FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZNVW v MINISTER FOR IMMIGRATION & ANOR *[2009] FMCA 1299*

MIGRATION – RRT decision – applicant suffering mental impairments at hearing – impairments established by evidence not before Tribunal – whether applicant denied real and meaningful opportunity to give his evidence – Tribunal assessed his evidence upon false assumptions about his mental capacities – jurisdictional error found – matter remitted.

Migration Act 1958 (Cth), ss.425, 425(1), 477(1), 477(2)

M175 of 2002 v Minister for Immigration & Citizenship [2007] FCA 1212
Minister for Immigration & Citizenship v SZIAI [2009] HCA 39
Minister for Immigration & Citizenship v SZIZO (2009) 238 CLR 627, [2009] HCA 37
Minister for Immigration & Multicultural Affairs v SZFDE (2006) 154 FCR 365
Minister for Immigration & Multicultural & Indigenous Affairs v SCAR (2003) 128 FCR 553
NAMJ v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 983
Perera v Minister for Immigration & Multicultural Affairs (1999) 92 FCR 6
SZGYM v Minister for Immigration & Citizenship [2007] FCA 1923
SZIWY v Minister for Immigration & Anor [2007] FMCA 1641
SZJBD v Minister for Immigration & Citizenship [2009] FCAFC 106
VWFY v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 1723
WAHU v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 890

Applicant:	SZNVW
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2018 of 2009
Judgment of:	Smith FM

Hearing dates:	9 November 2009, 14 December 2009 and 22 December 2009
Delivered at:	Sydney
Delivered on:	22 December 2009

REPRESENTATION

Counsel for the Applicant:	Applicant in person
Counsel for the First Respondent (at Hearing on 9 November 2009):	Mr J Smith
Counsel for the First Respondent (at Hearing on 22 December 2009):	Mr T Reilly
Solicitors for the Respondents:	DLA Phillips Fox

ORDERS

(1) A writ of certiorari issue directed to the second respondent, to quash the decision of the second respondent made on 29 June 2009 in matter 0903478.

(2) A writ of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent dated 7 May 2009.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2018 of 2009

SZNVW
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT
(revised from transcript)

1. The applicant is held in immigration detention, and has been so held for many months. The case has had an unfortunate history of adjournments in this Court, to enable the applicant and the Minister to present to the Court to the best of their respective abilities, medical evidence concerning the applicant's mental impairments when he attended a hearing of the Tribunal in June 2009. I am giving this judgment three days before Christmas, I have decided that the matter should be remitted to the Tribunal, and the urgency of the matter has caused me to give an *ex tempore* judgment explaining my reasons.

2. The applicant arrived in Australia in February 2006 on a student visa, allowing him to attend a postgraduate course in philosophy at the University of Sydney. He continued his university course but was unable to complete it, and in June 2008 his student visa expired or was cancelled, and he became an unlawful resident. He was given bridging

visas but these expired, and he was detained in March 2009. He has been held in immigration detention since then.

3. While in detention, he was referred to a solicitor for assistance to file a protection visa application, which was lodged on 2 April 2009. In it, he very briefly gave his reasons for seeking protection in Australia against return to his country of nationality, Pakistan. He said:

> ***41 Why did you leave that country?***
>
> *Before I came to Australia, I was teaching at some universities in Pakistan. Among students, I was known for my secular opinion. That made my person disliked to those who were fanatically opposed to my ideology. In public places, I was facing harassment for sometime. I was socially persecuted and isolated.*
>
> *The persecution, the isolation and the harassment that I faced, reached climax when my life was threatened by some people in a cafe. I could not go to the authorities because, there, the authorities are a part of the religious fanatical establishment. So I came to Australia on student visa. Initially I was trying to finish my studies, but could not do so due the emotional anxiety which culminated in an existential trauma. I was fortunate to have a girl friend here, who helped me emotionally.*
>
> ***42 What do you fear may happen to you if you go back to that country?***
>
> *I will be surrounded by the extremists again and will be physically harmed.*
>
> ***43 Who do you think may harm/mistreat you if you go back?***
>
> *The radical Islamic groups who lead the country and have control of all the places. The government is also part of my mistreatment because they perceive me as against Islam.*
>
> ***44 Why do you think this will happen to you if you go back?***
>
> *Because of my ideological concepts and for the reasons of being against their opinions. They perceive me as a political opponent.*
>
> ***45 Do you think the authorities of that country can and will protect you if you go back? If not, why not?***

> *No, because the authorities in Pakistan is part of the whole Islamic system where they mistreat me for my opinions.*

4. No further details of these claims were provided in writing to the Department, but the applicant attended an interview with a delegate on 24 April 2009. Following the interview, he submitted a statement seeking to explain why he thought that he had been more outspoken about liberalism than other academics, and also seeking to explain his mental state which caused his delay in seeking protection in Australia.

5. The delegate made a decision on 7 May 2009, refusing the protection visa. The delegate said that he was not satisfied that the applicant had provided *"a plausible or credible account of his claimed circumstances"*, referring to the lack of documentary evidence, to the applicant's evidence being *"vague, general and unsubstantiated"*, and to the applicant's delays in applying for refugee status.

6. The delegate also said:

> *Country information indicates that Lahore is politically vibrant and people publicly protest against extremism in Lahore. Internally displaced people usually take refuge in Lahore to escape attack from extremists. Lahore is also one of the major cities in Pakistan where night life, social get together and dance parties are regular scenes of the norm. Based on the available information I am not satisfied that the applicant will face Convention based persecution in Lahore from extremists because of his social outlook or ideology.*
>
> (citations omitted)

7. The applicant appealed to the Refugee Review Tribunal while still in detention, and appointed the solicitor as his representative. The Tribunal gave notice of an expedited hearing on 5 June 2009, and received a request for a delay. An internal email within the Tribunal states:

> *Rep called – in regards to hearing invitation sent. He advised that he spoke to the RA and that RA is very stress over the matter and wishes the hearing to be delayed for approx one week. I inform Rep that he will be required to put this request in writing for the Member to consider. I inform him that he should state the reasons why he/RA wants hearing to be rescheduled – I stated that he should provide supporting documentation (eg. medical*

> *reports for RA's condition). Rep stated that RA is in detention and has limited access to medical assistance. I inform Rep that as RA is in detention, there are psychological support offered at the detention centre – I also inform Rep that as RA is in detention, the Tribunal considers the matter a priority and will process review application promptly. Rep stated that he understands and thanked me for the information.*

8. The Tribunal was not provided with any medical reports, but it postponed the hearing for one week until 12 June 2009. The applicant was in attendance on that day, but his representative was not present. A transcript of the hearing is not in evidence, but the Tribunal gives a description of the hearing in its statement of reasons, and I have no reason not to accept it.

9. The Tribunal explored the applicant's academic history in Pakistan, and his claims to have been threatened or harassed, in particular, in an incident in September 2005. It questioned him about his claim to have expressed liberal secular views, and about an email which had been received from the applicant's brother. The Tribunal then put to the applicant that it had various difficulties accepting that he had been threatened, and had other problems with this case.

10. At this stage in the hearing, the Tribunal drew the applicant's attention to a statement which he had presented to the Tribunal at the start of the hearing, which was typed and heavily amended in handwriting. The statement is addressed to the Tribunal member, and *inter alia*, said:

> *I request the member to consider what the psychologist at Villawood Immigration Detention Centre Ms. Patricia Subirat has written about me. In my session with her, certain facts about my psychological state came to light. Among some other depressive symptoms, I have been suffering from PROCRASTINATION for nearly three years. I have attached a copy of the International Health and Medical Services Standard Health Event.*

11. The statement then referred to extracts from Wikipedia concerning "*procrastination*", and the applicant referred to this as a "*psychological state related to anxiety*". A handwritten conclusion to the statement said:

> *In other words, a procrastinator's actions can be very easily misunderstood – as mine are being misunderstood – to his*

detriment. With this psychological state, I "have great difficulty in seeking help". As the psychological state of procrastination is seldom acknowledged and the consequent behaviour pattern is rarely forgiven, I request the tribunal to give special consideration to this issue.

12. Accompanying the applicant's statement was a document on letterhead of International Health and Medical Services, which appears to be the organisation providing medical services at the Villawood Immigration Detention Centre. The form reported a "*standard health event*" concerning the applicant. Its body says:

> ***10 June 2001 12:11***
>
> *Patricia Subirat*
>
> ***Standard Health Event***
>
> *MHC – self referral.*
>
> *[The applicant] was reviewed by mental health as per referral. [The applicant] reports experiencing depressive symptoms, and that these have been long standing since Pakistan. He advised that these symptoms have been accentuated in the last 3 years. [The applicant] expressed that he is "uninterested in life" and finds himself unmotivated to follow through with things. He reports behaviours such as procrastination and appears to have anhedonia. Options for treatment were discussed such as counselling, therapy, medication and psychiatrist appointments. [The applicant] advised that he wished to commence counselling/therapy and perhaps review with the psychiatrist at a later date if necessary.*

The form contains provision for the insertion of diagnoses, but no insertions were made.

13. According to the Tribunal:

> *63. … The applicant asked the Tribunal to read the letter he had given to the Tribunal at the beginning of the hearing. The Tribunal adjourned the hearing to read the letter and other documents the applicant submitted which included a "Standard Health Event" document.*
>
> *64. Following the adjournment the Tribunal put to the applicant that it had read his letter and the "Standard Health Event"*

document. The Tribunal put to the applicant that it had a number of difficulties with the Standard Health Event document. The document had been written by Patricia Subirat who did not provide her qualifications. Ms Subirat had reported what the applicant had told her and accepted what the applicant had told her without conducting any independent testing. The Tribunal put to the applicant that Ms Subirat had discussed options for treatment that were available to him and he had advised he wished to commence counselling and had not sought treatment from a psychiatrist.

65. The Tribunal put to the applicant that it had difficulty with the fact that he had been in Australia for three years and although he told Ms Subirat that he had suffered from depression for a number of years he had not sought advice or treatment until two days before the Tribunal hearing. The applicant claimed that he didn't know he had a psychological problem. He claimed in Pakistan it is not normal to go to a psychologist. The applicant then claimed that because of everything that had happened to him he went to see Ms Subirat and she told him he had a problem and it was called the problem of procrastination. He claimed that when the psychologist told him he had a problem this was a revelation to him. He claimed he was told he had a problem by the psychologist and before that he didn't know that he had a problem.

14. According to the Tribunal's description of the hearing, it then identified various inconsistencies and changes to the applicant's story, which the Tribunal said might indicate that he had not provided a truthful account of what had happened to him in Pakistan. The Tribunal referred the applicant to various such inconsistencies and difficulties. In relation to a number of them, perhaps most of them, the applicant referred to his mental state to explain the difficulties perceived by the Tribunal. Thus:

69. The Tribunal put to the applicant that at the Departmental interview when the Departmental officer asked him to describe what had happened in the café when he was threatened he had not told the departmental officer that he was slapped or that he was shown a gun. The Tribunal put to the applicant that this information was relevant as it may indicate that he was not a witness of truth and he had fabricated those claims. The applicant claimed that he didn't like to think of the things that had happened to him

because they were unpleasant. He then claimed he couldn't think about everything that had happened to him. He then claimed that he wanted to forget what had happened to him. He then claimed he may not have spoken enough about what had happened to him because he was "not in a normal state".

70. The Tribunal put to the applicant that there were significant inconsistencies in the information he had provided in relation to his employment in Pakistan. The Tribunal put to the applicant that there were inconsistencies between the claims he made in his protection visa application and the claims he made at the hearing in relation to his employment. The Tribunal put to the applicant that it also had a copy of his student visa application and the claims he made in his student visa application were inconsistent with the claims in his protection visa application and the claims he made at the hearing. The Tribunal put to the applicant that in his protection visa application he had claimed that he had been employed as a lecturer at Government College from January 2002 until May 2004 but at the hearing he had claimed that he had been employed from January 2002 until May 2003. The applicant claimed there were inconsistencies because he didn't have access to his educational certificates or his certificates of employment. He claimed that since he was in Villawood he was trying to get the documents but he has been unable to do anything to get access to them. The Tribunal put to the applicant that if he had been employed as a lecturer at Government College the Tribunal was of the view that he would have remembered when he was employed and how long he was employed as a lecturer. The applicant then claimed that in his psychological state he needed the documents.

71. The Tribunal put to the applicant that in his protection visa application he had claimed that he had been employed as a lecturer at Beacon House National University Lahore from September 2003 until May 2004 but at the hearing he claimed that he had been employed from September 2002 until September 2003. The applicant claimed that the incidents that happened to him in Pakistan were traumatic and that could have caused him to make mistakes.

72. The Tribunal put to the applicant that in his protection visa application he had claimed that he had been employed as a lecturer at the Pakistan School of Fashion Design Lahore from September 2004 until May 2005 but at the hearing he

claimed he had been employed from September 2003 until May 2004. The Tribunal put to the applicant that what was even more significant was that at the hearing he claimed that he had been unemployed from May 2004 until February 2006 when he left Pakistan. The Tribunal put to the applicant that even if he could not remember exact details of his employment as a lecturer it was of the view he would have remembered the length of time he was unemployed. The applicant claimed that because of his psychological state he couldn't remember.

73. *The Tribunal put to the applicant that in his student visa application he had claimed that he was employed as a lecturer at Government College Lahore from January 2003 until August 2004 and had submitted a reference from the Dean of Arts stating he had been employed at the college at that time. The Tribunal put to the applicant that in his student visa application he had claimed that he was employed as a lecturer at Beacon House National University from October 2003 until June 2004 and had submitted a reference from Assistant Professor of the School of Liberal Arts stating he had been employed at that time. The Tribunal put to the applicant that the information was inconsistent with the information in his protection visa application and the evidence he provided at the hearing. The applicant claimed that the inconsistencies were because of his psychological state.*

74. *The Tribunal put to the applicant that it had three different accounts of when he was employed as a lecturer in Lahore which was relevant as it may indicate that he was not a witness of truth and had fabricated his claims about his employment which may lead the Tribunal to affirm the decision of the delegate not to grant him a protection visa. The applicant claimed that when he was filling out the details in his protection visa application he told his agent that he didn't have access to his documents and that he might make mistakes. He claimed that his agent told him to just put approximate dates. The applicant claimed that he had also told his agent that he might give wrong details because he was not good with dates generally.*

75. *The Tribunal asked the applicant if he wanted to make any further comments or if he wanted more time to comment on the information that had been put to him. The applicant claimed he wanted the Tribunal to take into account the fact that he was not good with dates, he didn't have access to his*

> *documents in relation to his employment and his psychological state. The applicant claimed that he knows some people who have suffered from fundamentalist violence and he needed more time to contact them. The Tribunal put to the applicant that the research section of the Tribunal had done extensive research on the current situation in Lahore and it was not prepared to give him more time to contact unknown individuals to provide information to the Tribunal. The applicant claimed that the Department had rejected his claims because his claims were general. He claimed that the reports the Tribunal had put to him were general and only tell one side of the story. He claimed that his situation happened in Lahore and that he was telling the truth. He claimed that his life had been threatened and as a non violent peace loving individual this had been a horrible experience.*

15. The Tribunal received no further evidence from the applicant as to his claims to be suffering a *"psychological state"*, and it did not seek further medical evidence in the possession of the Department, notwithstanding that the document before it suggested that the applicant had been referred for psychological treatments.

16. The Tribunal made its decision on 29 June 2009. In its decision, the Tribunal fully extracted all the evidence before it, and summarised the interview before the delegate, and the hearing before the Tribunal. It referred to country information concerning the college at which the applicant had obtained his degree, and to the current situation in Lahore.

17. Under the heading *"Findings and Reasons"*, the Tribunal said that it *"did not find the applicant to be a truthful or credible witness"*.

18. It said: *"there were a number of problems with the applicant's claims that he was known among students for his secular opinion"*. The Tribunal referred to the fact that the college at which the applicant had been a student was known to be committed to *"the ideals of liberal education"*, and the Tribunal appears to have thought that this was inconsistent with the applicant's claim to have been *"'known' because he expressed secular and liberal views"*.

19. The Tribunal then addressed the applicant's responses when the Tribunal explored the nature of the applicant's secular and liberal

opinions. The Tribunal said they were *"very general"*. It said: *"the Tribunal is of the view that if the applicant had been known for espousing liberal views he would have been able to do more than simply paraphrase the views of authors he had studied and would have been able to provide a more detailed explanation of his secular opinion and liberal views"*.

20. The Tribunal said there were also problems about *"***how** *he had expressed his secular opinions"* (emphasis added). It concluded: *"the Tribunal is of the view that the fact that the applicant simply summarised the themes of two novels he had studied while at university and mentioned one poem when asked by the Tribunal what he told his students is not consistent with his claim that 'among students he was known for his secular opinion'"*.

21. The Tribunal also thought *"there were problems with the applicant's evidence as to* **when** *he had expressed his secular opinions"* (emphasis added). It thought that the applicant had discreditably referred to his secular opinions and his thesis written in Australia in this regard, and said that this *"indicates that the applicant is not a witness of truth"*.

22. The Tribunal then identified various additional *"problems with the applicant's claims that he was harassed, socially persecuted and threatened because among students he was known for his secular opinion"*. Chiefly, the Tribunal's concern was that the evidence he gave was *"vague and lacking in detail"*. It said: *"the Tribunal is of the view that if the applicant had been harassed because of his secular opinion he would have been able to provide more specific details of the harassment he suffered"*.

23. The Tribunal thought that the applicant had invented incidents of harassment in 2002, 2003 and 2004, and that there had been changes to the applicant's claims about this. It thought that there was a lack of detail in the applicant's evidence about how he was harassed in 2005. The Tribunal said that it was of the view *"that if Islamist fanatics well known for their violent attacks by armed gunmen and suicide bombers had wanted to harm the applicant and get rid of him they would have done more than threaten him"*. The Tribunal concluded that *"the*

applicant is not a witness of truth and is prepared to fabricate evidence in order to strengthen his claim to refugee status".

24. The Tribunal referred to the applicant's delays in leaving Pakistan, and later in applying for protection. It was at this point that it referred to the applicant's claim to have been suffering from psychological impairments at the hearing. It said:

> *113. The applicant arrived in Australia on 14 February 2006 on a student visa to study a Master of Philosophy degree in English Literature at Sydney University. The applicant told the Tribunal that he completed three semesters of the four semester course but was unable to complete the fourth semester for financial reasons. The applicant applied for a protection visa on 19 March 2009 a day after he was detained as an unlawful citizen. When the Tribunal put to the applicant that the fact that he had been studying in Australia since February 2006 and only applied for a protection visa after he was detained may indicate to the Tribunal that his claims that he was known for his secular opinion and had been threatened may not be true he claimed that his delay in applying for protection was because he was suffering from the psychological state of procrastination. To support his claim that he was suffering from the psychological state of procrastination he submitted to the Tribunal a "Standard Health Event" document dated 10 June 2006 from Patricia Subirat.*
>
> *114. The Tribunal has considered the "Standard Health Event" document but places no weight on it for the following reasons.*
>
> *115. The Standard Health Event document consists of six typed lines. Ms Subirat doesn't provide details of her qualifications. Ms Subirat in the document reports the symptoms the applicant told her he had experienced. Ms Subirat stated that the applicant reports experiencing long standing depressive symptoms and reports behaviours such as procrastination. Ms Subirat has not suggested she did any independent testing of the applicant. Ms Subirat states that the applicant appears to have anhedonia but this conclusion appears to have been based on the acceptance of everything the applicant told her rather than any independent testing. Ms Subirat states that she discussed options for treatment with the applicant and that the applicant advised that he wished to commence*

> *counselling/therapy. The statement states that the applicant only wanted a review with a psychiatrist at a later date if necessary. At the hearing the applicant told the Tribunal that he didn't know he had a psychological problem until he went to see Ms Subirat and she told him he had one. The Tribunal is of the view that if the applicant had experienced long standing depressive symptoms as he has claimed he would have sought treatment earlier than two days before the hearing. The Tribunal is also of the view that if the applicant was currently experiencing depressive symptoms he would have wanted to see a psychiatrist as soon as possible. There is no medical evidence before the Tribunal to suggest that the applicant suffers from procrastination or depression.*

25. In my opinion, in the above paragraphs the Tribunal clearly rejected the applicant's claim that he suffered from impairments arising from symptoms of depression, and indicated that it was assessing his evidence as a person who was not suffering any impairments from such a condition. It is also clear from the remainder of its reasons, in my opinion, that it assessed all of the applicant's evidence on that basis.

26. When rejecting his evidence, the Tribunal appears even to have had doubts about his claimed academic history in Pakistan. It said:

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

27. The Tribunal referred to the applicant's explanation for his inconsistent recall, but did not accept it:

> *124. The applicant claimed that he has provided different accounts of when he was employed as a lecturer because of his psychological state. He claimed that the incidents that happened to him in Pakistan were traumatic and that this has affected his psychological state and could have caused him to make mistakes in relation to his employment. The Tribunal does not accept this explanation as it does not accept the claims the applicant has made in relation to the incidents that happened to him in Pakistan.*

> *125. The applicant also made a general claim about his present psychological state and the fact that he is depressed because of what has happened to him in Australia. The Tribunal accepts that the applicant could be feeling depressed because he has not completed the course he had enrolled in. The Tribunal accepts that being detained pursuant to the Migration Act could also lead to feelings of depression. However the Tribunal has no medical evidence before it to suggest that the applicant's present psychological state has affected his memory or his ability to recall what he did or what happened to him in Pakistan.*

28. The Tribunal concluded:

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

> *a Convention reason if he returns to Pakistan now or in the reasonably foreseeable future. The Tribunal is unable to be satisfied that the applicant has a well founded fear of persecution for any Convention reason.*

29. The Tribunal thought that the country information showed *"that Lahore is a modern, cosmopolitan and culturally vibrant city"*, and that bombings and attacks by gunmen suffered in Lahore in the last 18 months had been mostly targeted at the offices of State security forces and had *"injured civilian bystanders only incidentally"*.

30. The applicant attempted to appeal to this Court promptly, but suffered a number of setbacks in sending facsimiles to the Federal Court Registry, so that the application which was ultimately accepted on 19 August 2009 was filed outside the time required by s.477(1) of the *Migration Act 1958* (Cth). However, the applicant's explanations for the delay are before the Court, and the Minister ultimately did not oppose the extending of time pursuant to s.477(2). Such an extension was ordered by me at the hearing on 9 November 2009.

31. It is plain that the applicant has lacked legal assistance in the course of his presentation of his case to the Court, and given the time constraints I have done no more than refer him for advice under the free legal advice scheme. However, the applicant was able to raise sufficient substance to his concern for me to give him an adjournment to present further medical evidence. It then became appropriate to allow further time to the Minister to submit further evidence.

32. The contention made by the applicant in a document sent to the Court on 4 October 2009 is:

> *The RRT was in jurisdictional error because it disregarded my psychologist report.*

33. This ground was not explained further in any amended application or written submission, although the applicant has developed it in the course of tendering further evidence of his medical treatment at Villawood Detention Centre. Additional such records have now been put before the Court by the Minister, and it is convenient for me to set out the medical history in chronological order.

34. As I have noted above, the Tribunal had before it only one such record, being a record of an attendance on Ms Subirat on 10 June 2009, to which it gave *"no weight"*. It is now clear from subsequent evidence that Ms Subirat was, in fact, a qualified clinical psychologist.

35. The applicant saw Ms Subirat again on 11 June 2009, being the day before the Tribunal's hearing. Her *"mental state examination assessment"* on that occasion recorded a history from the applicant, and that *"he experienced symptoms associated with depression, predominantly 'procrastination'"*, and *"reports not sleeping well"*. It opined that he had a *"presenting problem"* of:

> *Ongoing issues with DIAC*
>
> *Possible mood disorder (symptoms associated with depression)*

Ms Subirat's assessment described the applicant's appearance and behaviour as *"unkept, polite, articulate, informative, engaged well in discussion"*, his mood and affect as *"depressed, flat, affect congruent with mood"*, and no problems noted were under other headings. Ms Subirat identified a treatment plan for monitoring *"via case management"* and promoting *"ongoing discussion with DIAC"*.

36. It is difficult to detect whether Ms Subirat arrived at a clinical diagnosis on that occasion. She does not appear to have expressly recorded one. However, the aspects of her assessment which I have extracted above would appear to indicate a professional opinion supportive of the applicant's claims that he was suffering symptoms of a depressive condition at the time of the Tribunal's hearing.

37. The next record of an attendance on Ms Subirat is dated 1 October 2009, which shows the applicant presenting with:

> *Depressed mood*
>
> *Referred to Psychiatrist for review/assessment.*

Ms Subirat again noted that the applicant's mood and affect should be assessed as *"depressed mood, affect congruent with mood"*. She did on that occasion refer the applicant to a psychiatrist.

38. An International Health and Medical Services *"standard health event"* record for 6 October 2009 is as follows:

> ***06 October 2009 12:59***
>
> *Alex Vrjosseck*
>
> *Psychiatrist*
>
> ## *Standard Health Event*
>
> *Polite, pleasant, articulate, anxious young man*
>
> *Well educated (Tertiary qualifications with Masters in English Literature)*
>
> *Above average intelligence*
>
> *University lecturer in Pakistan (Lahore) and spoke out re Religious Tolerance*
>
> *Threatened and harassed by Islamic fundamentalists*
>
> *Came to Australia in 2006 to further Postgraduate Studies at Sydney University*
>
> *Fell behind with fees and consequently detained*
>
> *Seeking Protection Visa*
>
> *Rejected by RRT June 2009*
>
> *Federal Magistrate hearing November 2009*
>
> *In Villawood since March 2009*
>
> *C/O Depression, anxiety, fears of deportation and procrastination*
>
> *Mood: depressed*
>
> *Sleep impaired*
>
> *Appetite fair*
>
> *Not suicidal*
>
> *Memory and concentration impaired*
>
> *Impression: Depressive Disorder*

For Avanza 15mgs nocte

Continue ongoing therapy with Psychologist, Patricia. This he has found to be helpful

Review in 2 weeks

39. Subsequent to these attendances, the applicant's matter came on for hearing before me on 9 November 2009, at which the applicant sought an adjournment of the hearing, *inter alia* by reference to his suffering from depression and being under psychiatric treatment and medication. On that occasion he tendered Mr Vrjosseck's report. I considered that this evidence was sufficient to raise an arguable case for the ground of his application, and that it was appropriate to allow him one further opportunity to present evidence in support of a contention that he was denied a meaningful opportunity to participate in the Tribunal's hearing, in the sense that the Tribunal acted upon a misapprehension as to his not suffering from any mental impairments on that occasion. In the written order adjourning the hearing, I included a specific direction:

> *2. The applicant is allowed until 7 December 2009 to present medical evidence, in particular a full report from a psychiatrist or consulting psychologist, showing that due to a mental impairment he was unable meaningfully to participate in the hearing held by the Refugee Review Tribunal on 12 June 2009. No further evidence or submissions will be received from the applicant after that date.*

40. The applicant then sought a further referral to an appropriate professional person, and Ms Subirat on 20 November 2009 referred the applicant for assessment by a psychologist at STARTTS.

41. Such an assessment was prepared by Ms Pearl Fernandes, and her report dated 30 November 2009 was given to the International Health and Medical Services at Villawood Detention Centre, and a copy was also tendered to Court in these proceedings. Ms Fernandes indicated in her report that she is a clinical psychologist with over 11 years' experience working with refugees and asylum seekers at STARTTS (Service for the Treatment and Rehabilitation of Torture and Trauma Survivors). No contest is made in these proceedings as to her qualifications and expertise to give the opinions found in her report.

42. The report is too long for me to extract in full. It is clear that a thorough interview was conducted by Ms Fernandes, involving the taking of a full personal history from the applicant and an assessment of his mental state. In the course of narrating the former, Ms Fernandes referred to the applicant's concerns in relation to the RRT hearing:

> ***RRT Hearing***
>
> *[The applicant] had a date written on the envelope he carried along with him, 12th June 2009. He said it was the date of his RRT hearing and repeated the date aloud. He appeared agitated as he said he had written this date down because he felt he was going to be asked about this hearing and he was having a problem with his memory recently.*
>
> *[The applicant] then went on to describe his humiliating experience at the hearing. He stated;*
>
> > 'Maybe I am more sensitive than others…the process (RRT hearing) reminded me of what I am trying to forget!'
> >
> > 'Words are not adequate to describe what I felt like (at the hearing). I was treated like a criminal by the RRT officer…just because I could not recall some of the dates correctly. Do I look like a criminal? Do I not look like I am educated?
>
> *In an attempt to try and understand how he missed out important details in the RRT hearing and how he could forget the dates/year he was lecturing at the Government University College in Lahore he remarked;*
>
> > 'I could not meaningfully participate in the RRT session. My mental impairment prevented meaningful participation in the hearing.'
>
> *He added that he regretted being treated like;*
>
> > '…A mechanical robot…a computer screen and not a human being with rights and feelings.'
>
> *[The applicant] regrets that he was not given proper advice about the RRT hearing and what it would entail. He said that he was helped by a migration agent to put together his written application. However, the agent did not represent him and was not present at hearing.*

He mentioned that he was being represented by another solicitor in his Federal Court hearing due in a few weeks and had more confidence in this solicitor's abilities and knowledge.

[The applicant] shared his hopes that his appeal for protection would have a positive outcome. His sense of disbelief and outrage was apparent when towards the end of the session, (breaking from the calm demeanour he was trying to present); he clasped his hands, gritted his teeth and in a low tone moaned;

> '…they just do not understand…why they can't just understand'

43. From page 9 of the report, Ms Fernandes summarised the applicant's narration of his mental symptoms, and included her observations of these in the course of his narration:

Summary of Mental State

[The applicant] was reluctant to discuss details of his past experiences. He nevertheless described an oppressive past in which he claims he was always made to feel different by a society that according to him ever since his birth was becoming increasingly intolerant and dominated by Islamic fundamentalism. He narrated an incident where he was surrounded, threatened and harassed by a group of militia, who nearly assaulted him. It is likely that there have been a few other incidents, but [the applicant] found it too distressing to talk about these events, or the circumstances or reasons why his parents changed circumstances made it impossible for them to pay his University fees.

[The applicant] reported and displayed the following dominant symptoms;

Automatic thoughts

Having lived in the university as a student for around three years [the applicant] was yet to come to terms with being detained in the IDC. Not having much to do in the IDC, he said he was flooded and preoccupied with thoughts of his past and current predicament.

Efforts to avoid detailed conversations about past events

[The applicant] found it difficult to talk about his past. He said he wanted to forget his earlier life of oppression and even talking

about the past made him relive the past and made all his memories linked to his past alive and real again.

Apparent distress when recollecting past trauma

[The applicant] was visibly distressed and seemed at a loss for words when describing an incident when he was threatened by a group of men from the militia.

Memory deficits

[The applicant] claims that he has become increasingly forgetful and is finding it hard to concentrate. This difficulty was responsible for him 'missing out' important dates during his RRT hearing. He had written the date of his hearing on the envelope he carried to help him remember, just in case he was queried about the hearing at our meeting.

Persistent symptoms of increased arousal (not present before the trauma)

[The applicant] reported sleep difficulties. He said he seems to have lost control over his sleep routine. He would stay awake till the early hours of the morning, reading a book trying to control his thoughts. As a result he ended up sleeping during the day almost everyday.

Changes in Appetite

[The applicant] claimed that he was physically doing OK and denied any aches and pains. However if he has been skipping meals (as he sleeps during the day) it is likely that he has not noticed as yet a change in his food intake and/or appetite.

Feelings of sadness

[The applicant] appeared sad and his energy seemed low. Even though he smiled during the session his eyes were moist at several points when he attempted to look away to conceal his true feelings.

Inability to articulate thoughts as effortlessly as he was previously used to

[The applicant] is finding it challenging to come to terms with his dilemma. He appears preoccupied with thoughts about its implication and the accompanying threat that he may be returned to his home country. He is experiencing changes in himself

(example memory deficits, difficulties regulating sleep routine) that he is finding hard to understand or control.

In addition, the content of his speech sounded repetitive. Being in 'survival' mode he appeared stuck, almost 'frozen' and admitted his surprise that he could not find words to express himself. Despite claiming that he wanted to be a writer he was having difficulties articulating his thoughts easily and felt the need to repeat a sentence in a slightly different way, like he had to rehearse before he was satisfied with the way he had articulated a sentence.

Alexithymia and emerging underlying feelings of anger

[The applicant] confided that he was finding it hard to express and verbalise his true feelings. Given his disappointment and despair at being detained in the IDC it is understandable why he felt emotionally numb. However, what is concerning are the underlying feelings of anger.

[The applicant] feels terribly misunderstood and this feeling has intensified following the RRT hearing. His experiences have rekindled his feelings of being treated differently and not being understood, since his childhood, by the dominant society he grew up in. The very situation he hoped he had escaped from, he believes is now being repeated in his current environment. His anger was apparent in his body language when he gritted his teeth and muttered '…they just do not understand…why they can't just understand'.

It is likely that he is angry at himself as well for not putting his paperwork together and initiating the application for protection as soon as he arrived in Australia. He needs to be monitored as if his distress is not managed appropriately his anger could easily be turned towards his own self.

***To summarise,** [the applicant's] provisional diagnosis is that of Post Traumatic Stress (PTSD) disorder with Depressive features consistent with his reported experiences in his home country, disappointment at being detained in a detention centre and uncertainty about his future. His coping strategy to manage his worry and anxiety appears to be dominated by avoidance and a reluctance to discuss details of past experiences. Lack of a clear understanding of the refugee determination process is not helping his current emotional state.*

> *[The applicant] reports that he enjoyed a 'normal' life at Sydney University prior to being detained. He resents that it has been prematurely terminated but retains hope that his appeal for protection will have a positive outcome and that he will be given an opportunity to continue and complete his thesis and reconnect with his dream of becoming a writer of fiction books in a moderate democratic society.*
>
> *Until then [the applicant] needs assistance with supportive counselling; with a focus on self care strategies that emphasise a healthy sleep routine and diet. He needs to be explained clearly the refugee determination process (with a time frame if possible) to help him better understand and accept why he is being detained. Appropriate CBT (Cognitive Behaviour Therapy) that incorporates psycho education and strategies to assist him address his growing anger and/or negativity is likely to prove beneficial. If detained for an indefinite period however, he is at risk of losing hope for the future, becoming increasingly negative and developing a complex form of PTSD (Complex Post Traumatic Stress Disorder) and/or Depression coupled with the risk that he could easily turn his seething anger towards himself.*

44. In my opinion, the statements in the report in the above extract, from under the heading *"Automatic thoughts"* and subsequently, indicate opinions by Ms Fernandes that the findings which she records were accepted by her. This seems implicit in the reference to *"displayed"* the dominant symptoms. Importantly to the issues which I must address, I would understand Ms Fernandes's statement in relation to memory deficits: *"this difficulty was responsible for him 'missing out' important dates during his RRT hearing"*, to reflect an opinion by Ms Fernandes to that effect. I would also read the report as including that and other opinions, in response to the applicant's narration of his experiences at the RRT hearing, and his explicit or implicit request that she provide a report which would be of use *inter alia* in the course of the present proceedings in accordance with my previous direction.

45. Contrary to the submission of counsel for the Minister, I therefore do not accept that Ms Fernandes did not provide opinions about the applicant's mental impairments as they stood at the time of the Tribunal's hearings, that is, in June 2009, and specifically at the hearing of the Tribunal.

46. Considering the whole of the medical evidence before me, and accepting that it might not be as comprehensive as might be hoped in a medico-legal dispute in litigation, I consider that the findings of dominant symptoms by Ms Fernandes in November 2009 should be applied to make findings on the balance of probabilities that the applicant was suffering from mental impairments at the time of his hearing with the Tribunal. The report should not be regarded entirely as a piece of subsequent medical opinion, since confirmation that there were symptoms of depression exhibited in June 2009 can be found in the records of attendances on Ms Subirat in June 2009 and on Dr Vrjosseck in October 2009.

47. Considering all the medical evidence now before me, I am satisfied, to the contrary of the findings of the Tribunal, that the applicant probably gave his evidence to it when suffering from mental impairments affecting his memory, ability to recall details, and capacity to engage in discussion about his history and opinions. I consider it likely that he was suffering from a treatable medical condition involving symptoms affecting memory, articulation, and distress when recollecting past trauma. I find that the applicant was, in fact, suffering from such a condition when appearing before the Tribunal on 12 June 2009.

48. The applicant's ground of appeal can in legal terms be regarded as raising several issues of jurisdictional error, as to the applicant's capacity to participate in a 'meaningful' hearing, the Tribunal's appreciation of his true impairments and how this affected its reasoning, and the Tribunal's investigation of the issues of impairment raised before it by the applicant. These are issues which I previously identified and addressed in *SZIWY v Minister for Immigration & Anor* [2007] FMCA 1641.

49. The circumstances in *SZIWY* were similar but not entirely the same as the present, in that the Tribunal in that case had no medical evidence about medical treatment being given to the applicant in detention at Villawood, and entirely ignored the suggestion by the applicant's solicitor that she was suffering from mental impairments which should be taken into account when assessing her evidence. Clear medical evidence of psychiatric treatment administered at Villawood, and proving the existence of material impairments, was later adduced

before the Court. I therefore found jurisdictional error on several grounds, including the Tribunal's failure to consider the solicitor's submission, its failure to consider investigating the medical evidence held at Villawood, and its assessment of the applicant's evidence upon the false assumption that she had no mental impairments affecting her presentation as a witness. I concluded that she had been denied an opportunity to provide her evidence meaningfully in the hearing held by the Tribunal.

50. In the present case, the Tribunal did consider the applicant's claims to be suffering mental impairments, and did consider the evidence he showed to it. That evidence, in my opinion, left it open to the Tribunal to not be persuaded that the applicant did suffer from any relevant medical condition. Upon the evidence which was before it, I consider that it was open to it to assess the applicant's evidence on an assumption that he lacked any material impairment. It was therefore open to it to give substantial, even overriding, weight, to defects in the presentation by the applicant of his case at the hearing, particularly in relation to his inarticulate opinions, lack of details, vagueness, and inaccurate memory of dates and details.

51. However, as in *SZIWY*, the evidence now before the Court reveals that the Tribunal's assumption as to the applicant's mental health was wrong, and the issue is whether jurisdictional error can be found by the Court in that circumstance alone.

52. In *SZIWY*, I explained such a conclusion on the facts in that case, and discussed the relevant authorities:

> *28. I conclude from this material, considered in the light of the contemporaneous lay observations of the applicant's solicitor, the medical records from Villawood, and my reading of the transcript, that the applicant was probably suffering impairments from mental illness at the time of her interview by the Tribunal, and that her impairments probably affected her ability to respond "normally" to the Tribunal's questions seeking to investigate and assess her claimed history. I consider that had the Tribunal known of her medical condition it is probable that its evaluation of the credibility of the applicant's history would have been materially affected, and it is quite possible that the conclusions it drew might have been significantly different.*

Jurisdictional failure of requirements under s.425

29. *Section 422B(1) of the Migration Act, as applicable to the present matter, provided that the procedural provisions of Division 4 of Part 7 of the Act are* "taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with". *In that Division, an important provision dealing with procedural fairness is found in s.425(1), which provides that* "the Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review".

30. *Notwithstanding some doubt in the Federal Court whether this section raises merely a requirement to give a hearing invitation, recent judgments of the High Court locate within s.425(1) a significant right for an applicant to participate in a real and meaningful hearing, which in fact affords the opportunity described in s.425(1) (see* SZFDE v Minister for Immigration & Citizenship *[2007] HCA 35 at [30]-[35], [48]-[53], also* Applicant NAFF of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs *(2004) 221 CLR 1 at [27] and [32],* NAIS v Minister for Immigration & Multicultural & Indigenous Affairs *[2005] HCA 77 at [37], [164], and [171], and* SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs *[2006] HCA 63 at [26]-[29], and [32]-[37]).* SZFDE *confirms the opinion of a Full Court in* Minister for Immigration & Multicultural & Indigenous Affairs v SCAR *(2003) 128 FCR 553 at [37], that a breach of s.425 can occur as a result of circumstances unknown to the Tribunal and beyond its control. It also supports the Full Court's opinion at [38] as to the jurisdictional nature of the requirements implicit in s.425(1).*

31. *In* SCAR, *an applicant gave evidence at a hearing in a noticeably vague and confused manner. Unknown to the Tribunal, he had received recent news of his father's death, and in the opinion of a psychologist he was* "in no condition to handle this interview". *The Full Court said at [14]:* "Clearly if the Tribunal had been aware of the respondent's distress it may have proceeded differently. At the very least it may not have made the credibility findings it did make in light of the alternative explanation for the inadequacy of that evidence".

32. *At [37], they said* "the statutory obligation upon the Tribunal to provide a 'real and meaningful' invitation exists whether or not the Tribunal is aware of the actual circumstances which would defeat that obligation". *They included in the circumstances where a breach of s.425(1) would occur* "where the fact or event resulting in unfairness was not realised by the Tribunal". *In the case before them, they concluded that the refugee claimant* "did not receive the fair hearing required by the Act"*, because the Tribunal had assessed the applicant's credibility adversely by reference to his vague responses, without taking into account the possible explanation given by the psychologist.*

33. *I consider that the present case falls within the principles and circumstances found in* SCAR. *As I have found above, I am satisfied that the applicant's capacities as a witness were materially affected by mental impairments at the hearing, and that these were not taken into account by the Tribunal before concluding that the applicant was not* "a witness of truth" *and* "has been deceptive and untruthful". *This resulted in an unfairness, which establishes a breach of the Tribunal's obligations under s.425(1).*

34. *I accept that, unlike* SCAR, *in the present case the unfairness of the hearing might not have been remedied by adjourning the hearing or affording a further hearing, due to the chronic nature of her impairments. I also accept that the Tribunal's duty to complete a review of the delegate's decision might in such a case result in its inability ever to be able to afford the applicant a hearing in which she could give evidence unhampered by mental impairments. However, the essential unfairness in this case, as in* SCAR, *arose from the Tribunal's assessment of the applicant's evidence given at the hearing as if she were a person without impairment.*

35. *The unfairness in relation to the hearing also arose in this case from the Tribunal's failure to take into account the concern about the applicant's mental capacities which was raised by her solicitor. I have made findings in relation to this above. The Tribunal failed to consider that concern in both a substantive and a procedural way. Substantively, the failure contributed to an unfair process of assessment of the applicant's evidence given at her hearing. The failure therefore supports my conclusion that a breach of s.425(1) occurred.*

> *36. Procedurally, the Tribunal failed to consider whether to investigate the issue of the applicant's mental capacities, and, in particular whether to call for medical records available at Villawood or for other psychological assessments, before reaching conclusions on the applicant's evidence and completing its review. In my opinion, this failure also resulted in jurisdictional error. In the circumstances known to the Tribunal which I have found above, I consider that it was not open to the Tribunal to proceed without first considering what, if any, inquiries should have been made into the concerns raised by the applicant's solicitor. The failure of the Tribunal to consider whether to investigate the applicant's mental capacities constituted, in my opinion, a failure* "to comply with the duty imposed by s.414(1) to conduct the review and the duty under s.425(1) to hear from the [applicant]" *(cf.* Applicant NAFF of 2002 *(supra) at [32]-[34]).*

53. In the present case, it is unnecessary for me to arrive at any conclusion whether the Tribunal had obligations of inquiry in relation to the course and nature of treatments being obtained by the applicant at Villawood Detention Centre. Such duties are exceptional, but may arise (see *Minister for Immigration & Citizenship v SZIAI* [2009] HCA 39 at [25]). The present case is less clear than *SZIWY* in this respect.

54. However, in my opinion, the reasoning which I applied in *SZIWY* at [33], arising from *SCAR*, is applicable to the present case. The High Court authorities to which I referred in [30] gave implicit support for the Full Court's opinion in *SCAR*, that s.425 raises implicit obligations of fairness which are jurisdictional and may unconsciously be denied by the Tribunal's decision, based on a variety of circumstances subsequently revealed to the Court. The implication of jurisdictional obligations of procedural fairness has received further confirmation in more recent judgments of the High Court (cf. *SZIAI* (supra) at [25], and *Minister for Immigration & Citizenship v SZIZO* (2009) 238 CLR 627, [2009] HCA 37 at [34]). I therefore remain of the opinion that the principle which I applied in *SZIWY* remains good law and binding on this Court.

55. The Minister's counsel made submissions on law and fact contrary to my above conclusions. I have taken his submission on fact into account when making my above findings. In relation to legal principle,

he submitted that *SCAR* supported only a jurisdictional error concerning persons totally unfit to present evidence to a Tribunal. He submitted that the implications of *SCAR* were confined to the proposition addressed by Branson J in *NAMJ v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 983.

56. In that case, the issue which was litigated was whether the applicant at the time of his attendance at a Tribunal hearing was totally unfit to participate in a hearing. Evidence which the applicant wished to rely on in this respect had been presented to the Tribunal, and then to the Court. It was not, therefore, a case where the Tribunal proceeded upon assumptions about an applicant's capacities which were subsequently disproved.

57. Her Honour had difficulty with the Migration Act being construed to give rise to a jurisdictional error arising from unfitness to attend a hearing under s.425, since her Honour thought that this might result in the Tribunal never being able to complete its review. This concern appears to have led her Honour to confine the effect of *SCAR*. She said:

> *49 An additional, but related difficulty is that, as I understand the approach adopted in* MIMIA v SCAR, *if an applicant is not fit to give evidence before the Tribunal, there can be no hearing before the Tribunal as required by the Act. A purported hearing, held while the applicant was not fit, will be of no statutory significance no matter what procedural assistance or other consideration was afforded to the applicant during the course of the hearing – and no matter what the outcome of the hearing. No finding made as a consequence of the hearing will be of any significance.*
>
> *50 Nonetheless, I consider that I am compelled, as the parties both contended that I am, to proceed on the basis that the Tribunal in this case will have acted outside its jurisdiction if the invitation which it gave to the applicant under s 425 of the Act was not a* 'meaningful invitation' *because the applicant was not fit to give evidence and present argument to the Tribunal.*

58. Branson J then closely examined the medical evidence, and concluded:

> 69 *It seems to me that, by analogy with a claim of procedural unfairness, the applicant must bear the onus of establishing that he was unfit to take part in the Tribunal hearing (*Re Minister for Immigration and Multicultural Affairs; Ex parte Lam *[2003] HCA 6; (2003) 195 ALR 502 at [36] per Gleeson CJ;* Rose v Bridges *(1997) 79 FCR 378 at 386 per Finn J). Having regard particularly to the assessment of the applicant made by the Tribunal member, I am not satisfied that at the time of the Tribunal hearing the applicant lacked the capacity to understand the concerns relating to his claim to be entitled to a protection visa that the Tribunal raised with him, including the Tribunal's concern as to his credibility. Nor am I satisfied that he lacked the capacity to understand and respond to the questions put to him by the Tribunal. Further, I am not satisfied that the applicant lacked the capacity to give an account of his experiences in Bangladesh or the capacity to present arguments in support of his claim to be entitled to a protection visa. For these reasons I am not satisfied that the applicant's psychological condition was such as to deprive the hearing conducted by the Tribunal of the meaning which the Act intended it to have.*

59. The Minister's counsel also referred me to a judgment of Nicholson J in *WAHU v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 890, where his Honour addressed a similar contention that the applicant had been totally unfit to give evidence and present arguments, and was not persuaded that there was evidence of this:

> 39 *I agree with the respondents that save for some passages in the medical notes, none of the new evidence is directed to the relevant question, that is whether, having regard to the particular circumstances of the case including the intended purpose of the hearing before the Tribunal and the support and assistance available to the appellant, there was compliance with the implied requirement that an applicant be fit to give evidence and present arguments, or whether the appellant's psychological state rendered the Tribunal hearing a nullity: see* NAMJ v Minister for Immigration & Multicultural & Indigenous Affairs *(2003) 76 ALD 56 at [53] and at [58];* WAJR *at [43];* WAIU v Minister for Immigration & Multicultural & Indigenous Affairs *[2004] FCA 1 at [40]*.

60. It is to be noted that other justices in the Federal Court also had difficulty accepting that s.425 gives rise to more than a right to receive an invitation to a hearing, and as to the correctness of *SCAR* (cf. Graham J in *Minister for Immigration & Multicultural Affairs v SZFDE* (2006) 154 FCR 365 at [212]). However, the subsequent High Court authorities cited above now provide clear authority that the Act intends jurisdictional obligations of fair procedures and decision-making in relation to the opportunity to be afforded to an applicant by way of a hearing held pursuant to s.425 of the Migration Act. There are now several streams of jurisprudence, suggesting that obligations under s.425 encompass transient impediments suffered by an applicant at a hearing, including significant translator errors, the actions of fraudulent agents, some misadventures affecting attendance, and unknown medical impairments. These impediments may readily be remediable by the Tribunal and not prevent it completing its review jurisdiction, if it is aware of the relevant circumstance before it makes a decision and responds appropriately, or if it conducts a second hearing either on its own initiative or after judicial review.

61. In my opinion, understood in the light of recent High Court and Federal Court judgments in such cases, the dicta of the Full Court in *SCAR* at [33] and [37] should be understood as pointing to a principle of jurisdictional error broader than the principal of total unfitness identified by Branson J, and as encompassing a variety of circumstances, including transient and remediable circumstances affecting the validity of a decision by the Tribunal made after a purported, but defective, hearing held under s.425.

62. In *SCAR*, their Honours said:

> *33 Pursuant to s 425 of the Act the Tribunal is under a statutory obligation to issue an invitation to an applicant to attend a hearing. That indicates a legislative intention that an applicant is to have an opportunity to attend an oral hearing for the purpose of giving evidence and presenting argument. The invitation must not be a hollow shell or an empty gesture:* Mazhar v Minister for Immigration and Multicultural Affairs *(2000) 64 ALD 395 at [31]*.
>
> …

> *37 On the other hand, it is also clear that s 425 of the Act imposes an objective requirement on the Tribunal. The statutory obligation upon the Tribunal to provide a "real and meaningful" invitation exists whether or not the Tribunal is aware of the actual circumstances which would defeat that obligation. Circumstances where it has been held that the obligations imposed by s 425 of the Act have been breached include circumstances where an invitation was given but the applicant was unable to attend because of ill health:* NAHF v Minister for Immigration and Multicultural and Indigenous Affairs *(2003) 128 FCR 359. They also include circumstances where the statements made by the Tribunal prior to the hearing have misled the applicant as to the issues likely to arise before the Tribunal:* VBAB v Minister for Immigration and Multicultural and Indigenous Affairs *(2002) 121 FCR 100. They also include circumstances where the fact or event resulting in unfairness was not realised by the Tribunal. For example, circumstances such as where the applicant was invited to attend and did attend before the Tribunal, but was effectively precluded from taking part because he could not speak English and a translator was not provided or was inadequate:* Tobasi v Minister for Immigration and Multicultural Affairs *(2002) 122 FCR 322;* W284 v Minister for Immigration and Multicultural Affairs *[2001] FCA 1788.*

63. In my opinion, *SCAR* stands as binding authority for an underlying principle going beyond the issue of fitness to *"represent himself before the Tribunal"* on the day of a hearing, which was raised by the facts of that case (see [13]-[16] and [40]-[41]). The broader foundation of the Full Court's decision is pointed to by the analogous circumstances that their Honours identify in [37] above. These include categories of jurisdictional error where a substantial error of translation has prevented the applicant meaningfully communicating his evidence to the Tribunal, where it assessed his evidence upon false assumptions as to his evidence, and where this materially affected the outcome (see authorities such as *Perera v Minister for Immigration & Multicultural Affairs* (1999) 92 FCR 6, *VWFY v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1723, *M175 of 2002 v Minister for Immigration & Citizenship* [2007] FCA 1212, *SZGYM v Minister for Immigration & Citizenship* [2007] FCA 1923, and *SZJBD v Minister for Immigration & Citizenship* [2009] FCAFC 106 at [73]). Plainly, such a jurisdictional error affecting a hearing of a Tribunal

does not usually, if ever, have the drastic and irremediable effects which concerned Branson J. The important consideration of fairness, which in my opinion the Full Court's judgment in *SCAR* points to, is that a significant impairment to communication at a hearing arising from language or mental state should be taken into account by the Tribunal when assessing the person's evidence, and that the Tribunal should not make its decision based upon a false assumption that the impairment did not exist. If the Tribunal does make a decision upon a false assumption as to the opportunity enjoyed by the applicant at the hearing under s.425, and if this has materially affected the Tribunal's conclusions, the Tribunal has failed to exercise its jurisdiction according to law.

64. I accept the submission of the Minister in the present case that the evidence now before me does not indicate that the applicant was entirely unfit to attend the Tribunal's hearing and answer its questions, whether on 12 June 2009 or at a later date. However, I am satisfied with the benefit of the additional evidence now before the Court, that the Tribunal was deprived of the opportunity to assess the evidence given by the applicant in the light of his diagnosed mental impairments, and that the applicant was denied a *"real and meaningful"* opportunity to participate in the hearing and to have his evidence fairly assessed by the Tribunal in the light of his impairments.

65. Importantly to the grant of relief in this situation, the Tribunal in its reasoning and its ultimate decision has plainly given a great deal of weight, even overriding weight, in arriving at its adverse conclusions about the applicant's credibility upon matters of demeanour, memory, and consistency. In relation to all of these matters, the applicant was denied a fair opportunity of having the Tribunal assess whether those defects were attributable to a mental impairment, or to concerns about veracity.

66. For the above reasons, I am satisfied that the decision arrived at by the present Tribunal was affected by jurisdictional error, and I therefore propose to order writs of mandamus and certiorari.

67. In relation to costs, the applicant does not seek any costs. The Minister seeks costs in relation to the adjournment of the hearing on

9 November 2009, and possibly also the adjournment of the hearing on 14 December 2009. Both of those adjournments came about because of the absence of medical evidence accompanying the applicant's original application to the Court or filed within the time limits I directed for evidence at the first court date.

68. However, that first court date was held on 8 September 2009, and I appointed an expedited hearing for 9 November 2009 because the applicant was in immigration detention. The applicant was, under the timetable, given until 5 October 2009 to file evidence. As I have indicated, shortly before 9 November 2009 he produced a medical report of an attendance on a psychiatrist at Villawood, but this was insufficient to win him the case on that day, and he applied for an adjournment to obtain further medical evidence.

69. The adjournment on 14 December 2009 occurred because I had listed the matter for judgment on that day, but on an understanding that if the applicant produced additional evidence favourable to his case, a further adjournment would probably be required to allow the Minister to respond to it. The Minister was represented on that occasion only by a solicitor, who was not able to participate in any substantive discussion of the case. In effect, therefore, the Minister has faced two contested hearings, where efficiently conducted litigation might have required only one hearing. The second hearing has required the briefing of second counsel, due to the unavailability of counsel originally briefed to attend today.

70. I accept that if this were normal *inter partes* litigation, I might be inclined to require the applicant to pay some costs incurred by reason of one of the above adjournments. However, it was not ordinary *inter partes* litigation. Importantly, because the applicant was in immigration detention and was produced to the Court by the Minister, the applicant was faced with a timetable at the commencement of the proceeding which was particularly short, and in retrospect, was insufficient to allow him a proper opportunity to obtain medical evidence in support of the contention which, it appears to me, he has attempted to pursue at all times in the Court. The Minister's expense of briefing a second counsel has arisen from similar considerations, which pointed in my mind to the urgency of the matter and the need to

arrive at a final hearing and judgment before Christmas. The applicant's contention has now been upheld by me.

71. In all the circumstances, in my opinion, the appropriate exercise of discretion, considering the interests of the administration of justice in this case, points towards the Court making no order as to costs.

I certify that the preceding seventy-one (71) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 21 January 2010