair and just.*

30. The applicant referred to obiter comments made by Perram J in *SZLLY v Minister for Immigration & Citizenship* [2009] FCA 185. His Honour noted that in *Minister for Immigration & Multicultural & Indigenous Affairs v NAMW* (2004) 140 FCR 572, in the period prior to the insertion of s.422B(3) into the Act, Merkel and Hely JJ had concluded that the effect of s.422B(1) was that there was "no longer an obligation on the part of the RRT to afford applicants before it a fair hearing". In *SZLLY's case* Perram J referred to the introduction of s.422B(3) in 2007 and observed that its significance does not yet appear to have been fully appreciated. In this context, his Honour said:

> *Section 422B(3) restores, as a procedural concept, fairness and justice. In that context, those words are not references to substantive notions of justice or fairness but can usefully be compared with the content of the same words in the expressions "natural justice" and "procedural fairness".* (at [24])

31. The applicant also referred to the decision of Raphael FM in *SZMOK v Minister for Immigration & Citizenship* [2008] FMCA 1710 where, by reference to s.422B(3), his Honour concluded that the Tribunal had

failed to meet its obligation to act fairly by failing to put a particular matter to an applicant.

32. The first respondent submitted that s.422B(3) did not require the Tribunal to put the material in question to this applicant or require it to have a further hearing to put its potential finding to the applicant for his comments.

33. I respectfully agree with Perram J's comments in *SZLLY's case* concerning the significance that s.422B(3) has for the conduct of the Tribunal's reviews. It should also be noted that, as a procedural provision, it must be distinguished from s.420(2)(b) which provides:

> *(2) The Tribunal, in reviewing a decision:*
>
> *(a)* …
>
> *(b) must act according to substantial justice and the merits of the case.*

Unlike s.422B(3), s.420(2)(b) imposes no procedural requirements on the Tribunal but, rather, deals with substantive notions of justice and fairness: *Sun Zhan Qui v Minister for Immigration & Ethnic Affairs* [1997] FCA 324 (especially at para.1.1.4); *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 628 [49].

34. Although for the reasons given above at [16] – [20] I conclude that the Tribunal did breach s.422B(3) by failing to act in a way which was fair and just in relation to the issue which the applicant should have been invited to address, that does not avail the applicant. The Tribunal's ultimate decision remains a decision which, for the reasons already given, is supportable on another, independent and unimpeached basis. For this reason it will not be set aside.

Conclusion

35. In light of the above findings, the application will be dismissed.

I certify that the preceding thirty-five (35) paragraphs are a true copy of the reasons for judgment of Cameron FM

Associate:

Date: 4 May 2009