FEDERAL COURT OF AUSTRALIA

SZMSA v Minister for Immigration & Citizenship [2010] FCA 345

Citation:	SZMSA v Minister for Immigration and Citizenship [2010] FCA 345
Appeal from:	SZMSA v Minister for Immigration and Citizenship and Refugee Review Tribunal [2009] FMCA 716
Parties:	**SZMSA v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL**
File number:	NSD 897 of 2009
Judge:	**GILMOUR J**
Date of judgment:	13 April 2010
Revised:	15 April 2010
Legislation:	*Migration Act 1958* (Cth) ss s 422B, 425
Cases cited:	*NAMJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 76 ALD 56 *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1
Date of hearing:	19 November 2009
Place:	Perth (Heard in Sydney)
Division:	GENERAL DIVISION
Category:	No catchwords
Number of paragraphs:	52
Counsel for the Appellant:	The Appellant appeared for himself
Counsel for the Respondent:	Mr T Riley
Solicitor for the Respondent:	Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 897 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZMSA** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**GILMOUR J**
DATE OF ORDER:	**13 APRIL 2010**
WHERE MADE:	**PERTH (HEARD IN SYDNEY)**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the costs of the first respondent to be taxed if not agreed.

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 Federal Law Search on the Court's website.

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BETWEEN:	**SZMSA** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent** **REFUGEE REVIEW TRIBUNAL** **Second Respondent**

JUDGE:	**GILMOUR J**
DATE:	**13 APRIL 2010**
PLACE:	**PERTH (HEARD IN SYDNEY)**

REASONS FOR JUDGMENT

1 This is an appeal from a judgment of a Federal Magistrate of 12 August 2009 dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) delivered on 5 August 2008. The Tribunal had affirmed a decision of a delegate of the Minister for Immigration and Citizenship to refuse to grant a protection visa to the appellant.

PROCEDURAL HISTORY

2 The appellant is a citizen of Ukraine who arrived in Australia on 14 April 2007. On 28 May 2007, the appellant lodged an application for a protection visa with the Department of Immigration and Citizenship. The appellant claimed to fear persecution in Ukraine for reason of his Jewish race and religion. A delegate of the first respondent refused the application for a protection visa on 22 June 2007. On 26 July 2007, the appellant applied to the Tribunal for a review of that decision.

3 In his application for a protection visa, the appellant claimed that he left Ukraine due to “unbearable anti-Semitism”. He stated that his father was Jewish and his mother Ukrainian and that because of this the Israeli authorities do not recognise his “Jewishness”

which is only acknowledged through the maternal line. He claimed that on three occasions a large red swastika was painted on his front door and that he was called 'kike face', an apparent Jewish slur, many times. On 5 August 2006, after leaving a Shabbat religious service he was assaulted by a group of neo-Nazis, sustaining severe injuries. He was assaulted and beaten again on the Jewish holiday of Purim on 4 March 2007. He claimed that a group of four men had attacked him yelling 'Heil Hitler.' He reported both attacks to the police. The police laid so-called "administrative charges" akin to disturbing the peace against two men in respect of the first assault as a result of which they received merely an "administrative fine" of 160 hryvnia. This was, it seems, a modest sum of money. No charges for "hate crimes" were levelled although it was open to the police to have done so. The authorities could not find the perpetrators of the second assault.

4 The appellant stated that he feared that the persecution would continue if he returned to Ukraine and that he would be subjected to repeated physical and mental abuse at the hands of neo-Nazis. He claimed that after the brain injury sustained in the first attack, he suffered from chronic anxiety and severe panic attacks and that he was not able to sleep and work normally, or fulfil his professional duties. He also stated that over the past year the level of anti-Semitism in Ukraine had increased significantly.

BEFORE THE TRIBUNAL

5 On 10 August 2007, the Tribunal wrote to the appellant inviting him to attend a Tribunal hearing on 17 September 2007. The appellant's migration agent advised the Tribunal that the appellant would not be able to participate in the hearing on that date due to his "poor health condition". He was said to have developed "Post-Traumatic Stress Disorder and Major Depression" according to the opinion of Dr George Jacobs, a consultant psychiatrist. Dr Jacobs described the appellant's claims concerning mistreatment in Ukraine. Dr Jacobs also recommended that the appellant not participate in a hearing of the Tribunal at that point in time as he was medically unfit, but said that he may be ready to participate in about two months depending on his response to medication.

6 On 28 September 2007, the Tribunal asked Health Services Australia to arrange an urgent appointment for the appellant with a psychiatrist to assess his fitness to attend a hearing. On 2 October 2007, a Tribunal officer wrote to the appellant's migration agent requesting that the appellant attend an appointment on 10 October 2007, which the Tribunal

had organised with a psychiatrist, Dr Sam Rogers (sic). This was intended to be a reference to Dr Roberts.

7 Dr Roberts provided a detailed medico-legal report in relation to the appellant dated 15 October 2007 in which he stated that he had been asked to assess both whether the appellant was fit to attend a Tribunal hearing and, if not, when he would be able to attend. Dr Roberts stated that the appellant had presented with features consistent with a Major Depressive Episode on a background of Post-Traumatic Stress Disorder precipitated by two vicious anti-Semitic assaults committed against him during the past 15 months. Under the heading "Recommendations" Dr Roberts stated that the appellant was "currently unfit to participate in a Tribunal Hearing" and that it was "premature to attempt to predict when [the appellant] will become sufficiently well as to be considered fit to participate in a Hearing. A review will be necessary to reassess fitness after a further period of treatment".

8 The Tribunal sent to the appellant's migration agent copies of the reports of Dr Jacobs and Dr Roberts, in response to a request under the *Freedom of Information Act 1982* (Cth) made on 29 October 2007. On 12 November 2007, the Tribunal invited the appellant to attend a hearing on 21 April 2008. On 2 April 2008, the Tribunal received a response to the invitation which indicated that the appellant wished to attend the hearing. The hearing was postponed at the Tribunal's request until 10 July 2008. The appellant's migration agent returned a further response to hearing invitation form dated 16 June 2008 indicating that the appellant wished to attend the hearing on 10 July 2008. In addition, on 9 July 2008, the migration agent telephoned the Tribunal to confirm that the appellant would be attending the hearing.

9 The hearing was conducted on 10 July 2008. The Tribunal accepted that the appellant had experienced a long history of insults and minor property damage, but found that this did not constitute serious harm amounting to persecution. The Tribunal noted that his past life and career as a medical doctor did not suggest that that these incidents held him back in any sense from achieving success in his personal or professional life. The Tribunal further noted that the appellant had acknowledged that he and other Jews in Ukraine had learned to tolerate this level of abuse and succeed in spite of it. The Tribunal was not satisfied that the abusive behaviour amounted to anything more than "an annoyance, even if at times a severe one".

10 The Tribunal accepted that the appellant was attacked by neo-Nazis groups in August 2006 and March 2007; that on both occasions he was readily identifiable as a Jew; that the attacks were anti-Semitic in character, motivated by a hatred of his Jewish religion; and that as a result he suffered serious physical injuries which triggered his post traumatic stress disorder and depressive illness.

11 After referring to independent country information, the Tribunal found that physical violence against Jews in Ukraine was no more than "an isolated or spasmodic problem", and that attacks on Jewish individuals were not common. The Tribunal was not satisfied that the there was anything in the independent country information to suggest that anti-Semitism was officially condoned or that efforts were not being made to prevent its expression.

12 The Tribunal concluded that on the basis of all the information before it, it was not satisfied that there was a real chance that the appellant would suffer serious harm amounting to persecution because of his Jewish religion, or any other Convention-related reason, in Ukraine in the future.

13 Finally, the Tribunal noted in its decision record under the heading "Hearing issues" that:

> Having had the opportunity to observe the Applicant give his oral evidence I am satisfied that he was able to participate effectively in the hearing and that he was not prevented by any psychological difficulties he may experience from articulating his claims. His answers to questions were responsive and detailed and he was able to engage in extended discussion on a range of issues. He was accompanied by his adviser who made a number of useful interventions. While he noted, at the end of the hearing, that he was feeling tired he also acknowledged that he had not encountered any particular difficulties in giving his evidence.

14 The Tribunal, therefore, affirmed the decision of the delegate not to grant the appellant a protection (Class XA) visa.

PROCEEDINGS IN THE FEDERAL MAGISTRATES COURT

15 On 1 September 2008, the appellant applied to the Federal Magistrates Court for review of the Tribunal's decision. The appellant was represented by counsel. In substance the appellant contended that he was unfit to appear at the Tribunal hearing on 10 July 2008

and accordingly there was a breach of s 425 of the *Migration Act 1958* (Cth) (the Act). In an amended application filed on 10 December 2008 the appellant claimed that:

> After the Tribunal
>
> (a) considered and apparently accepted a finding in the report of a Consultant Forensic Psychiatrist commissioned by the Tribunal itself some months prior to the hearing (a finding to the effect that the appellant was then unfit to participate in a hearing); and
>
> (b) asking itself (as a precondition to the exercise of its jurisdiction) to the effect "Is the appellant able to participate properly in the hearing?",
>
> the Tribunal considered two things, being
>
> (c) the interests of all parties that the process not drag on; and
>
> (d) statement(s) to the effect that he was able to participate properly,
>
> a consideration which was in the circumstances an error which went to jurisdiction:
>
> (e) the two things were each and both irrelevant to the question;
>
> (f) the Tribunal failed to consider matters which were relevant to the question;
>
> (g) the Tribunal misdirected itself in law; and
>
> (h) although not acting in bad faith, the Tribunal nonetheless acted in a way which was not fair and just.

16 In written submissions before the Federal Magistrate the appellant contended that there was a want of procedural fairness on the basis that he, the appellant, was not in a position to determine whether he was fit to participate, that the Tribunal did not clearly put the report of Dr Roberts to him in the hearing, and either did not appear to take the opinion into account or was under a misapprehension that Dr Roberts' view of the appellant's fitness related only to the time of the report. It was submitted that while the Tribunal was not bound to accept a particular piece of expert evidence, such as Dr Roberts' report, in this case that was the only material on which a rational assessment of his ability to participate could be made.

17 It was also contended that fairness dictated that, in the circumstances of this case, particularly given the postponements of the hearing at the request of the Tribunal, the Tribunal should either have taken Dr Roberts' opinion into account or, possibly, made it clear to the appellant that it was not going to do so. It was contended that the consideration of the appellant's statements to the effect that he was able to participate and the interests of all

parties that the process not drag on amounted to a consideration of irrelevancies. The proper question was said to be whether the hearing should have commenced, in the light of Dr Roberts' opinion and notwithstanding the delay.

18 In oral submissions it was clarified that s 425(1) was the section in Div 4 of Part 7 of the Act on which the appellant relied in contending that there was a lack of procedural fairness. Reference was also made to s 422B of the Act.

19 The parties accepted that "fitness to give evidence before the Tribunal is a jurisdictional fact upon which the Court must reach its own view": *NAMJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 76 ALD 56 at [46].

20 The Federal Magistrate was satisfied on the basis of the reports by Dr Jacobs and Dr Roberts that as at October 2007 the appellant was not fit to participate in a Tribunal hearing. As such, had the Tribunal held a hearing at this point in time, then it would not have afforded the appellant a *"meaningful invitation"* as required under s 425: *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553.

21 However, the Federal Magistrate also found that Dr Roberts' report was not of itself, or when considered together with Dr Jacobs report, such as to indicate that the appellant was necessarily unfit to participate in the hearing held on 10 July 2008. Her Honour noted that whilst the appellant's migration agent did bring to the Tribunal's attention Dr Roberts' October 2007 opinion about the appellant's apparent indifference as to the outcome of the Tribunal hearing in his letter of 10 July 2008, no postponement of the hearing was sought. Moreover, the Tribunal had twice received from the appellant written confirmation that he wanted to attend a hearing.

22 Her Honour further noted at [99] that, on the basis of the transcript of the Tribunal hearing, the appellant's answers to questions were responsive and detailed. Her Honour stated the fact that the appellant suffered from depression and post traumatic stress disorder and continued to receive treatment was relevant to but not determinative of his fitness to participate in the Tribunal hearing: *NAMJ* 76 ALD 56 at [52].

23 Her Honour noted that there was no indication or claim that the appellant failed to address aspects of his claims as previously put in writing, that he made different claims or inconsistent claims, that he was otherwise unable to articulate the extent and nature of the basis of his claim to fear persecution, or that he was limited in his ability to respond to issues raised by the Tribunal. The accuracy of the Tribunal's assessment of the appellant's presentation at the hearing was not challenged before the Court.

24 Following the reasoning of Branson J in *NAMJ*, the Federal Magistrate did not consider the Tribunal's assessment of the appellant's ability to participate in the hearing held on 10 July 2008 was rendered *"improbable"* by the fact that the appellant was unfit in October 2007. Having regard to all the evidence before the Court, and bearing in mind that the appellant bore the onus of establishing that he was unfit to take part in the hearing, her Honour was not satisfied that at the time of the Tribunal hearing the appellant lacked the capacity to give an account of his experiences in Ukraine, to present argument in support of his claims, to understand or to respond to the questions and concerns put to him or to do so in detail.

25 As a result of the above findings, her Honour concluded that the appellant's psychological condition was not such as to deprive him of the *"meaningful opportunity"* required under s 425 of the Act. Nor was there any lack of procedural fairness established on the basis contended for by the appellant pursuant to s 422B(3) of the Act. Nor had it been established that the Tribunal had regard to irrelevant issues, failed to consider relevant matters, misdirected itself in law or acted in a way that was not fair and just.

26 As she found no jurisdictional error in the decision of the Tribunal, her Honour dismissed the application.

THE PRESENT APPEAL

27 The appellant filed a notice of appeal on 21 August 2009. The appellant is now unrepresented. The Notice of Appeal contains three grounds:

1. FMCA has not considered all the evidence relevant to RRT decision.

2. The RRT misunderstood the report from psychiatrist Dr S Roberts in relation to my fitness to participate in a Tribunal hearing.

> 3. No jurisdictional error has been established by FMCA while I was medically unfit to participate in the Tribunal hearing and no psychiatric assessment was conducted before the tribunal hearing as was required by Tribunal commissioned Forensic psychiatrist Dr S Roberts.

THE HEARING

28 At the hearing of the appeal before me, the appellant appeared in person with the assistance of an interpreter in the Ukranian language. He said that when he appeared before the Tribunal he was depressed and that "it was all too much for me". He further submitted that the Tribunal did not study the details of his medical condition.

29 No particulars of the first ground were provided. Her Honour considered in detail the evidence as to the appellant's medical condition which was before the Tribunal hearing. There was no fresh evidence led before her Honour. There is no basis to this ground and it must fail.

30 The second ground claims that the Tribunal misunderstood the report from Dr Roberts. This ground is also unparticularised, and is irrelevant in any case because the appellant's fitness to give evidence is ultimately an issue for the Court. Her Honour concluded, correctly in my opinion, that the Tribunal did not misunderstand Dr Roberts' report. No submission was put as to why her Honour was wrong to so find nor can I discern for myself any such error.

31 The third ground of appeal, in effect, contends that the appellant was unfit to attend the Tribunal hearing and that the Tribunal was required to obtain another report from Dr Roberts. However, her Honour found that the appellant was not unfit to attend the hearing and there was no suggestion below that the Tribunal was obliged to obtain another report from Dr Roberts, and no legal basis for such a suggestion is identified in the Notice of Appeal. As her Honour correctly observed, Dr Roberts' report did not establish that the appellant was unfit to attend the Tribunal hearing.

32 The Federal Magistrate provided very detailed and considered reasons in this respect. It is instructive to set out relevant passages, which in my opinion are correct, as follows:

> 93. I am satisfied on the basis of the reports by Dr Jacobs and Dr Roberts that as at October 2007 the applicant was not fit to participate in a Tribunal hearing. Had the Tribunal held a hearing at that time it would not have afforded the applicant the

"*meaningful invitation*" required under s 425 (see *SCAR*).

94. However, Dr Roberts' report is not of itself, or considered with Dr Jacobs report, such as to satisfy me that the applicant was necessarily unfit to participate in the hearing held on 10 July 2008. The prognosis was not that the applicant remained unfit to participate in a hearing for a continuing indefinite time, but that as at October 2007 it was premature to predict when the applicant would be fit, as it would depend on his response to medication. Hence Dr Roberts could not address the second aspect of the Tribunal's instructions (see [8] above) at that time.

95. The applicant's migration agent obtained a copy of Dr Roberts' report in November 2007, after the Tribunal advised that the hearing had been rescheduled for 21 April 2008. He did not request any further postponement. The Tribunal received a response to hearing invitation form dated 31 March 2008 indicating that the applicant would attend the hearing. The Tribunal postponed the hearing twice more. Each time it received the same positive response to the hearing invitation and no further issue was raised about the applicant's fitness to attend the hearing.

96. The adviser did bring to the Tribunal's attention Dr Roberts' October 2007 opinion about the applicant's apparent indifference as to the outcome of the Tribunal hearing in his letter of 10 July 2008. However no postponement of the hearing was sought. I have however borne in mind that the applicant's willingness to attend the Tribunal hearing on 10 July 2008 must be seen in the context of his indifference to the importance of the Tribunal hearing in October 2007 and his desire to have the matter resolved quickly. (cf *SGLB* at [125] per Callinan J).

97. I am of the view that the analogy of fitness to plead in a criminal trial is not entirely in point although, as Branson J suggested in *NAMJ*, some limited guidance can be gained from considering that concept. However, as her Honour pointed out, there are important differences between a criminal trial and a hearing before the Tribunal (at [53]). In particular, in the context of a Tribunal hearing what is in issue is the applicant's ability to give evidence and present argument relating to the relevant issues, not the applicant's capacity to understand, plead, follow the course of the proceedings and make a defence or answer a charge relevant in relation to the common law test of fitness to stand trial (see *Eastman v The Queen* [2000] HCA 29; (2000) 203 CLR 1 at [58]). Moreover the Tribunal hearing is not adversarial. The Tribunal is not bound by technicalities and can modify its procedures to accommodate the particular circumstances of an applicant. As Branson J stated at [57]:

> *The tribunal is required, for the purpose of determining whether or not it is satisfied of the matters identified in s 65 of the Act, to consider the claims of the applicant upon which his or her claim for asylum is based. Those claims are likely to be able to be identified from the material already before the tribunal when the hearing commences. That material will include any written submissions made on behalf of the applicant. Additional claims may be identified during the course of the hearing. Although the tribunal is not required to make a case on behalf of an applicant, it must give consideration to any claim reasonably able to be identified from the evidence and other material before it. To this extent the tribunal and not the applicant has the conduct of the hearing. The legislature may be assumed to have appreciated that most applicants will not have a detailed understanding of the requirements of the Act or, without prompting by the tribunal, of the precise nature of the evidence that might assist their claim to be entitled to a protection visa.*

98. It is relevant to have regard to the conduct and intended purpose of the Tribunal hearing. In this case the transcript of the hearing is in evidence. The Tribunal was aware of the expert medical reports, including Dr Roberts' view that it was premature in October 2007 to predict when the applicant would become sufficiently well to be considered fit to participate in a hearing, as this would depend on his response to treatment.

99. The applicant had the assistance of his migration agent at the hearing. Importantly, as the Tribunal found and consistent with what appears in the transcript, the applicant's answers to questions were responsive and detailed. While the Tribunal did not raise the evidence about the applicant's psychological condition until after dealing with introductory matters, it also obtained confirmation from the applicant that he saw Dr Jacobs every three weeks, the last time a little over two weeks before the hearing and that he had been taking his prescribed medication at the increased dosage.

100. The fact that the applicant suffered from depression and post traumatic stress disorder and continued to receive treatment is relevant to but not determinative of his fitness to participate in the Tribunal hearing. As Branson J pointed out in *NAMJ* at [52]:

> *The UNHCR* Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees at *[207]–[208] recognises that determinations of refugee status may need to be made in respect of individuals suffering mental and emotional disturbances. The legislature may also be presumed to have been aware of this need. For this reason it seems unlikely that the legislature would have intended to set a jurisdictional standard of "fitness" that might prevent a significant number of individuals seeking asylum in Australia from being able to progress applications before the tribunal to the stage of a hearing when the tribunal is not able to decide the applications "on the papers". That is, it seems likely that the legislature intended that a tribunal hearing should be able to proceed notwithstanding some measure of psychological stress and disorder in the applicant. The decision in* MIMIA v SCAR *establishes, however, that there is a point at which an applicant's psychological state renders a tribunal hearing a nullity.*

101. As the Tribunal recorded, it is apparent that in the hearing the applicant was able to engage in extended discussion on a range of issues. He also had the assistance of his adviser, who was given the opportunity to and made a number of points about anti-Semitism in Ukraine and the applicant's claims.

102. There is no indication or claim in these proceedings that the applicant failed to address aspects of his claims as previously put in writing, that he made different claims or inconsistent claims, that he was otherwise unable to articulate the extent and nature of the basis of his claim to fear persecution or that he was limited in his ability to respond to issues raised by the Tribunal. Counsel for the applicant did not point to any specific difficulties in the applicant's participation in the hearing (other than in relation to how Dr Roberts' report and his psychological condition was discussed). The accuracy of the Tribunal's assessment of the applicant's presentation at the hearing was not challenged in these proceedings.

103. The Tribunal asked the applicant about whether he was able to participate in the hearing properly. While his positive response could not be determinative and must be seen in light of the apathy identified by Dr Roberts in October 2007, it is

notable that neither the applicant nor his advisor suggested that he was not fit to participate in July 2008. Moreover, notwithstanding that the applicant indicated that he thought he could participate, the Tribunal also informed him that it was "*very important*" that if he encountered "*any difficulty at any point*" he let the Tribunal know and they would take a break. The Tribunal also informed him that "*if it's a serious problem then we'll adjourn the hearing and come back on another day*". Hence it cannot be said that the applicant was not made aware that he could seek a further adjournment. Neither the applicant nor his adviser sought a break or an adjournment.

104. After a scheduled break, the Tribunal asked the applicant how he was feeling, to which he responded "*Fine*" (transcript page 21). In addition, at the end of the hearing the Tribunal stated (transcript pages 34-35):

> *One other point, I suppose, that I just need to ask you about at this point is the following. At the beginning of the hearing we discussed these psychological difficulties that you were suffering from, and after we had discussed it you indicated that you believed that those difficulties wouldn't prevent you from participating effectively in the hearing. Certainly, that's been my impression as we have gone through the hearing. But I just wanted to confirm with you at this point that – well, let me ask you whether you believe that you were able to participate properly, you weren't prevented by any psychological problem from responding and putting information before the tribunal.*

The applicant responded:

> *Actually, yes, I am – it was fine, but simply I am very tired and, you know, when I feel this tiredness it makes me even more depressed. But, still, I would like to have a final decision, I would like it to be somehow resolved, because it's just making me more depressed when it's going on.*

105. I accept that, as counsel for the applicant submitted, the applicant's own assessment should not be determinative of his fitness. However these exchanges also demonstrate that opportunities were given to him and to his advisor to raise any issues about his ability to participate in the hearing and that the Tribunal sought to adapt its procedures and to offer assistance to accommodate his particular circumstances (NAMJ at [56] and [58]).

106. I also accept that in assessing the fitness of the applicant to take part in the hearing I should accord weight to the view taken by the Tribunal. In this case, (unlike *SCAR*), the Tribunal was aware of the medical reports and accepted on that basis that the applicant "*now suffers from depression and post-traumatic stress syndrome, and that these conditions were triggered by the two attacks*". Contrary to the applicant's submission, it is not apparent that the Tribunal misunderstood the report from Dr Roberts in relation to the applicant's fitness to participate in a Tribunal hearing. At the time of the report Dr Roberts' opinion was that the applicant was unfit (October 2007) but in relation to the second issue raised with him, his opinion was that at that time it was premature to predict when the applicant would be fit and that for him to address that issue he would have to review the applicant after a further period of treatment. This does not mean that the Tribunal could not form a view of the applicant's fitness having regard to the nine months that had passed since the assessment and the applicant's evidence and presentation at the hearing.

107. As in *NAMJ*, I do not consider the Tribunal's assessment of the applicant's ability to participate in the hearing held on 10 July 2008 was rendered "*improbable*"

> by the fact that the applicant was unfit in October 2007.
>
> 108. Having regard to all the evidence before the Court, and bearing in mind that the applicant bears the onus of establishing that he was unfit to take part in the hearing, I am not satisfied that at the time of the Tribunal hearing the applicant lacked the capacity to give an account of his experiences in Ukraine, to present argument in support of his claims, to understand or to respond to the questions and concerns put to him or to do so in detail. I am not satisfied that the applicant's psychological condition was such as to deprive him of the "*meaningful opportunity*" required under s 425 of the Migration Act. No breach of s 425 is established.

33 I have read and considered the entirety of the transcript of the hearing before the Tribunal. I am satisfied, in particular, that her Honour's reasons and conclusions at [101], [102] and [108] as to the appellant's ability to understand and answer detailed questions or to put his case to the Tribunal were well-founded.

34 Although he was represented by counsel in the Court below, no medical report was adduced to support his assertion that he was not fit to participate in the Tribunal hearing.

35 No appealable error in her Honour's conclusions or reasoning has been established. The appeal should be dismissed with costs.

Postscript

36 I have found this case to be profoundly disturbing and am troubled by the decision of the Tribunal and in particular its conclusion that it was not satisfied that there is a real chance that the appellant would suffer serious harm amounting to persecution in future because of his Jewish religion should he return to Ukraine.

37 This concern was not an issue raised in the Court below and I am, therefore, unable to consider it as a ground of appeal.

38 As I observed above, the Tribunal accepted that the appellant was seriously injured following violent assaults on him by neo-Nazi groups in August 2006 and March 2007 and that the motivation for both assaults was hatred, on the part of the assailants, of his Jewish religion. Importantly too, the Tribunal accepted that, at the time of the assaults, the appellant was readily identifiable as a Jew and that he had been a regular worshipper at synagogue.

39 This case is to be distinguished on the facts from those found in the High Court judgment in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1. There, although the first respondent, as in this case, suffered two assaults, they were individual attacks by different perpetrators occasioned by violent adverse reaction to his proselytising as an adherent of the Jehovah Witness movement. In this case the assaults were on each occasion by members of a generic group namely neo-Nazis. Moreover, the appellant had taken no action to warrant or explain these assaults other than observably being a member of the Jewish faith. It was, viewed in that context, orchestrated violence by neo-Nazis, not merely, as in *Respondents S152/2003* "random and uncoordinated".

40 The Tribunal member, however, when considering the position of this appellant and his asserted fear of future harm amounting to persecution, beyond expressing sympathy for the violence suffered by him and his serious and continuing aftermath, focussed on non-governmental statistics from various sources as to the level of attacks on Jews in Ukraine. From these the member concluded that attacks on Jews in Ukraine, such as that suffered by the appellant were uncommon and were merely "isolated or spasmodic".

41 Accordingly, the Tribunal considered the position generally of Jews in Ukraine who had suffered attacks rather than the position of the appellant, his fear and whether or not it was well-founded. Undoubtedly objective evidence of the extent of assaults is relevant. However, there was no evidence and no consideration given to whether the incidence of assaults is more likely towards Jews who, observably by their headdress and regular attendance at synagogue, are more vulnerable. Not all Jews, for example, the appellant's son, profess their Jewish faith openly to the extent that the appellant has done.

42 I do not regard as reasonable the Tribunal's characterisation of the fact that the appellant had, in the past, as had other Jews there, stoically become used to verbal abuse and insults since he was at school because he was a Jew as "a nuisance even if at times a severe one". Such "nuisance" included, in the case of the appellant, having large red swastika signs daubed, on three occasions, on the front door of his home as well as being the butt of verbal anti-semitic slurs.

43 In any event, as the appellant told the Tribunal, a fact borne out by independent country information, the level of anti-semitism in Ukraine has risen markedly in recent years

with a particularly high level of it being evident amongst young Ukrainians aged 18-20 years. The appellant said that until 2006 he had tolerated the anti-semitism directed toward him but that by 2006 the position became unbearable.

44 In the same vein it seems to me to be of little relevance to conclude, as the Tribunal did at [67], on the question of the appellant's fear of persecution in the future, that he had been well educated and had, in the past, pursued a successful career as a medical specialist.

45 The independent country information arguably supports a conclusion that although, on occasions, arrests are made where anti-semitic attacks have been made that these are often disguised as "hooliganism" rather than "hate crimes". The official statistics for anti-semitic criminal conduct are, for this reason, distorted.

46 The Tribunal member, at [73], said:

> … While it may be, as the Applicant claims, that the authorities are generally reluctant to admit that the problem of anti-Semitism exists to any significant degree in the Ukraine, I am not satisfied that there is anything in the independent country information to suggest that anti-Semitism is officially condoned or that efforts are not being made to prevent its expression.

47 There was evidence before the Tribunal, but not referred to in its reasons, in respect to this conclusion, which was to the contrary and which constitutes more than mere suggestion. The European Jewish Congress News of 12 February 2007 reported:

> In addition, Ukraine media sources "frequently ignore anti-Semitic attacks, in contrast to the Russian media, which does a better job of reporting both anti-Semitic and racist violence." This is particularly due to the fact that the problem of neo-Nazi violence Russia, primarily targeted against Muslims, has reached such a massive scale that the government and media can no longer ignore it.
>
> The report also mentions that local authorities in Ukraine have at times covered up hate crimes by classifying them as "hooliganism." Despite lofty promises by the Ukrainian federal government to combat anti-Semitism, it seems there is much work to be made on the local, regional level. The experiences in the wake of anti-Semitic attacks, of many small Jewish communities scattered around the country is testament to this contradiction.

48 There was detailed country information of what, it seems to me, were frequent assaults on Jews in the Ukraine associated with apparent indifference to these by the police and even some political leaders. The following are some examples.

European Jewish Congress News
February 15, 2007

53 year old Georgy Dobryansky burst into the Central Brodsky Synagogue in downtown Kiev in February last year as Shabbat services were under way, demanding that he be brought to see the rabbi. According to witnesses on the scene, he was brandishing a large knife and shouting that "Jews should be killed." Security guards then tackled the would-be attacked bringing him to police.

Earlier this week he allegedly issued a violent threat against "Evreysky Obozrevatel", a Ukrainian Jewish newspaper, on the phone.

At his sentencing, Dobryansky was not charged with a hate crime.

Chronicle of Antisemitism in Ukraine & Russia: 2005-2006
(February 2, 2007)
(For release January 2007)

Antisemitism remained a serious problem in Ukraine in 2005-2006. Both countries have yet to overcome the historical legacy of Tsarist and Soviet mistreatment, violence, and discrimination against Jews. Both confront similar problems of ***corrupt and dysfunctional criminal justice systems that are ill-equipped to deal with relatively complicated legal issues like hate crimes and hate speech***. Antisemitic attitudes among the general population are widespread, and several politicians in both countries have been elected and re-elected while openly espousing antisemitic beliefs.

1. The neo-Nazi movement has expanded rapidly in both countries.
2. The frequency of violent attacks on Jews is higher in Ukraine than in Russia.
3. Ukrainian media frequently ignore antisemitic attacks.
4. In both countries, ***there is an unfortunate tendency by some local authorities and law enforcement agencies to cover up hate crimes by lumping them under the vague rubric of "hooliganism***."
5. …

This report details only the most serious antisemitic incidents reported in 2005-2006 in Ukraine and Russia.

UKRAINE

1. On January 7, 2005, ten Orthodox Jewish youths (all around the age of 13) and three adults were assaulted by neo-Nazis as they made their way from a synagogue to their rabbi's home in Simferopol, Ukraine. .. the Jews were ambushed by around 20 skinheads who appeared to be 5-10 years older than their victims. Yelling "Here are the Jews!" the neo-Nazis threw the children and the rabbi's wife to the ground and started to beat them. Two 13-year-old girls were hospitalized, one with a broken skull, and another with severe damage to her face which necessitated an operation.

Just as dispiriting as the attack was the police's reaction to it. Mr. Gendin criticized local police for trying to hush the matter up by declaring it ordinary "hooliganism" rather than an antisemitic hate crime.

(2) … in the early evening of January 20, 2005 two young men approached a Jewish youth leader on a downtown Simferopol street and called him a "kike face."

(3) A synagogue in the western Ukrainian city of lvano-Frankovsk that was vandalized on multiple occasions last year was once again targeted by antisemites in late January 2005. The attack resulted in "significant damage". Police treated the incident as "minor hooliganism" rather than employing the rarely used section on the criminal code for hate crimes.

(4) According to a February 7, 2005 report antisemitic incidents continue to plague Jews in Donetsk. … antisemitic incidents are becoming more frequent in the city. "Over the past year, there have been more incidents than there were in the preceding ten years," "More and more, youths are falling under the ideology of Nazism. If they see a Jew on the street, some of them yell out 'Heil Hitler!"' … there are at least five extremist youth gangs operating in the city, some of them openly antisemitic, and that the city has been inundated by "a sea of antisemitic literature" mostly produced in Russia.

(5) In March 2005, a project manager for the Hebrew Immigrant Aid Society (HIAS) was attacked in Kiev by skinheads and suffered a broken nose.

(6) On March 17 2005 the Ukrainian Jewish website 'Jewish News' reported that a Jewish youth was attacked by skinheads near Kiev's Brodsky synagogue on March 1. The youth, a university student named Aleksandr Koshman, was walking by the synagogue that evening with a friend when he noticed a group of around 15 skinheads wearing heavy boots and clothes reading "White Power." He started walking quickly towards his car, but was hit behind the head. When he turned around, he was called a "kike" and thrown to the ground, where the neo-Nazis started to kick him. … a large swastika was painted on the Brodsky synagogue.

(7) In May 2005, two young men assaulted Rabbi Shlomo Wilhelm, his son, and two other members of the Jewish community on Sunday evening in downtown Zhitomir as the men were heading home on the second night of Passover.

(8) In August 2005, Mordekhay Molozhenov, an Israeli yeshiva student, was put into a coma after being beaten and stabbed by neo-Nazis in Kiev. Another yeshiva student suffered minor injuries.

Later in August 2005, showing the continuing problem of Ukrainian police officials denying that neo-Nazi violence is a serious problem in their country, the deputy minister of internal affairs publicly asserted that the attack on Mr. Molozhenov and two other violent assaults on Jews in the preceding months were not motivated by antisemitism,

The head of the Jewish Agency (said) "A sharp rise in antisemitic acts has taken place in Ukraine recently: desecrations of Jewish graves, antisemitic graffiti on Jewish community buildings, and now attacks on Jews."

(9) On September 11, Rabbi Mikhail Menis and his 14 year old son visited a beer festival at the Kiev Expo Center and ere set upon by seven young men and a young woman armed with chains and other weapons. After a sustained beating, during which some of the attackers reportedly yelled neo-Nazi slogans, the attackers left. Two of them were charged with "hooliganism" while the other six were held as witnesses.

(10) An October 6, 2005 article in the Ukraine edition of the Russian national daily Komsomolskaya Pravda mentioned in passing an incident which took place

sometime in the spring of 2005. Within the context of an article on recent incidents of people being pushed onto the rails of the Kiev subway or jumping in front of trains in suicide attempts, the article briefly described the following incident: A Kiev neo-Nazi, believing that a man standing on a subway platform was Jewish, pushed him onto the rails. Luckily, the man was pulled off the tracks before the train came. Police later arrested the skinhead. It is not clear if the victim of the assault was Jewish or not, but the incident was just one of a rising number of incidents of antisemitic violence in Ukraine over the past two years, many of which have not received broad media attention, or received only the kind of cursory, dismissive coverage that this Komsomolskaya Pravda article gave it.

(11) On February 3, 2006 a man entered Kiev's Brodsky synagogue brandishing a knife and screaming that all Jews should be killed, according to a report that day by the Jerusalem Post. The man was detained by security guards and later arrested. Jewish leaders criticized the local prosecutor's decision to only charge the man with weapons possession rather than a hate crime, despite the fact that since his arrest he vowed to murder Jews upon being released from custody.

(12) On February 8, 2006 the Global Forum against Anti-Semitism – an Israeli quasi-governmental agency charged with monitoring anti-semitic incidents around the world – reported that anti-semitic incidents had decreased worldwide in 2005. The only two exceptions to the rule were Ukraine and Russia where the report found that anti-semitic incidents had noticeably increased.

(13) On May 19, 2006 JTA reported that Ukrainian rabbis called on authorities to ensure the safety of the country's Jews and adopt legislation against antisemitism. "We are trying to calm down Jews in our communities. We are trying to lower the level of anxiety," rabbis said in a statement after a rabbinical meeting in Kiev. "Unfortunately we do not see any adequate or unequivocal response toward manifestations of xenophobia from the Ukrainian authorities."

On May 29, 2006 JTA reported that Ukrainian Jewish leaders announced their intention to appeal a court decision that found a school teacher innocent of making antisemitic statements. A court in the Kirovograd region acquitted Nikolay Yakimchuk, a public-school teacher, of hate speech charges. Several of his students testified that he allegedly said during his lesson that "Jews are bad and impudent people," that Jewish students are only "taking space in our school" and there should be "no place for them among people."

The JTA report did not mention that the teacher called for the extermination of Jews in Ukraine (he reportedly told his students: "They need to be exterminated, they have no place among people" according to a May 26, 2006 AEN report). This goes well beyond the realm of un-PC talk to clear incitement of violence. Ukraine's hate speech law has only been successfully applied once, against the newspaper Silski Visti, a decision that was overturned after the Orange Revolution. President Yushchenko subsequently awarded that paper's editors medals.

(14) The parents of a Jewish youth who was shot by his neighbor in an alleged antisemitic attack accused police and prosecutors in Kiev of covering up the crime.

(15) Fans of a Tel Aviv soccer team who traveled to Odessa, Ukraine to lend their support in a match against the local Chernomorets club were attacked by soccer hooligans.

(16) A few days after this attack, the Russian Jewish web site Jewish.ru reported

on September 20, 2006 that a group of youths beat up a Jew in front of numerous witnesses in Odessa's downtown area. Chaim Veitsman was set upon during the evening of September 18 on a crowded street. A gang off youths, who witnesses say often hang out on that street, approached Mr. Veitsman. One screamed in his face, "I don't like kikes!" and started to attack him. "The hooligans were not afraid of any witnesses or that anybody would stand *up* for him [the victim]" the report's author wrote.

After the beating was over, Mr. Veitsman, who was covered in his own blood and was suffering from a busted lip and a concussion, had to call the police himself. The officers who responded were reportedly not very interested in investigating the attack. A witness came forward and named one of the attackers. Mr. Veitsman then went to the police station with the officers and waited 40 minutes before someone took down his complaint. Sources within the local Jewish community told Jewish.ru that Odessa's streets are becoming increasingly dangerous. People interviewed at the Migdal Jewish Cultural Center reported that over the past two years, five Jews affiliated with their organization have been attacked, and that police have not been able to solve even one of those cases.

(17) On December 7, 2006 JTA reported that one in three Ukrainians do not want Jews to be citizens of their country. The survey also found that 36% of respondents do not want to see Jews as citizens of Ukraine, compared to 26% in a similar survey conducted in 1994. A Regions.ru report from December 6 added that the poll found 45% of 18-20 year olds in Ukraine don't want Jews to live in Ukraine---a higher rate than older respondents.

On December 16, 2006, three Orthodox laws were attacked in Kiev by a gang of young men screaming antisemitic abuse.

Country Reports on Human Rights Practices – 2007 (Released by the Bureau of Democracy, Human Rights and Labour: March 11, 2008).

Problems with the police and the penal system remained some of the most serious human rights concerns. … There was societal violence against Jews and increased violence against persons of non-Slavic appearance. Anti-Semitic publications continued to be a problem.

49 The appellant also gave uncontradicted evidence as to the longstanding and widespread failure on the part of the Ukrainian authorities, police and political leaders to protect Jews from violent attacks.

[The questions were asked by Mr A Mullin, the Tribunal Member].

INTERPRETER: You know, I'm just prohibited from having such kind of life that I would like to have, such kinds of life when I have my religious beliefs. I'm prohibited to do all that. And, you know, just I am again very scared that I would be harmed physically again.

. . .

You know, just what I meant, I meant that I would like to live like a normal civilised person, to have the right to follow religious beliefs that I would like to have, to have the religious beliefs that I would have, to have a normal life and to have work and, you know, not to worry about my life, not to be concerned about my life and about

> the life of my family. You know, since they didn't give you the opportunity to have a normal life. Every time you're leaving the synagogue you are just scared that you will be humiliated or will be beaten or harmed, physically harmed or in any other way.
>
> MR MULLIN: Right. Right. Who would do this to you?
>
> INTERPRETER: Who was doing all these to me before? The same kind of people, you know, who have loads of different Nazism group, fascist group right now. Nationalistic groups. You know, they shout, they cry at each corner, "Just kill the Jews", "Just destroy the Jews, because they have to be destroyed." You know, just from the tribunal, the supreme council, they opening declare such ideas. What else can they expect from the government? You know, just for example, two years ago, yes, we got used to live like that, and we became very patient and very tolerant of the fact when some signatures would appear on your door or they would break your windows, or they would call you names. We got used to it. But when it came from bad to the worst part, when they started just performing the physical harm, introduced - when the physical harm was introduced then, you know, it was next to impossible to tolerate all that, especially when you have this special hat on your head, skull cap, yeah.
>
> INTERPRETER: Then it's – you know, it's like a sign for them.
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> . . .
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> What I meant was that some delegates in the Supreme Council of Ukraine, they were openly expressing their antagonistic hostile ideas against Jews. They were not supportive, they were not trying to improve the situation. But, on the other hand, they were just making speeches against Jews.
>
> . . .
>
> I did notice, especially after the Orange Revolution that took place in Ukraine; the situation became more critical and, you know, they started saying that it was due to the Jews, to the Jewish people, that there was a famine.
>
> . . .
>
> MR MULLIN: Right. When these things were happening, this incident, these incidents, did you go to the police about them?
>
> INTERPRETER: You know, that from my early childhood I know that it's useless to go to the police for some help. We haven't seen - our subconscious, yes, but I tried to do so, I tried to go to the police with my complaints, but nothing happened. I didn't get any kind of assistance. You know, they don't want even to listen that this is - this has some kind of relation to the religious beliefs or to the nationality. They don't want to connect those things, they are just trying to explain that some hooligans did it.

50 This evidence together with the independent country information is capable of supporting a conclusion that the Ukrainian authorities were either unable or unwilling to protect its openly Jewish citizens from violence by neo-Nazis motivated by religious hatred. The "administrative charges" levelled against two of the appellant's assailants in respect of the first assault were inappropriate and did not respond to what were hate crimes. The modest fines imposed on them were plainly inadequate. They do not, on an objective basis,

reflect an appropriate societal condemnation and repudiation of such hate fuelled crimes. They do not constitute any deterrent to his attackers or others.

51 The evidence is capable, arguably, of demonstrating that the violence against Jews in Ukraine is not random but is co-ordinated through the rising neo-Nazi movement there. The historical precedent for widespread and concerted attacks on Jews before and during the Second World War by the Nazis is well-established.

52 It is not for me to make any recommendation to the Minister to exercise one way or another, the discretion available to him under s 417 of the *Migration Act*. However, in this case, it seems to me that consideration of this case and the decision of the Tribunal ought be given by the Minister under this provision.

I certify that the preceding fifty-two (52) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gilmour.

Associate:

Dated: 13 April 2010