FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZQQC v MINISTER FOR IMMIGRATION & ANOR *[2012] FMCA 410*

MIGRATION – Persecution – review of Refugee Review Tribunal decision – visa – protection visa – refusal.

ADMINISTRATIVE LAW – Allegation that the Refugee Review Tribunal's decision affected by jurisdictional error by reason that it denied the applicant procedural fairness; unreasonably, illogically and irrationally refused to grant an adjournment; failed to exercise its discretion under s.426A of the *Migration Act 1958* properly; failed to comply with s.425 and was ostensibly biased.

ADMINISTRATIVE LAW – Refugee Review Tribunal – requirements for effective lodgment of documents.

ADMINISTRATIVE LAW – Refugee Review Tribunal – when *functus officio*.

Migration Act 1958, ss.65, 414, 414A, 415, 425, 425A, 426A, 427, 441AA, 441A, 441F, 441G, 474

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476
Minister for Immigration & Multicultural Affairs v Bhardwaj (2002) 209 CLR 597
Minister for Immigration & Multicultural & Indigenous Affairs v SCAR (2003) 128 FCR 553
SZQOY v Minister for Immigration & Citizenship [2012] FMCA 289
SZQCN v Minister for Immigration & Citizenship [2011] FMCA 606
Semunigus v Minister for Immigration & Multicultural Affairs (2000) 96 FCR 533
Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82
Minister for Immigration & Citizenship v SZIZO (2009) 238 CLR 627
Associated Provisional Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
SZOFE v Minister for Immigration & Citizenship (2010) 185 FCR 129
Minister for Immigration & Citizenship v SZNVW (2010) 183 FCR 575
Minister for Immigration & Citizenship v SZMDS (2010) 240 CLR 611
SZOOR v Minister for Immigration & Citizenship [2012] FCAFC 58
Minister for Immigration & Multicultural Affairs v Eshetu (1999) 197 CLR 611
Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 198 ALR 59

Applicant:	SZQQC
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2047 of 2011
Judgment of:	Cameron FM
Hearing date:	1 May 2012
Date of Last Submission:	1 May 2012
Delivered at:	Sydney
Delivered on:	17 May 2012

REPRESENTATION

Counsel for the Applicant:	Mr T.M Ower
Counsel for the First Respondent:	Mr D.A Hughes
Solicitors for the Respondents:	Clayton Utz

ORDERS

(1) A writ of certiorari issue directed to the second respondent quashing its decision made on 16 August 2011.

(2) A writ of mandamus issue directed to the second respondent requiring it to determine according to law the application for review made on 30 May 2011.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2047 of 2011

SZQQC
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant is a citizen of China who arrived in Australia on a student visa in December 2007. On 18 March 2011 he applied to the Department of Immigration and Citizenship for a protection visa, alleging that he feared persecution in China because of his religion. On 2 May 2011 his application was refused by a delegate of the first respondent ("Minister"). The applicant then applied to the second respondent ("Tribunal") for a review of that departmental decision. He was unsuccessful before the Tribunal and has applied to this Court for judicial review of the Tribunal's decision.

2. In these judicial review proceedings the Court's task is to determine whether the Tribunal's decision is affected by jurisdictional error as that is the only basis upon which it can be set aside: s.474 *Migration Act 1958* ("Act"); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

3. For the reasons which follow, the Tribunal's decision will be set aside and the matter remitted to be determined according to law.

Background facts

4. The facts alleged in support of the applicant's claim for a protection visa are set out on pages 4-6 of the Tribunal's decision.

5. The applicant made the following claims in his protection visa application:

    a) he was born into a Christian family;

    b) in October 1999 his grandparents were caught by the police holding a church assembly in their house. They were sentenced to a year in prison. His parents, who were also there at the time, were detained by the police for seven days;

    c) his father took up the position left by his (the applicant's) grandfather and became the Christian leader in the area;

    d) in May 2003, during a gathering at his parents' home, the police broke in and arrested everyone. His father was sentenced to two years in prison;

    e) his mother wanted him to live in a country where he could practice his religion freely and so made arrangements for him to study abroad. He came to Australia in December 2007 and had been attending a Chinese Christian church regularly;

    f) in July 2008 his father was again arrested for organising church activities and sentenced to three years in prison. The applicant's family could no longer afford to pay his tuition so he gave up his studies in September 2008;

    g) his father became sick while in prison and was released on medical parole in January 2010. He died in February 2010;

    h) his mother went to talk to the local government, hoping that they would take responsibility for his father's death. However, she had a "collision" with the police and was subsequently detained for

three months for disturbing public security. The police also searched his parents' home and confiscated all their Christian material, including a copy of "the Epoch" and other magazines he had sent back to China from Australia; and

i) on 1 March 2010 the police issued a summons against him on the basis that he had sent illegal materials to China and had supported his parents' illegal religious activities. His sister advised him not to go back to China.

The Tribunal's decision and reasons

6. On 30 May 2011 the applicant applied to the Tribunal for review of the delegate's decision. In that application, he gave his home address as his address for service and did not identify any other person as authorised to receive documents on his behalf. Later, apparently on 20 June 2011, the applicant or his agent lodged with the Minister's department a form entitled "Advice by a migration agent/exempt person of providing immigration assistance". That document referred to the applicant's appointment of a migration agent and stated that the agent had also been appointed as the applicant's "authorised recipient". The Minister conceded that the form was passed by his department to the Tribunal and, based on the stamp appearing on the reproduction of the form at p.59 of the Court Book, which was exhibit 1, it appears that this occurred on 29 June 2011.

7. On 5 July 2011 the Tribunal wrote to the applicant to advise him that it had considered all the material before it but was unable to make a favourable decision on that information alone. The Tribunal invited the applicant to a hearing on 16 August 2011 to give oral evidence and present arguments. The applicant was advised that if he did not attend the hearing and a postponement was not granted, the Tribunal might make a decision on his application without further notice. No response was received from the applicant and he did not appear before the Tribunal on the day and at the time and place he was scheduled to appear. In these circumstances, and pursuant to s.426A of the Act, the Tribunal decided to make its decision without taking any further action to enable the applicant to appear before it.

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

a) as the applicant did not avail himself of the opportunity to attend an oral hearing, the Tribunal only had before it the information contained in the written material from which to make a determination;

b) the Tribunal found that the applicant's claims were brief, lacking in essential detail and vague. For instance:

i) there was no detailed information in relation to the applicant's claims about past harm or his concerns about what might happen to him if he returned to China;

ii) the applicant's account was very broad and did not clearly identify when and how certain critical events took place; and

iii) each of the integers making up the applicant's claims was an assertion without any specific information such that the Tribunal was unable to set the claims in a clear Convention-based context;

c) because the applicant elected not to attend the hearing, the Tribunal was unable to question him to obtain further information about his claims or test the factual basis of his claims in order to assess whether there was a real chance that he might attract persecutory treatment by the Chinese authorities should he return there;

d) the Tribunal noted that in light of the claims he had made it would have wished to hear evidence about the applicant's delay in seeking protection in Australia;

e) the Tribunal noted that the applicant left China legally using a passport in his own name which indicated that he was not wanted by the Chinese authorities at the time of his departure; and

f) there was no evidence that the authorities had shown an interest in the applicant since he left China.

9. On the day of the hearing, 16 August 2011, the applicant wrote to the Tribunal advising that he was ill and requesting an adjournment of his hearing. The evidence indicates that the applicant's letter was received by the Tribunal at 12:48pm on the day of the hearing, nearly two hours after the hearing was scheduled to commence. By letter dated 17 August 2011 the Tribunal informed the applicant that his letter had been received on 16 August 2011 but after it had already determined his case. In its letter, the Tribunal said:

> *The hearing went ahead as scheduled at 11am on 16 August 2011. As no notice was received to indicate you would not attend the hearing prior to the hearing time, the Tribunal member proceeded to determine the case in your absence as you were advised it would do, in the hearing invitation sent to you on 5 July 2011. The Tribunal made its decision on 16 August 2011 and your request arrived after the decision was made.*
>
> *Once the Tribunal has made a decision under the Migration Act 1958, it becomes* functus officio *and has no power to take any further action on the review.*

10. The Tribunal's decision was dated 16 August 2011 and was sent to the applicant under cover of another Tribunal letter dated 17 August 2011. It was not suggested that the decision was sent to the applicant before that date.

Proceedings in this Court

11. In his amended application the applicant alleged:

> *1. The Second Respondent failed to afford the Applicant procedural fairness.*
>
> *Particulars*

a) Upon receipt of the Applicant's request for an adjournment of the hearing the Second Respondent should have withheld finalising its decision until providing the Applicant with an opportunity to be properly heard.

b) The Second Respondent failed to properly consider the Applicant's request for an adjournment.

2. The Second Respondent [sic] *failure to grant an adjournment was unreasonable, illogical and irrational in the circumstances.*

3. The Second Respondent failed to properly exercise its discretion under s.426A in that it did so in such a way as to stultify its obligations under s.425.

4. The Second Respondent's reliance upon s.426A in the circumstances of the matter gives rise to a reasonable perception of bias.

Particulars

a) The Applicant's request for an adjournment was apparently received at 12.48pm on the allocated hearing date. The hearing was scheduled for 11am. It is alleged that the "decision" had already been made before the request was received. The preparation of written reasons in such a short space would indicate probable pre-judgement in the eyes of an objective observer.

b) Given the expressed wish of the Tribunal member to have had the opportunity to question the Applicant about his claims, the peremptory rejection of the Applicant's request for an adjournment would indicate probable pre-judgement in the eyes of an objective observer.

12. At the hearing the applicant was granted leave to further amend his application by the addition of a fifth ground:

5. The Second Respondent had no power to proceed pursuant to s.426A(1) of the Act because it failed to comply with s.425A.

13. It is convenient to deal first with the additional ground of review as all the other issues raised by the parties depend on whether, in inviting the applicant to its hearing, the Tribunal followed the correct procedure.

Ground 5

Relevant statutory provisions

14. Section 425(1) provides:

> ***425 Tribunal must invite applicant to appear***
>
> *(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.*

15. Section 425A of the Act relevantly provides:

> ***425A Notice of invitation to appear***
>
> *(1) If the applicant is invited to appear before the Tribunal, the Tribunal must give the applicant notice of the day on which, and the time and place at which, the applicant is scheduled to appear.*
>
> *(2) The notice must be given to the applicant:*
>
> *(a) except where paragraph (b) applies—by one of the methods specified in section 441A …*

16. Section 441A(4) provides:

> ***441A Methods by which Tribunal gives documents to a person other than the Secretary***
>
> …
>
> 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 …

17. Section 441F(1) provides:

441F Giving documents etc. to the Tribunal

(1) If, in relation to the review of an RRT-reviewable decision, a person is required or permitted to give a document or thing to the Tribunal, the person must do so:

(a) by giving the document or thing to the Registrar or an officer of the Tribunal; or

(b) by a method set out in directions under section 420A; or

(c) if the regulations set out a method for doing so—by that method.

18. Section 441G relevantly provides:

441G Authorised recipient

(1) If:

*(a) a person (the **applicant**) applies for review of an RRT-reviewable decision; and*

*(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;*

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

(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. …

19. Section 426A provides:

426A Failure of applicant to appear before Tribunal

(1) If the applicant:

(a) is invited under section 425 to appear before the Tribunal; and

(b) does not appear before the Tribunal on the day on which, or at the time and place at which, the applicant is scheduled to appear;

the Tribunal may make a decision on the review without taking any further action to allow or enable the applicant to appear before it.

(2) This section does not prevent the Tribunal from rescheduling the applicant's appearance before it, or from delaying its decision on the review in order to enable the applicant's appearance before it as rescheduled.

Applicant's submissions

20. The applicant submitted that the manner in which the Tribunal invited him to its hearing failed to comply with the Act. He said that as he had given notice, admittedly to the Minister's department which forwarded the notification to the Tribunal, that he had appointed his migration agent as his authorised recipient, s.441G required that the Tribunal's letter of 5 July 2011 inviting him to its hearing be sent to his agent and not just to him. He said that as this had not occurred he had not been invited to the hearing in a way which satisfied the Act and thus the Tribunal's discretion under s.426A(1) to make a decision on the review without taking any further action to allow or enable him to appear before it had not been enlivened with the consequence that it had not been empowered to make the decision it made on his review application.

21. The applicant submitted that the fact that the notification of his authorised recipient had been given to the Minister's department rather than to the Tribunal was of no significance because the document was

ultimately received by the Tribunal before it sent its hearing invitation letter of 5 July 2011. He also submitted that the information contained in the document notifying of his migration agent was information of which the Tribunal should have taken cognizance in accordance with para.41 of the Principal Member Direction 2/2011 which stated:

> *Information provided to the tribunal in the course of a review is used in making the decision on the review and may be divulged or communicated for the purposes of the Act or for the purposes of, or in connection with, the performance of a function or duty or the exercise of a power under the Act. …*

He submitted that the statutory purpose reflected in this paragraph of the Principal Member Direction, that the Tribunal communicate with an appointed authorised recipient, would be defeated if the Tribunal could ignore that nomination because notice had not been given directly to it.

22. No submission was made that the Tribunal failed to comply with the procedural requirements of s.441A(4) when sending the letter of 5 July 2011.

Consideration

23. Section 441F of the Act is located in div.7A of pt.7 of the Act, a group of sections which direct how, as between the Tribunal and applicants and as between the Tribunal and the secretary of the Minister's department, documents are to be given and received. Section 441F provides that documents given to the Tribunal "must" be given in one of three ways.

24. The sections in div.7A express imperative requirements, such as that found in s.441F, and also provide discretionary powers. The distinction is seen most conveniently in the first section in the division, s.441AA, which relevantly provides:

> ***441AA Giving documents by Tribunal where no requirement to do so by section 441A or 441B method***
>
> *(1) 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).*

25. The statutory context in which s.441F is found indicates that the imperative tone it employs is intended to allow no discretion or variation from the methods of notification which the section prescribes.

26. This conclusion is reinforced when it is recognised that s.441F could have been drawn so that delivery would be effective as long as the Tribunal actually received the documents sent to it. However, that was not the approach taken by the drafter and it must be inferred that this was deliberate. Supporting this inference is the fact that s.441F applies not only to notifications of authorised recipients but also to all documents which are given to the Tribunal, including applications for review. It is impossible to conceive that an application for review could be lodged effectively with the Tribunal other than by one of the methods prescribed by the section.

27. I conclude from the imperative nature of s.441F and its statutory context that a document provided to the Tribunal other than in accordance with the section is to be treated as if it has not been given to the Tribunal at all.

28. In this case, it was accepted that the applicant had not complied with s.441F when advising of his authorised recipient. I therefore conclude that he did not notify the Tribunal in an effective manner that he had an authorised recipient who could receive documents on his behalf. That being so, the Tribunal's hearing notification letter of 5 July 2011

satisfied the requirements of the Act and, in particular, ss.425A(2)(a) and 441A(4). Indeed, in the circumstances, the Tribunal would have erred if it had sent the hearing invitation to the purported authorised recipient rather than to the applicant.

29. In this regard, I do not discern in the Principal Member Direction a statutory purpose which would be defeated if the Tribunal were to ignore an improperly notified nomination of an authorised recipient. Paragraph 41 of that direction does not refer to the Tribunal being obliged to do anything with information it receives, in particular, that it should communicate with authorised recipients regardless of whether they have been notified in accordance with the Act. In fact, it appears to be concerned principally with information material to the review rather than information of only procedural relevance. But even if a statutory purpose of the sort advocated by the applicant were to be discerned, the Act is the superior authority on how the Tribunal is to operate and the direction must defer to the statute under whose authority it was published.

30. Because the Tribunal complied with ss.425A(2)(a) and 441A(4) and the applicant failed to attend the hearing at the time and at the place specified in the s.425A notice, the Tribunal was empowered by s.426A to make a decision on the review without taking any further action to allow or enable the applicant to appear before it. Its decision to exercise that discretion by proceeding to make a decision was not erroneous for want of compliance with ss.425A and 441A and thus the fifth ground of the applicant's application is not made out.

Grounds 1 and 3

Applicant's submissions

31. The applicant submitted that it was procedurally unfair for the Tribunal to declare that it was *functus officio* given that his fax enclosing his medical certificate stating that he was ill was received within two hours of the starting time of the hearing.

32. The applicant also submitted that, in any event, the Tribunal was not *functus officio* at the time his fax was received because, even if it had reached a decision on the review, the decision had not been published

and, until this happened, the decision was only a preliminary one. He said that at the time his fax arrived the Tribunal had not passed the point of no return in relation to its decision.

33. The applicant submitted that as the Tribunal was not *functus* at the relevant time, it denied him procedural fairness when it denied his request for an adjournment which, he said, had been a reasonable one. He also submitted that the reasoning of the High Court in *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 was applicable to his case. In *Bhardwaj* a decision of the Immigration Review Tribunal ("IRT") was affected by jurisdictional error because the IRT had failed to consider a reasonable request made by the applicant for an adjournment on health grounds and, the applicant not appearing at the hearing, proceeded to make a decision on the review. It was submitted that in this case, for similar reasons, the Tribunal's decision to make a final decision on the review was affected by jurisdictional error. It might be noted at this point that no reference was made by the applicant to *Minister for Immigration & Multicultural & Indigenous Affairs v SCAR* (2003) 128 FCR 553.

34. In relation to the third ground of the amended application the applicant submitted that he was entitled to have the Tribunal consider his adjournment request on its merits, rather than it being addressed in a "theoretical way" in the belief that the Tribunal was *functus officio*. He submitted that the Tribunal's failure to do this "was an error of law stultifying its obligations under s.425 of the Act".

Minister's submissions

35. The Minister submitted that the Tribunal was correct to conclude that it was *functus officio* when it received the applicant's fax because by that time it had already made its decision and discharged its review function under s.414 of the Act. In this regard the Minister submitted that the applicant had adduced no evidence to prove that the Tribunal was not *functus officio* at the relevant time notwithstanding that he bore the onus of proving this. For his part, the Minister pointed to the fact that the Tribunal's decision was dated 16 August 2011 and further submitted that the manner in which it was drafted would only make sense if it had been written before the applicant's fax had been received.

36. The Minister submitted that to the extent that my reasons for judgment in *SZQOY v Minister for Immigration & Citizenship* [2012] FMCA 289 would lead to a conclusion that the Tribunal was *functus officio*, I should depart from that reasoning. In support of that submission the Minister argued that it was incorrect to hold that the Tribunal is *functus officio* at the point a decision is "beyond recall" because the scheme of pt.7 of the Act makes it clear that a "decision" is something separate from the "written statement of reasons" and that the publication of those reasons does not determine when the decision is made. He submitted that a decision-maker will become *functus* when his or her power has been validly exercised, the relevant issue being to determine when that occurs. He submitted that the scheme of pt.7, particularly as revealed by s.414A(1) which states that the Tribunal

> *must review the decision under section 414 and record its decision under section 430 within 90 days … ,*

indicated that the recording of the Tribunal's decision is a step outside the review and that the review concludes when the decision is made.

37. After canvassing the relevant provisions of pt.7 of the Act in some detail, the Minister said that a decision is made before the statement of reasons is sent out because:

> *(a) the making of a valid application for review (under s 412) imposes a duty on the Tribunal to review the RRT-reviewable decision and exercise one of the powers in s 415(2), which becomes the Tribunal's "decision on a review";*
>
> *(b) the making of the "decision on a review" gives rise to a duty to prepare a written statement of reasons (s 430(1));*
>
> *(c) the completion of the written statement of reasons gives rise to a duty to send materials to the Secretary (s 430(3));*
>
> *(d) the completion of the statement of reasons (which is also the deemed date of the decision) gives rise to a duty to notify the applicant and Secretary of the decision (by means of giving the statement of reasons) within a specified period (s 430A).*

38. In the alternative, the Minister submitted that I had erred in *SZQOY* because I had relied on Smith FM's statement in *SZQCN v Minister for*

Immigration & Citizenship [2011] FMCA 606 at [45] that the judgments in *Semunigus v Minister for Immigration & Multicultural Affairs* (2000) 96 FCR 533 held that, in the absence of any specific provision governing the time when the Tribunal became *functus officio*, no decision was "beyond recall" prior to its publication. He submitted that each of the judges making up the Full Court of the Federal Court in *Semunigus* applied that test to the facts differently and that this Court is not bound by that case to hold that that a decision is "beyond recall" only when it has been published to the applicant and the secretary of the Minister's department. He submitted that the preferable finding in *Semunigus* was that of Higgins J who concluded that the delivery or publication of the decision to the Tribunal's registry for further publication to the parties would be an act of sufficient overtness that it would put the decision beyond recall.

39. The Minister also submitted that concepts of procedural fairness were irrelevant to an assessment by the Tribunal of whether it was *functus officio* or not. He submitted that the Tribunal's statement that it was *functus officio* was no more than it noting the consequence of the fact that it had already made a decision.

40. The Minister further submitted that, in any event, the decision of the Tribunal which was relevant to the requested adjournment was the one it made pursuant to s.426A to proceed to make a final decision on the review without taking any further action to allow or enable the applicant to appear before it. The Minister said that because the applicant had not appeared at its hearing the Tribunal was authorised to proceed to make its decision without taking the further step sought by the applicant in his fax, namely to allow him to appear before it at another time. It was further argued that because, when it received the applicant's fax it had already resolved pursuant to s.426A to make a decision on the review, the applicant's request did not oblige the Tribunal to consider exercising its power under s.427(1)(b) to adjourn the review by rescheduling the applicant's appearance before it.

41. He also submitted that nothing in the fax was relevant to the question whether the applicant was entitled to a protection visa and even if the Tribunal had not been *functus officio* at the relevant time, a failure to

consider the contents of the fax could not amount to a failure to consider any relevant information.

Consideration

42. I accept the Minister's submission that procedural fairness concepts are irrelevant to the Tribunal's assessment of whether it was *functus officio* or not. I agree that in this case the Tribunal's observation that it was *functus officio* was no more than it noting the consequence of a decision on the review having ostensibly already been made.

43. The evidence indicates, and I find, that the Tribunal hearing which the applicant failed to attend was scheduled for 11:00am on 16 August 2011 and that at 12:48pm the Tribunal received the applicant's request for an adjournment of that hearing. I therefore find that when the Tribunal decided to exercise its s.426A discretion and proceed to make a decision on the review without taking any further action to allow or enable the applicant to appear before it, it had not received the applicant's fax. I also accept as truthful the Tribunal's statement in its letter to the applicant of 17 August 2011 that it had made its decision before the fax arrived; its decision appears to me to have been drafted in ignorance of the request for an adjournment. Consequently, I further find that when the Tribunal made its decision on the review it had not received the applicant's fax.

44. In relation to the *functus officio* question, I am not of the view that I should depart from the conclusion I reached in *SZQOY* that the Act does not prescribe a point at which the Tribunal is *functus officio* and that the answer to that question is provided by the common law and, in particular but at a certain level of abstraction, by the decision of the Full Court of the Federal Court in *Semunigus*.

45. By reference to various provisions of the Act, the Minister argued that the Tribunal discharged its function when it made a decision on a review and that the written expression of that decision was a step outside the review. He said that the Tribunal discharged its function by the simple fact of reaching a decision on a review, unexpressed though it would presumably be. However, the Minister did not explain whether the Tribunal would be capable of reconsidering an unpublished decision – presumably not – and whether the Tribunal would be fixed

with the first decision it reached on a review, regardless of how preliminary or incorrect it might be. Further, the approach he advocates would be open to abuse because there would be no way of determining objectively when the decision had been reached and what it was. These outcomes indicate that the position advocated by the Minister is not correct.

46. When the Act speaks of a decision of the Tribunal, it must be taken to be speaking of a final decision: see *Bhardwaj* at 615-616 [52]-[53] per Gaudron and Gummow JJ. That conclusion then focuses attention on determining the point at which the Tribunal has made a final decision on the review, i.e. one which cannot be revisited. That question was considered in *Semunigus* and the Minister correctly identified the divergent conclusions reached in that case and the fact that it expresses no binding *ratio* as to what particular action by the Tribunal is sufficient to render it *functus officio*. Madgwick J held in *Semunigus* that a decision was no decision until it had been communicated to the applicant or irrevocable steps taken to achieve that outcome. Spender J relevantly said:

> *I agree with the holding of the learned primary judge that:*
>
> > *" ... the making of a decision involves both reaching a conclusion on a matter as a result of a mental process having been engaged in and translating that conclusion into a decision by an overt act of such character as, in the circumstances, gives finality to the conclusion — as precludes the conclusion being revisited by the decision-maker at his or her option before the decision is to be regarded as final."*
>
> *There is little evidence touching the question whether the decision by the Member of the RRT, in this particular case, was "beyond recall". I think it likely that, had the Member wanted to recall his signed decision, because, for example, he had changed his mind or had realised that he had made a mistake, he would have been able to retrieve the decision at any time prior to a copy of it having been sent to either the Minister or the applicant as then required by s 430(2) of the* Migration Act *1958 (Cth) (the Act).* (at 536 [11]-[12])

Higgins J held that for a decision to be made such that a decision-maker is *functus officio* it is necessary that some overt act be performed

by the decision-maker putting the decision beyond his or her power to recall or change it. His Honour held that that test would be met once the reasons for decision were delivered to and recorded in the Tribunal's registry.

47. Although each of their Honours reached a different conclusion on what step was or might be sufficient or necessary to render the Tribunal *functus officio*, the common thread in all their judgments was that this occurred at a point when its decision became beyond recall. When this occurs is a question of fact but the Act gives some guidance on how to approach it.

48. As the Minister pointed out in his submissions, if a valid application for review is made, s.414 of the Act requires the Tribunal to undertake a review and s.415 empowers it to affirm, vary, set aside or replace the delegate's decision. Section 415 provides:

> ***415 Powers of Refugee Review Tribunal***
>
> *(1) The Tribunal may, for the purposes of the review of an RRT-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision.*
>
> *(2) The Tribunal may:*
>
> *(a) affirm the decision; or*
>
> *(b) vary the decision; or*
>
> *(c) if the decision relates to a prescribed matter—remit the matter for reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the regulations; or*
>
> *(d) set the decision aside and substitute a new decision.*
>
> *(3) If the Tribunal:*
>
> *(a) varies the decision; or*
>
> *(b) sets aside the decision and substitutes a new decision;*

the decision as varied or substituted is taken (except for the purpose of appeals from decisions of the Tribunal) to be a decision of the Minister.

(4) To avoid doubt, the Tribunal must not, by varying a decision or setting a decision aside and substituting a new decision, purport to make a decision that is not authorised by the Act or the regulations.

49. A delegate's decision cannot be affirmed and, more importantly, cannot be varied, set aside or replaced until publication of the Tribunal's decision. That fact indicates that the Act contemplates that the last step in the review is not the decision but its publication. It reflects the fact that the Tribunal's task is not simply to reach a decision on an applicant's case and express reasons for it, as if it were some form of advisory opinion, but to perform a public act which determines whether the preceding decision of the Minister's delegate continues to be of force and effect.

50. Significantly, the public expression of the Tribunal's decision on the review, and thus the exercise of the power provided by s.415 which is the object and purpose of the review, also marks a point at which it is objectively undeniable that the Tribunal is irrevocably committed to a decision. It may be that some irrevocable step could be taken at an earlier point but no evidence of this was adduced. In the absence of evidence to demonstrate that a decision made by the Tribunal cannot be recalled before its publication to the applicant, to the secretary of the Minister's department or to both of them, there is no reason to conclude that the Tribunal is not in control of its processes, including the steps taken between deciding on the outcome of a review and the publication of that decision, or to conclude that the Tribunal becomes *functus officio* at some point prior to such publication.

51. In this case, the Tribunal had not published its decision before it received the applicant's fax. It was not contended that the Tribunal sent its decision to the applicant earlier than the next day. In those circumstances and for the above reasons I conclude that the Tribunal was not *functus officio* at the time it received the applicant's fax requesting an adjournment on medical grounds.

52. Similarly, I do not conclude that the Tribunal was prevented from reconsidering its s.426A decision to proceed to make a decision on the review forthwith upon the applicant's failure to attend the 16 August 2011 hearing. The fact that such a decision would affect the potential exercise of the s.427 power of adjournment says nothing about whether the s.426A decision could be revisited. Even on the Minister's approach to the *functus officio* question, it could not be said that a procedural decision of this sort, which was antecedent to the ultimate decision on the review, was incapable of reconsideration if the Tribunal itself was not *functus officio*. In fact, s.426A(2), which is quoted above at [19], appears to contemplate just such a situation, in that even if the Tribunal decides to exercise the discretion under s.426A(1) to make a decision on the review, it is not prevented from rescheduling the applicant's appearance before it or from delaying its decision on the review to permit this. Consequently, the fact that a s.426A decision had been made did not prevent the Tribunal from considering the applicant's fax of 16 August 2011 or from exercising the power provided by s.426A(2) and thus the power under s.427(1)(b).

53. The Tribunal's mistaken belief that it was *functus officio* is significant only if that caused its ultimate decision to be affected by jurisdictional error because it failed to consider the applicant's request for an adjournment. My findings that the Tribunal was not *functus officio* and was not prevented from reconsidering the exercise of its s.426A discretion lead to the further conclusion that the Tribunal was obliged to consider the applicant's request. Although the Minister submitted that the request did not contain information which needed to be considered in the context of the application for review, the presently relevant question is not whether the letter would have required decisions favourable to the request for an adjournment or to the principal application but whether the request for an adjournment was actually considered at all. The facts satisfy me that the Tribunal did not consider the request except in an *ex post facto* way and that this was because it believed that it was *functus officio* and had no power to. The Tribunal denied the applicant procedural fairness by failing to consider the exercise of its discretion, notwithstanding that it was requested to, because it mistakenly believed that it had no discretion to allow the applicant to appear before it.

54. Nevertheless, that failure to accord procedural fairness had no bearing on the outcome of the review. The Tribunal's letter to the applicant of 17 August 2011 states that although it considered itself to be *functus officio* it had nevertheless considered the applicant's request for an adjournment and concluded that it would have rejected the request even if it had not been *functus*. In *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 122 [104] McHugh J said that:

> … *once a breach of natural justice is proved, a court should refuse relief only when it is confident that the breach could not have affected the outcome* …

In this case the evidence indicates, and I find, that even if the Tribunal had understood its position properly, it would still have refused the requested adjournment and thus the Tribunal's mistaken belief that it was *functus officio* is insufficient to demonstrate that the applicant suffered practical injustice or that the Tribunal's decision was affected by jurisdictional error on that account: *Minister for Immigration & Citizenship v SZIZO* (2009) 238 CLR 627 at 639-640 [32]-[36]. For the reasons given below at [56] and [58], the Tribunal's appreciation of and hypothetical approach to the adjournment request were, in my view, incorrect. However, they did not manifest unreasonableness of the sort considered in *Associated Provisional Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. Therefore, on the facts, the applicant did not lose an opportunity to advance his case on account of the Tribunal's failure to consider his request for an adjournment. This case is therefore distinguishable from *Bhardwaj's* case.

55. However, a failure to afford procedural fairness which has not resulted in practical injustice is not the same thing as a failure to observe a statutory obligation, such as the one imposed by s.425, for which partial compliance is not sufficient: *SZIZO; SZOFE v Minister for Immigration & Citizenship* (2010) 185 FCR 129 at 145-146 [66]-[67] per Buchanan and Nicolas JJ. It therefore remains to consider whether, notwithstanding the conclusion expressed above at [54], the Tribunal nevertheless breached its statutory obligation to give the applicant a real and meaningful (invitation to a) hearing in the sense discussed by Perram J in *Minister for Immigration & Citizenship v SZNVW* (2010) 183 FCR 575 at 595-597 [75]-[82].

56. In this case the only evidence touching on the applicant's claimed inability through ill-health to attend the Tribunal's hearing was his letter of 16 August 2011 and attached medical certificate, which were reproduced in the Court Book. The applicant said in his letter that he was "sick" and felt "really bad" and his medical certificate stated that he was "suffering from a medical condition" and was "unfit for work/school" on 16 and 17 August 2011. These elliptical documents do not identify what the applicant's illness was or how it affected him and, if subjected to scrutiny might not have satisfied the Tribunal, or the Court, that the applicant was indeed unfit to attend the Tribunal hearing scheduled for 16 August 2011. However, in these proceedings they have not been challenged by the Minister and, notwithstanding their shortcomings, I am willing to accept that the applicant, who was dealing with an unfamiliar process in a language which is not his first language, was medically unfit to attend the Tribunal hearing.

57. *Bhardwaj* preceded the Act's codification, for the purposes of administrative merits reviews, of the natural justice hearing rule in certain provisions of the Act. Relevantly for this matter that codification is found in div.4 of pt.7 and, specifically, in s.425(1). *Bhardwaj* held that a failure to accede to a reasonable request for an adjournment can constitute procedural unfairness by denying a person a reasonable opportunity to present their case: per Gaudron and Gummow JJ at 611 [40]. In the context of s.425, the equivalent failure would be failing to allow a person a real and meaningful hearing. In *Bhardwaj* Callinan J said:

> *If one thing is abundantly clear, it is that the Tribunal* must*, if an application has properly been made as it was here, review the Minister's decision. This means that the Tribunal must exercise the jurisdiction of reviewing the Minister's decision: that is to say, it must make a decision on the application and any documents properly submitted by an applicant, with, as part of, or relevant to it. To fail, or refuse to receive and consider such a document, and to make a decision without regard to it, is a failure to exercise jurisdiction.* (at 649 [163])

58. Here, although not presented or substantiated in a way which made it persuasive, the substance of the adjournment request was, in my view, reasonable in the applicant's circumstances. Because, notwithstanding the Tribunal's contrary belief, the review was still on foot at the time

the adjournment request was received, not only should the request have been considered, it should have been granted because it was, on balance and absent an adequate basis then or now to disbelieve it, reasonable.

59. The Tribunal's failure to accede to the adjournment request, although not erroneous in itself for the reasons already given, nevertheless denied the applicant a real and meaningful invitation to the hearing as required by s.425 with the result that the Tribunal did not perform its mandated review and the further result that its decision was affected by jurisdictional error.

Ground 2

60. The second ground of the amended application alleges that, given that it expressed a desire to have received further information from the applicant before making its decision, the Tribunal's failure to grant the requested adjournment was illogical, irrational and unreasonable. However, such an allegation is not apposite. Illogicality, irrationality and unreasonableness in the relevant sense, discussed in *Minister for Immigration & Citizenship v SZMDS* (2010) 240 CLR 611 and explained in *SZOOR v Minister for Immigration & Citizenship* [2012] FCAFC 58, concern decisions in relation to the state of satisfaction required under s.65 of the Act for which there is no evidence or at which no rational or logical decision-maker could arrive. They are not concerned with discretionary decisions of a procedural nature for which, in any event, *Wednesbury* unreasonableness would be the appropriate test: *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59.

61. In any event, if the Tribunal's misunderstanding of the status of the review is taken into account, the failure to grant the requested adjournment was not illogical, irrational or unreasonable. If the Tribunal's misunderstanding is removed from consideration then its failure to consider the adjournment request was a denial of procedural fairness as discussed above in relation to the first and third grounds of

the amended application, not a manifestation of illogicality, irrationality or unreasonableness.

62. In such circumstances, the second ground of the amended application is not made out.

Ground 4

63. The applicant submitted in relation to the fourth ground of the amended application that the speed with which the Tribunal reached its decision and its determination that it was *functus officio* would indicate prejudgment to a fair-minded lay observer. However, it was not suggested that the Tribunal knew, when preparing its decision, that the applicant was going to make contact within a matter of hours. The facts thus provide no basis to suggest anything untoward in the speed with which the Tribunal arrived at its decision and prepared the decision record. Nor was it suggested that the Tribunal did not have a bona fide belief, when it received the adjournment request, that it was *functus officio*. A fair-minded lay observer would not perceive the possibility of prejudgment on the part of the Tribunal by reason of actions which were in accordance with its bona fide understanding of the situation.

Conclusion

64. In this matter the Tribunal's decision was affected by jurisdictional error.

65. Consequently, that decision will be set aside and the matter remitted to the Tribunal to be determined according to law.

66. The Court expresses its appreciation to Mr Ower who appeared pro bono for the applicant.

I certify that the preceding sixty-six (66) paragraphs are a true copy of the reasons for judgment of Cameron FM

Date: 17 May 2012