FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZIPL v MINISTER FOR IMMIGRATION & ANOR *[2009] FMCA 585*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming persecution in Syria and then Iraq – issue of nationality – whether the Tribunal needed to consider the possibility of dual nationality considered – whether the applicant was invited to a hearing in accordance with s.425 of the *Migration Act 1958* (Cth) considered.

Migration Act 1958 (Cth), ss.36, 424A, 425, 441A, 441AA, 441G

Al-Anezi v Minister for Immigration [1999] FCA 355
Jong Kim Koe v Minister for Immigration [1997] FCA 306
Le v Minister for Immigration [2007] FCAFC 20
Minister for Immigration v SZIPL [2009] FCA 143
NAVK v Minister for Immigration [2005] FCAFC 124
SZIPL v Minister for Immigration & Anor [2007] FMCA 643
SZIPL v Minister for Immigration & Anor [2008] FMCA 1501
WAJS v Minister for Immigration [2004] FCAFC 139

Applicant:	SZIPL
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1432 of 2008
Judgment of:	Driver FM
Hearing date:	23 June 2009
Delivered at:	Sydney
Delivered on:	24 July 2009

REPRESENTATION

Solicitors for the Applicant:	Mr R Turner Turner Coulson Immigration Lawyers
Counsel for the Respondents:	Mr G Kennett Mr J Clarke
Solicitors for the Respondents:	DLA Phillips Fox

ORDERS

(1) The application is dismissed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1432 of 2008

SZIPL
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. I have before me for the second time an application to review a decision of the Refugee Review Tribunal ("the Tribunal"). The decision was handed down on 27 September 2007. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa. On 28 November 2008 I gave judgment in favour of the applicant[1]. However, the matter has been remitted to the Court for rehearing pursuant to orders made by the Federal Court on 20 February 2009[2].

2. I dealt with the background to the applicant's protection claims and the Tribunal decision on them in my earlier judgment at [2] – [16]. For present purposes the following background is relevant.

[1] *SZIPL v Minister for Immigration & Anor* [2008] FMCA 1501
[2] *Minister for Immigration and Citizenship v SZIPL* [2009] FCA 143

3. In her visa application the applicant listed her citizenship (at birth and presently) as 'Syrian'[3] and said that she was seeking protection so as not to have to go back to that country.[4] She claimed that her mother was an Iraqi national and her father, Mr H, and her two brothers were also Syrian.[5] In a supporting statement she described how the family had fled from Syria to Iraq when she was a baby; she had grown up and been educated in Iraq; the family had fled from Iraq back to Syria in 1994; and she had suffered discrimination in Syria as a result of her Christian religion and her Iraqi background (and suspected affiliation with the Iraqi Baath Party). Mr H was described here as her stepfather.[6]

4. We are dealing in this matter with the second of two Tribunal decisions, the first having been set aside by this Court.[7] At a hearing before the Tribunal as initially constituted, the applicant expanded on these claims, but now said that she was an Iraqi national and had obtained a Syrian passport only through bribery: her natural father, like her mother, was Iraqi.[8] She said that she was unable to return safely to either Syria or Iraq: in Iraq she had been harassed by the Iraqi Baath Party.[9]

5. After the setting aside of its first decision the Tribunal was reconstituted and considered the applicant's case again. It now had before it the departmental files relating to two earlier visa applications which the applicant had made, in which she had supplied documents relating to her parents and her status in Syria. In those applications she had claimed to be Syrian and in one she had said that she had no other nationality. She had also described Mr H in those applications as her father.[10]

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[3] court book ("CB") 15.
[4] CB 20.
[5] CB 6.
[6] CB 29.
[7] *SZIPL v Minister for Immigration & Anor* [2007] FMCA 643
[8] CB 117.
[9] CB 117-118.
[10] CB 150. SZIPL's 1999 application for a prospective spouse visa and its supporting material are at Supplementary Court Book (SCB) 1- 40. See in particular SCB 2 (Q13-Q15), SCB 33. The application was initially unsuccessful (SCB 41) but was remitted to the Department by the Migration Review Tribunal (SCB 49), further documents were submitted (SCB 57-92) and the visa was granted in January 2004 (SCB 93). Her application for a spouse visa (lodged in September 2004) and its supporting documents are at CB 168-199. See in particular CB 172 (Q19). This application was

6. As well as writing to the applicant (through her adviser) to invite her to attend a hearing,[11] the Tribunal wrote to her (again, through her adviser) on 22 August 2007 inviting comment on the material in her earlier visa applications.[12] It did not receive a response to either letter, and the Applicant did not appear on the day appointed for the hearing.[13]

7. Relying on the documentary material before it, the Tribunal concluded that Mr H was the applicant's father.[14] It also concluded that, even if he was her stepfather, all official documentation treated him as her father and this was sufficient for her to be regarded by the Syrian authorities as a national of that country. It went on:

> *The Tribunal finds that the applicant is a national of Syria. The Tribunal does not accept the applicant's claim raised at the hearing of the previously constituted Tribunal that she is a national of Iraq and not a national of Syria. Given the finding that the applicant is a national of Syria, the Tribunal has assessed her claims against Syria as her country of nationality.*[15]

8. The Tribunal went on to assess the applicant's claim to fear persecution in Syria. It was not satisfied that she faced a real chance of persecution in that country:

   a) as a result of being Iraqi (which the Tribunal did not accept she was) or having spent much of her life in Iraq (which the Tribunal did accept);[16]

   b) as a result of being thought to belong to the Iraqi Baath Party;[17]

   c) as a result of her religion;[18] or

   d) as a woman.[19]

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ultimately unsuccessful because SZIPL's relationship with an Australian citizen had ended (CB 215 [27]).

[11] CB 133, 150-151.
[12] CB 136, 151.
[13] CB 151. (See the affidavit of Raymond Charles Turner affirmed 3 November 2008 for a partial explanation of these events.)
[14] CB 155-156.
[15] CB 156.
[16] CB 156.
[17] CB 157.
[18] CB 157.
[19] CB 157-158.

The application and evidence

9. The position of the applicant in relation to the application before the Court is the same as in the earlier proceeding before me[20]. I have the same material before me as in the earlier proceeding.

Submissions

10. The applicant continues to assert that she was not properly invited to the hearing before the Tribunal pursuant to s.425 and s.441AA(5) of the *Migration Act 1958* (Cth) ("the Migration Act") because the invitation sent by facsimile was not in fact received on her behalf by her authorised recipient. Secondly, the applicant contends that the Tribunal failed to consider all of the integers of her claims because her claims raised the possibility that she was a dual citizen of both Iraq and Syria (although she contended that she was a national of Iraq and not Syria) and, if the applicant was a dual citizen, the Tribunal was required to consider:

    a) whether she would be refouled to Iraq by Syria; and

    b) whether she would suffer harm amounting to persecution in Syria as a person who held Iraqi citizenship.

11. The Minister relies upon the following submissions:

> *Issues*
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> *The Court's earlier judgment was the subject of an appeal by the Minister to the Federal Court. Flick J allowed the appeal and remitted the matter to this Court, essentially on the basis that the issue on which the Court had decided the case in the Applicant's favour had not been the subject of argument.*[21] *The whole matter is thus before the Court, although the earlier course of the proceedings limits the range of issues upon which further argument is appropriate.*
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> *In her most recent written submissions the Applicant relies on three grounds:*

[20] See *SZIPL v Minister for Immigration* at [17]
[21] [2009] FCA 143 at [3]-[4].

(1) a failure to invite the Applicant to attend a hearing in the manner required by the Migration Act 1958*;*

(2) failure to consider all integers of the Applicant's claims; and

(3) failure to apply the law properly to the facts as found.

These grounds resolve themselves into two broad issues: whether the Tribunal fell into error because its hearing invitation was not seen by the Applicant's adviser (despite having been sent by facsimile to the correct number); and whether the Tribunal dealt properly with the question whether the Applicant was an Iraqi national. The second issue appears to encompass grounds 2 and 3 and to overlap substantially with the ground on which the Court previously decided against the Minister.

The first issue was correctly dealt with by this Court in its earlier reasons.[22] *In the appeal from the Court's earlier judgment, the Applicant sought to challenge this reasoning by way of a notice of contention; but the point was ultimately not argued or decided in the Federal Court. It is understood that the Applicant continues to press her first ground only formally, so as to reserve her position in case of a further appeal. In any event the Minister submits that the Court's earlier conclusion on the issue was correct and should not be revisited.*

The remainder of these submissions deal with the second issue.

The nationality issue

Dual nationality and refugee status

*The issue that the Tribunal had to determine was whether the Applicant was a person to whom Australia had protection obligations under the Refugees Convention (*Migration Act 1958 *s 36(2), read in the light of s 36(3)-(5) and ss 91R-91U). Under the Convention, the effect of dual nationality is to create an additional hurdle that the applicant for refugee status must clear – not an additional ground (or set of grounds) upon which he or she might be found to be a refugee. This is because, in order to establish refugee status, the applicant must show a well-founded fear of persecution in each of the countries of which he or she is a national.*[23]

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[22] At [21]-[30].

[23] See the definition of 'refugee' in Article 1A; Hathaway, *The Law of Refugee Status* (1991), 57-59; Goodwin-Gill, *The Refugee in International Law* (3rd ed 2007), 72.

If the Tribunal had been satisfied that the Applicant faced a real chance of persecution in Syria, it would have needed to know whether she was a national (or a habitual resident) of Iraq, in order to determine whether her application for a protection visa had to be refused either pursuant to the definition of a refugee or under s 36(3) of the Migration Act 1958.

However, once the Tribunal found that the Applicant was a national of Syria, and that she did not *face persecution there, that was sufficient to require a conclusion that she was not a person to whom Australia had protection obligations under the Convention. The question whether she had one or more other nationalities became irrelevant.*

In order to succeed, therefore, the Applicant must demonstrate error in the conclusion that she did not have a well-founded fear of persecution in Syria.

The Applicant's asserted Iraqi nationality

The Applicant now argues that the possibility that she was an Iraqi national was potentially relevant to the Tribunal's decision in two ways, namely:

(a) because one of the things she feared was refoulement from Syria to Iraq; and

(b) because the Tribunal needed to consider a claim that she faced persecution in Syria on the ground of having Iraqi nationality.

The short answer to ***both*** *arguments is that the Tribunal expressly recorded that it 'has not accepted that the applicant is an Iraqi national'.*[24] *To the extent that the possibility of the Applicant having Iraqi nationality was relevant, the Tribunal reached a conclusion about the issue. This was a conclusion of fact which was open to the Tribunal.*

To reach the conclusion that the Tribunal somehow ignored the possibility of the Applicant having dual nationality, it is necessary to read its reasons as not meaning what they say. The Applicant's claim might have been summarised in a 'bundled up' way (as being Iraqi and not Syrian);[25] *but the Tribunal expressed distinct conclusions. It first concluded that she was a Syrian national;*[26]

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[24] CB 156.6.
[25] CB 156.4.
[26] CB 156.4.

then, in the course of considering whether she had faced harm in Syria on the ground of being an Iraqi, noted its view that she was not an Iraqi national.[27] *This is sufficient to confirm that the Tribunal had in mind the possibility of the Applicant holding two nationalities and rejected it.*

Two further points should be briefly noted.

(a) Tribunal members may be presumed to have some familiarity with the terms of the Convention definition (which refers to situations of multiple nationality) and with broad principles of nationality. The Court should be very slow to infer, from ambiguous phrasing in a statement of reasons, that a member was unaware of the possibility of an applicant having two nationalities.

(b) If it were shown that the Tribunal had assumed the holding of one nationality (Syrian) to exclude the possibility of holding others, that would be no more than an error as to the content of foreign law – ie, an error of fact. It would not go to jurisdiction.

As to the ***first*** *of the Applicant's arguments, one of the forms of harm which she claimed to fear in connection with Syria was that 'at any time they can put me between the Syrian and Iraqi borders'.*[28] *This claim was noted by the Tribunal*[29] *and could possibly be seen as a claim to fear* refoulement *to Iraq.*

It is important to note, however, that being expelled from Syria was simply a form of harm *which the Applicant claimed to fear. To erect that claim into a viable case to be considered a refugee, she had to convince the Tribunal (*inter alia*) that she feared this form of harm as a consequence of being singled out for a* Convention reason*, and that such fear was* well-founded*.*

The basis upon which the claim to fear expulsion from Syria was advanced ('there is noone to protect me … and I am a stranger') was emphatically rejected: the Applicant was found to be a Syrian national, with a Syrian father (or stepfather) living in that country, who could readily demonstrate her right to live there. There was nothing to suggest that she faced refoulement *to Iraq on some other basis. The suggestion that this might happen to the Applicant was thus rejected on the facts: there was therefore no need for the Tribunal to analyse whether expulsion from Syria* per

[27] CB 156.6.
[28] CB 29.
[29] CB 148.

> se, *or the treatment she might face in Iraq, would amount to persecution.*
>
> *As to the* ***second*** *argument, it has been noted above that the Tribunal was not satisfied that the Applicant faced harm in Syria as a result of being Iraqi. It accepted that she may well have been* perceived *as an Iraqi for a time but would not have face persecution on this basis;*[30] *and it noted that thousands of Iraqis lived in Syria without evidence of mistreatment.*[31] *It is far from clear what, if anything, having Iraqi nationality as a matter of law would have added in circumstances where the Applicant's potential persecutors already perceived her to be an Iraqi. However, it is clear that she advanced no distinct claim to fear persecution as a result of having Iraqi* nationality *(as distinct from her Iraqi* background *and her asserted lack of Syrian nationality). Nor did any such claim arise clearly from the material before the Tribunal.*[32]

Consideration

12. I maintain the views I expressed in my earlier judgment at [21]-[30] in relation to the Tribunal's statutory duty of communication:

> *There is no doubt that, once Mr Turner was appointed as the applicant's authorised recipient on 25 May 2007, the Tribunal's obligation was to communicate with him on behalf of the applicant at one or other of the postal, telephone, facsimile or e-mail addresses given for him*[33].
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> *Section 441G of the Migration Act provides that:*
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> (1) If:
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> (a) a person (the applicant) applies for review of an RRT‑reviewable decision; and
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> (b) the applicant gives the Tribunal written notice of the name and address of another person (the authorised recipient) authorised by the applicant to do things on behalf of the applicant that consist of, or include, receiving documents in connection with the review;

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30 CB 156.7.
31 CB 156.8.
32 Cf *NABE v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 144 FCR 1, 20 [61].
33 *Le v Minister for Immigration* [2007] FCAFC 20

the Tribunal must give the authorised recipient, instead of the applicant, any document that it would otherwise have given to the applicant.

Note: If the Tribunal gives a person a document by a method specified in section 441A, the person is taken to have received the document at the time specified in section 441C in respect of that method.

(2) If the Tribunal gives a document to the authorised recipient, the Tribunal is taken to have given the document to the applicant. However, this does not prevent the Tribunal giving the applicant a copy of the document.

(3) The applicant may vary or withdraw the notice under paragraph (1)(b) at any time, but must not (unless the regulations provide otherwise) vary the notice so that any more than one person becomes the applicant's authorised recipient.

(4) The Tribunal may communicate with the applicant by means other than giving a document to the applicant, provided the Tribunal gives the authorised recipient notice of the communication.

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

Sections 441AA provides:

If:

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

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

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

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

the Tribunal may give the document to the person by any method that it considers appropriate (which may be one of

the methods mentioned in subparagraph (b)(i) or (ii) of this section).

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

Section 441A provides:

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

Coverage of section

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

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

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

the methods are as follows.

Giving by hand

(2) One method consists of a member, the Registrar or an officer of the Tribunal, or a person authorised in writing by the Registrar, handing the document to the recipient.

Handing to a person at last residential or business address

(3) Another method consists of a member, the Registrar or an officer of the Tribunal, or a person authorised in writing by the Registrar, handing the document to another person who:

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

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

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

Dispatch by prepaid post or by other prepaid means

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

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

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

(c) to:

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

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

Transmission by fax, e−mail or other electronic means

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

(a) fax; or

(b) e-mail; or

(c) other electronic means;

to the last fax number, e‑ mail address or other electronic address, as the case may be, provided to the Tribunal by the recipient in connection with the review.

The applicant and the Minister differ as to whether the applicable provision is s.441AA or s.441A in relation to s.441G. In my view, s.441AA is the applicable provision because s.441G does not state that communications to an authorised recipient must be by one of the methods specified in s.441A. Nevertheless, the Tribunal did use a prescribed method in the exercise of its discretion pursuant to s.441AA. Following Mr Turner's appointment as the applicant's authorised recipient on 25 May 2007 the Tribunal sent several important items of correspondence to him. On 26 June 2007 the Tribunal sent to Mr Turner by facsimile an invitation to the applicant to appear before the Tribunal[34]*. The transmission log appearing at CB132 confirms that a transmission was successful. On 22 August 2007 the*

[34] CB 133-134.

Tribunal sent to Mr Turner at the same facsimile number an invitation to comment pursuant to s.424A of the Migration Act[35]*. The transmission log reproduced at CB 135 confirms that that transmission was also successful. The Tribunal later sent to Mr Turner at the same facsimile number an invitation to the handing down of the Tribunal's decision and the statement of the decision.*

The practical problem is that none of the correspondence was in fact received by Mr Turner because he had left the firm and, after 5 October 2007, there was no one at the premises. Nevertheless, provided that the Tribunal met its statutory obligations in attempting to communicate with Mr Turner, there would be no jurisdictional error. The facsimile number used was the facsimile number identified in the authorised recipient form signed on 25 May 2007. This was one of five postal or electronic addresses identified in the authorised recipient form. Provided that the Tribunal used one of those addresses in accordance with the Migration Act, then the first ground must fail and the applicant is taken to have received the correspondence even though her authorised recipient did not receive it in fact.

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

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

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

or secondly,

> to communicate, as information, news et cetera.

The definition in the Australian Concise Oxford Dictionary (3rd edition) is similar. While there is, in the ordinary or natural

[35] CB 136-138.

meaning of the word "transmit" a concept of communication implying both dispatch and receipt, it is not inherent in the meaning of the word in the context of s.441A(5) that a facsimile, e-mail or other electronic communication must be seen and read by the intended recipient in order to be transmitted. It is, in my view, inherent in the use of the word in the subsection that the electronic transmission must be successful in that it must be received by a device providing the opportunity for the communication to be seen and read by the intended recipient. There is evidence that the relevant facsimile transmissions were received at the number identified for Mr Turner, the authorised recipient. In other words, a facsimile machine was operating successfully at the receiving end. In my view, that is all that is required to establish compliance with s.441A(5) of the Migration. While it is unfortunate that the hearing invitation and that the invitation to comment were not in fact seen by Mr Turner and that the applicant thereby lost important opportunities, by virtue of the operation of s.441C of the Migration Act, the applicant is taken to have received those invitations and the Tribunal was entitled to proceed in the manner it did. That said, it is surprising that the Tribunal did not take the trouble to telephone Mr Turner. If it had done so, the problem would most likely have been overcome.

I reject the first ground of review.

13. I also maintain the views I expressed in my earlier judgment at [31]-[33] in relation to the applicant's claim of serious harm in connection with being questioned and slapped on the face.

The issue of nationality

14. I dealt with this issue at [34]-[37] of my earlier judgment. In that judgment I took the view that the Tribunal erred in asking itself the wrong question. Although the Tribunal stated that it had not accepted that the applicant is an Iraqi national and found that she is a Syrian national, there was no consideration of the possibility of dual citizenship. In fact, there was no reasoned consideration of the possibility of Iraqi citizenship at all. I stated that s.36(6) of the Migration Act requires that the determination of nationality be made solely by reference to the law of the relevant country. I said that the Tribunal was confronted by two questions as to nationality and effectively answered only one of them, albeit on the opposite basis to the first Tribunal which accepted that both the applicant's natural

parents were Iraqi and was not satisfied that she was a Syrian national. My conclusions require reconsideration in the light of the more complete submissions made by the parties on the issue of nationality at the rehearing before me on 23 June 2009[36].

15. The applicant made conflicting and confusing statements about her nationality. In her protection visa application[37] she claimed to be a citizen of Syria with a Syrian father and an Iraqi mother and Syrian siblings. In an application for migration to Australia made in 1999 the applicant stated that she only held Syrian citizenship[38]. She also provided evidence of Syrian nationality[39]. Further, the applicant claimed to be Syrian in a partner migration application made in 2004[40]. However, before the first Tribunal the applicant claimed to be an Iraqi national. She denied being a Syrian citizen. The Tribunal as presently constituted considered the applicant's claims on that basis. There is no dispute that there was evidence before the Tribunal which entitled it to conclude that the applicant was a Syrian national. The applicant contends that there was no evidence before the Tribunal which supported a finding that she was not an Iraqi national and that the Tribunal's non acceptance of her claim to be an Iraqi national must have been based on the view that nationality of both Syria and Iraq was mutually exclusive.

16. The Tribunal made no express finding that the applicant was not an Iraqi national. The Tribunal was not satisfied that the applicant was an Iraqi national as she had claimed. I accept the Minister's submission that the Tribunal did not require controverting evidence to support that lack of satisfaction[41]. There is nothing before me which would enable me to conclude that the applicant was or was not entitled to Iraqi citizenship (which would, it seems, turn on the fact that her mother was an Iraqi). Neither is there anything before me that would enable me to conclude whether, if the applicant was entitled to Iraqi citizenship, that

[36] Oral submissions were made at the first hearing on 3 November 2008. See the transcript of that hearing, especially at pages13-15, 19-23 and 26-31. The transcript was not available to the Federal Court on the appeal
[37] CB 6 and 15
[38] SCB 2
[39] SCB 89
[40] CB 172
[41] *WAJS v Minister for Immigration* [2004] FCAFC 139 at [11]-[15] and *NAVK v Minister for Immigration* [2005] FCAFC 124 at [32]-[34]

was capable of being held at the same time as Syrian citizenship. Neither did the applicant claim to be a dual national. She claimed only to be a national of Iraq before the Tribunal.

17. Further, I accept the Minister's contention that even if the applicant had dual nationality, she would not be entitled to protection pursuant to the Convention unless she had a well-founded fear of harm for a Convention reason in both Iraq and Syria[42].

18. The difficulty is that while the Tribunal's finding that the applicant was a Syrian national was clearly articulated and explained, the Tribunal did not provide any reasoning for not accepting the applicant's claim that she was an Iraqi national. It may have been that the Tribunal considered that claims of Iraqi and Syrian dual nationality were not available. There may or may not have been a proper basis for such a view. I do not know. Secondly, the applicant's claims of a well-founded fear of harm in Iraq were not considered by the Tribunal as presently constituted because it did not accept the applicant's claim that she was an Iraqi. The Tribunal only considered her claims in relation to Syria.

19. Although the applicant's protection visa application asserted that she was a Syrian national, her statement of her claims provided with that application[43] supported four possibilities, namely that she was a Syrian national or that she was an Iraqi national or that she had dual nationality or that she was stateless. The first Tribunal erroneously proceeded on the basis that the applicant was stateless. The Tribunal as presently constituted proceeded on the basis that the applicant was Syrian and only Syrian. Having found that the applicant was a national of Syria, the Tribunal did not need to consider the possibility that the applicant was stateless. The issue of dual nationality would be relevant if it bore on the risk of harm that the applicant feared in Syria. The applicant's protection visa claims asserted that she was at risk of being refouled from Syria to Iraq or at least to be put between the two countries. In other words, the applicant feared that she would not receive protection or enjoy the benefits of Syrian citizenship because of her connection with Iraq.

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[42] Hathaway, *The Law of Refugee Status* (1991) at pages 57-59. See also *Al-Anezi v Minister for Immigration* [1999] FCA 355 and *Jong Kim Koe v Minister for Immigration* [1997] FCA 306

[43] CB 29

20. Upon reflection, in my view, the Tribunal dealt adequately with the applicant's claim of being at risk in Syria because of her connection to Iraq (whether based on citizenship or otherwise) in its reasons. Relevantly, the Tribunal said[44]:

> *The Tribunal accepts that the applicant and her family resided in Iraq for 20 years and that they returned in 1994. The Tribunal accepts that the applicant may have had difficulty obtaining employment and education in Syria. The Tribunal has not accepted that the applicant is an Iraqi national and has found that the applicant is a Syrian national. The Tribunal does not therefore accept that the applicant was denied education and employment for that reason. The Tribunal does not accept that the fact that the applicant's mother was an Iraqi national or that she had lived in Iraq for 20 years would affect her ability to obtain employment and education, given that she was in possession of valid identity documentation showing that she is a national of Syria. While the Tribunal is prepared to accept… that the applicant may initially have been perceived as Iraqi given that she lived in Iraq for 20 years, has an Iraqi mother and may have spoken with an accent that differed from other Syrians, the Tribunal does not accept that the applicant could not readily have produced identification showing her status as a Syrian national. The independent evidence, cited in the decision of the previously constituted Tribunal, also indicates that there are many thousands of Iraqis living in Syria and there is no evidence of mistreatment, although they are not generally treated generously in terms of resettlement (US State Department Report on Iraqi refugees in Syria). The Tribunal does not therefore accept that the applicant was denied education or employment in Syria for a Convention reason. The Tribunal is also not satisfied that there is a real chance that the applicant would encounter difficulties in relation to employment or education for a Convention reason upon her return to Syria.*

21. Accordingly, while it would have been better if the Tribunal had addressed more clearly the issue of Iraqi nationality, the risk of harm in Syria that would have flowed from such nationality was subsumed in the consideration of the risk of harm that the applicant feared in Syria by reason of her connection with Iraq.

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[44] CB 156

22. I conclude that the Tribunal decision is free from jurisdictional error. The decision is therefore a privative clause decision and the application must be dismissed. I will so order.

23. I will hear the parties as to costs.

I certify that the preceding twenty-three (23) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 24 July 2009