FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZOVP v MINISTER FOR IMMIGRATION & ANOR (No.2) [2011] FMCA 442

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming persecution in China based upon a dispute between her husband and local officials – Tribunal finding no Convention nexus with the harm experienced and feared by the applicant – whether the Tribunal overlooked an element or integer of the applicant's claims based upon her family background considered – applicant suffering from schizophrenia – whether her mental disability prevented her from participating in the Tribunal hearing considered – applicant's migration agent failing to attend either of the two hearings conducted by the Tribunal – whether the agent's conduct subverted the review process considered.

LAW REFORM – Observations on the desirability of protection visa applicants being assisted by a migration agent who is a legal practitioner and also on the desirability of the *Migration Act 1958* (Cth) regulating uniformly the representation of applicants before the review tribunals.

Federal Magistrates Court Rules 2001 (Cth)
Migration Act 1958 (Cth), ss.414, 424A, 425, 427, 432
Migration Agents Regulations 1998 (Cth)

Breen v Williams [1996] HCA 57; (1996) 186 CLR 71
Dranichnikov v Minister for Immigration (2003) 197 ALR 389
Htun v Minister for Immigration [2001] FCA 1802; (2001) 194 ALR 244
Minister for Immigration v Le [2007] FCA 1318
Minister for Immigration v SZGUR (2011) 273 ALR 223
Minister for Immigration v SZIAI (2009) 259 ALR 429
Minister for Immigration v SZNCR [2011] FCA 369
Minister for Immigration v SZNVW (2010) 183 FCR 575
NABE v Minister for Immigration (No.2) (2004) 144 FCR 1
SZFDE v Minister for Immigration (2007) 232 CLR 189
SZMEM v Minister for Immigration & Anor [2008] FMCA 1286
SZOCT v Minister for Immigration & Anor [2010] FMCA 425
SZOGP v Minister for Immigration & Anor [2010] FMCA 704
SZOIN v Minister for Immigration [201] FCAFC 38
SZOPW v Minister for Immigration & Anor [2011] FMCA 48
SZOVP v Minister for Immigration & Anor [2011] FMCA 183
SZQKF v Minister for Immigration & Anor [2011] FMCA 566

Applicant:	SZOVP
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2667 of 2010
Judgment of:	Driver FM
Hearing dates:	9 June, 11 July 2011
Delivered at:	Sydney
Delivered on:	10 August 2011

REPRESENTATION

Counsel for the Applicant:	Mr R Nair, appearing *pro bono publico*
Solicitors for the Applicant:	Salvos Legal
Counsel for the Respondents:	Mr T Reilly
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) The amended application filed on 25 May 2011 is dismissed.

(2) A copy of this judgment, together with a copy of the transcript of the evidence given by Weiming Qian on 9 June 2011 is to be provided to the Office of the Migration Agents Registration Authority for such action as it considers appropriate.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2667 of 2010

SZOVP
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. The applicant in this case suffers from the serious mental disability of schizophrenia. Her disability, and the manner in which the Refugee Review Tribunal ("the Tribunal") dealt with it, coupled with the conduct of the applicant's migration agent, give rise to issues of significance concerning the manner in which the Tribunal can and should deal with such applicants. The issues are not entirely new or novel but this case is a demonstration of the practical difficulties confronting the Tribunal in dealing with mentally disabled applicants and also illustrates the legal challenge of ensuring, as far as practicable, that the review process is a fair one for such applicants.

2. The application before the Court is to review a decision of the Refugee Review Tribunal (constituted by the Principal Member) made on 12 November 2010. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa. The applicant is from China and had made a claim of political persecution. The

background facts are detailed in my interlocutory judgment in this matter[1] as follows.

3. The applicant is a citizen of the People's Republic of China who first entered Australia on 24 September 2006 (court book "CB" 76) on a Student Guardian visa. The applicant returned to China on 28 February 2008 to visit her dying mother but returned to Australia on 23 April 2008: CB 76. The applicant applied for a protection (Class XA) visa on 8 December 2009 (CB 1-26) and appointed a migration agent to assist her in connection with that application: CB 32-35.

4. In a typed three page statement attached to that application, the applicant stated that her father was imprisoned and publicly humiliated during the Cultural Revolution for reason of being an *intellectual* and a *counter-revolutionaries* [sic]. The applicant claimed that she feared harm on the basis that her husband was a person of adverse interest to the authorities. Her husband and nephew had allegedly been involved in an altercation with a government official after the official refused to compensate them when their backhoe was destroyed by villagers protesting the demolition of their homes to widen roads. The applicant's husband and nephew were forced to go into hiding and the applicant was beaten and sent to a detention centre in her husband's absence. In 2006, the applicant's nephew was set upon by more than ten unknown people and beaten to death when he returned to their village. The applicant claimed further that she suffered from a "mental disorder" due to her experiences in China: CB 27-29.

The delegate's decision

5. On 11 February 2010, a delegate of the Minister invited the applicant to attend an interview scheduled for 3 March 2010: CB 40-41. The applicant attended that interview and gave evidence in support of the claims made in her protection visa application: CB 51.8. Following the interview, the applicant provided to the delegate photographs of her husband with his backhoe (CB 42) and a document titled "Certificate of approval": CB 43.

[1] *SZOVP v Minister for Immigration & Anor* [2011] FMCA 183 at [3]-[19]

6. On 5 March 2010, the delegate made a decision refusing to grant the applicant a protection visa: CB 46-53. The delegate found that the harm the applicant feared from the threat of arrest and criminal prosecution if she returned to China did not have a Convention nexus: CB 52. The Tribunal also found that her ability to return to China in February 2008 and then depart again for Australia in April 2008 without incident indicated she was not a person of significant interest to the Chinese authorities regardless of whether her claimed fear related to Convention-based persecution or not: CB 52.8-53.1.

7. The delegate was therefore not satisfied that the applicant was a person to whom Australia owed protection obligations under the Convention: CB 53.

The Tribunal's proceedings

8. On 1 April 2010, the applicant lodged an application with the Tribunal to review the delegate's decision: CB 54-57. She continued to be represented in relation to the review by her appointed migration agent: CB 55.

9. By a letter dated 15 April 2010, the Tribunal invited the applicant to attend a hearing before the Tribunal scheduled for 14 May 2010: CB 60-62.

10. The applicant accepted the invitation (CB 63) and attended the hearing and gave evidence on 14 May 2010: CB 65-66; CB 115-118, [28]-[53]. At the hearing the applicant provided translated copies of documents from hospitals in China titled "Brief Summary of Hospital Discharge" (CB 68-69) and "Death Summary": CB 70-71. The applicant also provided copies of pages from her passport: CB 72-78. The Tribunal hearing was adjourned as the applicant appeared unwell and an ambulance was called: CB 67; CB 113, [20].

11. By a letter dated 14 May 2010, the Tribunal invited the applicant to attend a rescheduled hearing before the Tribunal on 24 May 2010: CB 79-81. The applicant accepted that invitation (CB 82) but the hearing was later cancelled by the Tribunal member: CB 84-85.

12. By a letter dated 13 July 2010, the Tribunal wrote to the applicant pursuant to s.424A of the *Migration Act 1958* (Cth) ("the Migration Act") inviting her to comment or respond to information in writing: CB 86-88. The letter referred to material contained on the department file relating to her student guardian visa application in which she had indicated that her husband had been employed as the Deputy General Manager of a company since 2003. This information was said to be relevant because it suggested that she had fabricated her claims regarding the reasons why she left China. On 2 August 2008, the applicant provided a response to that letter: CB 89.

13. By a letter dated 5 October 2010, the Tribunal invited the applicant to attend a hearing before the Tribunal scheduled for 3 November 2010: CB 90-91.

14. The applicant accepted the invitation to the hearing (CB 92), which she attended and gave evidence on 3 November 2010: CB 93-95; CB 115-118, [28]-[53]. At the hearing the applicant provided various medical references, receipts and certificates which indicated that she had been diagnosed with schizophrenia and required medication: CB 96-104, 106. The applicant also provided a translated copy of her mother's death certificate (CB 105) and copies of the photographs previously provided to the delegate showing her husband on a backhoe: CB 107.

The Tribunal's decision

15. In a decision dated 15 November 2010, the Tribunal affirmed the delegate's decision to refuse the applicant's application for a protection visa: CB 110-122.

16. The Tribunal accepted that the applicant had been diagnosed with schizophrenia and that she had suffered traumatic events in her life that affected her health, such as the events she described in her protection visa application. However, the Tribunal was satisfied after considering her responses to its initial questions that the applicant was competent to give evidence: CB 118, [55]-[56].

17. The Tribunal had some concerns with the applicant's documentary evidence (CB 118, [57]) but found that even if it accepted her claims it was not satisfied that the harm she suffered was for a Convention

reason: CB 119, [58]. The Tribunal found that the applicant's claimed fear of harm arose because of her association with her husband who the police were apparently seeking to charge with an offence: CB 119, [58]. The Tribunal found that the applicant could not be said to belong to a particular social group for the purposes of the Convention by reason of her association with her husband, as there was no evidence before the Tribunal that indicated that her husband was being targeted by the police for a Convention reason. Rather, it found that the police wanted to charge (or at least interview) her husband about an affray which allegedly occurred at the local government offices in November 2004: CB 119, [60]. Similarly, the Tribunal found that any harm which the applicant or her husband feared from the local villagers, due to their involvement in demolishing the villagers' homes, was not founded on a Convention ground: CB 119, [61].

18. The Tribunal found further that there was no evidence that the authorities attributed political opinions of any kind to the applicant or her husband, or that they would be targeted by the authorities in the future for this reason: CB 119, [62].

19. Accordingly, the Tribunal found there was no real chance that the applicant would be persecuted for a Convention reason if she returned to China in the reasonably foreseeable future: CB 120, [63].

20. In making its decision the Tribunal made the following observations concerning the applicant's disability and state of mind at the hearing (CB 118 [55]-[57]):

> *The applicant has been diagnosed with schizophrenia, according to a letter on the Tribunal file dated 8 July 2010 from Dr Steven Green, Consultant Psychiatrist, Auburn Mental health team, Sydney West Area health Service (f. 76). She is on anti psychotic medication. The diagnoses given on the hospital discharge document relating to her discharge from the hospital in China on 13 December 2004 is also a diagnosis of schizophrenia. That document mentions that delusions of persecution and other delusions or hallucinations may occur.*
>
> *Given the applicant's medical condition, the Tribunal was concerned to establish that she was capable of giving evidence. The medical evidence supplied to the Tribunal indicated that she was no longer in need of the crisis support the Auburn Mental*

> *Health Crisis Team had been giving her and that her condition had stabilised or was stabilizing through access she was getting to a regular supply of medication at recommended dosage levels. The Tribunal satisfied itself through considering her responses to the initial questions it asked her that she was competent to give evidence.*
>
> *From the way the applicant appeared to be traumatized and fearful in giving evidence about certain events and from the medical evidence available to the Tribunal, it appears that she has suffered a traumatic event or traumatic events in her life which has or have affected her health. The events may be the events the applicant has described both in her written claim and orally before the Tribunal and there is documentary material before the Tribunal suggesting that her nephew … was set upon in the street and died from haemorrhagic shock caused by chop wounds and cuts (death certificate at f.44-46), as the applicant claims. It is unclear, however, how much reliability should be placed on all aspects of the applicant's evidence given the reference in the hospital discharge document to the possibility of her suffering from delusion of persecution and other delusions.*

21. The Tribunal was also critical of the applicant's migration agent for failing to attend the Tribunal hearing. At [64] of its reasons the Tribunal stated (CB 120):

> *As mentioned above, the applicant's representative did not attend the Tribunal hearing. The Tribunal notes that the representative was the same representative whose failure to attend the relevant Tribunal hearing was the subject of adverse comment by the Federal Magistrates Court in* SZOOI v Minister for Immigration & Anor *[2010] FMCA 816 (25 October 2010). In the present matter the failure of the representative to attend is of particular concern to the Tribunal given the vulnerability of the applicant. Her psychological and emotional state was such that it was not appropriate for her not to have had the benefit of support from her representative at the hearing.*

The judicial review application

22. These proceedings began with a show cause application filed on 9 December 2010. I dealt with that application on an interlocutory basis on 21 March 2011. Relevantly, I ordered the first respondent to show cause, pursuant to rule 44.12(1)(b) of the *Federal Magistrates Court*

Rules 2001 (Cth), why relief should not be granted in relation to the issue of whether the Tribunal breached s.425 of the *Migration Act 1958* (Cth) in proceeding with a hearing in the absence of the applicant's migration agent in knowledge of the applicant's serious mental disability.

23. I also arranged for *pro bono* legal representation for the applicant. The Court is grateful for the willingness of legal practitioners to appear on that basis, especially in circumstances where the applicant suffers from a disability which renders it difficult for her to provide coherent instructions.

24. An amended application was filed on behalf of the applicant on 25 May 2011. The grounds in that amended application are:

> *1. The Tribunal failed to conduct the review required by s.414 of the Migration Act.*
>
> *Particulars*
>
> *i) The Applicant claims that she has a well-founded fear of persecution because her father had been imprisoned and publicly humiliated as a counter revolutionary.*
>
> *ii) The Applicant's persecution was for one or more Refugee Convention reasons.*
>
> *iii) It is clear, and would have been clear to the Tribunal, that the Applicant's claims included claims of persecution and fear of persecution for reasons of being her father's daughter and of imputed political opinion.*
>
> *iv) The Tribunal failed to consider these claims.*
>
> *2. The Tribunal failed to invite the Applicant as mandated by s.425 of the Migration Act. The purported invitation was vitiated by the Applicant's severe mental impairment.*
>
> *Particulars*
>
> *i) The Applicant was (and continues to be) suffering from schizophrenia.*
>
> *ii) The Tribunal itself noted (CB 118 at [57]) that the Applicant* "appeared to be traumatized and fearful in

giving evidence about certain events*" and that it was* "unclear how much reliability should be placed on all aspects of the Applicant's evidence given the reference in the hospital discharge document to the possibility of her suffering from delusion of persecution and other delusion*".*

iii) The Court can and should find that, in all the circumstances, the Applicant's psychological condition denied her the opportunity to give evidence and present arguments relating to the issues arising in relation to the decision under review.

3. The Tribunal failed [to] *invite the Applicant as mandated by s.425 of the Migration Act. The purported invitation was vitiated by the failure of the Applicant's representative to attend.*

Particulars

i) The Applicant's representative was not specifically invited to attend and was not told [by] *the Tribunal that it was not appropriate for the Applicant to appear at the hearing without the benefit of the representative. The representative did not attend the hearing.*

ii) The Tribunal itself noted (CB 120 at [64]):

> "In the present matter the failure of the representative to attend is of particular concern to the Tribunal given the vulnerability of the applicant. Her psychological and emotional state was such that it was not appropriate for her not to have had the benefit of support from her representative at the hearing.*"*

iii) The Migration Agents' Code of Conduct imposes on a registered migration agent "the overriding duty to act at all times in the lawful interests of the agent's client*". The Tribunal should have – invited the Applicant's migration agent to attend the hearing and should have told the migration agent that it was not appropriate for the applicant to not have the benefit of the representative at the hearing. The Tribunal failed to do so.*

iv) The Court can and should find that this failure resulted in the Tribunal's purported invitation (under s.425) not

> *being a real and meaningful opportunity to give evidence and present arguments relating to the issues arising in relation to the decision under review.*

25. On 5 July 2011 the solicitors for the applicant filed an Application in a Case seeking an order that, pursuant to rule 11.11(1) of the *Federal Magistrates Court Rules 2001* (Cth), Captain Lai Li be appointed the litigation guardian for the applicant in these proceedings. Having considered the evidence presented in support of that application and there being no opposition by the respondents, I made that order at the trial of the matter on 11 July 2011.

The evidence and submissions

26. In addition to the court book filed on 27 January 2011, I have before me the following evidence:

    a) the affidavit of Luke Patrick Geary made on 23 May 2011 to which is annexed a transcript of the hearings conducted by the Tribunal on 14 May 2010 and 3 November 2010; and

    b) the affidavit of Mr Geary made on 3 June 2011 to which is annexed a medical report concerning the applicant by Dr Richard Wu, a consultant psychiatrist.

27. I also received as an exhibit[2] correspondence to Dr Wu relating to the request for his report. Dr Wu was cross-examined on his report.

28. In addition, the applicant's former migration agent, Ms Weiming Qian, was subpoenaed on behalf of the applicant to give evidence. I received that evidence on 9 June 2011.

29. Counsel for the applicant submits that the Tribunal's review process was subverted or disabled by the conduct of the applicant's then migration agent in failing to attend the Tribunal hearing to which the applicant had been invited. Counsel further submits that the hearing opportunity afforded the applicant was vitiated by the applicant's severe mental impairment such that the Tribunal failed to comply with its obligation to afford a real hearing opportunity pursuant to s.425 of

[2] Exhibit R1

the Migration Act. Finally, counsel submits that the Tribunal overlooked an element or integer of the applicant's claims relating to imputed political opinion as the daughter of a counter revolutionary.

30. The Minister submits that there was no clearly articulated claim by the applicant relying upon established facts as asserted and that no element or integer of the applicant's claims was overlooked by the Tribunal. The Minister submits that the matters noted by the Tribunal at [30] of its reasons (CB 115) are, on any fair reading, merely historical.

31. Secondly, the Minister submits that the Court should find that the applicant was not so unfit at the second Tribunal hearing that she was unable to give evidence, present arguments or answer questions before the Tribunal.

32. Finally, the Minister submits that whatever criticism might be directed at the applicant's former migration agent for not attending either Tribunal hearing, it cannot substantiate a claim of jurisdictional error by the Tribunal.

Consideration

Did the Tribunal overlook an element or integer of the applicant's claims?

33. At [30] of its reasons (CB 115) the Tribunal stated:

> *In response to the Tribunal's question as to what had happened to her father, the applicant said that he was an activist and used to work in a local community group. He was arrested and detained for two years during the Cultural Revolution. The applicant was very young at the time. She recalls that, after her father was arrested, the family home was sealed up and the family was forced to live in an old shabby temple, which had no heating. It was freezing. The applicant was humiliated at school and gave up study. Upon his release, her father was forced to work on the roads, wearing a sign around his neck.*

34. That assertion was also reflected in the applicant's written claims. In the statement accompanying her protection visa application the applicant stated (CB 27):

> *My misery experience in childhood*

> *My father was so-called 'intellectual' when I was a child. The society was dark under the control of Communist party. At the end period of the Culture Revolution, the year when I was 8, two people from the commune came to my home and took my father to the commune. They claimed that my father was a "counter-revolutionaries" and a rebel. He was sentence 2 years in prison after being detained for one month. My father was brought to the street to be publicly displayed and ridiculed, with a big sign hanged in front of his chest. People from my village looked down upon our family and treated us as criminals. We lost our dignity as a human being. I was also discriminated by my teachers and classmates at school. Some classmates mocked me as a counter-revolutionary and I kept getting bullied. Finally, I was forced to quit my study. I only studied for 3 year before that and therefore became illiterate as I was deprived of my right to receive further education.*

35. This might be articulated as a claim of imputed political opinion or a claim of a fear of harm based on membership of a particular social group (the families of anti communist "counter revolutionaries" or persons with a "bad" class background). The balance of the applicant's claims related to her husband's dispute with local government officials in connection with his excavation work.

36. The Tribunal noted the applicant's claim concerning her father at [25] of its reasons (CB 113). The transcript confirms that the applicant was asked about her father and her childhood at the second Tribunal hearing. The applicant stated:

> *My father used to work in a community – in a local community. He's a real big person. He always available. And he's an activist. But, ah, one day, two person came and invited him to – to come to a meeting. And I don't know why, he was arrested and detained. An he was put in – he was put in prison for three years and then – um – also, our house was sealed in that time, so that means our whole family couldn't live in our house. So we had no choice, we had to live in a very old tin home – a used tin home I mean, the weather was very, very cold but we couldn't go home – we couldn't go home. I even, um, I even said not to record what happened to me when I was young because it was really painful um, it was a really painful experience. I remember in that time I was very young I was still study at school, and, um, and the weather – ah – it was very, very cold. And when I went to the school, other person even looked down to us. Because my dad was arrested and, um, and was asked to work on the streets with,*

> *um, wearing – wearing something in front of him and I saw running home, all my classmates looked down to me. That is why I gave up study. So I received little education.*

37. The Tribunal did not in its reasons deal with a claim by the applicant that she had a fear of persecution based on her imputed political opinion because of her family background and childhood experience. The applicant contends that the Tribunal, in failing to deal with the assertion as a separate claim, overlooked an element or integer of her claims. In *Htun v Minister for Immigration* [2001] FCA 1802; (2001) 194 ALR 244 at 259 Allsop J said at [42]:

> *The "participation in the Karen community and the political groups" could be said to have been dealt with by the Tribunal dealing with the appellant's activities in Australia. The friendships (of the appellant, as a Karen) with people in organisations such as the KNLA were not. This is not merely one aspect of evidence not being touched. It is not a failure to find a "relevant" fact. The Tribunal failed to address and deal with how the claim was put to it, at least in part. The requirement to review the decision under s 414 of the Act requires the Tribunal to consider the claims of the applicant. To make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction embarked on. The claim or claims and its or their component integers are considerations made mandatorily relevant by the Act for consideration in the sense discussed in* Minister for Aboriginal Affairs v Peko Wallsend *[1986] HCA 40; (1986) 162 CLR 24; and* Minister for Immigration and Multicultural Affairs v Yusuf *[2001] HCA 30; (2001) 180 ALR 1. See also* Sellamuthu v Minister for Immigration and Multicultural Affairs *[1999] FCA 247, at [18], [19], [21] and [50]. It is to be distinguished from errant fact finding. The nature and extent of the task of the Tribunal revealed by the terms of the Act, eg ss 54, 57, 65, 414, 415, 423, 424, 425, 427 and 428 and the express reference in Regulation 866 to the "claims" of the applicant eg 866.211, make it clear that the Tribunal's statutorily required task is to examine and deal with the claims for asylum made by the applicant. If there is a* sur place *claim made in addition to a claim based on conduct or experiences elsewhere both must be dealt with. If the* sur place *claim is, or is to be seen as, based on more than one foundation - that is, what has been done by way of political activity and also because of friendships made with other Karen people of arguably seriously subversive background, both bases of the claim must be dealt with. The Tribunal did not deal with the latter basis of the appellant's* sur place *claim based on*

imputed political opinion. It was not a failure merely to attend to evidence, even probative evidence, and by such route commit a factual error. It was a failure to deal with one part of the claim for asylum on the basis of his imputed political opinion. It is true that when called on at the hearing to articulate orally his fears he did not expressly identify his friendships as distinct from his activities in Australia. However, given the clarity of the expression of this fear in his application for review and the existence of objective material put forward by him to support it, I do not see this basis for the claim as having been abandoned. Conceptually, and in a common sense way, it was quite distinct from his claim based on his activities of the kind referred to earlier.

38. Further, in *Dranichnikov v Minister for Immigration* (2003) 197 ALR 389 at [24] the High Court (Gummow and Callinan JJ) stated:

> *To fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice. …*

39. The Full Federal Court (Black CJ, French and Selway JJ) dealt with the issue in *NABE v Minister for Immigration (No.2)* (2004) 144 FCR 1 at [55]-[63] and [68] where the Court stated:

> *Although the discussion in* S20 *did not set any precise limit upon the scope of factual error which may amount to or indicate jurisdictional error there is, in the case of Refugee Review Tribunal decisions, one circumstance in which it is clearly established that the absence of a finding of a relevant fact may amount to jurisdictional error. Where the Tribunal fails to make a finding on '... a substantial, clearly articulated argument relying upon established facts' that failure can amount to a failure to accord procedural fairness and a constructive failure to exercise jurisdiction* – Dranichnikov v Minister for Immigration and Multicultural Affairs *[2003] HCA 26; (2003) 197 ALR 389 at 394 [24] per Gummow and Callinan JJ, Hayne J agreeing at 408 [95]. Although not expressly so identified in that case, the constructive failure to exercise jurisdiction may be seen as a failure to carry out the review required by the Act. The joint judgment of Gummow and Callinan JJ in* Dranichnikov *described the task of the Tribunal where the applicant relied upon membership of a particular social group. Their Honours said (at 394 [26]):*
>
> > '... the task of the tribunal involves a number of steps. First the tribunal needs to determine whether the group or class to

> which an applicant claims to belong is capable of constituting a social group for the purposes of the Convention. That determination in part at least involves a question of law. If that question is answered affirmatively, the next question, one of fact, is whether the applicant is a member of that class. There then follow the questions whether the applicant has a fear, whether the fear is well-founded, and if it is, whether it is for a Convention reason.'

In that case the Tribunal should have decided the matter which was put to it by reference to the particular social group defined in the applicant's submissions – namely entrepreneurs and businessmen in Russia who publicly criticise law enforcement authorities for failing to take action against crime or criminals. Instead it decided whether the applicant's membership of the group of 'businessmen in Russia' was a reason for his persecution.

The observations cited reflect the general principle that the first task of the Tribunal is to determine whether the applicant's claims are claims of a well-founded fear of persecution for one of the reasons set out in Art 1A(2) of the Refugees Convention. Those are questions of characterisation which involve in part questions of law. The factual questions that follow are, as in Dranichnikov, *whether the applicant has a fear of persecution, whether it is well founded and if so whether the apprehended persecution is for a Convention reason. Those logical steps emerge as necessary elements of the Tribunal's review function by reference to the nature of the decision it is called on to review. The way in which it discharges that function flows from the powers and procedures prescribed for the Tribunal in the conduct of reviews and the use of the word 'review'.*

The nature of the review function was described by Allsop J (with whom Spender J agreed) in Htun v Minister for Immigration and Multicultural Affairs *[2001] FCA 1802; (2001) 194 ALR 244 at 259 [42]:*

> 'The requirement to review the decision under s 414 of the Act requires the tribunal to consider the claims of the applicant. To make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction embarked on. The claim or claims and its or their component integers are considerations made mandatorily relevant by the Act for consideration ... It is to be distinguished from errant fact finding. The nature and extent of the task of the tribunal revealed by the terms of the Act...

make it clear that the tribunal's statutorily required task is to examine and deal with the claims for asylum made by the applicant.'

The review process is inquisitorial rather than adversarial. The Tribunal is required to deal with the case raised by the material or evidence before it – Chen v Minister for Immigration and Multicultural Affairs *[2000] FCA 1901; (2000) 106 FCR 157 at 180 [114] (Merkel J). There is authority for the proposition that the Tribunal is not to limit its determination to the 'case' articulated by an applicant if evidence and material which it accepts raise a case not articulated* – Paramananthan v Minister for Immigration and Multicultural Affairs *[1998] FCA 1693; (1998) 94 FCR 28 at 63 (Merkel J); approved in* Sellamuthu v Minister for Immigration and Multicultural Affairs *[1999] FCA 247; (1999) 90 FCR 287 at 293 – 294 (Wilcox and Madgwick JJ). By way of example, if a claim of apprehended persecution is based upon membership of a particular social group the Tribunal may be required in its review function to consider a group definition open on the facts but not expressly advanced by the applicant* – Minister for Immigration and Multicultural Affairs v Sarrazola (No 2) *[2001] FCA 263; (2001) 107 FCR 184 at 196 per Merkel J, Heerey and Sundberg JJ agreeing. It has been suggested that the unarticulated claim must be raised 'squarely' on the material available to the Tribunal before it has a statutory duty to consider it* – SDAQ v Minister for Immigration and Multicultural and Indigenous Affairs *[2003] FCAFC 120; (2003) 199 ALR 265 at 273 [19] per Cooper J. The use of the adverb 'squarely' does not convey any precise standard but it indicates that a claim not expressly advanced will attract the review obligation of the Tribunal when it is apparent on the face of the material before the Tribunal. Such a claim will not depend for its exposure on constructive or creative activity by the Tribunal.*

There is some authority which might be taken to suggest that the Tribunal is never required to consider a claim not expressly raised before it. In SCAL v Minister for Immigration & Multicultural & Indigenous Affairs *[2003] FCAFC 301, membership of a 'particular social group' was put to the Tribunal as a Convention ground for apprehended persecution. The Tribunal was held 'not obliged to consider whether some other social group might be constructed ...' at [19]. That decision however turned upon particular circumstances. Its correctness is not in contention here. It does not establish a general rule that the Tribunal, in undertaking a review, can disregard a claim which arises clearly from the materials before it.*

In SGBB v Minister for Immigration and Multicultural and Indigenous Affairs *[2003] FCA 709; (2003) 199 ALR 364 at 368 [17], Selway J referred to the observation by Kirby J in* Dranichnikov, *at 405, that '[t]he function of the Tribunal, as of the delegate, is to respond to the case that the applicant advances'. He also referred to the observation by von Doussa J in* SCAL v Minister for Immigration & Multicultural & Indigenous Affairs *[2003] FCA 548 that '[n]either the delegate nor the Tribunal is obliged to consider claims that have not been made' (at [16]). Selway J however went on to observe in* SGBB *(at [17]):*

> 'But this does not mean the application is to be treated as an exercise in 19th Century pleading.'

His Honour noted that the Full Court in Dranichnikov v Minister for Immigration & Multicultural Affairs *[2000] FCA 1801 at [49] had said:*

> 'The Tribunal must, of course, deal with the case raised by the material and evidence before it. An asylum claimant does not have to pick the correct Convention "label" to describe his or her plight, but the Tribunal can only deal with the claims actually made.'

His Honour, in our view, correctly stated the position when he said (at [18]):

> 'The question, ultimately, is whether the case put by the appellant before the tribunal has sufficiently raised the relevant issue that the tribunal should have dealt with it.'

This does not mean that the Tribunal is only required to deal with claims expressly articulated by the applicant. It is not obliged to deal with claims which are not articulated and which do not clearly arise from the materials before it.

In STYB v Minister for Immigration & Multicultural & Indigenous Affairs *[2004] FCA 705, Selway J questioned whether the comments made by Merkel J in* Paramananthan *accurately reflected the position. He said (at [15]):*

> 'Whether or not those comments were correct when they were made, they may not now accurately reflect the jurisdiction of this Court. That jurisdiction is limited to the identification of jurisdictional errors. The question in this context is whether the Tribunal has made a jurisdictional error in not considering a claim that has not been made. In

> my view it does not make a jurisdictional error in such circumstances, providing, of course, that it correctly identifies the legal issues relevant to the claim that is made: contrast the majority and minority reasons in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; (2003) 203 ALR 112.'

We are of the view that the observations by Merkel J in Paramananthan, *by the Full Courts in* Sellamuthu *and* Sarrazola (No 2) *and by Cooper J in* SDAQ *are consistent with the proposition that the Tribunal is not required to consider a case that is not expressly made or does not arise clearly on the materials before it. The Tribunal's obligation is not limited to procedural fairness in responding to expressly articulated claims but, as is apparent from* Dranichnikov, *extends to reviewing the delegate's decision on the basis of all the materials before it.*

Whatever the scope of the Tribunal's obligations it is not required to consider criteria for an application never made. The application for protection visas by a mother and her children on the basis that they were refugees was not required to be considered as though it were an application in their capacity as the family of a man who had been granted a temporary protection visa – Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte S134/2002 *[2003] HCA 1; (2003) 195 ALR 1 at 8-9 [31]- [32]. Gleeson CJ generalised from this, albeit in dissent, in* Appellant S395/2002 v Minister for Immigration and Multicultural Affairs *[2003] HCA 71; (2003) 203 ALR 112 at 114 [1]:*

> 'Proceedings before the tribunal are not adversarial; and the issues are not defined by pleadings, or any analogous process. Even so, this court has insisted that, on judicial review, a decision of the tribunal must be considered in the light of the basis upon which the application was made, not upon an entirely different basis which may occur to an applicant, or an applicant's lawyers, at some later stage in the process.'

It is plain enough, in the light of Dranichnikov, *that a failure by the Tribunal to deal with a claim raised by the evidence and the contentions before it which, if resolved in one way, would or could be dispositive of the review, can constitute a failure of procedural fairness or a failure to conduct the review required by the Act and thereby a jurisdictional error. It follows that if the Tribunal makes an error of fact in misunderstanding or misconstruing a claim advanced by the applicant and bases its*

conclusion in whole or in part upon the claim so misunderstood or misconstrued its error is tantamount to a failure to consider the claim and on that basis can constitute jurisdictional error. The same may be true if a claim is raised by the evidence, albeit not expressly by the applicant, and is misunderstood or misconstrued by the Tribunal. Every case must be considered according to its own circumstances. Error of fact, although amounting to misconstruction of an applicant's claim, may be of no consequence to the outcome. It may be 'subsumed in findings of greater generality or because there is a factual premise upon which [the] contention rests which has been rejected' – Applicant WAEE *(at 641 [47]). But as the Full Court said in* WAEE *(at [45]):*

> 'If the tribunal fails to consider a contention that the applicant fears persecution for a particular reason which, if accepted, would justify concluding that the applicant has satisfied the relevant criterion, and if that contention is supported by probative material, the tribunal will have failed in the discharge of its duty, imposed by s 414 to conduct a review of the decision. This is a matter of substance, not a matter of the form of the tribunal's published reasons for decision.'

In that case the appellant, who was an Iranian citizen, put to the Tribunal that the marriage of his son to a Muslim woman in Iran had ramifications for him and his family. The Tribunal made no express reference in its discussion and findings to the claimed fears of persecution which arose out of the marriage by the appellant's son to a Muslim woman although it made reference to the claim in its overview of the appellant's case. The Court held that the Tribunal had failed to consider an issue going directly to the question whether the criterion under s 36 of the Act was satisfied. The Court held that the Tribunal had therefore failed to discharge its duty of review and had made a jurisdictional error.

…

Although such a claim might have been seen as arising on the material before the Tribunal it did not represent, in any way, 'a substantial clearly articulated argument relying upon established facts' in the sense in which that term was used in Dranichnikov. *A judgment that the Tribunal has failed to consider a claim not expressly advanced is, as already indicated in these reasons, not lightly to be made. The claim must emerge clearly from the materials before the Tribunal. In our opinion the judgment that the Tribunal, by reason of the error it made about the appellant's*

> *involvement with PLOTE, failed to consider an unexpressed claim of want of effective State protection against persecution by PLOTE, is not open having regard to the thresholds required for such a judgment by the authorities to which we have referred. This case does demonstrate an unfortunate factual error which, as Tamberlin J found, contributed to the Tribunal's adverse finding as to credibility and could have affected the outcome of the review by the Tribunal. It did not, however, constitute jurisdictional error in the sense earlier discussed. It was, as the members of the Full Court found on the first occasion, an error of fact within jurisdiction.*

40. In my view, on a fair reading of the applicant's claims, her childhood and family experience was only advanced so as to properly inform the Tribunal of her difficult past and her sensitivity to the fate of her husband and eldest son in China. Her present fear of harm derived not from her childhood experience but from her husband's more recent experience of conflict with local officials over his backhoe work, which was addressed in some detail in the applicant's written and oral claims. There was, in my view, no substantial, clearly articulated argument relying upon established facts in reference to the applicant's childhood experience that required consideration as a separate claim of persecution by the Tribunal.

41. The first ground of review therefore fails.

Was the hearing conducted by the Tribunal vitiated by the applicant's mental illness?

42. There is no dispute between the parties that the applicant was unable to participate in any effective way in the first hearing conducted by the Tribunal on 14 May 2010. That hearing was adjourned when the applicant was taken to hospital by ambulance. The question is whether the applicant was able to participate in the second Tribunal hearing conducted on 3 November 2010. The Tribunal was aware that the applicant has been diagnosed with schizophrenia and was taking anti-psychotic medication. At the first Tribunal hearing the Tribunal recorded the medication the applicant was taking. As already noted, the Tribunal was concerned to establish that the applicant was capable of giving evidence. The Tribunal made an assessment that the applicant was capable of giving evidence by reference to medical

evidence that the applicant's condition had stabilised or was stabilising as a result of the applicant taking her medication at recommended dosage levels. The Tribunal also satisfied itself, through asking "initial questions" that the applicant was competent to give evidence.

43. A difficulty here is that the Tribunal did not have the benefit of the medical opinion of Dr Wu. Dr Wu gave evidence that while the applicant was able to deal with simple, straightforward questions directed to matters in the present, she had real difficulty in dealing with questions that required her to recount her traumatic past experiences. This, in Dr Wu's opinion, inhibited the applicant from giving an effective account of those experiences.

44. The applicant contends that the Tribunal should have exercised its power under s.427(1)(d) of the Migration Act to require the Secretary of the Minister's Department to arrange for a medical examination of the applicant and to obtain a report about her mental condition. While the Tribunal has the discretion to take that action, it is under no general obligation to do so. In *Minister for Immigration v SZIAI* (2009) 259 ALR 429 at [25] the High Court (French CJ, Gummow, Hayne, Callinan, Kiefel and Bell JJ) stated:

> *Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a "duty to inquire", that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case.* … (endnote omitted)

45. Further, in *Minister for Immigration v SZGUR* (2011) 273 ALR 223 at [18]-[23] and [41] French CJ and Keifel J stated:

> *This appeal focused upon s 427(1)(d) which confers powers on the Tribunal in terms which have remained unchanged since it*

was introduced as part of Pt 7 of the Migration Act in 1992. It provides:

> "For the purpose of the review of a decision, the Tribunal may:
>
> ...
>
> (d) require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination."

At the heart of the decision of the Federal Court under appeal in this case was the proposition that the Tribunal had failed to consider whether it should require the Secretary of the Department of Immigration and Citizenship to arrange for a medical examination of SZGUR. *This constituted, so it was said, a failure by the Tribunal to consider whether to exercise the power conferred on it by s 427(1)(d).*

The power conferred by s 427(1)(d) is to be exercised having regard to the requirement imposed on the Tribunal, in the discharge of its core function of reviewing Tribunal decisions, "to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick" and to act "according to substantial justice and the merits of the case". In so doing it is not to be bound by "technicalities, legal forms or rules of evidence". Section 424 provides that in conducting a review the Tribunal "may get any information that it considers relevant". It is required to have regard to any information so obtained in making the decision on the review.

Section 427(1)(d) is ancillary to s 424. Those two provisions and s 415, which confers upon the Tribunal all the powers and discretions of the person who made the decision under review, give the Tribunal wide discretionary powers to investigate an applicant's claims. But they do not impose upon the Tribunal a general duty to make such inquiries. Relevantly to the present case, as Gummow and Hayne JJ observed in Minister for Immigration, Multicultural and Indigenous Affairs v SGLB*:*

> "whilst s 427 of the Act confers power on the Tribunal to obtain a medical report, the Act does not impose any duty or obligation to do so." (footnote omitted)

That observation was made in a context in which the Tribunal had considered it highly likely that the applicant for review was suffering from Post Traumatic Stress Disorder. The Court, by majority, held the Tribunal was under no duty to inquire as to the effect of that condition.

The reasons for judgment of Rares J and the submissions made on behalf of SZGUR *in this appeal assumed the existence, at least in some circumstances, of a duty on the part of the Tribunal to "consider" whether to exercise its power under s 427(1)(d). Rares J referred, in his reasons, to the judgment of the Full Court of the Federal Court in* Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin. *The Full Court there held that the Migration Review Tribunal was obliged, by s 361(3) of the Migration Act, to consider an applicant's request that it obtain oral evidence from named persons. The reference in his Honour's judgment to* Maltsin *pointed to some analogical argument about a duty to consider a request to the tribunal to exercise its power under s 427(1)(d). The analogy, if that is what it was, was inapposite given the differences between ss 427 and 361. There is an express requirement in the latter section that the tribunal have regard to an applicant's notice requesting the tribunal to obtain oral evidence from named persons. The analogy is not supported by resort to the obligation in s 424 that the Tribunal have regard to information which it obtains under that section. This is not least because the fact of a request is not information of the kind contemplated by s 424. Nor is the analogy supported by s 424A.*

The question whether s 427(1)(d) imposes a legal duty on the Tribunal to consider whether to exercise its inquisitorial power under that provision was answered in the negative by the Full Court of the Federal Court in WAGJ v Minister for Immigration and Multicultural and Indigenous Affairs. *The Court held that absent any legal obligation imposed on the Tribunal to make an inquiry under s 427(1)(d) "[b]y a parity of reasoning ... there is no legal obligation to consider whether one should exercise that power". That view is correct. That is not to say that circumstances may not arise in which the Tribunal has a duty to make particular inquiries. That duty does not, when it arises, necessarily require the application of s 427(1)(d).*

In Minister for Immigration & Citizenship v SZIAI *the Court considered the implications of its designation, in earlier decisions, of Tribunal proceedings as "inquisitorial". As was pointed out in that case, the term "inquisitorial" has been applied to tribunal proceedings to distinguish them from adversarial*

proceedings and to characterise the Tribunal's statutory functions. As the plurality judgment stated:

> "The duty imposed upon the Tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error." (footnote omitted)

It was not necessary in that case to further explore those questions of principle. Nor in our opinion is it necessary in this case.

…

Then it was said that it was not open to the Tribunal to reach the state of satisfaction or non-satisfaction required by s 65 of the Act as to the fulfilment of the criteria for the grant of a protection visa without:

- *having regard to and considering the agent's request; and*
- *taking steps to obtain an independent medical opinion.*

Again, SZGUR *failed to demonstrate that the Tribunal did not have regard to and consider the agent's request. In any event the Tribunal was under no obligation to obtain an independent medical report. It was under no obligation derived from s 427(1)(d) to consider whether to obtain such a report. It was entitled to decide the case on the material before it and if the material were insufficient to satisfy it that* SZGUR *was entitled to the grant of a protection visa, it was required to affirm the delegate's decision.* (endnotes omitted)

46. Gummow J stated at [74]:

> *While, in light of the above conclusion, it is not necessary to decide conclusively whether a failure by the Tribunal to consider the request would have amounted to jurisdictional error, something should be said on that subject. Rares J had referred to the following passage from the plurality judgment in* SZIAI*:*

> "Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a 'duty to inquire', that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case." *(endnotes omitted)*

47. At [87]-[88] Gummow J stated:

> *Ground 5(b) of the notice of contention is to the effect that the Tribunal, in order to reach a state of satisfaction about whether the criteria for a protection visa had been met (s 65(1)(a)(ii)), was required to obtain an independent medical report. But for the reasons given above, there was no duty on the Tribunal to obtain a medical report. Even if the Tribunal had required the Secretary to arrange a medical examination under s 427(1)(d), attendance at the examination would not have been compulsory. A further power of the Minister concerning medical examinations is contained in s 60 of the Migration Act. By virtue of s 415(1), this is a power also enjoyed by the Tribunal. Section 60 provides as follows:*
>
> > "(1) If the health or physical or mental condition of an applicant for a visa is relevant to the grant of a visa, the Minister may require the applicant to visit, and be examined by, a specified person, being a person qualified to determine the applicant's health, physical condition or mental condition, at a specified reasonable time and specified reasonable place.
> >
> > (2) An applicant must make every reasonable effort to be available for, and attend, an examination."
>
> *As is apparent from s 60(2), the visa applicant is not required to attend the examination. This may be because in most cases it will be, or at least in the present case it was, in the interests of the applicant to attend such an examination given the adverse*

> *consequences for his or her application which might follow on from a failure to so attend.*
>
> *The terms of s 427(1)(d) qualify the Tribunal's power with respect to medical examination by the words "that the Tribunal thinks necessary with respect to the review". There were no circumstances here that made such an examination necessary. The first respondent's migration agent had asked his client to obtain a detailed psychiatric or psychological report. The reason why such a report was not obtained was unknown. In his letter to the Tribunal, the migration agent said he gave the first respondent a letter for Dr Khan (presumably requesting a written report) but the first respondent then claimed never to have been given such a letter. The migration agent had indicated that the first respondent would meet the costs of an examination if arranged by the Tribunal. No reason has been shown as to why it would have been more appropriate, or necessary, for the Tribunal rather than the first respondent or his migration agent to arrange for such an examination. I agree with Rares J that it was open to the Tribunal to reject the request.* (endnotes omitted)

48. In the present case the Tribunal knew that the applicant was mentally ill. Indeed, the hearing record of the Tribunal hearing on 3 November 2010 says that, with an asterisk (CB 93). The Tribunal already had available to it medical evidence which, coupled with the Tribunal's own questioning of the applicant, enabled it to form a view that the applicant, notwithstanding her schizophrenia, was capable of giving evidence. The Tribunal was not obliged to obtain a further opinion. In addition, I accept from the transcript of the second hearing that, while the applicant suffered apparent distress and confusion at several points, and while she was probably not able to give as effective an account of her experiences as a mentally able person could have given, the applicant was not *unable* to give evidence, present arguments and answer questions before the Tribunal at the time of the second hearing (see *Minister for Immigration v SZNCR* [2011] FCA 369 per Tracey J at [30]-[34]; *Minister for Immigration v SZNVW* (2010) 183 FCR 575).

49. The second ground of review also fails.

Was the review process disabled by the conduct of the applicant's migration agent?

50. As already noted, the Tribunal was critical of the applicant's migration agent in its reasons at [64] (CB 120). The agent, Ms Qian, gave evidence in these proceedings under compulsion by subpoena. Her evidence establishes the following:

a) she is an experienced agent, having represented applicants in around 200 protection visa cases[3];

b) Ms Qian very rarely, if ever, attends Tribunal hearings[4] ostensibly because her clients do not want her to attend, even though she would be prepared to attend without an additional charge;

c) Ms Qian was aware, at least in general terms, that the applicant had mental problems and she described the applicant's handwritten statement of her claims of persecution as a "mess";

d) Ms Qian feels that she has nothing useful to contribute at a tribunal hearing and she would not normally expect to be called upon to contribute anything; and

e) Ms Qian has little, if any, knowledge of migration law or of the complexities of the assessment of asylum claims under the Refugee's Convention and the Migration Act. She sees her role essentially as a more limited one of assisting applicants to present their claims in writing in proper form and little more.

51. The applicant does not contend that the Tribunal has the power to compel a migration agent to attend a hearing to support an applicant. However the Tribunal is not prevented from inviting a migration agent to be present at the hearing. In fact the Response to Hearing Invitation form (CB 63) makes it clear that it is the normal practice for an applicant or a migration agent to indicate whether "the representative" will "be attending" the hearing.

[3] It was not clear from the evidence whether that is the total number of cases in which Ms Qian has acted or the number of cases *per annum* that Ms Qian acts in.
[4] Ms Qian said that she might attend a hearing in five to ten per cent of cases, although the Tribunal hearing record in respect of the hearing on 3 November 2010 states in handwriting that Ms Qian was "never present".

52. The Tribunal also has the power, under s.427(3) of the Migration Act, to compel persons other than the applicant to give evidence, and it is an offence (punishable by imprisonment) under s.432 for a witness, without reasonable excuse, not to attend.

53. Migration agents are required to observe a code of conduct prescribed in Schedule 2 of the *Migration Agents Regulations 1998*. Section 314 of the Migration Act provides:

> *Code of Conduct for migration agents*
>
> *(1) The regulations may prescribe a Code of Conduct for migration agents.*
>
> *(2) A registered migration agent must conduct himself or herself in accordance with the prescribed Code of Conduct.*

54. Regulation 8 of the *Migration Agents Regulations 1998* provides:

> *For subsection 314 (1) of the Act, the Code of Conduct is set out in Schedule 2.*

55. The Code of Conduct includes the following provisions:-

> *1.10 The aims of the Code are:*
>
> *(a) …*
>
> *(b) to set out the minimum attributes and abilities that a person must demonstrate to perform as a registered migration agent under the Code, including:*
>
> *(i) being of good character;*
>
> *(ii) knowing the provisions of the Migration Act and Migration Regulations, and other legislation relating to migration procedure, in sufficient depth to offer sound and comprehensive advice to a client, including advice on completing and lodging application forms;*
>
> …
>
> *1.12 However, the Code imposes on a registered migration agent the overriding duty to act at all times in the lawful interests of the agent's client. Any conduct falling short of that*

requirement may make the agent liable to cancellation of registration.

2.3 A registered migration agent's professionalism must be reflected in a sound working knowledge of the Migration Act and Migration Regulations, and other legislation relating to migration procedure, and a capacity to provide accurate and timely advice.

2.4 A registered migration agent must have due regard to a client's dependence on the agent's knowledge and experience.

2.6 To the extent that a registered migration agent must take account of objective criteria to make an application under the Migration Act or Migration Regulations, he or she must be frank and candid about the prospects of success when assessing a client's request for assistance in preparing a case or making an application under the Migration Act or Migration Regulations.

2.19 Subject to a client's instructions, a registered migration agent has a duty to provide sufficient relevant information to the Department to allow a full assessment of all the facts against the relevant criteria. For example, a registered migration agent must avoid the submission of applications under the Migration Act or Migration Regulations in a form that does not fully reflect the circumstances of the individual and prejudices the prospect of approval.

56. The Code of Conduct imposes on a registered migration agent the overriding duty to act at all times in the lawful interests of the agent's client. Arguably, it would be a breach of the Code for a migration agent not to attend a hearing when the Tribunal has invited the agent to do so and has indicated that it is in the best interests of the migration agent's client for the migration agent to be present.

57. The applicant contends that, in the circumstances of this matter, the review process was subverted by the non attendance of the agent and the Tribunal could not avoid the subversion of its obligation to give a real and meaningful invitation by merely noting that the applicant's "*psychological and emotional state was such that it was not appropriate for her not to have the benefit of support from her representative at the hearing*". In the circumstances, the Tribunal's

failure to invite the migration agent to be present and/or to take evidence from the migration agent is said to result in the subversion of the Tribunal's obligation to provide the applicant with a "real and meaningful" invitation to attend a oral hearing for the purpose of giving evidence and presenting arguments.

58. The applicant does not claim to have been the victim of fraud by her migration agent. I accept the Minister's submission that an applicant who has simply been adversely affected by bad or negligent advice "or some other mishap" before the Tribunal may be disadvantaged but such misadventure does not subvert or disable the Tribunal's review function (see *SZFDE v Minister for Immigration* (2007) 232 CLR 189 at [53]; see also *SZOIN v Minister for Immigration* [2011] FCAFC 38 at [60]-[61]). On the other hand, I do not rule out the possibility that a migration agent in breach of his or her professional obligations may disable or subvert the Tribunal's review process.

59. The concept of "acting in the best interests of" implies a positive duty to do so. In *Breen v Williams ("Medical Records Access case")* [1996] HCA 57; (1996) 186 CLR 71 (6 September 1996) Gaudron and McHugh JJ at [12] of their joint judgment say:

> *While the notion of "best interests" is a relevant consideration in some areas of the law, such as the law relating to child welfare, a doctor does not impliedly promise that he or she will always* ***act in the "best interests****" of the patient. The primary duty that a doctor owes a patient is the duty "to exercise reasonable care and skill in the provision of professional advice and treatment". The doctor does not warrant that he or she will act in the patient's best interests or that the treatment will be successful (82). If a doctor owed such a duty, he or she would be liable for any act that* ***objectively*** *was not in the best interests of the patient. (emphasis added).*

60. In *Minister for Immigration v Le* [2007] FCA 1318 (27 August 2007) Kenny J at [52] said:

> *It does not follow from this that a representative is at large with respect to his client's affairs. Registered migration agents (as Mr Oladejo was required to be) are subject to regulation by the law, including the Act, the* Migration Agents Regulations 1998 *(Cth), and the Code of Conduct made under these Regulations and s 314(1) of the Act. Under the Code, registered migration agents*

> *are required to act in the lawful interests of their client at all times (clause 1.12); to deal with their clients competently, diligently and fairly (clause 2.1); and to have due regard to a client's dependence on the agent's knowledge and experience (clause 2.4). Further, they "must ... within a reasonable time after agreeing to represent a client, confirm the client's instructions in writing to the client; ... act in accordance with the client's instructions; and ... keep the client fully informed in writing of the progress of each case or application that the agent undertakes for the client...": clause 2.8. Mr Oladejo was thus obliged to seek Ms Le's instructions on the matter of a further hearing and, for this purpose, to inform her of his discussion with the Tribunal.*

61. The applicant contends that the concept of *"acting at all times in the lawful interests of the client"* must be construed as requiring the migration agent to act at all times in the interests of the client provided only that this is lawful. In conjunction with the other obligations described above by Kenny J this is said to impose on a migration agent a duty similar to acting in the best interests of the client in that the obligation is a positive one and a breach is to be determined objectively. In my view, it is unnecessary and inappropriate to seek to generalise from or put a gloss on the express duties imposed on migration agents in the Code of Conduct. I accept, however, that there must be an objective component to any determination as to whether the prescribed obligations were breached.

62. The migration agent gave evidence that she had offered to attend the Tribunal hearings but did not do so because the applicant had asked her not to. She said she would have attended if the Tribunal had requested her to do so.

63. The migration agent gave evidence that she was aware that the applicant had some difficulties in that she, the migration agent, noted that the applicant often repeated herself. However the migration agent said she was not aware of the full extent of the applicant's impairment.

64. It is fair to conclude from the evidence given by the migration agent that the migration agent did not consider whether the applicant was able to properly appear by herself before the Tribunal. On her own account of the circumstances, the migration agent merely proceeded on the basis that she would not appear because the applicant did not want her to do so.

65. The applicant contends that the migration agent breached the prescribed obligations imposed on migration agents in acting as her agent. Notwithstanding that the applicant (on the agent's evidence) told the migration agent that she did not want the agent to appear, the agent should have advised her that in all the circumstances it would be appropriate and in the applicant's interests that the agent appeared. In my view, the agent failed to deal with the applicant competently and diligently and to have due regard to the applicant's dependence on the agent's knowledge and experience.

66. The conduct of the migration agent warrants inquiry by the Office of the Migration Agents Registration Authority ("OMARA"). I do not know whether the Tribunal, given its criticism of the agent, has already referred the matter to the OMARA. In case it has not done so, I will direct that a copy of these reasons, together with the transcript of the evidence given by Ms Qian, be referred to the OMARA for such action as the OMARA considers appropriate.

67. Having regard to its experience at the first Tribunal hearing, the Tribunal might have considered it appropriate to specifically request the attendance of Ms Qian at the second Tribunal hearing so that she might support and assist her mentally disabled client. The Tribunal had the power, pursuant to s.427(3) to summons Ms Qian to give evidence if it thought that she may have been able to give useful evidence concerning her knowledge of the applicant's claims and experiences. Where an applicant suffers from a mental disability, the presence of a registered agent assisting the applicant, if only as a support person, could be seen as an advantage. However, I do not accept that the absence of the agent, while unfortunate and meriting criticism, disabled or subverted the Tribunal's review function. As I have already stated, the Tribunal did not err in a jurisdictional sense in determining that the applicant was capable of participating in the second hearing. Even if the applicant had been incapable of participating in a tribunal hearing (with or without the presence of her agent) that would not in itself have disabled the Tribunal's review function. In such circumstances, I agree with the view previously expressed by this Court that the Tribunal would be obliged to complete its duty of review without an oral hearing: *SZOGP v Minister for Immigration & Anor* [2010] FMCA 704 at [48]-[52].

68. I find that the third ground in the amended application also fails.

A greater involvement of legal practitioners in the visa application and review process is needed

69. I have previously recommended that protection visa applications should be required to be submitted with the assistance of a registered migration agent who is a legal practitioner[5]. It is an unfortunate fact that many protection visa applications are submitted with the assistance of agents (both registered and unregistered) who do not have an adequate understanding of their professional obligations. While that situation continues decision makers will continue to be burdened by applications improperly framed and by applicants not properly represented.

70. It is noteworthy, in this regard, that the Migration Act itself discriminates against protection visa applicants. Section 427(6) provides that a person appearing before the Tribunal to give evidence is not entitled to be represented before the Tribunal by any other person. In contrast, s.366A provides, in relation to matters before the Migration Review Tribunal ("the MRT"):

> *(1) The applicant is entitled, while appearing before the Tribunal, to have another person (the assistant) present to assist him or her.*
>
> *(2) The assistant is not entitled to present arguments to the Tribunal, or to address the Tribunal, unless the Tribunal is satisfied that, because of exceptional circumstances, the assistant should be allowed to do so.*
>
> *(3) Except as provided in this section, the applicant is not entitled, while appearing before the Tribunal, to be represented by another person.*
>
> *(4) This section does not affect the entitlement of the applicant to engage a person to assist or represent him or her otherwise than while appearing before the Tribunal.*

[5] *SZMEM v Minister for Immigration & Anor* [2008] FMCA 1286 at [20]; *SZOCT v Minister for Immigration & Anor* [2010] FMCA 425; *SZOOW v Minister for Immigration & Anor* [2010] FMCA 960 at [30]; *SZOPW v Minister for Immigration & Anor* [2011] FMCA 48; *SZQKF v Minister for Immigration & Anor* [2011] FMCA 566 at [11]

71. The policy reason for these restrictions on representation may have something to do with a concern that representation, especially representation by a legal practitioner, may in some way complicate or prolong hearings. That is not the experience of this Court, which welcomes the assistance provided by legal practitioners. In my view, an administrative decision maker, acting lawfully, has nothing to fear from the involvement of competent and experienced legal practitioners who are well aware of their professional obligations. Indeed, the Tribunal would have good reason to be concerned about the current restrictions on representation. In the absence of the assistance of independent legal practitioners, the Tribunal is left to attempt to find its way through its highly prescriptive procedural code based on the experience of the presiding member, or, especially where the presiding member is not legally qualified, the Tribunal is left inappropriately dependent upon its own in house legal advice.

72. Further, the reason why protection visa applicants are treated differently from other visa applicants in the legislation in relation to representation at hearings is not clear to me. The distinction may have something to do with s.363A of the Migration Act which is peculiar to proceedings in the MRT. The effect of that provision would seem to be to prevent the MRT from permitting any assistance or representation at MRT hearings except as is expressly provided by s.366A. These are very strange provisions and I suspect that they are not being complied with. If there is no sound policy reason for the restrictions on representation then they should be removed.

Conclusion

73. The applicant has been unable to demonstrate jurisdictional error on the part of the Tribunal. The decision of the Tribunal is therefore a privative clause decision and the application must be dismissed. I will so order.

74. I will hear the parties as to costs.

I certify that the preceding seventy-four (74) paragraphs are a true copy of the reasons for judgment of Driver FM

Date: 10 August 2011