FEDERAL COURT OF AUSTRALIA

NALQ v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 121

MIGRATION – judicial review – application for protection visa – application for review by Refugee Review Tribunal – appellant invited to attend oral hearing – appellant sought adjournment on basis of illness and pending operation – Tribunal request for medical certificate – no medical certificate provided – hearing proceeded in absence of appellant – whether contravention of s 425 – whether invitation illusory – whether breach of requirement of procedural fairness

Migration Act 1958 (Cth) s 414, s 420, s 425, s 426A
Migration Legislation Amendment (Procedural Fairness) Act 2002

Minister for Immigration and Multicultural Affairs v Capitly (1999) 55 ALD 365 cited
Hossain v Minister for Immigration and Multicultural Affairs [2000] FCA 842 cited
Minister for Immigration and Multicultural and Indigenous Affairs v SCAR (2003) 198 ALR 293 cited
Mazhar v Minister for Immigration and Multicultural Affairs (2000) 183 ALR 188 cited
Liu v Minister for Immigration and Multicultural Affairs (2001) 113 FCR 541 cited
Minister for Immigration & Multicultural Affairs v Mohammad (2000) 101 FCR 434 cited
Xiao v Minister for Immigration & Multicultural Affairs [2000] FCA 1472 cited
Sreeram v Minister for Immigration & Multicultural Affairs (2001) 106 FCR 578 cited
Applicant NAHF of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 140 cited

NALQ v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
N1655 of 2003

RYAN, FRENCH AND RD NICHOLSON JJ
10 MAY 2004
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N1655 OF 2003**

On Appeal from the Federal Magistrates Court of Australia

BETWEEN:	**NALQ** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**RYAN, FRENCH and RD NICHOLSON JJ**
DATE OF ORDER:	**10 MAY 2004**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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JUDGES:	**RYAN, FRENCH and RD NICHOLSON JJ**
DATE:	**10 MAY 2004**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 The appellant, NALQ, is a citizen of Bangladesh. He was born in the town of Jessore on 22 January 1953. He describes his occupation as that of Homeopathic Doctor.

2 On 6 June 2001 the appellant arrived in Australia on a visitor class TR Visa valid for a one-month stay. He lodged an application for a protection (Class XO) visa with the Department of Immigration and Multicultural and Indigenous Affairs on 5 July 2001. The application was lodged with a covering letter from a migration agent, Mr Sirajul Haque.

3 On 25 August 2001 the application was refused by a delegate of the Minister for Immigration, Multicultural and Indigenous Affairs. The appellant applied to the Refugee Review Tribunal ('the Tribunal') for review of that decision on 14 September 2001. On 6 February 2003 the Tribunal affirmed the decision not to grant a protection visa. The appellant then filed an application in the Federal Court seeking judicial review of the Tribunal's decision. That application was transferred to the Federal Magistrates Court. On 9 October 2003 the application was dismissed by his Honour, Driver FM. The appellant lodged a notice of appeal against that decision to this Court. The sole ground in the appeal

turns on whether the Tribunal erred in proceeding to a hearing in the absence of the appellant who had requested an adjournment the day before because of his medical condition and a surgical procedure he was to undergo after the scheduled hearing date.

The Appellant's Claims

4 In a statement which accompanied his application for a protection visa the appellant said that he left Bangladesh to escape political oppression and to save his life. He said his political activities began when he was a student. He had been a freedom fighter in 1971 during the war of liberation of Bangladesh. Following the death of Sheikh Mujib in 1975 and the accession of Major Zia to power he had joined the Bangladesh Nationalist Party ('BNP') in 1979. After the death of President Zia in 1981 and the takeover by General Ershad, who removed the BNP government in a military coup, the appellant became an executive member of a party committee. He claimed that as a leading activist in the party he became the victim of oppression from his political opponents. He said he was arrested, beaten and put into custody on a number of occasions in 1983.

5 The appellant said he took an active role in a national movement, led by the BNP, against President Ershad in the late 1980s. On 6 December 1990 President Ershad resigned and transferred power to a caretaker government to oversee free parliamentary elections. An election was held in February 1991. The appellant was joint co-ordinator for the BNP Derma unit election. He claimed that because of his leadership and policy the BNP candidate, Mr Salahuddin, won the election.

6 In 1992 the appellant said he became a Vice President of a branch of the BNP. He then had the opportunity to work with many central leaders of the party. He became an executive member of the Dhaka city committee under the leadership of Mr Sadek Khoka. In the next parliamentary election in 1996 he worked hard to help the BNP candidate Mr Salahuddin who was defeated by an Awami League candidate, Mr Habibur Rahman. The Awami League then formed the government. It had been 21 years in opposition. The appellant said that, following the Awami League's accession to power, he was 'targeted by Awami hooligans'. He said there had been a number of attempts to kill him. More recently Awami League men had been 'filing false cases' against people associated with the BNP such as himself. He said:

'Many false cases were lodged against me to doom my political career. My

life was in great danger in Bangladesh. My wife and children are at in risk (sic). If I return home I will be persecuted. I am seeking refugee status in light of the abovementioned circumstances and in accordance with the United Nation Convention 1951 as amended 1967 protocol related to the status of refugee.' (sic)

The Proceedings before the Tribunal

7 The appellant lodged his application for review of the delegate's decision on 14 September 2001. Some fifteen months elapsed and then, on 20 December 2002, he was sent a letter by the Tribunal advising that it had considered the material before it in relation to his application but was unable to make a decision in his favour on that information alone. The letter went on:

> '**Hearing of the Tribunal**
> *We now invite you and any persons listed above to come to a hearing of the Tribunal to give oral evidence and present arguments in support of your claims. You can also ask the Tribunal to obtain oral evidence from another person or persons.*
>
> *If you want to come to a hearing it will be on:*
>
> *Date:* *Wednesday, 29 January 2003*
> *Time:* *1.30PM* *Please arrive at least 15 minutes before the start of the hearing*
> *Place:* *Level 29, Pacific Tower Building, 201 Elizabeth Street, Sydney*
>
> ***Important information about your hearing***
>
> - *The Tribunal will only change this hearing date for good reasons. If you think you might be unable to attend the hearing, you must contact the Tribunal immediately. If you do not attend the hearing and the Tribunal does not postpone the hearing, it can make a decision on your case without further notice.*
> - *If you have a passport you should bring it to the hearing.*

The letter drew the appellant's attention to a Response to Hearing Invitation form and requested that he read and complete it carefully. There was a follow up letter from the Tribunal on 2 January 2003 noting that some parts of the protection visa application form had been left incomplete and requesting additional information about the appellant's full name, the date of his marriage and the whereabouts of his wife and any children. He was also asked to give details of past employment including self-employment and work addresses in Bangladesh since his graduation in 1986.

8 The appellant completed the Response to Hearing Invitation form and named Mr

Haque as his 'Authorised Recipient'. He advised that he wanted to come to the hearing and would need a Bengali interpreter. He indicated also that he wanted Mr Haque to be present at the hearing.

9 On 28 January 2003, the day before the hearing, the Deputy Registrar of the Tribunal in Sydney received a letter signed by Mr Haque in the following terms:

> *'I write this letter in relation to the above named applicant who is sick and going for an operation on 4 February 2002. As such the applicant instructed me to ask the Tribunal to postpone the hearing.*
>
> *Therefore, I request you to please provide a date for further hearing for the applicant. I enclose herewith Hospital document.*
>
> *Should you have any queries regarding this matter please feel free to contact me on above address.' (sic)*

Enclosed with the letter was a form from Royal Prince Alfred Hospital described as an 'Adult Consent Form MR5A'. The form was in two parts, the first being by way of provision of information to the patient, which was to be completed by a medical practitioner, the second part was the 'Patient Consent' to be completed by the patient. The first part described the planned procedure as 'Repair of Right Inguinal Hernia'. It was initialled by a medical practitioner. The second part, signed by the appellant and dated 2 December 2002, recorded his consent to the proposed procedure. Also attached to or comprising part of the form was a 'Diagnostic Centre Request Form'. The only additional relevant information on that form was the planned admission and theatre date of 4 February 2003.

10 A document from the electronic records of the Tribunal, which was accepted as an exhibit in the Federal Magistrates Court, disclosed that a Tribunal officer received the request to postpone the hearing by fax and sent it to the relevant case team. Another officer of the Tribunal rang Mr Haque to say that the Tribunal member before whom the application for review was listed would not postpone the hearing unless the appellant sent a medical certificate.

11 No medical certificate was received. Nor was the request for information answered although, as it turned out, that was not critical to the outcome of the case. According to an affidavit sworn subsequently by Mr Haque on the application for review before the learned federal magistrate, he received a telephone call from a Tribunal officer in which he was told

'the postponement of the hearing will not be granted'. On Mr Haque's account of it he was not invited to submit further evidence to the Tribunal.

12 The appellant, in his own affidavit before the learned federal magistrate, said he remembered Mr Haque telling him that the Tribunal would not change the hearing date. He was suffering from right-sided pain at the time. Although the pain could be reduced by medication it came back. He found himself unbalanced and dizzy when he stood up and suffered from headaches. He said that by the weekend before the hearing date he was not able to go out at all. He spent all of his time resting in bed.

13 The appellant thought it was just before the hearing that Mr Haque told him that the Tribunal would not change the date. He said to Mr Haque 'I am too sick to go to the hearing'. Mr Haque, he said, promised to send a further letter to the Tribunal. The appellant had his hernia operation on 4 February. He remained in hospital for a day and a night after the operation. He exhibited medical certificates to his affidavit. One of those certificates, apparently signed by a medical practitioner, said that he was symptomatic from his hernia for sometime prior to his operation on 4 February 2003 and was not able to work during that time. Another certificate from the same Centre said that he had had a hernia repair operation on the right inguinal hernia on 4 February 2003.

14 The Tribunal which did not have that affidavit material or the certificates before it, stated in its reasons that the appellant had been invited to give oral evidence and to present argument at the hearing on 29 January 2003. He was advised that if he did not attend the hearing and a postponement was not granted, the Tribunal might make a decision without further notice. It referred to a letter received by his agent on 28 January 2003 asking for an adjournment because the appellant was sick. It referred to the copies of the Diagnostic Centre Request Form from Prince Albert Hospital noting that the form recorded a planned admission on 4 February 2003 for surgery and a two to three day admission for repair of a left inguinal hernia. The arrangements had been made on 2 December 2002.

15 The Tribunal then said:

> *'The Tribunal is obliged to determine matters referred to it economically and expeditiously. There are many cases to consider, hearing schedules are full and qualified interpreters in certain languages, like Bengali, are scarce. There are expenses incurred when are (sic) hearing is arranged, for example*

> *interpreter fees. For this reason requests for adjournment, particularly late requests, are carefully considered before approval.*
>
> *In this case, the request for adjournment was not approved. The Tribunal was not satisfied that the medical information provided, which about future optional routine surgery (sic) precluded the applicant from attending the hearing, which he had accepted on 8 January, more than a month after the planned admission date was known to him. The applicant and the adviser were informed that, failing more satisfactory medical evidence of an inability to attend and give evidence, the hearing would proceed as planned. No further medical information was provided by or for the applicant either before the hearing or subsequent to it.*
>
> *The applicant did not appear at the time and place laid down for the hearing. In these circumstances, and pursuant to s 426A of the Act, the Tribunal has decided to make its decision on the review without taking any further action to enable the applicant to appear before.' (sic)*

16 The Tribunal found the appellant to be a citizen of Bangladesh. It accepted that he had been politically involved with the BNP and accepted his claims of holding political office up until 1992 and of working to assist his party's candidate in 1996. It found the appellant's statements about threats and harm to him to be vague as to dates, locations, circumstances of the incidents, the perpetrators, others involved and outcomes. The first incidents mentioned were in 1983 at which time, according to independent information accepted by the Tribunal, President Ershad was in office as a result of a military coup and the country was under martial law. The second incident concerned a claimed attack by Awami League hoodlums in 1996. The Tribunal was not satisfied that either incident occurred.

17 The Tribunal, in any event, did not accept that such incidents (assuming they had occurred) would recur. President Ershad has lost power as has the Awami League. The BNP has held office since October 2001 with a large majority and the next election is not until 2007. The Tribunal found:

> *'…that violence is endemic between student wings of the major national parties and between rival factions within the parties. Further, that criminal conduct is often involved. The country information, which the Tribunal accepts, is to the effect that both major parties when in office have detained or harassed activists in opposition parties using legal powers in the Criminal Code, the Special Powers Act and the Public Safety Act. However illegalities are regularly overturned by the independent Court system. The Tribunal is thus satisfied, from the country information that the BNP and the normal judicial system, that is state protection, is able to protect its party workers, like the applicant, from Awami League activists.'*

18 The Tribunal found no detail or supporting evidence of the appellant's claim of false charges being laid against him. The claim was, in any event, contradicted by a statutory declaration which he signed and which accompanied his protection visa application form. There he wrote that he had not been charged with any offence that was incomplete or awaiting legal action. Nor was he aware of any investigation into his affairs which had the potential to lead to such charges. The Tribunal was therefore not satisfied with the truth of the false charges claim.

19 The Tribunal did not accept the claim in the agent's submission of a corrupt judicial process. Other claims were also rejected. The Tribunal found that it was satisfied that the appellant did not have a well-founded fear of persecution for a Convention reason should he return to his country.

The Decision of the Federal Magistrate

20 Only one ground of review was pursued in the Federal Magistrates Court. That was that the RRT had not complied with the requirements of s 425 of the *Migration* Act 1958 (Cth) ('the Act') and had breached procedural fairness by proceeding with the hearing in the absence of the appellant. The learned federal magistrate referred to the factual materials that were before the Tribunal in relation to the request for an adjournment. He referred also to the affidavits sworn by the appellant and his migration agent which were before the Federal Magistrates Court.

21 His Honour observed that the appellant was vague under cross-examination about the time at which he first told his migration agent that he would be unable to attend the Tribunal hearing. Ultimately he said it was two or three days before the scheduled hearing. Mr Haque the migration agent, corroborated his account in cross-examination. Mr Haque however could not recall the appellant instructing him to send a further letter to the Tribunal concerning his illness and his request for an adjournment. He told the learned federal magistrate that it became clear to him the day before the hearing that the appellant would not be attending and that in the circumstances he and the appellant decided it was prudent to send a written submission in support of the application for a visa.

22 The learned federal magistrate found, contrary to the affidavit evidence of Mr Haque,

that the Tribunal advised Mr Haque that further information, and in particular, a medical certificate would be required if there was to be an adjournment of the hearing. The learned federal magistrate observed:

> *'In those circumstances, it is surprising that Mr Haque did not make that clear to the applicant and it is surprising that the applicant did not make the effort to ensure that the medical certificates he said he had obtained to explain his absence from work were made available to the RRT. It may well have made a difference.'*

It may be observed that the appellant's failure to supply a medical certificate might not be surprising if, as he said, Mr Haque did not convey that requirement to him.

23 The learned federal magistrate identified the real issue in the case as whether the decision to proceed in the absence of the appellant was procedurally fair and whether it was open to the Tribunal under s 426A(1)(b). His Honour made reference to *Minister for Immigration and Multicultural Affairs v Capitly* (1999) 55 ALD 365 which, given its particular context, he did not regard as authority for the purpose of resolving the questions before him. He also referred to *Hossain v Minister for Immigration and Multicultural Affairs* [2000] FCA 842. Based on that decision of Mansfield J he said that the answer to the question whether the Tribunal was entitled to proceed under s 426A(1)(b) of the Act was answered according to whether the decision of the Tribunal to refuse an adjournment was procedurally fair. If it was unfair the Tribunal should not have proceeded in the absence of the appellant. On the other hand if there was no procedural unfairness, the Tribunal was entitled to proceed in the absence of the appellant.

24 Given that the Tribunal was left uninformed of the appellant's state of health at the time, his Honour was not surprised that the Tribunal decided that insufficient reason had been advanced to adjourn the hearing and that it elected to proceed in the absence of the appellant. The simple information that the appellant was undergoing a hernia operation after the hearing and that he was sick was not, in the opinion of the learned federal magistrate, 'objectively persuasive enough' to warrant an adjournment of the Tribunal hearing. It was not procedurally unfair for the Tribunal to decline the adjournment and to decide, in reliance upon s 426A(1)(b) of the Act, to proceed in the absence of the appellant. For these reasons the learned federal magistrate dismissed the application and awarded costs fixed in the sum of $4,000.

Grounds of Appeal

25 The grounds of appeal set out in the Notice of Appeal are as follows:

> *'1. The trial judge erred in failing to find that the Tribunal had failed to ensure procedural fairness and particularly the RRT was procedurally unfair and not acted under s 426A(1)(b) of the Migration Act.*
>
> *2. The Tribunal breached the rule of procedural fairness/natural justice in connection with this case and the Honourable Trial Judge did not consider it.*
>
> *3. The applicant was ill and circumstances surrounded of the illness was not considered by the Tribunal The Honourable Trial Judge also erred to determine this particular matter.' (sic)*

Statutory Framework

26 The obligation of the Tribunal upon receiving an application for review is to review the decision under challenge. This obligation is imposed by s 414 of the Act:

> *'(1) Subject to subsection (2), if a valid application is made under section 412 for review of an RRT-reviewable decision, the Tribunal must review the decision.*
>
> *(2) The Tribunal must not review, or continue to review, a decision in relation to which the Minister has issued a conclusive certificate under subsection 411(3).'*

Section 420 requires the Tribunal in carrying out its functions under the Act to pursue the objective of providing a mechanism of review that is 'fair, just, economical, informal and quick'. It is not bound by technicalities, legal forms or rules of evidence and must act according to substantial justice and the merits of the case (s 420(2)).

27 The conduct of review by the Tribunal is dealt with in Division 4 of Pt 7 of the Act. Section 422B was introduced into Division 4 by the *Migration Legislation Amendment (Procedural Fairness) Act 2002,* No 60 of 2002, which commenced on 4 July 2002. The amendments made by that legislation apply to any application for review made on or after the commencement of the relevant items. Given that the application for review in this case was lodged in September 2001, s 422B, which commenced in July 2002, does not apply.

28 Section 425 provides:

> *'(1) The Tribunal must invite the applicant to appear before the Tribunal to*

give evidence and to present arguments relating to the issues arising in relation to the decision under review.

(2) Subsection (1) does not apply if:

(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or
(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or
(c) subsection 424C(1) or (2) applies to the applicant.

(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.'

Section 425A sets out the method of giving the applicant a notice under s 425. It requires the notice to be given within the prescribed period or, absent a prescribed period, a reasonable period before the hearing. It also requires that the notice contain a statement of the effect of s 426A.

29 Section 426A provides:

'(1) If the applicant:

(a) is invited under section 425 to appear before the Tribunal; and
(b) does not appear before the Tribunal on the day on which, or at the time and place at which, the applicant is scheduled to appear;

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

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

Whether the Tribunal Failed to Comply with Procedural Fairness and the Requirements of Section 425

30 The obligation of the Tribunal under s 425 of the *Migration Act* is to issue an invitation to the applicant for review to attend a hearing. That invitation must be real and meaningful and not just an empty gesture – *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 198 ALR 293 at [33]; *Mazhar v Minister for Immigration and Multicultural Affairs* (2000) 183 ALR at 188 [31]. In *Liu v Minister for Immigration and*

Multicultural Affairs (2001) 113 FCR 541 at [44] the Full Court expressly rejected a submission that changes made to s 425 had diminished the applicant's right to appear before the Tribunal to 'a merely formal right to be invited …'. Importantly also s 425 did not, at the time of the present appellant's application to the Tribunal, exhaust the requirements of procedural fairness so far as they relate to the right to be heard. Put in that context the effect of the subsequent enactment of s 422B does not fall for consideration in this case.

31 The Full Court in *SCAR* characterised the requirements of s 425 as 'objective'. Their Honours said (at [37]):

> *'The statutory obligation upon the tribunal to provide a "real and meaningful" invitation exists whether or not the tribunal is aware of the actual circumstances which would defeat that obligation. Circumstances where it has been held that the obligations imposed by s 425 of the Act have been breached include circumstances where an invitation was given but the applicant was unable to attend because of ill heath:* Applicant NAHF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs *[2003] FCA 140.'*

32 In his judgment in *NAHF* Hely J found for the appellants on the basis of a want of procedural fairness rather than a breach of the obligation imposed by s 425. As to the latter, he followed the views expressed by Branson J in *Minister for Immigration and Multicultural Affairs v Mohammad* (2000) 101 FCR 434 and approved by Wilcox J in *Xiao v Minister for Immigration & Multicultural Affairs* [2000] FCA 1472 and by Beaumont J in *Sreeram v Minister for Immigration and Multicultural Affairs* (2001) 106 FCR 578. In *Mohammad*, Branson J said of s 425 and the change in its language (at [43]):

> *'This change from the substantive requirement of giving the applicant an opportunity to appear before the Tribunal to the procedural requirement of inviting the applicant to appear before the Tribunal suggests an intention in the legislature to remove the statutory requirement which had been construed as requiring the Tribunal to give an applicant a genuine and reasonable opportunity to appear before it, and to replace it with a more formal requirement.'*

In *Mohammad* the Tribunal's invitation had been returned unclaimed. In *Xiao* the applicant's request for an adjournment was not received by the Tribunal. Wilcox J in a passage in his judgment in *Xiao*, which was quoted with evident approval by Hely J, said (at [37]):

> *'The Tribunal] issued an invitation that complied with the requirements of s425A. That invitation remained open. Notwithstanding my finding that [the migration agent] sent the fax requesting a postponement, it cannot be said that the Tribunal] was wrong in finding that [the applicant] did not appear at the hearing. If, as I believe, s425 imposes on the Tribunal only an obligation to issue an invitation, without any continuing obligation in relation to a reasonable opportunity to appear, that is the end of the matter; at least so far as this Court is concerned.'*

33 In *NAHF* there were husband and wife applicants. Their applications were evidently to be heard together. The wife was unable to attend the relevant hearing as she had suffered a miscarriage. Ultimately, after communications and postponements, the hearing went on without her. It is not necessary to set out the details of the various communications between the appellants and the Tribunal in that case. It is sufficient to note that although Hely J found that there was a denial of natural justice he also found there to have been no contravention of s 425. The refusal to adjourn the hearing '[did] not lead to the conclusion that the RRT failed to invite the applicants to appear before the RRT' – (at [28]).

34 There is a question whether the Full Court in *SCAR* misconstrued the decision of Hely J in *NAHF*. Counsel for the respondent in the present case contended that the Court had done so. That is relevant to whether the obligation imposed upon the Tribunal by s 425 would render insufficient an invitation sent to an applicant who was or became too ill to attend the hearing. In the event it is not necessary to determine that question for present purposes. Assuming the proposition in *SCAR* to be correct makes no difference to the outcome of this case.

35 In the present case the learned federal magistrate found as a fact that the Tribunal had informed the appellant's representative, Mr Haque, that a medical certificate would be required if the request for an adjournment was to be granted. No medical certificate was forthcoming. That finding of fact was not controverted on appeal. The Tribunal, having made the reasonable requirement that some evidence be produced to support the request for an adjournment, did not render the s 425 invitation illusory by proceeding to the hearing on the appointed day in the absence of the appellant. It also had regard to the fact that the appellant had known of the date of the proposed surgery at the time that he had accepted the invitation to attend the hearing. Nothing in the Tribunal's approach reflected a failure to provide a real opportunity to the appellant to be heard. There was nothing in its approach to

this matter therefore that was in breach of s 425, however construed. Nor was there any procedural unfairness on the part of the Tribunal.

36 There remains the question whether, unknown to the Tribunal, the appellant was in truth unfit to participate in the hearing. If, as a matter of fact, the appellant had been unfit to participate in the hearing, the Tribunal's lack of awareness of that fact flowed from the appellant's failure to respond to its reasonable request for further support for the adjournment. Such protection as is offered by s 425 and by the requirements of procedural fairness was not thereby vitiated. The situation which arose, assuming the appellant to have in fact been unfit to attend the hearing, arose from the appellant's failure to respond to the Tribunal's request. On the facts found by the learned federal magistrate that failure was followed or accompanied by a considered decision to furnish a written submission to the Tribunal.

37 It is not for the Court in this case to allocate responsibility for what happened between the appellant and his advisor. That would involve going behind the learned federal magistrate's findings of fact in a way which was not raised on the grounds of appeal. In our opinion there was no breach of s 425 nor of the requirements of procedural fairness and the appeal should be dismissed.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 10 May 2004

Counsel for the Appellant:	Mr B Zipser provided written submissions on behalf of the Appellant
Counsel for the Respondent:	Mr T Reilly
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	6 May 2004
Date of Judgment:	10 May 2004