FEDERAL COURT OF AUSTRALIA

MZXRE v Minister for Immigration and Citizenship [2009] FCAFC 82

MIGRATION – appeal – application for protection visa – Refugee Review Tribunal found no jurisdiction to conduct review – Tribunal nonetheless conducted full hearing – Tribunal decision set aside and matter remitted to Tribunal to 'rehear and determine according to law' by consent – Tribunal constituted by same member – invitation under s 424 to provide additional evidence served in accordance with s 441C(4), but, in fact, not received by appellant – Tribunal proceeded to make decision and affirm delegate's decision not to grant protection visa without second hearing – whether Tribunal was obliged to invite appellant to second hearing under s 425 of *Migration Act 1958* (Cth) – whether no further invitation required due under s 425(2)(c) and (3) – whether second hearing required as result of majority decision in *SZHKA v Minister for Immigration and Citizenship* (2008) 172 FCR 1

MIGRATION – appeal – appellant provided additional information after Tribunal decision signed but before decision handed down – whether Tribunal made a jurisdictional error in not reopening review – file note transcribed by Tribunal member stated that Tribunal had regard to information and determined not to recall decision

Held: appeal dismissed

Migration Act 1958 (Cth) ss 411, 412, 414, 414A, 420, 422A, 422B, 424, 424C, 425, 426A, 441A, 441C

Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 221 CLR 1 cited
Applicant NAHF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 128 FCR 359 cited
Attorney-General (Qld) v Australian Industrial Relations Commission (2002) 213 CLR 485 discussed
Liu v Minister for Immigration and Multicultural Affairs (2001) 113 FCR 541 cited
Minister for Immigration and Multicultural and Indigenous Affairs v Lat (2006) 151 FCR 214 applied
Minister for Immigration and Multicultural and Indigenous Affairs v VSAF of 2003 [2005] FCAFC 73 cited
MZXRE v Minister for Immigration [2009] FMCA 99 affirmed
NAIS v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 470 applied
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 followed
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 215 ALR 162 cited
SXGLM v Minister for Immigration and Citizenship [2007] FCA 1840 cited
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152 cited
SZBSZ v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 779 cited

SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609 cited
SZCIJ v Minister for Immigration & Multicultural Affairs [2006] FCAFC 62 applied
SZEPZ v Minister for Immigration and Multicultural Affairs (2006) 159 FCR 291 cited
SZFDE v Minister for Immigration and Citizenship (2007) 232 CLR 189 discussed
SZHKA v Minister for Immigration and Citizenship (2008) 172 FCR 1 discussed
VAF v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 206 ALR 471 cited
VNAA v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 136 FCR 407 discussed

MZXRE v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
VID 152 of 2009

NORTH, GRAHAM AND RARES JJ
30 JUNE 2009
MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 152 of 2009**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**MZXRE** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**NORTH, GRAHAM AND RARES JJ**
DATE OF ORDER:	**30 JUNE 2009**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 152 of 2009**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **MZXRE**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **NORTH, GRAHAM AND RARES JJ**
DATE: **30 JUNE 2009**
PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

NORTH AND RARES JJ

1 The appellant, a Tamil national of Malaysia, was 42 years old when he arrived in Australia on 25 November 2006. He applied for a protection visa in December 2006. He claimed that he was a Roman Catholic and had been the victim of persecution on 5 November 2006 by a mob of Muslims who threatened harm to Christians inside a church in Silibin in the State of Ipoh. He claimed that his sister had telephoned from the church where her daughters were receiving their first communion. He claimed that she said she was frightened by the Muslims outside and he then travelled there to assist. The appellant claimed that when he arrived he was threatened. He claimed that when he reported the incident to the local police, they ignored his report and he then was mistreated while detained by the police. He claimed that after he complained to the officer in charge of the police station about that treatment he received a threatening phone call. He asserted that all the authorities were Muslims. He claimed that these matters caused him to seek protection in Australia from Muslims and the Malaysian police.

2 A delegate of the Minister refused to grant him a visa in February 2007. The appellant sought a review of that decision by the Refugee Review Tribunal in April 2007. The tribunal invited him to a hearing on 8 June 2007.

THE INITIAL PROCEEDINGS IN THE TRIBUNAL

3 The appellant gave an account of his own involvement in this incident to the tribunal at the hearing. During the course of the hearing, the tribunal raised with the appellant the question whether it had jurisdiction to hear his application for review because he may have made it too late. Nonetheless, the tribunal conducted a full hearing. It informed the appellant that it was doing so in case it concluded that it did have jurisdiction.

4 After the hearing in June 2007 the tribunal concluded that it did not have jurisdiction. It gave its reasons for this conclusion but it did not give any decision or reasons as to the merits of the appellant's claims. Next, on 30 August 2007 the Federal Magistrate's Court relevantly made the following orders by consent:

> "1. The decision of the second respondent made on 8 June 2007 be set aside.
>
> 2. The matter be remitted to the second respondent to **rehear** and determine according to law."
>
> (emphasis added)

Those orders were made on the basis that the Court noted that the Minister accepted that the tribunal had erred in finding that it had no jurisdiction.

THE FORM OF THE CONSENT ORDERS

5 The word "rehear" should not have been used in the orders. The order should have used the word "hear". The tribunal commences the process of a review of the delegate's decision when a valid application for its review is made under ss 412 and 414 of *Migration Act 1958* (Cth) (the Act}. By force of s 414(1) the tribunal must conduct a review of a valid application. If some jurisdictional error occurs in the process of a review, the decision arrived at will be quashed and the matter remitted to the tribunal to complete the conduct of the review in accordance with the procedures specified in the Act: *SZEPZ v Minister for Immigration and Multicultural Affairs* (2006) 159 FCR 291 at 299 [39] per Emmett, Siopis

and Rares JJ. In *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485 at 503 [43] Gaudron, McHugh, Gummow and Hayne JJ said:

> "It was pointed out in *Ozone Theatres* ((1949) 78 CLR 389 at 399) that: "in the case of a court or other body which is under a duty to hear and determine a matter, the tenor of the writ will require the hearing and determination of the matter, and not the decision of the matter in any particular manner." This precept finds expression in the form of order, exemplified in *Wade v Burns* ((1966) 115 CLR 537 at 569. See also *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 488; *Re Coldham; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 522 at 531), which requires a determination "according to law" (In some cases, it may be appropriate to frame the order so as to require the making of a particular decision: *R v Mahony; Ex parte Johnson* (1931) 46 CLR 131 at 139, 154; *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 188, 203, 206)."

6 The word "rehear" in the consent orders could be taken to suggest that whatever had been done by the tribunal had to be redone. That would not have been correct. The Federal Magistrates Court should not have departed from the use of the usual form of words in an order for, or in the nature of, a writ of mandamus. It is regrettable that the Minister was party to consent orders in that form. It should not be used in future.

THE SUBSEQUENT PROCEEDINGS IN THE TRIBUNAL

7 On 29 October 2007 the tribunal wrote to the appellant by registered post at his nominated address advising him that his case had been remitted to it for reconsideration. The appellant received this letter. It invited him to provide any documents or written arguments he wished the tribunal to consider which he had not already provided. The letter also stated:

> "In the meantime, your case will be allocated to a member of the Tribunal who has not previously made a decision in relation to your case. A member may do one or more of the following:
>
> - seek further information
> - seek your comments on particular information
> - invite you to a hearing
>
> before making a decision on your case."

8 It is common ground that this letter did not amount to an invitation to the appellant to give additional information within the meaning of s 424(2) of the Act. This was because it

had not specified a date, in accordance with s 424C(1)(b), before which any information had to be provided.

9 Shortly afterwards, on 5 November 2007, the tribunal wrote a second letter, also sent by registered post to the appellant's nominated address. The second letter formally invited him under s 424 to provide by 29 November 2007 any additional evidence he considered relevant to his application. It noted that since the appellant had already provided oral evidence at a hearing, the tribunal would not offer him a further hearing unless it were satisfied that it was appropriate to do so in the circumstances. But, the letter suggested to the appellant that he request another hearing if he thought this were appropriate. The letter warned the appellant that if the tribunal did not receive additional information within the time allowed it could proceed to make a decision on the review without taking any further action to obtain that additional information.

10 The appellant never received the second letter. It was returned to the tribunal by Australia Post on 5 December 2007. And, despite the assurance in the first letter, the tribunal was reconstituted by the same member who had made the original decision that it had no jurisdiction. That member prepared, and on 18 January 2008 signed, the written statement of decision and reasons for the tribunal's decision to affirm the decision under review. Then on 21 January 2008 the tribunal sent a letter to the appellant, again at his notified address, informing him that the decision would be handed down on 8 February 2008.

THE APPELLANT'S STATUTORY DECLARATION

11 On 7 February 2008, the appellant lodged with the tribunal a statutory declaration he had made on that day. The declaration said that the appellant had received the tribunal's letter inviting him to the handing down of the decision and continued:

> "2. I also received a letter dated 29th October 2007 informing me that a Tribunal member may seek further information, seek my comments on particular information and/or invite me to a hearing before making a decision in my case.
>
> 3. The Tribunal did not invite me to a hearing nor sought further information, seek my comments on a particular information from me to this date.
>
> 4. I am still fearful of returning to Malaysia for convention reasons.

> 5. I believe that people of my profile are continue to suffer persecution at the hands of the Malaysian authorities and I have enclosed the following in support of my claim:
>
> a) Herald Sun article "PM defends arrest of activists".
>
> b) Asia Pacific News "Malaysian Court denies bail for 31 ethnic Indians".
>
> c) The Times of India article "Malaysia Hits back…"."

12 Each of the three attached articles was datelined in December 2007 and each consisted only of the first page of three. The articles referred to unrest in Malaysia in December 2007. One article referred to a Malaysian Court having denied bail to 31 ethnic Indians who were said to face up to 20 years in jail for the attempted murder of a policeman during anti-discrimination protests at a Hindu temple in the previous month. The article noted that the presiding judge had said that her decision had not been racially motivated.

13 The second article referred to the reactions of the governments of India and Malaysia to comments each had made about an anti-government demonstration by more than 10,000 Malaysian Indians the previous Sunday. The protesters alleged that there had been discrimination against them. This article noted that many of the protesters had been Tamils who had roots in the southern Indian state of Tamil Nadu. The Foreign Minister of Malaysia commented that it was that country's right to deal with people who had broken Malaysia's laws in accordance with those laws. The article referred to comments by the Indian government suggesting its concern about the treatment of ethnic Indians.

14 The third article referred to comments of the Malaysian Prime Minister defending a decision to detain five ethnic Indian activists under a security law in the interests of public order. The article referred to the activists being members of a Hindu rights action force who were campaigning for an end to alleged discrimination against ethnic Indians in multi-racial Malaysia.

THE TRIBUNAL HANDS DOWN ITS DECISION

15 After receiving the statutory declaration, the tribunal member considered its contents on 7 February 2008. He wrote the following on a record sheet headed "Material received after signing of decision but prior to handing down":

> "Having examined the submission and attachments, I am not satisfied that they provide grounds for recalling this decision."

16 The decision was handed down the next day in the form in which it had been signed on 18 January 2008 without making any reference to the statutory declaration. The decision affirmed the decision of the delegate of the Minister to refuse the appellant a protection visa. The tribunal did not accept the appellant as being a truthful or plausible witness. The tribunal member considered, along with country information, the evidence that the appellant had given to him at the hearing held prior to the initial decision that the tribunal had no jurisdiction.

17 In its reasons the tribunal referred to the discussion it had had with the appellant during the hearing dealing with country information that an incident at the church on 5 November 2006 had been widely reported in the media. The country information was that the incident was sparked by an anonymous SMS message claiming that Muslims would be baptised as Christians at the church on that day. A crowd of Muslims gathered and surrounded the church. The police were called. They arrived with security officers, surrounded the church and protected the occupants. Eventually the crowd dispersed without incident. Later, the Prime Minister of Malaysia publicly condemned those responsible and announced that the perpetrators would be found and punished.

18 The tribunal found that in his 42 years in Malaysia, apart from the sole incident at the church, the appellant had never experienced any similar incident. It also found that he and his family had experienced no harassment or other ill treatment prior to, or after, their allegedly becoming involved in the church incident. The tribunal found, on the basis of country information and the appellant's admissions to it, that the incident was an isolated one, adding "… so much so that the Prime Minister was moved to issue a public statement on the matter". It found that the response of the police and security forces in protecting Roman Catholics at Sibilin had been swift and effective and that Christians enjoyed the protection of the state authorities.

19 The tribunal found that the appellant had not suffered any harm in the past for reasons of his religion or any other *Refugees Convention* reason. It found that he did not fear persecution for any such reason. The tribunal also found that if he were to return to Malaysia

there was no real chance of the appellant being persecuted now or in the reasonably foreseeable future.

THE SECOND APPLICATION TO THE FEDERAL MAGISTRATES COURT

20 The appellant was represented by counsel before the Federal Magistrates Court and before the Full Court. The Federal Magistrate dismissed the appellant's application for constitutional writ relief: *MZXRE v Minister for Immigration* [2009] FMCA 99. He dealt with each of the then five grounds of the application. Three of the grounds were related and formed the substantive issue argued before both his Honour and the Full Court. The appellant argued that after the remittal of the application for review by the Federal Magistrates Court, the tribunal had to invite him to a second hearing and that its failure to do so was a jurisdictional error. He contended that this was necessitated by both the decision of the majority in *SZHKA v Minister for Immigration and Citizenship* (2008) 172 FCR 1 and s 425 itself. He argued that because his statutory declaration confirmed that he had not received the undelivered (and returned) letter of 5 November 2007, the tribunal was obliged to offer him a further hearing under s 425 of the Act. He also argued that the tribunal had contravened Div 4 of Pt 7 of the Act by utilising the evidence he had given at its earlier hearing in coming to its ultimate decision and that it had denied him procedural fairness or a fair hearing contrary, he claimed, to s 420(2) of the Act.

21 His Honour rejected these arguments. He found that the tribunal had invited the appellant to provide it with further information in its letter of 5 November 2007 so that ss 424C and 441C(4) operated to deem that the appellant had received and failed to respond to that invitation, despite his actual non receipt of the letter. Accordingly, his Honour held that s 425(2)(c) and (3) authorised the tribunal to make its decision without taking any further action to obtain the additional information or inviting the appellant to a hearing. He also held that the Act did not require the tribunal to conduct a second hearing in the circumstances. He found that the tribunal had held a valid hearing in June 2007 but, because it found that it lacked jurisdiction, it had not then reviewed the delegate's decision. His Honour held, following *SZEPZ* 159 FCR at 299 [39], that after the matter had been remitted, the tribunal could use material from the earlier hearing to conduct the review.

22 His Honour distinguished *SZHKA* 172 FCR 1 on the basis that it required the ultimate decision-maker to hold a hearing. That had occurred in this case. And, he found that the circumstances of the remittal had not required the tribunal to be reconstituted (e.g. because there was no allegation of an apprehension of bias). His Honour rejected the argument that the tribunal had failed to accord procedural fairness to the appellant in the above circumstances. This was because under the then form of s 422B, the tribunal had no obligation to provide a second hearing once the time to respond to the invitation in its letter of 5 November 2007 had expired. His Honour rejected the appellant's contention that the tribunal had failed to take into account his statutory declaration. He found that the tribunal had had regard to it but had decided the additional material did not provide grounds for recalling its decision.

23 The appellant also asserted before his Honour that the tribunal had failed to consider the substance of his claims and had looked at them from a simplistic point of view. He argued that this was established by the tribunal's use in its reasons of the statement made by the Prime Minister of Malaysia to support its finding that the incident at the Church in Sibilin was an isolated one. His Honour rejected that ground as not disclosing any jurisdictional error and as an attempt to engage in merits review.

24 Next, the appellant suggested before his Honour, that there had been a failure of some kind to comply with s 424A of the Act. However, the appellant did not identify any passage in the tribunal's reasons in which the tribunal had used any information to which s 424A(1) applied as the reason or part of the reason for affirming the decision under review. His Honour at [74] described the way in which this matter was argued as "not a vigorous attempt on the part of the applicant". One additional ground before his Honour was not pressed before the Full Court and can be put to one side (namely that a different tribunal member had to constitute the tribunal after the matter was remitted).

THE APPEAL

25 The appellant's substantive argument on appeal was that the tribunal had been obliged to invite him to a second hearing under s 425 of the Act and, by proceeding to make a decision adverse to him, as it did, it contravened the procedure which the Act mandated, so committing a jurisdictional error. In addition, the appellant argued that the decision of the

majority in *SZHKA* 172 FCR 1 required that he be invited to a second hearing. Before the Full Court, the Minister wished to contend that there had been a hearing in June 2007 and that all that *SZHKA* 172 FCR 1 required had been done. In the view to which we have come, it is not necessary to resolve this controversy.

26 The tribunal was authorised by ss 424(2) and 424B to seek further information in its letter to the appellant of 5 November 2007. Even though that letter had not been received by the appellant and had been returned to the tribunal, s 441C(4)(a) deemed that the appellant had received the letter 7 working days after its date. When the appellant had not responded to the 5 November letter by 29 November, ss 424C(1), 425(2)(c) and (3) authorised the tribunal to make a decision on the review without taking any further action (including inviting the appellant to a hearing) to obtain the additional information. In the circumstances here, albeit through no fault of the appellant, the tribunal was authorised to proceed to make a decision as it did.

27 The next question is whether the tribunal made a jurisdictional error in not reopening the review. The appellant argued that in his statutory declaration of 7 February 2008 he had made the tribunal aware that he had not received the letter of 5 November but he was now available and had provided information. The appellant contended that he had not had the opportunity to appear at a hearing under s 425(1) and that the tribunal erred, once it had received his statutory declaration, in failing to invite him to a second hearing or had failed to accord him procedural fairness under s 420(2) of the Act. That section was in Div 3 of Pt 7 of the Act and provided:

> "(2) The Tribunal, in reviewing a decision:
>
> (a) is not bound by technicalities, legal forms or rules of evidence; and
>
> (b) must act according to substantial justice and the merits of the case."

28 We reject this argument. The tribunal had to conduct the review in accordance with Div 4 of Pt 7 of the Act, with which s 420(2) must be read harmoniously: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71] per

McHugh, Gummow, Kirby and Hayne JJ. In particular, the tribunal was bound to accord the appellant a right to be heard in accordance with s 422B(1) and (2). These provided:

> "**422B Exhaustive statement of natural justice hearing rule**
>
> (1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
>
> (2) Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with."

(Section 422B did not include s 422B(3) for the purpose of an application to the tribunal to review a decision, such as the appellant's, that was made before Schedule 1 of the *Migration Amendment (Review Provisions) Act 2007* (Cth) commenced on 29 June 2007: see s 2, and Sch 1 items 17 and 33).

29 Thus, s 422B(1) and (2) provided that Div 4 exhaustively stated the appellant's right to be heard on the review in relation to the matters it deals with. One such matter was the appellant's right to receive, and the tribunal's obligations to give him, notices in writing under Div 7A (which included s 441C). Reading s 420(2) together with s 422B required the tribunal to follow the procedure in Div 4 for the conduct of the review. The common law natural justice hearing rule was excluded by s 422B in relation to the matters dealt with by Div 7A: *SZCIJ v Minister for Immigration & Multicultural Affairs* [2006] FCAFC 62 at [7]-[8] per Heerey, Conti and Jacobson JJ; *Minister for Immigration and Multicultural and Indigenous Affairs v Lat* (2006) 151 FCR 214 at 225 [66]. Since the tribunal complied with s 441A(4) when sending its letter of 5 November 2007 to the appellant, s 441C(4) deemed him to have received it 7 working days after its date. The appellant's only response to that letter was received 3 months later on 7 February 2008. That was well outside the time of 29 November pursuant to s 424B(2) for a response specified in the letter. As we have found, ss 424C(1), 425(2)(c) and (3) authorised the tribunal to make its decision without taking any further action to obtain the further information from the appellant or to invite him to a hearing.

30 The tribunal's receipt of the statutory declaration on 7 February 2008 did not necessarily require it to postpone or change its decision. After receiving the statutory declaration, the tribunal had a discretion to reopen its procedures and permit the appellant a hearing. The tribunal actually and properly had regard to the new material. But it found that

it was not persuaded to change its decision or reasons. In its reasons, the tribunal had said that it would only rely on material of a general nature (such as country information) where specific information about the applicant for review's treatment was unavailable or inconclusive. The tribunal had disbelieved the appellant on his account. The new material would not have been persuasive to enable the tribunal to reach any other decision than it did. The newspaper articles attached to the statutory declaration concerned Hindu, not Christian, Indians and the killing of a police officer. That was a different situation to the appellant's claims.

31 The tribunal was entitled to conclude that the contents of the statutory declaration were not of assistance. It was a carefully phrased document. Although in par 3 the appellant referred to the failure of the tribunal to invite him to a hearing, he did not expressly say that he wished to have one or identify to the tribunal anything that he may have added to his earlier evidence, apart from providing the extracts from the three articles. The appellant had acknowledged his receipt of the letters of 29 October 2007 and 21 January 2008 but he had not given the tribunal any indication in the statutory declaration that he wished to say anything more, let alone that he had anything more to say: cf *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at 12 [34] per McHugh, Gummow, Callinan and Heydon JJ. In that context, the tribunal was entitled to form the view that it would not exercise its discretion to seek further information before relying on its power to decide the review under s 424C(1).

32 The appellant did not establish that the tribunal's statement of decision and reasons was incomplete merely because it did not refer to the statutory declaration or its annexures or did not comply with its duty to set out the matters required by s 430(1) of the Act: see *SXGLM v Minister for Immigration and Citizenship* [2007] FCA 1840 at [33] per Lindgren J. The tribunal did not make a jurisdictional error in deciding not to reopen the review in the circumstances.

33 The appellant also repeated his earlier arguments, rejected by his Honour, that the tribunal:

- had to be reconstituted by a different member;

- had failed to consider the substance of the appellant's claims but had looked at them simplistically.

None of those arguments had any substance. The appellant did not identify any error in his Honour's reasons for their rejection. It was unfortunate and inaccurate that the tribunal wrote in its letter of 29 October 2007 that a different member would continue the review. However, it was not necessary for the tribunal to be reconstituted. The erroneous decision on jurisdiction could not have required that a different person complete the review where the original tribunal member already had conducted a hearing.

34 The appellant did not explain comprehensibly the basis he claimed that the tribunal had failed to comply with s 424A(1) or had not dealt with the substance of his claims. The Court cannot engage in a review of the merits of the appellant's claims for a protection visa. Its role is to ensure that the tribunal followed the processes required by law to arrive at its decision: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 160-161 [25]-[26] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ.

35 In our view, the appellant has failed to demonstrate any jurisdictional error and the appeal must be dismissed with costs.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices North and Rares.

Associate:

Dated: 30 June 2009

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 152 of 2009**

BETWEEN: **MZXRE**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **GRAHAM J**
DATE: **30 JUNE 2009**
PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

GRAHAM J

BACKGROUND

36 The appellant who is identified for the purposes of these proceedings as 'MZXRE' was born in Perak in Malaysia in 1964. On 15 September 2006 he was issued with a Malaysian passport. He travelled from Malaysia to Australia on that passport arriving at Sydney airport on 25 November 2006 and entering Australia under an ETA VISITOR (SHORT) AUTHORITY TO ENTER AUSTRALIA granted to him on 23 November 2006.

37 On 19 December 2006 the appellant applied for a Protection (Class XA) visa, claiming to have a well-founded fear of persecution for reasons of religion within the meaning of the definition of 'refugee' in the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

38 On 12 February 2007 a delegate of the Minister decided that the appellant's application for the grant of a protection visa should be refused.

THE RELEVANT LEGISLATION

39 Part 7 of the *Migration Act 1958* (Cth) ('the Act') deals with 'Review of protection visa decisions' and comprises ss 410-473.

40 Under s 411(1)(c) a decision to refuse to grant a protection visa is an RRT-reviewable decision. Section 412 provided for the form of an application for review, the time within which such an application must be given to the Tribunal and associated matters. Section 414(1) provided that the Tribunal must review a decision, the subject of a valid application under s 412.

41 In addition, s 414A(1) required the Tribunal to review RRT-reviewable decisions that may have been 'remitted by any court to the Refugee Review Tribunal for reconsideration'.

42 Section 420 dealt with the Tribunal's way of operating. It provided:

> *'420(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.*
>
> *(2) The Tribunal, in reviewing a decision:*
>
> *(a) is not bound by technicalities, legal forms or rules of evidence; and*
>
> *(b) must act according to substantial justice and the merits of the case.'*

43 The constitution of the Tribunal for the purposes of a particular review is as determined by the Principal Member. Sections 422 and 422A contemplate the replacement of a member selected to constitute the Tribunal for the purposes of a particular review by another member in certain circumstances. In each case provision was made for the new member constituting the Tribunal for a particular review to 'continue to finish the review' and, for that purpose, he or she was empowered to 'have regard to any record of the proceedings of the review' made 'by the Tribunal as previously constituted' or 'by the member who previously constituted the Tribunal' (see ss 422(2) and 422A(3) of the Act).

44 Section 425 of the Act is to be found in Division 4 of Part 7 of the Act, which comprises ss 422B to 429A, is entitled 'Conduct of review' and deals with the manner in

which the review of decisions covered by, inter alia, s 411(1)(c), should be conducted by the Tribunal. Section 425 provided as follows:

> *'425(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.*
>
> *(2) Subsection (1) does not apply if:*
>
> *(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or*
>
> *(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or*
>
> *(c) subsection 424C(1) or (2) applies to the applicant.*
>
> *(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.'*

45 It is implicit from the terms of s 425(1) that not only must an appropriate invitation be extended but also it should be followed by a corresponding hearing at which the opportunity to give evidence and present arguments relating to the issues arising in relation to the decision under review will be afforded to the applicant, subject to the provisions of s 425(2)-(3). However, any shortcomings of the Tribunal in respect of the provision of a corresponding hearing will fall to be determined according to the rules of natural justice, the content of which must be ascertained in the context of the relevant statutory power, including s 426A(1). Any such shortcomings will raise issues which are separate and distinct from the sufficiency of the invitation required by s 425(1) (see Hely J in *Applicant NAHF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* ('NAHF') (2003) 128 FCR 359 at [28]).

46 The obligation of the Tribunal to invite an applicant to appear before it in accordance with s 425(1) is subject to s 425(2)(c). That paragraph relevantly directs attention to s 424C(1) of the Act which provided as follows:

> *'424C(1) If a person:*
>
> *(a) is invited under section 424 to give additional information; and*

(b) does not give the information before the time for giving it has passed;

the Tribunal may make a decision on the review without taking any further action to obtain the additional information.
…'

47 Section 424 provides, amongst other things, for the Tribunal to invite a person to give additional information. It relevantly provided as follows:

'424(1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.

(2) Without limiting subsection (1), the Tribunal may invite a person to give additional information.

(3) The invitation must be given to the person:

(a) … by one of the methods specified in section 441A;
…'

48 Section 441A(4) provided for the giving of documents to a person by dispatching same by prepaid post within three working days of the date of the relevant document and s 441C(4) provided for deemed receipt of such documents, relevantly, seven working days after the date of the document if it was dispatched from a place in Australia to an address in Australia.

THE APPELLANT'S APPLICATION FOR REVIEW

49 Following the making by the delegate of the Minister of the decision to refuse the appellant's application for a Protection (Class XA) visa, the appellant lodged an application for review of the Minister's delegate's decision with the Refugee Review Tribunal on 26 April 2007.

50 The appellant was invited to and attended a hearing before the Tribunal on 8 June 2007. For the purpose of the review the Tribunal was constituted by one of its members, Mr David Young. The transcript of the hearing before the Tribunal member included the following:

TRIBUNAL MEMBER: *'Well the reason I'm raising all that with you* [the history of written communications between the Minister's delegate and the appellant] *is that I don't think I have jurisdiction to hear this application.'*

…

TRIBUNAL MEMBER: *'I don't think I have jurisdiction to hear this application. Let me explain why – that the Act provides that the Minister must notify the decision to the address given by the applicant for the purpose of the application. … Now once that's done …, the time that's allowed for lodging an application with this Tribunal starts and the Act only provides for 28 days plus seven working days to lodge an appeal with the Tribunal. …..'*

TRIBUNAL MEMBER: *'… So I believe basically you filed this application out of time, I have no jurisdiction to hear it, but rather than cause further delays or waste your time by investigating that further and perhaps finding I'm mistaken, or that there was some problem with the notification of the first decision, what I propose to do today is to go through your change* (sic) *with you so that if I find that it was in fact validly notified and that I do have jurisdiction we can then make a decision about the application. Do you understand all of that?'*

MZXRE: *'Yes.'*

[The hearing then proceeded to address the appellant's claim that he was a non-citizen in Australia to whom the Minister should have been satisfied that Australia had protection obligations under the Refugees Convention as amended by the Refugees Protocol as defined in the Act.]

TRIBUNAL MEMBER: *'As I said I'll decide on the first question, whether I have jurisdiction or not and if I don't then I'll dispose of the matter on that basis. If I do have jurisdiction then I'll go ahead and make a decision on the materials you've provided. If that is the case then we may write to you inviting you to comment in writing on a number of issues that have come up at the hearing today?'*

MZXRE: *'That is it.'*

TRIBUNAL MEMBER: *'Which (indistinct) did you understand?'*

MZXRE: *'I don't know what you are talking about.'*

TRIBUNAL MEMBER: *'I said – when we started talking I said that my first doubt was that I have jurisdiction because the application was lodged out of time but I decided in fairness to you and as a matter of*

> *efficiency that rather than say, well let's finish the proceedings right now, I said, well let's go ahead and hear your claims as though I do have jurisdiction so that if I then find that the application was lodged within time, I can make a decision, rather than having to call you back for a second hearing. Is that clear enough? It's important that you understand that.'*
>
> MZXRE: *'Yes I understand.'*

51 The problem of jurisdiction arose because two letters recording the Minister's delegate's refusal of the application for the grant of a protection visa had been sent to the appellant. The first was sent to the original address provided by him, being a letter dated 12 February 2007, and the second, being a letter dated 30 March 2007, was sent to a later address which had been notified by the appellant. As previously indicated the application for review was not lodged until 26 April 2007.

52 By a decision signed 8 June 2007 and handed down on 12 June 2007 the Tribunal decided that it had no power to determine the appellant's application. Thereupon the appellant instituted proceedings in the Federal Magistrates Court of Australia seeking constitutional writ relief in respect of that decision. Those proceedings were settled with orders being made by consent on 30 August 2007 in the following terms:

> ***'THE COURT ORDERS BY CONSENT THAT:***
>
> *1. The decision of the second respondent made on 8 June 2007 be set aside.*
>
> *2. The matter be remitted to the second respondent to rehear and determine according to law.*
>
> *3. The first respondent pay the applicant's costs fixed in the amount of $1,000.*
>
> ***THE COURT NOTES:***
>
> *The first respondent accepts that the second respondent erred in finding that it had no jurisdiction to consider the application for review.'*

53 It is at this point that the problems in this case begin.

54 The main issue is whether the Tribunal was required to again invite the appellant to appear before it to give evidence and present arguments relating to the issues arising in

relation to the decision under review in accordance with s 425(1) of the Act. The appellant's argument was that once the application for review was remitted to the Tribunal to determine according to law (the order made on 30 August 2007 required the Tribunal to 'rehear' and determine the matter according to law), the process of review began again even though the Tribunal was entitled to have regard to the record of the proceedings of the review from the time of the institution of the application for review on 26 April 2007.

WAS A SECOND S 425(1) INVITATION REQUIRED?

55 The appellant's contention that a fresh s 425(1) invitation was required is arguably consistent with what was said by the High Court in *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 ('SZFDE') at [54]-[55] where the Court said:

> *'54 Were the matter litigated in the original jurisdiction of this Court, the consequence would be that mandamus would lie under s 75(v) of the* Constitution *to compel the Tribunal to redetermine the review application according to law. In support of that remedy under s 75(v), certiorari would lie in respect of the purported decision of the Tribunal. By reason of the terms of the conferral of jurisdiction upon the Federal Magistrates Court it was in a corresponding position.*
>
> *55 The order of the Federal Magistrates Court granting orders in the nature of certiorari to quash, and mandamus requiring the Tribunal to redetermine according to law, the review of the decision of the delegate were properly made. That redetermination according to law will include the Tribunal giving the appellants, pursuant to s 425, a fresh invitation to appear before the Tribunal.'*
>
> (footnotes omitted)

56 *SZFDE* was an unusual case in that a s 425(1) invitation had been sent and the first appellant and her husband were aware of its contents but they did not attend the hearing to which the first appellant had been invited, the operation of the critically important natural justice provisions made by Division 4 of Part 7 of the Act having been stultified by the fraudulent dealings of the appellant's migration agent with them. Accordingly, in the case of *SZFDE* there had been no hearing at which the appellants or any of them had been present. However, the High Court's order in *SZFDE* required *redetermination* of the application for review according to law, not *determination* according to law for which the Federal Magistrates Court of Australia's order of 30 August 2007 provided. Furthermore, in the

present case the appellant had received a s 425(1) invitation and had attended the appointed hearing.

57 The appellant relied upon the decision of a Full Court of this Court in *SZHKA v Minister for Immigration and Citizenship* (2008) 172 FCR 1 ('SZHKA') where it was held that in the event that the Tribunal was reconstituted by a different member a fresh s 425(1) invitation was required so that the relevant applicant for review would have an opportunity to present arguments relating to the issues arising in relation to the decision under review to the relevant decision-maker rather than contenting himself with the arguments previously advanced when the matter was before the Tribunal constituted by a different Tribunal member. In *SZHKA* Gyles J said at [27]-[28]:

> *'27 In my opinion, the obligation to invite an applicant to appear before the Refugee Review Tribunal (the Tribunal) to give evidence and present arguments relating to the issues concerning the decision to refuse a visa is fundamental to the review of protection visa decisions provided for by Pt 7 of the* Migration Act 1958 *Cth (the Act).* …
>
> *28 An applicant's case will inevitably involve subjective elements – starting with a genuinely held fear of persecution. The grounds for that fear will usually involve accepting the applicant's word for events for which there may be no objective corroboration. The applicant may have to persuade the Tribunal that some apparently credible external source of information is incorrect, incomplete or out of date. It will often involve the applicant in persuading the Tribunal that the applicant is, in truth, the person the applicant claims to be from the place the applicant alleges. Usually, failure by an applicant to succeed will be because the truth of what the applicant has said has not been accepted by the Tribunal in some critical respect. It is, no doubt, for this reason that the Parliament has provided for a compulsory opportunity for an applicant to persuade the Tribunal face to face. That opportunity is only of real value if the face to face meeting is with the person making the decision. The face to face meeting is not just an opportunity for the applicant to put his or her best foot forward. It is the opportunity for the Tribunal member to explore issues that concern that member with the applicant. The importance of that process is underlined by the decision of the High Court in* SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs *(2006) 228 CLR 152, particularly at [33]-[40]. In my opinion, the opportunity to be provided by virtue of s 425 is not provided by an appearance before another Tribunal member on an earlier occasion in the course of an aborted review.'*

58 The appellant submitted that in **all** cases requiring a redetermination according to law, a fresh s 425 invitation and consequential hearing was required.

59 The respondent Minister submitted that no such requirement arose in the circumstances of this case. Firstly, it was said that this was not a case where the Tribunal had relevantly been reconstituted, as the ultimate determination of the application for review was entrusted to the Tribunal constituted by the same member as had previously made a finding of 'no jurisdiction', namely Mr David Young. Secondly, the Minister submitted that this was not a normal case where **re**determination of the appellant's application for review was required under an order in the nature of mandamus, an earlier decision on the application having been quashed. The Minister submitted that the application for review had never been the subject of a determination and accordingly what transpired after the matter went back to the Tribunal was simply a continuation of the earlier consideration by the Tribunal of the application for review where the Tribunal had duly complied with its obligations under s 425 of the Act.

60 Thirdly, the Minister submitted that on the facts of this case, it fell within the reach of s 425(2)(c) and (3) of the Act with the consequence that no further invitation was required and the appellant was without an entitlement to appear.

61 Following the making of the orders by consent in the Federal Magistrates Court of Australia of 30 August 2007 including the order that '[t]he matter be remitted to the second respondent to rehear and determine according to law', two letters were sent by the Tribunal to the appellant by registered post. The first letter was dated 29 October 2007 and the second 5 November 2007. The second letter answered the description of a s 424 invitation to give additional information which specified the time before which information was to be given as 'before 29 November 2007'. The second letter included the following:

> *'You are invited pursuant to s424 of the Act to provide any additional evidence you consider relevant to your application. The Tribunal will, of course, take into account any written and oral evidence that you have provided to date in making its decision.*
>
> *Since you have already provided oral evidence at a hearing, the Tribunal will not be offering you a further hearing unless it is satisfied that one is appropriate in the circumstances. …*
>
> *Your additional information, unless a further hearing is agreed to by the Tribunal in the meantime, should be received at the Tribunal by 29 November 2007. …*

> *If you cannot provide the additional information by 29 November 2007, you may ask the Tribunal in writing for an extension of time in which to provide the additional information. …'*

62 The envelope containing the second letter of 5 November 2007 was endorsed on 3 December 2007 with a notation that it was unclaimed and was to be the subject of 'RETURN TO SENDER'. The envelope bears a receipt stamp of the Tribunal indicating that it was received back at the Melbourne office of the Tribunal on 5 December 2007.

63 By dispatching the second letter as it did the Tribunal duly gave the appellant a s 424 invitation. The appellant's failure to respond to that invitation by 29 November 2007 enlivened s 424C(1) and brought the case within s 425(2)(c) regardless of whether the invitation reached the appellant.

64 A further letter dated 21 January 2008 was sent by the Tribunal to the appellant at the address provided by him in his application for review which invited him 'to attend the formal handing down of the decision' on his application for review at 10:30am on 8 February 2008. As it transpires the Tribunal member, Mr David Young, had signed the decision of the Tribunal on 18 January 2008, but, by virtue of s 430B(4) the date of a decision is the date on which it is handed down.

65 On 7 February 2008 the Tribunal received a statutory declaration made by the appellant on that day which included the following:

> *'1. I am in receipt of a letter dated 21st January 2008 inviting me to handing down of a decision in my application for a protection visa.*
>
> *2. I also received a letter dated 29th October 2007 informing me that a Tribunal member may seek further information, seek my comments on particular information and/or invite me to a hearing before making a decision in my case.*
>
> *3. The Tribunal did not invite me to a hearing nor sought further information, seek my comments on a particular information from me to this date.*
>
> *4. I am still fearful of returning to Malaysia for convention reasons.*
>
> *5. I believe that people of my profile are continue to suffer persecution at the hands of the Malaysian authorities and I have enclosed the*

following in support of my claim:

a) Herald Sun article "PM defends arrest of activists".
b) Asia Pacific News "Malaysian Court denies bail for 31 ethnic Indians".
c) The Times of India article "Malaysia Hits back …"'

66 The extract from the 'Herald Sun' would appear to have been page one of a three page article. The extract from 'Asia Pacific News' would appear to have been page one of a three page article and the extract from 'The Times of India' would also appear to have been page one of a three page article.

67 It is apparent that the statutory declaration of the appellant and the three pages of extracts from the news items were brought to the attention of the Tribunal member, Mr David Young, who decided on 7 February 2008 not to recall the decision which he had prepared and signed on 18 January 2008. He added a comment to his memorandum of 7 February 2008 on the material submitted by the appellant as follows:

'Having examined the submission and attachments, I am not satisfied that they provide grounds for recalling this decision.'

68 By the Tribunal member's Statement of Decision and Reasons it affirmed the decision of the Minister's delegate not to grant the appellant a Protection (Class XA) visa. The Tribunal member was not satisfied that the appellant had a well-founded fear of persecution in Malaysia, his country of nationality, for any Convention reason.

69 It will be apparent from the terms of the appellant's statutory declaration that he had received the Tribunal's letter dated 29 October 2007, the first of the two letters mentioned earlier, which in its terms informed him that the member of the Tribunal to whom his application for review had been allocated 'may' do one or more of the following:

'• seek further information
• seek your comments on particular information
• invite you to a hearing

before making a decision on your case.'

70 No representation was made by the Tribunal to the effect that it **would** do one or more of the things covered by those bullet points before making a decision on the appellant's case and the appellant was conscious of this fact as indicated by paragraph 2 of his statutory declaration of 7 February 2008.

71 The 29 October 2007 letter from the Tribunal to the appellant also included a sentence reading 'The Tribunal will send all future communications to the address at the top of this letter, unless you advise us otherwise. I have attached forms you can use to change your address details …'.

The Tribunal's s 424 letter to the appellant of 5 November 2007 had been posted to the appellant's address which had been recorded at the top of the letter of 29 October 2007.

72 Importantly, the letter of 29 October 2007 included an informal invitation to the appellant 'to provide any documents or written arguments you wish the Tribunal to consider which you have not already provided to the Tribunal. Any documents should be provided as soon as possible.' It was not until the appellant submitted his statutory declaration of 7 February 2008 that he chose to provide any documents or other matter that he may have wished the Tribunal to consider which had not already been provided to the Tribunal.

73 The letter of 29 October 2007 did include a sentence indicating that the appellant's application for review would be allocated 'to a Member of the Tribunal who has not previously made a decision in relation to your case.'

74 Whilst it would have been open to the Principal Member of the Tribunal to direct that another member constitute the Tribunal for the purpose of the appellant's application for review of the Minister's delegate's decision, it was not incumbent upon him to do so. It could not be suggested that the appellant acted to his detriment in any way by reason of the Tribunal's letter of 29 October 2007 suggesting that his case would be allocated to a member of the Tribunal other than the one which found that he lacked jurisdiction to decide his application for review. Indeed, there was no evidence to suggest that the appellant had any knowledge as to the identity of the Tribunal member whose decision on behalf of the Tribunal was handed down on 8 February 2008 until after that handing down occurred. The appellant had no right to have his application for review determined by a different Tribunal Member.

75 There is some force in the respondent Minister's submission that a further invitation to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review was not required under s 425(1) in circumstances where the Tribunal member who ultimately decided the appellant's application had previously conducted a hearing to which the appellant had been invited under s 425(1), in the circumstances referred to in the transcript of the Tribunal hearing of 8 June 2007, extracts from which have been recorded above. However, given the terms of the remittal order of 30 August 2007, the observation of the High Court in *SZFDE* at [54]-[55] referred to above and the terms of ss 414A(1)(b) and 414 of the Act, I am inclined to the view that a further invitation to the applicant under s 425(1) of the Act was required after 30 August 2007, subject, of course, to s 425(2)-(3) of the Act.

76 In my opinion no further s 425 invitation was required in the circumstances of this case because a s 424 invitation was clearly extended to the appellant to give additional information and he failed to do so before the time for giving it had expired thus bringing the case within the exclusion for which s 425(2)(c) of the Act provided.

77 The fact that the Tribunal was on notice that the envelope containing the invitation which had been sent by prepaid registered post had not been claimed, as early as 5 December 2007, does not mean that the exclusion for which s 425(2) of the Act provided should not have effect.

78 In *VNAA v Minister for Immigration and Multicultural and Indigenous Affairs* ('VNAA') (2004) 136 FCR 407 the Tribunal had given the required invitation to the applicants seeking review by posting it, by registered post, to both the mailing address provided and also to the residential address given on the application. The latter copy was returned marked 'Return to Sender' and 'no such address'. The applicants claimed that they did not receive either copy. Sundberg and Hely JJ, with whose reasons for judgment Gyles J expressed his general agreement, said at [14]:

> *'… Section 425 merely requires the Tribunal to invite an applicant to appear.*
> *…'*

Their Honours proceeded to conclude that there had been no failure on the part of the Tribunal to comply with s 425. They said at [15]:

> *'There was no breach of s 425, as alleged in the notice of appeal. The Tribunal invited the appellants to appear to give evidence and present arguments. The invitation and the notice of the time and place of the hearing were embodied in the one document, as ss 425 and 425A contemplate. See* NAOZ [NAOZ v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 820 at [19]]. *They were sent to the appellants' address for service at their last residential address appearing on their application for review. By force of s 441C(4) they are taken to have received the document seven working days after the date it bears. As the primary judge said, the fact that they did not become aware of the invitation does not displace the effect of s 441C. A Full Court so decided in* NADK of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs *[2002] FCAFC 184 at [14]-[16]. Section 426A empowered the Tribunal to decide the review in the absence of the appellants and without taking any further action to allow or enable them to appear before it. We agree with the primary judge when he said:*
>
> > If the applicants' argument were right, the Tribunal would be required in each case to be affirmatively satisfied that the invitation under s 425 had actually come to the notice of the applicant. To proceed in the absence of such affirmative satisfaction would, on the applicants' argument, convict the Tribunal of jurisdictional error. That argument flies in the face of the statutory scheme discernible in ss 441A and 441C and must, I consider, be rejected.'

(See also *SZBSZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 779 and *Minister for Immigration and Multicultural and Indigenous Affairs v VSAF of 2003* [2005] FCAFC 73 at [11] – [12].)

The conclusion reached by the Full Court in *VNAA* is consistent with that part of the judgment of another Full Court in *Liu v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 541 which held, at [47], that there was no absolute right conferred on an applicant by the Act to appear before the Tribunal.

WAS THE TRIBUNAL'S PROCESS AFFECTED BY DELAY ON ITS PART?

79 The appellant submitted that another reason why a further invitation to appear before the Tribunal was required was that the first hearing took place on 8 June 2007 and the Tribunal's obligation to extend procedural fairness to the appellant necessitated that he have a further hearing given that the ultimate decision of the Tribunal was not handed down until

8 February 2008, some eight months after the original hearing (see *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [25]).

80 Undue delay in decision-making, whether by courts or administrative bodies, is always to be deplored. However, that comfortable generalisation does little to advance the task of legal analysis when it becomes necessary to examine the consequences of delay. The circumstances in which delay, of itself, will vitiate proceedings, or a decision, are rare (per Gleeson CJ in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 ('NAIS') at [5]).

81 In *NAIS* the appellants had applied on 5 June 1997 to the Tribunal for review of a decision of the Minister's delegate. An oral hearing had taken place on 6 May 1998, with a further oral hearing on 19 December 2001, but it was not until 14 January 2003 that the Tribunal handed down its decision affirming the delegate's decision to refuse to grant protection visas to the appellants. At [9]-[11] Gleeson CJ said:

> *'[9] Because the Tribunal's reasons ignored the question of the time that had elapsed between the taking of evidence and the final assessment of that evidence, it can never be known how that assessment was in fact affected by the delay. What must be kept in mind is that the question concerns the fairness of the procedure that was followed. It was an inquisitorial procedure that, in the circumstances of this case, depended to a significant extent upon the Tribunal's assessment of the sincerity and reliability of the appellants. That is one of the reasons why they were entitled to, and were given, a "hearing". An important purpose of the hearing was to enable the Tribunal to do just what it ultimately did, that is, make a judgment about whether the appellants were worthy of belief. … A procedure that depends significantly upon the Tribunal's assessment of individuals may become an unfair procedure if, by reason of some default on the part of the Tribunal, there is a real and substantial risk that the Tribunal's capacity to make such an assessment is impaired.*
>
> *[10] … The procedures required by the Act were designed to give the appellants a reasonable opportunity to state their claims and to have those claims competently evaluated. If the Tribunal, by its unreasonable delay, created a real and substantial risk that its own capacity for competent evaluation was diminished, it is not fair that the appellants should bear that risk. The delay on the part of the Tribunal in the present case was so extreme that, in the absence of any countervailing considerations advanced in the reasons of the Tribunal, it should be inferred that there was a real and substantial risk that the Tribunal's capacity to assess the appellants was impaired. That being so, the appellants did not have a fair hearing of their*

claims by the Tribunal.

[11] … when the Tribunal, exercising the control over its own procedures given to it by the Act, without explanation or justification, and without any fault of an applicant for review, draws out those procedures to such an extent that its capacity to discharge its statutory obligations is likely to be materially diminished, and there is nothing in the Tribunal's reasons to displace that likelihood, then a case of procedural unfairness arises.'

See also per Callinan and Heydon JJ at [167]-[168].

82 In my opinion the eight month delay between the hearing and the ultimate decision of the Tribunal in this case could not be described as unfair. The Tribunal member did not accept the appellant's claims about his involvement in certain events on 5 November 2006 at a service of baptism at Lourdes Church in Silibin as truthful or even plausible, and did not accept as truthful the appellant's claims to having been involved in an altercation at a police station when he sought to report the church incident and a related assault, to having suffered a four hour detention and a subsequent threat for complaining about his alleged treatment, but, most importantly, the Tribunal member was satisfied on the basis of country information and the appellant's own admissions that the Silibin incident was an isolated one and that the response of the police and security forces in protecting Roman Catholics at Silibin was swift and effective.

83 In all cases there will invariably be some delay between the conclusion of a Tribunal hearing and the handing down of the Tribunal's decision. Whenever, for example, a s 424A invitation to comment on information is extended to an applicant after a Tribunal hearing, there will inevitably be a period of time which will elapse before a decision is handed down (see, amongst other things, s 424B(2) of the Act).

There was an obvious explanation for the eight month delay in this matter. Furthermore, the delay of eight months was not so extreme that it should be inferred that there was a real and substantial risk that the Tribunal's member's capacity to assess the appellant was impaired.

84 The process invoked by the Tribunal was not unfair. Apart from statutory constraints affecting the Tribunal's process, it may be observed that in the appellant's statutory declaration there was no request for a further hearing to allow further evidence to be given

nor were arguments presented relating to the issues arising in relation to the decision under review, nor was there any request for an extension of time within which to present further information to the Tribunal. There was nothing in the appellant's statutory declaration or the extracts from the news articles or the Tribunal's consideration of them which could have provided the groundwork for a submission that the Tribunal had committed a jurisdictional error in reaching the decision which it handed down on 8 February 2008.

85 The respondent Minister conceded that the consent order of the Federal Magistrates Court of Australia of 30 August 2007 providing for remittal of the matter to the Tribunal 'to **rehear** and determine according to law' was irregular and, as expressed, possibly beyond power. That irregularity, however, does not provide a basis for a finding of jurisdictional error in relation to what followed, in the context of the relevant statutory provisions to which reference has been made above.

DID S 424A HAVE ANY APPLICATION?

86 The final submission of the appellant related to an alleged failure by the Tribunal to give the appellant particulars of information that the Tribunal considered would be the reason, or a part of the reason, for affirming the decision that was under review and inviting the appellant to comment upon it in accordance with s 424A(1) of the Act (the terms of which were amended on 29 June 2007).

87 The appellant submitted that there had been a breach of s 424A on the basis that 'if the Tribunal was not going to accept the appellant's statement he ought to have given the appellant the appropriate notice.' This submission was put in the context of the Tribunal member's indication at the hearing on 8 June 2007 referred to at [15] above, namely:

> *'[i]f I do have jurisdiction then I'll go ahead and make a decision on the materials you've provided. If that is the case then we **may** write to you inviting you to comment in writing on a number of issues that have come up at the hearing today.'*
>
> (emphasis added)

88 In *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 ('SZBYR'), which was handed down on 13 June 2007, the High Court gave close attention to

the circumstances in which s 424A was engaged. The Court's consideration was primarily directed at s 424A(1)(a) of the Act.

Whilst it did not deal expressly with s 424A(1)(b), it made a number of general observations in respect of s 424A which demonstrate that the scope of the 'it' referred to in s 424A(1)(b), namely the 'information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review' is limited.

In their joint reasons for judgment, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ commenced their consideration of s 424A by observing that firstly, its effect was mandatory, in that a breach of it constituted jurisdictional error, and secondly, that its temporal effect was not limited to the pre-hearing stage, referring to the Court's earlier judgment in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162 ('SAAP') (see *SZBYR* at [13]).

89 At [22] their Honours drew attention to the 'limited scope of s 424A' and at [15] and [21] they said:

> *'**[15]** … Section 424A does not require notice to be given of every matter the tribunal might think relevant to the decision under review. …*
> …
>
> ***[21]** … Section 424A has a more limited operation than the appellants assumed: its effect is not to create a back-door route to a merits review in the federal courts of credibility findings made by the tribunal. …'*

90 Importantly, their Honours found at [17] that the use of the future conditional tense (would be) rather than the indicative strongly suggested that 'the operation of s 424A(1)(a) [was] to be determined in advance – and independently – of the tribunal's particular reasoning on the facts of the case'.

91 At [18] their Honours approved a passage in the joint reasons for judgment of Finn and Stone JJ in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 at 477 saying:

> *'… Finn and Stone JJ correctly observed in* VAF v Minister for Immigration and Multicultural and Indigenous Affairs *that the word "information"*:

> *"… does not encompass the tribunal's subjective appraisals, thought processes or determinations … nor does it extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the tribunal in weighing up the evidence by reference to those gaps, etc …"*
>
> ***If** the contrary were true, s 424A would in effect oblige the tribunal to give advance **written notice** not merely of its reasons but of each step in its prospective reasoning process. **However broadly "information" be defined, its meaning in this context is related to the existence of evidentiary material or documentation**, not the existence of doubts, inconsistencies or the absence of evidence. …'*
>
> (footnotes omitted and emphasis added)

92 As Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ said in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [48]:

> *'Procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given. On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of prejudgment.'*

93 The appellant, in this case, was not entitled to a running commentary on his evidence nor was he entitled to have his 'statement' referred back to him for comment. Furthermore, s 424A(1) had no application to information the appellant gave to the Tribunal for the purpose of his application for review (see s 424A(3)(b) of the Act) and the appellant did not identify any other 'information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision' that was under review in respect of which an invitation to comment was required.

94 The appellant's submission that the Tribunal failed to give the appellant an 'appropriate notice' under s 424A of the Act is without any substance.

95 The appellant has failed to make out any case of jurisdictional error on the part of the Tribunal. In my opinion the appeal should be dismissed with costs.

I certify that the preceding sixty (60) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Graham.

Associate:

Dated: 30 June 2009

Solicitor for the Appellant:	Mr T A Fernandez
Counsel for the First Respondent:	Ms K L Walker
Solicitor for the First Respondent:	Clayton Utz

The Second Respondent filed a submitting appearance.

Date of Hearing:	29 May 2009
Date of Judgment:	30 June 2009