FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZOGI v MINISTER FOR IMMIGRATION & ANOR [2010] FMCA 390

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming persecution in Lebanon – applicant disbelieved in part – applicant nominating two witnesses to support his claims – witnesses attending Tribunal on the day of the hearing but not called into the hearing room – failure by the Tribunal to consider the applicant's wishes as set out in his Response to Hearing Invitation – breach of s.426(3) of the *Migration Act 1958* (Cth) – jurisdictional error established.

Acts Interpretation Act 1901 (Cth), s.29
Evidence Act 1995 (Cth), s.160
Migration Act 1958 (Cth), ss.66, 424, 425A, 426, 430A, 441A, 441C
Migration Reform Act 1992 (Cth), s.166DC

Minister for Immigration v Katisat [2005] FCA 1908
Minister for Immigration v Maltsin (2005) 88 ALD 304
Sook Rye Son v Minister for Immigration (1999) 86 FCR 584
SZMBF v Minister for Immigration [2005] FCA 1427
Uddin v Minister for Immigration (1999) 165 ALR 243
Xiang Sheng Li v Refugee Review Tribunal (1996) 45 ALD 193

Applicant:	SZOGI
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG605 of 2010
Judgment of:	Driver FM
Hearing date:	4 June 2010
Date of last submissions:	18 June 2010
Delivered at:	Sydney
Delivered on:	30 June 2010

REPRESENTATION

The Applicant appeared in person

Solicitors for the Respondents: Mr G Johnson
DLA Phillips Fox

ORDERS

(1) A writ of certiorari shall issue quashing the decision of the Refugee Review Tribunal made on 25 February 2010.

(2) A writ of mandamus shall issue requiring the Refugee Review Tribunal to rehear the review application before it according to law.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG605 of 2010

SZOGI
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. This is an application to review a decision of the Refugee Review Tribunal ("the Tribunal"). The decision was made on 25 February 2010. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa.

2. The following statement of background facts is derived from the Minister's submissions filed on 25 May 2010.

3. The applicant is a male citizen of Lebanon born on 01 December 1986. He last arrived in Australia on 24 May 2009. The applicant applied for a Protection (Class XA) visa on 24 August 2009.[1] The application was refused on 25 November 2009.[2]

[1] court book (CB) 1-29.
[2] CB 73.

4. The applicant applied to the Tribunal for review of the original decision on 18 December 2009. The applicant gave oral evidence before the Tribunal on 11 February 2010. The Tribunal handed down its decision on 25 February 2010.[3]

The applicant's claims

5. The applicant claimed to fear persecution for being implicated in a murder that took place during the course of a family dispute in April 2008. He claimed that he was threatened with being killed for appearing as a witness in the trial of the accused.

6. At the Tribunal hearing, the applicant claimed that the dispute between the two branches of his family started because they supported two different political parties, Hariri and Al Marada. There were long-running tensions over the division and ownership of agricultural land. The applicant also claimed that the other branch harassed his fiancée in Australia, resulting in the termination of his engagement.

The decision of the Tribunal

7. The Tribunal found that the applicant was not a credible witness (at [46]). The Tribunal found that the political differences raised for the first time at the hearing were fabricated, or seriously exaggerated, to support the applicant's claims for protection (at [46]). The Tribunal also found the applicant's explanation for his delay in lodging a protection visa application and his lodgement on the day his visitor visa expired lacked credibility (at [46]).

8. The Tribunal accepted that the applicant's immediate family and another branch had a history of conflict and that a person was accidentally killed in a confrontation in April 2008. The Tribunal found that it had no reason to doubt the authenticity of the documents presented by the applicant with respect to this claim (at [47]). The Tribunal accepted the applicant's account of the confrontation and the court proceedings following, including that the applicant gave evidence

[3] CB 106.

at court. The Tribunal accepted that the applicant was kept in protective custody by the police for two months (at [47]).

9. The Tribunal concluded that there may have been political differences between the branches of the applicant's family but did not accept these were the essential reason for the 2008 incident (at [47]).

   a) It found the applicant's account of being in hiding after June 2008 for almost a year before coming to Australia was unconvincing and implausible, and inconsistent with his claim that he came to Australia to visit relatives (at [49]).

   b) It rejected the applicant's claim that he was threatened with being killed after he arrived in Australia. The Tribunal found it implausible that the applicant was threatened over a year after the incident, during which time he had not been harmed (at [50]).

10. The Tribunal found that the applicant would receive effective protection in Lebanon from the police if he required it (at [52]). Accordingly, the Tribunal was not satisfied there was a real chance of persecution for a Convention reason if the applicant were to return to Lebanon (at [51]).

The application

11. The application filed on 19 March 2010 contains the following grounds:

   1. The Refugee Review Tribunal (the Tribunal) ignored my witnesses who accompanied me to the Tribunal hearing and whose names were listed on the form call "Response to Hearing Invitation" and who told the Tribunal Officer that they wish to give evidence to support my claim.

   2. The Tribunal misunderstood my well-founded fear of persecution and made an error by concluding that I have not been seriously harmed for a [C]*onvention reason.*

   3. The Tribunal Member rejecting that I was in hiding after June 2008 committed an error because she based her decision on speculative assumption.

4. *The Tribunal acted contrary to the evidence before it and made a wrong finding that I will receive effective protection from the Police in Lebanon.*

5. *I reserve my right to submit the transcript which would assist the Honourable Court to accept that the Tribunal failed to put important questions to me and my witnesses as to the persecution in Lebanon in relation to the serious incident which involves killing.*

6. *The Tribunal ignored the system of indirect revenge in Lebanon.*

The evidence and submissions

12. I received as evidence the court book filed on 15 April 2010 and the affidavits of the applicant (filed 19 March 2010) and Mr Toufic Laba Sarkis filed on 2 June 2010. Attached to Mr Laba Sarkis' affidavit is a transcript of the Tribunal hearing on 11 February 2010.

13. I permitted the applicant to give additional oral evidence in chief concerning the Tribunal's hearing invitation, his alleged response to it and his attendance at the Tribunal hearing with two intended witnesses. I received as an exhibit[4] what purports to be a Response to Hearing Invitation signed by the applicant on 15 January 2010 nominating as witnesses Adel Kanj and Youssef Bayeh.

14. I also received as an exhibit[5] the Tribunal's hearing invitation dated 7 January 2010 and a bundle of other documents referred to as a "health attachment number 001".

15. The Minister submits that (leaving aside ground 1) none of the other grounds in the application have any substance. I explained to the applicant at the hearing that I saw no merit in grounds 2-6. The hearing before me focussed on ground 1. The applicant submits in relation to that ground that the Tribunal committed a jurisdictional error by failing to take evidence from his two nominated witnesses. The Minister makes three submissions in relation to that ground:

[4] Exhibit A1.
[5] Exhibit A2.

First, the Court should draw an inference on the evidence before it that the applicant did not post to the RRT (or anyone) a completed Response to Information form (Response form). This inference, on its own, is sufficient for the Court to find the RRT was not given notification of the applicant's wishes to have evidence taken from witnesses at the hearing. It follows that the RRT was therefore not required to consider a request not sent to it.

Secondly, putting to one side the applicant's evidence, there is irrefutable evidence that the RRT did not, in fact, receive and was not aware of the Response form. The RRT was therefore not 'notified' in any sense contemplated by s 426(2).

Thirdly, if the Court accepts the RRT failed to consider s 426(3), which the first respondent does not concede, the applicant should nevertheless be denied relief.

Consideration

16. The applicant contends that he received the hearing invitation sent to him and that he responded to it in the form of the document tendered as exhibit A1. The applicant gave evidence that although he was uncertain when he sent the form back to the Tribunal, it was probably within a week of receiving it. He said that on the day of the hearing he went to the Tribunal premises with his two witnesses at 10.00am and he was later taken into the hearing room and his witnesses were asked to wait outside. The hearing proceeded and he provided his evidence to the Tribunal. The applicant said that he had assumed that as he had nominated two witnesses, the Tribunal would take evidence from them after it had finished taking evidence from him. However, when the Tribunal had finished with him, the presiding member closed the hearing. He did not think it appropriate to draw the presiding member's attention to the presence of his two witnesses because he assumed that the Tribunal would decide who to take evidence from. Neither he nor his witnesses had informed the Tribunal officer who met them outside the hearing room that the three of them wished to give evidence as the applicant did not think it necessary, having returned the Response to Hearing Invitation form.

17. In cross-examination, the applicant resisted attacks upon the credibility of his evidence.

18. It appears that a mistake was made which is reflected on the Tribunal's file. The hearing invitation to the applicant on the Tribunal's file appears at CB 92 and 93. It was sent by registered post on 7 January 2010 and bears a registered post receipt number 559147725012. The next two pages in the court book (pages 94 and 95) are a photocopy of the two sides of an envelope bearing a return to sender stamp and the registered post sticker number 59929651010. Page 96 of the court book is a no reply checklist completed by an officer of the Tribunal stating that the Tribunal had not received a response to the hearing invitation. Page 97 of the court book is the Tribunal hearing record which discloses that the interpreter arrived at 10.07am on 11 February 2010 and that the hearing commenced at 10.44am. The hearing concluded at 12.19pm[6].

19. The presiding member mistakenly thought that the hearing invitation had been returned unclaimed to the Tribunal. This was incorrect because the hearing invitation and the envelope bear different registered post receipt numbers. The envelope reproduced at CB 94 and 95 appears to relate to the Tribunal's acknowledgement letter dated 18 December 2009[7]. It is unclear when the Tribunal sent the applicant the health check documents comprised in exhibit A2 but I accept the applicant's evidence that he received the hearing invitation sent to him. The transcript of the Tribunal hearing contains the following exchange[8]:

> *Member: Do you know your invitation got sent returned, I wasn't sure you were coming today because this got returned saying you were unknown at that address.*
>
> *Applicant: No I received this letter and I had to go and collect it from the post office in Auburn.*
>
> *Member: Oh they sent it back to us. I don't know why.*
>
> *Applicant: We usually get the letters at our home address but we received a card in the mail and then we had to go and collect this letter from the post office.*

[6] CB 98.
[7] CB 91.
[8] T3 at about point 7.

Member: I see there was a bit of a mix up there. So you were still living with your aunty there, is that right?

Applicant: Yes.

20. The hearing then proceeded.

21. The presiding member was mistaken in thinking that the hearing invitation had been returned unclaimed. There was nothing before the Tribunal to suggest that the applicant was unknown at his nominated address. The return to sender stamp on the envelope stated simply that the letter was unclaimed. Nevertheless, the presiding member was concerned that the applicant's address might not be accurate. At T21 the following exchange occurred between the presiding member and the applicant:

Member: OK so what I'm going to do is to think about what you have said today and as soon as I make a decision, which I would've thought would be in the next two to three weeks, I will then write to you at that address, 18…

Applicant: 17 [Street].

Member: 17, yes. I'm a bit concerned that they sent this last thing back, though.

Applicant: Thank you.

Member: And you said they just left you a card and you went to the post office and got your invitation, is that right?

Applicant: Yes, then we went and collected the letter from the post office.

Member: OK. All right. Thank you very much for coming in, Mr [Applicant].

Applicant: Thank you.

22. It appears that, even at that stage, the presiding member was doubtful that the applicant had in fact received the hearing invitation sent to him.

23. The applicant gave oral evidence that he completed the Response to Hearing Invitation form comprising exhibit A1 and returned it to the Tribunal. He was uncertain how he addressed the envelope containing

the form but there is no reason to think that he sent the response to an address different to one of the two set out in the hearing invitation[9]. It was suggested to the applicant in cross-examination that his evidence concerning his response to the hearing invitation was untrue but the applicant was unshaken. I found the applicant to be a credible witness. I accept his evidence. He was also truthful to the Tribunal in explaining how he collected the hearing invitation from the post office (it being sent by registered post).

24. If the Tribunal received the Response to Hearing Invitation, it would have been put on notice that the applicant wished the Tribunal to take evidence from his two nominated witnesses. There is an issue of fact whether the Tribunal was so on notice. If the Tribunal was on notice, then its discretion, pursuant to s.426(3) of the *Migration Act 1958* (Cth) ("the Migration Act") was enlivened. Section 426 provides:

> *(1) In the notice under section 425A, the Tribunal must notify the applicant:*
>
> *(a) that he or she is invited to appear before the Tribunal to give evidence; and*
>
> *(b) of the effect of subsection (2) of this section.*
>
> *(2) The applicant may, within 7 days after being notified under subsection (1), give the Tribunal written notice that the applicant wants the Tribunal to obtain oral evidence from a person or persons named in the notice.*
>
> *(3) If the Tribunal is notified by an applicant under subsection (2), the Tribunal must have regard to the applicant's wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice.*

25. It was assumed in argument that the Tribunal complied with s.426(1). The applicant was unsure when he responded to the hearing invitation. Ultimately, he said that the response form would have been sent to the Tribunal no more than a week after he signed it. In other words, he said that it was returned no later than 22 January 2010. It is unclear when the applicant was actually notified for the purposes of s.426(1). However, as the invitation was clearly posted on 7 January 2010, the

[9] GPO Box 1333 Sydney or Level 11, 83 Clarence Street, Sydney.

applicant is taken to have received it seven working days after the date of the document[10], that is, on 18 January 2010. It would follow that the last date on which the applicant could give notice to the Tribunal, for the purposes of s.426(2) was 25 January 2010. Despite the applicant's initial uncertainty, I have no reason to disbelieve his ultimate evidence that he returned the Response to Hearing Invitation no later than 22 January 2010. I find that the applicant responded to the Tribunal's hearing invitation by posting the response form to the Tribunal on or before 22 January 2010.

26. The Minister contends that notification requires actual receipt of the document under ss.426(2) and (3). The Minister contends that there is no evidence of receipt of the document by the Tribunal, given the absence of a completed form in the court book, and that there is evidence it was not received in the form of the no response checklist. The Minister submits:

> *It is submitted that there can be no failure on the part of the RRT to consider the applicant's expressed desire for evidence to be taken from nominated witnesses if the RRT is not made aware of the applicant's wishes.*
>
> - *Section 426(2) requires an applicant to 'give the Tribunal written notice' of his wishes that oral evidence be obtained from nominated persons. Such notice must be given in accordance with subsection (2) (in other words, within 7 days of being notified of the hearing invitation). Subsection 426(2) does not, it is submitted, simply require the applicant to 'give' or 'send' a written notice.*
>
> - *Section 426(3) is unlike other provisions in the Act[11] which impose requirements for the giving of documents. In each such instance, the requirement for the RRT to give a notice, a written statement, or an invitation, is subject to specific methods of 'giving' that are prescribed in the Act, and, in each instance mentioned above, is subject to a prescribed deeming provision for receipt of the notice or invitation.*

[10] see s.441C(4).

[11] For instance, see s.66(1), which requires notification of an applicant, by the Department 'in the prescribed way'; s.430A, which requires the RRT to notify the applicant of a decision on a review (other than an oral decision) by giving the applicant a copy of the written statement by one of the methods specified in section 441A; s.424, which requires that an invitation be 'given to a person' by one of the methods specified in s.441A' or 'by a method prescribed' for persons in immigration detention; and s.425A, which requires that the RRT 'must give' the applicant a notice 'by a method prescribed for the purposes of giving documents to such a person'.

- *However, s 426 does not prescribe methods by which an applicant is to give to the RRT notice of a desire to have witnesses be called to give evidence at a hearing for the purposes of ss 426(2) and 426(3). Neither does the Act provide for any deeming provision with respect to a notice sent under s 426(2).*

If the legislature had intended that s 426(2) be read subject to a deeming provision for the receipt of notices sent, such a provision would have and could have easily been explicitly included in the Act. In the absence of a prescribed deeming provision, the Court should interpret 'notify' as that word appears in s 426(3) of the Act in accordance with the word's ordinary meaning.

The Macquarie Dictionary defines 'notified' as: '1. To give notice to, or inform, of something. 2. To make known; give information of...'. It is submitted that the word 'notify', in the context of ss 426(2) and 426(3), implies that the intended recipient of the information is made known of the information.

- *If the legislation does not 'deem' a notice to have been given under s 426(2), the Court should not interpret s 426(3) by giving the term 'notified' a meaning other than its natural and ordinary meaning.*

- *An analogous approach was taken by Weinberg J in* Solomon v Minister for Immigration & Multicultural Affairs *[2000] FCA 912, where his Honour found, dealing with the term 'notified' as that term appeared elsewhere in the Act*[12]*, that: 'There is authority for the proposition that an applicant is relevantly "notified" of a decision of the Tribunal rejecting his application when* ***he learns of the decision****, albeit without having yet been provided with the reasons.'*

- *In the first respondent's submission, notification for the purposes of s 426(3) requires* actual receipt *by the RRT of the notice purportedly sent. It would otherwise be incongruous and absurd to require the RRT to consider the exercise of its discretionary power to hear from witnesses nominated by an applicant, where the RRT in fact was not made aware that any such witnesses had been nominated, or made aware of their identities. In these circumstances, for example, the RRT is unable to turn its mind to whether it is appropriate to receive the witness(es) evidence, having regard to various factors like*

[12] His Honour was considering the meaning of the word 'notified' as it appeared in a now repealed version of s 478 of the Act.

relevance and probative value (see Minister for Immigration & Multicultural and Indiegnous Affairs v Maltsin *(2005) 88 ALD 304).*

- *It is noted that s 29 of the* Acts Interpretation Act 1901 *(Cth) does not apply in this case, as it relates to circumstances where an Act 'authorizes or requires any document to be served by post'. There is no such requirement or authorisation in the terms of s 426(2). A notice under s 426(2) could, in theory, be given to the RRT by means of fax, email or hand delivery.*

- *It is further submitted that s 160 of the* Evidence Act 1995 *(Cth) does not apply here, as although that Act establishes a rebuttable presumption of receipt with respect to sent postal articles, s 426(3), as discussed above, specifically requires the giving 'of notice' and requires that the RRT is 'notified'. It is not sufficient that the Court form the opinion that the RRT is taken to have been aware of the Response form, or 'should have known' of the existence of the Response form.*

27. I accept that s.29 of the *Acts Interpretation Act 1901* (Cth) does not apply but I have difficulty with some of the Minister's other submissions. It would seem incongruous for Parliament to establish a regime of deemed receipt in respect of documents sent to applicants but to relieve the Tribunal from any obligation to deal with responses to documents sent to applicants unless applicants could prove actual receipt of the response by the Tribunal. The Federal Court has been concerned for over a decade that the seven day time limit for a response fixed by s.426(2) should not be artificially shortened: see for example the observations of Burchett J in *Sook Rye Son v Minister for Immigration* (1999) 86 FCR 584 at [9]-[10] and the decision of Hely J in *Uddin v Minister for Immigration* (1999) 165 ALR 243.

28. In my view, the interpretation of s.426(2) argued for by the Minister would give rise to the same kind of problem excoriated by Burchett J in *Sook*. In other words, if an applicant is required to ensure, in order to comply with s.426(2) that his response reaches the Tribunal within seven days of the day when he is deemed to have received the Tribunal's hearing invitation, the opportunity to nominate witnesses may be stripped of any substance. In *Xiang Sheng Li v Refugee Review Tribunal* (1996) 45 ALD 193 Sackville J at 201 put to one side the

question of whether the seven day period in s.426(2) bears on despatch of a response or the receipt of it.

29. Section 426 has its origins in s.166DC of the *Migration Reform Act 1992* (Cth). The explanatory memorandum for the Bill states, in relation to the section:

> *Subsection (1) and (2) provide that where there is no review "on the papers", the RRT must notify the applicant that he or she is entitled to appear before the Tribunal to give evidence and that he or she is entitled to inform the Tribunal within 7 days of notification of persons from whom he or she wants the Tribunal to obtain oral evidence. Subsection (3) provides that while the RRT must have regard to the applicant's wishes it is not required to obtain the evidence requested by the applicant.*

30. I accept that the words "give" and "notified" in ss.426(2) and (3) should be given their ordinary and natural meaning. I accept the Minister's submissions concerning the meaning of "notified". "Give" means, relevantly, to "furnish" or "provide"[13]. It connotes despatch, but not necessarily receipt. If Parliament had meant "give" to mean "notify" in s.426(2) it would have used that term. In my view, the difference in language between ss.426(2) and (3) is deliberate and substantive. Section 426(2) requires despatch of a response by an applicant within seven days of being notified pursuant to s426(1). Section 426(3) imposes a duty on the Tribunal to consider a response sent within that period if the Tribunal receives it. The apparently legislative intention was to allow a period of seven days after an applicant is taken to have received a hearing invitation to respond with notice of additional witnesses. It was not in my view Parliament's intention that the notice must be received by the Tribunal within that period of seven days.

31. Accepting the Minister's argument as to the interpretation of the word "notified" in s.426(3) the receipt or non-receipt of the Response to Hearing Invitation by the Tribunal is a question of fact to be answered by reference to the available evidence. It is plain from the Tribunal transcript that the presiding member was unaware of the Response to Hearing Invitation. It does not follow that the Tribunal as a body was

[13] *The Macquarie Dictionary*, 3rd edition

unaware of it. The no response checklist appearing at CB 96 suggests that the Tribunal was unaware of the applicant's response but it is not conclusive. The checklist is coloured by the clerical error that was made with the envelope reproduced at CB 94 and 95 and the surrounding circumstances.

32. The no response checklist at CB 96 was completed on 4 February 2010 on the assumption that a response was due by 25 January 2010. I accept from that evidence that the Tribunal had not received the applicant's Response to Hearing Invitation by 25 January 2010, but, as I have already found, that was the last day on which notice had to be given – it was not the last day on which notice could be received. If the applicant's response was received later it is possible that the no response checklist was completed in ignorance of it.

33. Because the receipt or non receipt of the Response to Hearing Invitation by the Tribunal is a matter of evidence, the *Evidence Act 1995* (Cth) ("the Evidence Act") is relevant. Section 160 of the Evidence Act provides:

> *(1) It is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that a postal article sent by prepaid post addressed to a person at a specified address in Australia or in an external Territory was received at that address on the fourth working day after having been posted.*
>
> *(2) This section does not apply if:*
>
> *(a) the proceeding relates to a contract; and*
>
> *(b) all the parties to the proceeding are parties to the contract; and*
>
> *(c) subsection (1) is inconsistent with a term of the contract.*
>
> *(3) In this section:*
>
> *"working day" means a day that is not:*
>
> *(a) a Saturday or a Sunday; or*
>
> *(b) a public holiday or a bank holiday in the place to which the postal article was addressed.*

Note: Section 182 gives this section a wider application in relation to postal articles sent by a Commonwealth agency.

34. I accept that s.160 does not apply in respect of the regime in the Migration Act concerning the deemed receipt of correspondence sent by post[14]. However, I also accept the Minister's submission that that regime does not apply in relation to ss.426(2) and (3) and I find that the presumption in s.160 is available. The Minister has failed to rebut that presumption. I find that the Response to Hearing Invitation was received by the Tribunal on 29 January 2010 (after allowing for the weekend and the Australia Day holiday).

35. I find that a clerical error was made in the filing of the envelope at CB 94 in the mistaken belief that the hearing invitation had been returned to the Tribunal. It is more likely than not that, that mistake having been made, an officer of the Tribunal did not link the Response to Hearing Invitation with the applicant's file because the file appeared to show that the hearing invitation had been returned unclaimed, and a no response checklist had been completed.

36. The Minister does not submit that where the discretion under s.426(3) is enlivened following notification under s.426(2) a failure by the Tribunal to have regard to the applicant's wishes is not a jurisdictional error. The Minister concedes that the Tribunal must have regard to notification that an applicant wants to obtain oral evidence from a person (see *Minister for Immigration v Katisat* [2005] FCA 1908 at [37])[15]. The use of the imperative word "must" and the obvious significance of the consideration of whether to receive evidence from witnesses offered in support of an application leads me to the view that a breach of s.426(3) is a jurisdictional error.

37. Even if I were wrong in my interpretation of s.426(2) and the duty imposed by s.426(3) was not enlivened, because the applicant's response was received after 25 January 2010, in my view the Tribunal still had an obligation to consider the applicant's request to call witnesses because the Tribunal had notice of the request during the

[14] *SZMBF v Minister for Immigration* [2005] FCA 1427 at [8]
[15] Reliance was placed on the decision of the Full Court in *Minister for Immigration v Maltsin* (2005) 88 ALD 304, relating to the identical requirement on the MRT found in s 361(3). The Court found a breach of 361 which was inextricably linked with a breach of procedural fairness prior to the enactment of s 357A (s 422B for the RRT).

course of the review process. In my view, a refusal or failure by the Tribunal to consider a request by an applicant for the Tribunal to take evidence from witnesses who are conveniently available and who may be able to assist in corroborating the applicant's claims would subvert the review process and constitute a breach of s.425 of the Migration Act: see *Uddin* at [22].

38. Finally, the Minister submits that even if the Tribunal fell into jurisdictional error, relief should be refused in the exercise of the Court's discretion. The Minister makes the following submissions:

> … [E]*ven when a breach of 'inviolable limitations or restraints' are involved, as the High Court in* Minister for Immigration and Citizenship SZIZO *(2009) 238 CLR 627 found at [36], it remains incumbent on the applicant to establish some injustice occasioned by the alleged breach*[16]*:*
>
> > Notwithstanding the detailed prescription of the regime under Divs 4 and 7A and the use of imperative language it was an error to conclude that the provisions of ss 441G and 441A are inviolable restraints conditioning the Tribunal's jurisdiction to conduct and decide a review. They are procedural steps that are designed to ensure that an applicant for review is enabled to properly advance his or her case at the hearing; a failure to comply with them will require consideration of whether in the events that occurred the applicant was denied natural justice. There was no denial of natural justice in this case.
>
> *If the Court finds that the RRT failed to turn its mind to 'the applicant's wishes' contrary to s 426(3), and that such a failure constituted error going to the exercise of the RRT's jurisdiction, the Minster submits that the Court should refuse relief to the applicant in the exercise of its discretion.*[17]
>
> - *Even had the RRT considered whether to take evidence from the applicant's nominated witnesses (which is a logical impossibility as the RRT was not in possession of the Response form), there is no evidence before the Court that the two proposed witnesses could have said anything to the RRT which might have bore an influence on the RRT's findings, or affected the outcome of the review. It is for the applicant to*

[16] See also *Minister for Immigration v SZMTR* (2009) 180 FCR 586.
[17] *Re Refugee Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82; *SZBYR v Minister for Immigration* [2007] HCA 26; (2007) 235 ALR 609.

prove, and not for the first respondent to disprove, that the evidence that could have been given by the witnesses might have affected the outcome: NAQS v Minister for Immigration & Multicultural & Indigenous Affairs *(2003) 77 ALD 424 per Hill J at [28] to [31].*[18]

The basis of the RRT's decision was that the events described by the applicant as being the cause of his well-founded fear of Convention-related persecution were not, in fact, Convention-related.[19]*The only aspects of the applicant's account which the RRT did not accept was the applicant's explanation for why he was not tracked down by members of his family, and harmed, in the year leading up to his departure from Lebanon: [49].*

Critically, there was no suggestion by the applicant before the RRT that anyone could have verified that he was, in effect, 'in hiding' for the year leading up to his departure. Before the Court, in his evidence, the applicant disclosed that one of his witnesses, nominated on the Response form, could have given evidence to the RRT concerning the incident. The applicant said, at p 16 of the transcript: 'one of the young men have went to Lebanon and witness the incident and saw that people there are - I was asked for - or people were asking for me.'

- *It is not at all clear that this witness would have been able to assist the RRT in determining whether the applicant was in hiding during the year before the applicant left Lebanon. The applicant did not give any evidence about what the other nominated witness might have told the RRT.*

There is no basis upon which the Court could be satisfied that further witness evidence given at the hearing could have influenced the RRT's firm opinion that the applicant's claims, the critical aspects of which the RRT wholly accepted to have taken place, were centred upon Convention-relation persecution. In those circumstances, it would be futile for the Court to remit the matter to the RRT for consideration.[20] *The RRT's discrete finding*

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[18] Justice Hill's comments at [28] to [31] ultimately did not prevent his Honour from finding that the RRT had failed to conduct a review, owing to a number of other deficiencies on the part of the RRT: [65]-[66].

[19] The Tribunal made this finding, at [47]-[48], despite accepting, as questions of fact, that the applicant's family was feuding, and that in 2008, an incident occurred during which his cousin was shot and killed, where the applicant was supposed by some members of the family to have been responsible. The RRT further accepted that the applicant had sought protection from the police, and was held in protective custody for two months.

[20] *Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400.

that the applicant would have the benefit of state protection, fortifies this submission.

Further and alternatively, the applicant's conduct before this Court is inconsistent with his failure before the RRT to alert it to the existence of his witnesses and his desire for it to take evidence from them. This conduct disentitles the applicant from the relief now sought: see SZGME v Minister for Immigration and Citizenship *(2008) 168 FCR 487; (2008) 247 ALR 467 at [51]-[52]; [98]-[99];* Toia v Minister for Immigration and Citizenship *(2009) 177 FCR 125.*[21]

As the Full Federal Court recently found in Minister for Immigration and Citizenship v SZNVW *[2010] FCAFC 41 at [87], the RRT has not committed a legal error in circumstances where the applicant should have (but did not) present\d his case at its highest at the hearing by requesting that his witnesses be heard, or presenting other evidence:*

> That being so, I do not think it can be said that the Tribunal's review function was stultified or frustrated. The respondent suffered the misfortune of not running his case as well as he might have. Regrettably though that outcome might appear to be, this Court is bound to conclude that "a person whose conduct before an administrative tribunal has been affected, to the detriment of that person, by bad or negligent advice or some other mishap should not be heard to complain that the detriment vitiates the decision made": *SZFDE* at 207 [53] per the Court. Whatever disquiet one may feel about the Tribunal's reasons, now to permit review effectively for an error in presentation would be to create a most unwholesome precedent.

39. I do not accept that relief should be refused in the exercise of discretion. First, I am unable to rule out the possibility that one or other of the two witnesses the applicant wished to give evidence on his behalf may have had some bearing on the Tribunal's assessment of the credibility of the applicant's claims that his problems had a political nexus and that he was "in hiding" for the year before his departure from Lebanon. Their evidence may not have assisted the applicant but I cannot assume that they would not have assisted him. I cannot speculate about what the witnesses might have said.

[21] Regarding whether appellant was entitled to advance a position which was the opposite to the position taken before the Administrative Appeals Tribunal, see paragraphs [4] and [49]-[59] and the authorities there cited

40. Secondly, on the basis of my factual findings, the applicant has not acted inconsistently. The applicant alerted the Tribunal to the existence of his witnesses and his desire for it to take evidence from them by completing the Response to Hearing Invitation form and sending it back to the Tribunal. It then became the Tribunal's duty to consider that request. It was not up to the applicant to draw to the Tribunal's attention that request. The applicant was not to know that his Response to Hearing Invitation form had somehow been misplaced. The applicant gave evidence that he did not think it was his place to tell the Tribunal member who she should be taking evidence from. Applicants dealing with authority figures may understandably be reticent about reminding the presiding member of matters falling within his or her discretion. This is not simply a matter of the applicant potentially being able to put forward a better case. It is a question of the hearing process being subverted by the failure of the Tribunal to have regard to the applicant's wishes concerning his witnesses.

41. Thirdly, there is a general concern in my mind that the hearing opportunity afforded the applicant was stultified by the presiding member's misunderstanding of what had occurred. It is apparent from the transcript that the presiding member was not expecting the applicant to attend and was suspicious about both his attendance and the accuracy of his address, because she held the mistaken belief that the hearing invitation had been returned to the Tribunal. That may have impacted upon her consideration of the applicant's claims. Further, the hearing was not a particularly long one (about 90 minutes) and, given that the applicant was not expected, the presiding member may not have been well prepared for the hearing. The Tribunal found that the applicant's claims were "seriously lacking in credibility, most crucially in relation to his claim of fearing persecution for a Convention reason"[22]. The Tribunal was concerned that the applicant had made a political claim for the first time at the Tribunal hearing but the Tribunal was unaware that the applicant had not received the Tribunal's acknowledgement of his application which enjoined him to provide material or written arguments to consider as soon as possible[23].

[22] [46] of the Tribunal's reasons, CB 116.
[23] CB 91.

This combination of factors leads me to the view that there was unfairness as a result of the mistake made by the Tribunal.

42. Neither do I accept that the Tribunal decision is separately and independently supported by the Tribunal's view that effective State protection was available to the applicant in Lebanon. That issue was only very lightly traversed at the Tribunal hearing and it does not appear that the Tribunal had regard to any country information about the effectiveness of the police in Lebanon.

43. Accordingly, the applicant should receive relief in the form of the constitutional writs of certiorari and mandamus. I will so order.

44. I will hear the parties as to costs.

I certify that the preceding forty-four (44) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 30 June 2010