FEDERAL COURT OF AUSTRALIA

SZHVM v Minister for Immigration and Citizenship [2008] FCA 600

MIGRATION – judicial review – protection visa – where appellant worked for migration agent as a nanny – where agent told appellant to work rather than go to Tribunal hearing – where appellant did not understand English – whether invitation in English to attend hearing was "real and meaningful" – whether Tribunal failed to undertake a reasonably open and regular administrative procedural step – where appellant subsequently gave false information to the Federal Magistrate – allegation of third party fraud on Tribunal – leave sought to adduce further evidence explaining failure to attend hearing

WORDS AND PHRASES – fraud on the Tribunal

Federal Court of Australia Act 1976 (Cth) s 27
Migration Act 1958 (Cth) ss 425, 426A

Arnotts v Trade Practices Commission (1990) 97 ALR 555 cited
CDJ v VAJ (No 1) (1998) 197 CLR 172 followed
Greater Wollongong City Council v Cowan (1955) 93 CLR 435 cited
Minister for Immigration and Multicultural Affairs v SZFDE (2006) 236 ALR 42 cited
Minister for Immigration and Citizenship v SZLIX [2008] FCAFC 17 followed
Murdaca v Accounts Control Management Services Pty Ltd [2007] FCA 577 cited
Orr v Holmes (1948) 76 CLR 632 cited
SZFDE v Minister for Immigration and Citizenship (2007) 237 ALR 64 distinguished
SZFNX v Minister for Immigration and Citizenship [2007] FCA 1980 cited
SZGWH v Minister for Immigration and Citizenship [2007] FCA 543 cited
SZHBC v Minister for Immigration and Citizenship [2007] FCA 1310 cited
SZHVM v Minister for Immigration and Citizenship [2007] FMCA 1200 affirmed
SZHZT v Minister for Immigration and Citizenship [2007] FCA 1661 cited
SZICU v Minister for Immigration and Citizenship [2008] FCAFC 1 cited
SZIVK v Minister for Immigration and Citizenship [2008] FCA 334 distinguished
SZJBA v Minister for Immigration and Citizenship (2007) 164 FCR 14 distinguished

SZHVM v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL
NSD 1566 OF 2007

MIDDLETON J
7 MAY 2008
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1566 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGE:	**MIDDLETON J**
DATE OF ORDER:	**7 MAY 2008**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the costs of the first respondent.

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

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AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**MIDDLETON J**
DATE:	**7 MAY 2008**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

INTRODUCTION

1 This is an appeal from orders made by the Federal Magistrates Court of Australia on 11 July 2007 in *SZHVM v Minister for Immigration and Citizenship* [2007] FMCA 1200.

BACKGROUND

2 The appellant is a citizen of Indonesia and arrived in Australia on 23 November 2004. On 22 December 2004, the appellant lodged an application for a protection (class XA) visa.

3 The appellant claimed that she had witnessed electoral fraud during the Indonesian presidential election of 2004. She reported what she saw to the Komiti Pemilihan Umum ('the KPU'), the Indonesian National Elections Commission, in her local area. She claimed that the following day she was threatened with death if she 'did not keep quiet'. Days after that she was assaulted by young men. She suspected that her report to the KPU had leaked. She hid at a friend's place but was then told to leave the house because of the fears her friend held as a result of offering a safe haven to the appellant. The appellant departed from

Indonesia. She feared that she would suffer serious harm if she returned to Indonesia and that the authorities would not protect her.

4 The appellant's application for a protection visa indicated that:

- The appellant spoke, read and wrote Indonesian and spoke Hokkian but did not otherwise speak, read or write English;
- The appellant required an interpreter in the Indonesian language;
- The application was prepared with the assistance of Erwin Marzukie, a registered migration agent, who was the appellant's migration agent. Mr Marzukie agreed to receive all written communications in respect of that application; and
- The appellant's residential address was nominated as 45/2-8 Brisbane Street, Surry Hills. The application indicated that she had been residing at that address since November 2004. The appellant's postal address was nominated as Suite 201, Level 2, 78 Liverpool Street, Sydney. This was Mr Marzukie's postal address as identified in the application itself.

5 On 26 May 2005 a delegate of the Minister refused to grant the appellant a protection visa. The delegate found that the appellant's fears were not well-founded because the latest US State Report for Indonesia indicated that, notwithstanding the Indonesian government's poor human rights record, observers monitoring the elections considered the elections were largely free and fair. Accordingly, the delegate found:

> *While it is not impossible that there may have been some irregularities, based on the independent country information it cannot be found that the applicant's claim would result in a real chance of Convention based persecution should she return to Indonesia in the foreseeable future.*

APPLICATION FOR REVIEW BY TRIBUNAL

6 On 28 June 2005 an application for review by the Refugee Review Tribunal ('the Tribunal') was filed on the appellant's behalf. That application recorded no further claims. The application indicated that the appellant's residential address and address for correspondence was 45/2-8 Brisbane Street, Surry Hills, New South Wales and indicated a mobile phone number as the appellant's. No adviser was nominated by the appellant as authorised to act for her in relation to the application for review. The appellant appeared to

have signed the declaration herself on the application form, and there was no indication that an interpreter was used in the preparation of the application for review. This was the last piece of correspondence with the Tribunal that was initiated by or on behalf of the appellant.

7 On or about 18 August 2005 the Tribunal sent an invitation to attend a hearing to be held on 18 October 2005 to the address for correspondence nominated in the application for review. There was no response to that invitation.

8 On 5 October 2005 the Tribunal phoned a mobile phone number and 'left the Tribunal's contact number'. There was no evidence from the person who made the telephone call about what type of message was left on the mobile telephone.

9 The Tribunal made no further attempt to contact the appellant on the mobile telephone number in the application for review, including on the day of the hearing.

10 On 18 October 2005 the appellant did not attend the hearing before the Tribunal. The Tribunal proceeded to make its decision affirming the decision under review without taking any further action to enable the appellant to appear before it. It affirmed the delegate's decision on the basis that it could not be satisfied of the appellant's claims, notwithstanding that it accepted that some minor fraud occurred during the 2004 election.

APPEAL TO FEDERAL MAGISTRATES COURT

11 The appellant applied for judicial review of the Tribunal's decision by the Federal Magistrates Court by an application filed on 15 December 2005. The grounds of that application contested the merits of the appellant's refugee claims and the fairness of the Tribunal's decision.

12 The appellant appeared in person at the hearing before the Federal Magistrates Court. She explained that she did not attend the Tribunal hearing because she was sick, did not know the telephone number of the Tribunal, and was not fluent in English.

13 The Federal Magistrate found that none of the appellant's grounds was made out and that the Tribunal properly exercised its discretion under s 426A of the *Migration Act 1958*

(Cth) ('the Act'). The court observed that the independent country information supported the proposition that there was electoral fraud in Medan, which was the area where the appellant lived.

CURRENT APPEAL

14 The appellant, in the current appeal, relied upon the following grounds in her Further Amended Notice of Appeal:

> *1. The Court below erred by failing to find that:*
>
> *a. The Appellant's migration agent, Erwin Marzukie, knowingly deceived the Appellant as to the invitation to hearing before the Refugee Review Tribunal scheduled for 18 October 2005 by the following conduct:*
>
> *i. Providing, or procuring the provision of, a residential address and an address for service for the Appellant to the Tribunal which Mr Marzukie knew were not the Appellant's residential address or an address at which the Appellant could access correspondence and were not addresses of which the Appellant was aware of prior to the Tribunal handing down its decision.*
>
> …
>
> *ii. Failing to tell the Appellant the time and place of the Tribunal hearing failing to disclose the invitation to hearing dated 18 August 2005 prior to the Tribunal handing down its decision.*
>
> …
>
> *iii. Failing to disclose to the Appellant, prior to the Tribunal handing down its decision, that the delegate of the First Respondent had rejected her application for a protection visa.*
>
> …
>
> *iv. Failing to disclose to the Appellant, prior to the date of the Tribunal handing down its decision, any correspondence sent to the Tribunal on her behalf or any correspondence received from the Tribunal on her behalf, including the fact that an application for review had been filed on her behalf.*
>
> …
>
> *v. Telling the Appellant that the Tribunal hearing was an interview.*
>
> …
>
> *vi. Directing or instructing the Appellant not to go to the interview but rather to attend to her work duties as a nanny for his child.*

…

vii. Telling the Appellant not to disclose the fact that she was working for him at the same time as being his client in circumstances where he had an obligation to:

A. tell the Appellant about the conflict of interest;
B. advise the Appellant that he could no longer act for her;
C. advise the Appellant about appointing another registered migration agent; and
D. cease to deal with the Appellant in his capacity as a registered migration agent.

…

b. By the above conduct, Mr Marzukie denied the Appellant access to information that was critical to her application for review with the Tribunal and thereby knowingly deceived the Appellant.

…

c. As a consequence of the above circumstances the Appellant did not receive and was not aware of the invitation to the Tribunal hearing until she had the contents of the Appeal Book translated to her in August 2007. She was thereby denied a real and meaningful invitation to the Tribunal hearing and this subverted the Tribunal's obligations to provide such an invitation under s 425 of the Migration Act 1958 *and subverted the Tribunal's exercise of discretion under s 426A.*

…

2. The Court below erred by failing to find that the Tribunal's exercise of discretion under s 426A miscarried because of its failure to consider whether the reason for the Appellant's failure to respond to the invitation to hearing and attend the hearing could have been due to the fact that the invitation was wholly in English and was not in a language that was capable of being understood by the Appellant and therefore was not a real and meaningful invitation.

3. The Court below erred by failing to find that the decision of the Tribunal was vitiated by jurisdictional error as a result of the Tribunal's failure to undertake a reasonably open and regular administrative procedural step to provide the Appellant with a real and meaningful invitation to hearing.

4. The Court below erred in law by finding that the Appellant received several letters from the Tribunal in the absence of any evidence as to receipt of the letters.

15 In support of her appeal, the appellant sought to have the Court receive further evidence which was not before the Federal Magistrate. The appellant sought to rely upon two

affidavits, through an interpreter, which set out the factual material she sought to rely upon. I set out the contents of those affidavits, omitting formal parts and the exhibits thereto making my own emphasis of certain portions.

16 The first affidavit was affirmed on 11 October 2007 where the appellant deposed as follows:

> *1. I am citizen of Indonesia.*
>
> *2. I am 43 years old.*
>
> *3. I do not speak, read or write English. My solicitor has prepared this affidavit as a result of interviews with him on 6, 7 and 28 August 2007, and on 6 October 2007. I participated in those interviews with the assistance of a friend, Juliana Japit who speaks Indonesian.*
>
> *4. I was 40 years old when I arrived in Australia from Indonesia on 22 November 2004.*
>
> *5. Before I arrived in Australia, I spent my entire life in Indonesia in the city of Medan which is the main city on the island of Sumatra.*
>
> *6. At the age of 19 I finished school in Indonesia. I did not get enough marks to go to University.*
>
> *7. I subsequently worked selling little trinkets, such as key rings, in a shack in Medan that I rented until the age of 34 years. After that I worked as a housekeeper to support my two sons. My ex husband did not support me and my two sons during the period that I was married to him. I had to get a divorce from him because he regularly beat me while I was living with him. Even though I tried to escape from him several times, he would find me and beat me. The police did not protect me from this violence.*
>
> *8. The main reason I came to Australia on 22 November 2004, was for fear of my life and fear of being put in jail in Indonesia on false charges.*
>
> *9. When I arrived in Australia I sought out the assistance of a Migrant Agent who could help me to get the protection that Australia offers from those in Indonesia who want to harm me. I met Mr Erwin Marzukie who told me he was a Migrant Agent. He offered to help me by lodging on my behalf an application for a protection visa. He completed my application for protection visa which appears at Court Book pages 1 to 26 and lodged that on 22 December 2004.*
>
> *10. Before Mr Marzukie completed my application for a protection visa the*

following conversation in the Indonesian language took place between myself and Mr Marzukie:

I said: *I want to apply to stay in Australia permanently because I am afraid of going back to Indonesia. Can you help me?*

He said: *Yes, I can help you do that. How are you going to support yourself in Australia?*

I said: *I am looking for work, and up to now I have not found any.*

He said: *I can help you, would you like to work for me as a live in nanny?*

I said: *Yes, thank you very much, you mean I live in your house?*

He said: *Yes, but it is very important that you do not tell anybody about your working for me as a live in nanny because you and I could get in trouble with the government. Can I trust you to do this?*

I said: *Why would we get in trouble with the government if they found out that I was working with you as a live in nanny?*

He said: *Don't ask questions. Remember that if you cannot support yourself in Australia you will be sent back to Indonesia, I am offering you a chance to support yourself in Australia, if you ask questions then you are on your own.*

I said: *I am very sorry, I will not do that again. You know that I cannot speak English, nor can I read and write English, and that there is nobody in Australia that can help me because I do not have any friends or relatives in Australia, and you are my only hope of escaping with my life from Indonesia, and even now that I am in Australia, I am still afraid because at any time I might be sent back to Indonesia.*

He said: *Do not worry, leave it to me. In your application for the protection visa I will put your residential address being that of one of the staff that work for me, you understand, because I said, there will be problems if I put your residential address as my house. You just have to trust me.*

I said: *You know better than me about these things, I trust you to do the right thing by me. You are the only one in Australia that is able to help me, I fully rely on you.*

He said: *Good, I will pay you $450.00 per week, and you have half a day every Thursday off work. That is, you will work for me six and a half days per week as a live in nanny. Remember, if you tell anybody about working for me, then you would most probably be sent back to Indonesia, do you understand? You tell nobody about this.*

I said: *Thank you very much, I promise I will tell nobody.*

11. *The main reason for me claiming to be a refugee is as stated in that application on pages 7 to 10 of the Court Book. Below is a quote of the reasons I gave:*

> I left my country for fear of my life for matters that I should not have seen.
>
> On the last election day in Indonesia when people had to choose a president, like any normal election day, people lined up to vote from morning to afternoon. Around 6:30 in the afternoon I saw a mini truck approaching the place where voting was conducted. Suddenly many people carrying boxes from the truck and replacing them with those boxes inside the police booth. I heard some of them saying if most boxes had been replaced.
>
> After the counting of votes, I realised that there had been some sort of fraud in the voting system when the "original" votes were replaced earlier by those people from the truck. I could not sleep that night as it was unfair that the votes had been "fixed".
>
> The next few days I reported this event to KPU (Komiti Pemilihan Umum) or the election committee in the local branch giving details of what I saw. The next day, I was approached by a few persons who threatened to kill me if I did not keep quite [sic].
>
> I told some of the neighbours about the boxes. A few days later I was kicked and punched by some young men. I managed to run and hide in my friend's place. A few weeks later she told me to leave the house for fear that it would involve her and her family. I had no choice but to leave the country temporarily.

[What do you fear may happen to you if you go back?]

If I go back I would fear for my life as voting fraud is a serious matter that involve many politicians. To shut me up, the [sic] may put me or frame me doing something and send me to jail.

[Who do you think may harm/mistreat you if you go back?]

As the election was won by the current president, Soliso Bambang Yudoyone, I would think some of his supporters, the local politician and the police who is behind the president.

[Why do you think this will happen to you if you go back?]

If this changing of boxes goes to the media or some other opposition parties, they will complain and may demand the new election. In order to avoid this, they will shut me up by sending/framing me to go to jail or silence me forever."

12. Mr Marzukie completed my application for a protection visa stating my residential address was 45/2-8 Brisbane Street, SURRY HILLS NSW 2010, (the Surry Hills address) being the residential address of a member of his staff known to me as Jenny. I never lived at that address.

13. During the entire period that I was residing in Mr Marzukie's house at 4 Gabrile Avenue, LIVERPOOL, being the period from December 2004 to December 2005, Mr Marzukie passed on to me only 2 letters that were addressed to me regarding this matter. These letters are annexed hereto and marked with the letter "A" is a copy of a letter from the Refugee Review Tribunal dated 21 October 2005 (see Court Book at pp 50-51); and annexed hereto and marked with the letter "B" being a copy of a letter from the Department of Immigration and Multicultural and Indigenous Affairs, dated 10 January 2005 (see Court Book at pp 27-28). These 2 letters were not translated to me. I would be able to make sense of only small parts of these letters because my ability to read English is very poor, and except for Mr Marzukie and his wife, Mrs Fiona Vimala Marzukie, I knew nobody in Australia who could translate these letters. I did not want to upset Mr Marzukie and his wife so I did not trouble them with translating those letters because I was worried that if I upset them I would lose my job working for them as a live in nanny. I knew that if I lost my job I might not find any other jobs and when my money ran out I would be sent back to Indonesia. I also trusted that Mr Marzukie would translate to me those letters if they were very important.

14. Mr Marzukie was a Migration Agent and an accountant. His wife works with him. I was taking care of his 2 year old daughter, Miss Hermione Teresa Marzukie. She is the only child of Mr Marzukie's

second wife, Mrs Fiona Vimala Marzukie. Mrs. Marzukie is Indonesian, and she was married [sic] Mr Marzukie in the year 2000. His first wife lives in Wollongong, and she is of the Vietnamese origin. Mr Marzukie has 2 daughters from his first wife, Natasha and Sarah. One of those daughters is about 14 years old and the other, is about 10 years old. Natasha and Sarah stayed about 2 weeks in their father's house. Mr Marzukie's house is very big. It also has a big back yard. Mr. Marzukie and his wife have their bedroom upstairs, and Mr. Marzukie's office containing computer equipment and printers is located in an upstairs room of the house. My room was downstairs next to the garage. Hermione sleeps with them in the same room at night. During the day, when both Mr and Mrs Marzukie were at work, she slept in my bedroom. Hermione went to day care on Wednesdays and Thursdays at the World Tower in Liverpool Street in the Sydney CBD. On Wednesdays, Mrs. Marzukie takes her there, so that I can clean the house and do the vacuuming. I cannot do the vacuuming of the house when Hermione is in the house because the sound of the vacuuming would wake her up. On my half day off, being a Thursday, I take Hermione to the day care at the World Tower, and at 5.00 pm I collect her and bring her to the house.

15. *I did not realise until I was interviewed by my current solicitor on 6 August 2007 that my protection visa was refused by a delegate of the Department of Immigration, notwithstanding that I received the Court Book from the Minister's solicitors prior to the hearing before the Federal Magistrates Court on 11 July 2007. Neither Mr Marzukie nor his colleague Jenny provided me the letter from the Department of Immigration dated 26 May 2005 that stated my application for a protection visa had been refused (see Court Book 29-40). The first time I was provided the documents at pages 29 to 40 of the Court Book was by the solicitors for the Minister prior to the hearing before the Federal Magistrates Court which was contained in the Court Book for the hearing. The first time that the significance of those documents was explained to me was on 6 August 2007 by my current solicitor.*

16. *As I cannot read and write the English language, and the Federal Magistrates Court was aware of this fact, the Court Book that was provided to me by the Minister's solicitors prior to the hearing before the Federal Magistrates Court was in the English language. Although I knew that understanding the content of the Court Book was important, there was no one available that I knew who could translate the Court Book to me. As such, I was severely disadvantaged at the Federal Magistrates Court because I had no knowledge at all of the content of the Court Book. The Indonesian interpreter provided at the hearing before the Federal Magistrates Court was not available to translate the Court Book to me, and his assistance was limited to the function of interpreting at the hearing, the questions asked of me and the replies that I gave.*

17. I also did not realise until I was interviewed by my current solicitor on 6 August 2007 that Mr Marzukie applied to the Refugee Review Tribunal on my behalf on 28 June 2005 for a review of the delegate's decision, notwithstanding that I received the Court Book from the Minister's solicitors prior to the hearing before the Federal Magistrates Court on 11 July 2007. I cannot recall having signed the form at Court Book pages 41 to 44 and I do not think that I did sign that form but I cannot be certain about this because I do not understand the contents of the form and therefore my recollection is not perfect. The first time I was provided with a copy of the documents at pages 41 to 44 of the Court Book was by the solicitors for the Minister prior to the hearing before the Federal Magistrates Court. The first time that the significance of those documents was explained to me was on 6 August 2007 by my current solicitor.

18. Mr Marzukie did not put his details as my Migrant Agent in the application for review by the Refugee Review Tribunal at page 43 of the Court Book, notwithstanding that he had agreed to be my Migration Agent.

19. On about 4 October 2005, two weeks before the hearing with the Refugee Review Tribunal that was held on 18 October 2005, I was sitting in the dining room at Mr Marzukie's house when Mr Marzukie approached me and stated words to the following effect:

> You have an interview with the Department of Immigration on 18 October

Then Mr Marzukie left the dining room. I then went to my bedroom to check the Calender in my mobile phone to see what day of the week 18 October was, and found it was a Tuesday which was not my half day off work. As stated above, my half day off work was on a Thursday.

20. When, on about 4 October 2005, Mr Marzukie told me about the hearing, as stated in the above paragraph, I thought it was just an interview with someone at the Department of Immigration. I basically knew nothing about this hearing. Mr Marzukie did not tell me that it was a hearing, he said it was an in interview, and he did not tell me that it was with the Refugee Review Tribunal. I did not know the address and the time of the hearing.

21. Mr Marzukie did not provide me with the invitation to the hearing that appears at Court Book page 47 to 48 or the documents that are stated to have been enclosed with that invitation. I have never seen those documents that were supposed to have been enclosed with the invitation to hearing. I did not realise the significance of the invitation to the hearing until after 15 November 2005 when Mr Marzukie handed me the letter contained in annexure "A" (see Court Book at pp 50-51). To date, this letter was the only letter I ever received from the

Refugee Review Tribunal, and there was no brochure with it.

22. Specifically, I had no knowledge until after 15 November 2005 that this scheduled hearing wan an opportunity for me to explain the basis for my fears of returning to Indonesia and to answer questions in respect to my fears. At that time I had no knowledge that this was my last chance to explain the basis for my fears of being seriously harmed if I returned to Indonesia.

23. On Tuesday morning, 18 October 2005, I was dressed up to go with Mr. Marzukie in the morning to his city office so that he could show me where to go to the interview. I kept my mobile phone in my bedroom in the ground floor of Mr Marzukie's house, and I kept it switched off because Mr Marzukie's 2 year old daughter, Hermione, sleeps in my bedroom. When Mr. Marzukie saw me, we had the following conversation in the Indonesian language being words to the following effect:

He said: Why are you dressed up?

I said: To go to the interview that you told me about.

He said: Today is Tuesday, it is not your day off work, your day off work is Thursday. Who will take care of Hermione when you are at the interview?

I said: Can your wife stay with her?

He said: No, I need my wife at work. You have to stay with Hermione because there is no one else to take care of her.

I said: I thought going to the interview is important.

He said: Yes, but this is more important. OK? Get back into your work clothes.

I said: Alright."

24. I did not realise that Mr Marzukie had put my mobile phone number in my application for review (see Court Book at page 42). I therefore never expected that I would be contacted on my mobile phone. One day when I switched on my mobile phone I saw that I had a missed call. I did not realise that, the missed number was in respect to a phone call from the Refugee Review Tribunal. I only realised this when, at a date after 15 November 2005, Mr Marzukie handed me the letter contained in annexure "A" (see Court Book at pp 50-51) from the Refugee Review Tribunal that stated that the decision would be handed down on 15 November 2005. On that letter, it had the same

telephone number as the missed phone number on my mobile phone. Because this letter was in the English language, there was no information, other than the date and the telephone number that I could understand.

25. There was no way for me to go to the interview on 18 October. I did not know where the interview was because Mr Marzukie never told me the address where the interview was held. I had Hermione with me and therefore could not take her with me to the interview as I did not have the permission to do that from Mr and Mrs Marzukie. Hermoine was 2 years old, I could not leave her alone in the house.

26. As I depended on Mr Marzukie for my livelihood and as I was living in his house, I dared not oppose him. I also thought that since Mr Marzukie was a Migrant Agent, he would have allowed me to go to the interview if it was very important for my future. I trusted him to do the right thing by me.

27. Mr Marzukie knew because I was working as a live in nanny for him six and a half days per week, that I was therefore socially isolated. I had no friends, relatives or anyone else who I could talk to about my concerns, and as such Mr Marzukie knew that I was completely dependent on him for advise and assistance. During the entire period I was with Mr Marzukie, he failed to communicate to me anything dealing with my matter except for pointing out to me the date of the interview. I did not ask him anything about my matter because I was afraid that I would upset him and it could get me sacked.

28. In the morning of 18 October 2005, when I realised that I would not be going to the interview, I wanted to call up to tell them I would not be attending, however up to that day and until after 15 November 2005, I did not know where the interview was, whom it was before or how to contact the people running the interview. Mr Marzukie had not given me any letters that told me these things.

29. When Mr Marzukie's aunty arrived in about 23 December 2005 to take care of his daughter, Mr Marzukie sacked me and told me that he would not help me with my Visa any more, and that I was from then on, on my own.

30. After I was sacked, I found Ms Shuang Zhang of 108/413-415 Sussex Street, SYDNEY, a Migrant Agent, who helped me with my application to the Federal Magistrates Court. Ms Zhang did not speak Indonesian and I had a lot of trouble communicating with her in the English language as I had no one who could interpret for me. It was impossible to communicate to her my circumstances. The first person that was able and willing to interpret for me in Australia, and help me, was Ms Juliana Japit who I met for the first time in August 2007.

31. At the Federal Magistrates Court, I said that I did not attend the hearing because I was sick. This was not true. The reason why I said this was that I did not want to break the promise I made to Mr Marzukie that I would not tell any one that I was working for him as a nanny. At the time, I did not realise that Mr Marzukie had taken advantage of me, and that because of his actions, I may be deported to Indonesia where I could potentially be silenced either by ending up in Jail, or worse, losing my life.

17 The second affidavit was affirmed on 1 December 2007, where the appellant deposed as follows:

1. I like to add this Affidavit to the filed Affidavit that I affirmed on 11 October 2007.

2. Since affirming the Affidavit on 11 October 2007, I have had a chance refresh my memory, and as a result if there is any conflict between this Affidavit and the Affidavit that I affirmed on 11 October 2007, this Affidavit will contain the true information and not the other Affidavit.

3. I arrived in Australia on 22 November 2004, and commenced work with Mr. Erwin Marzukie on 29 November 2004, as a live-in-nanny.

4. I commenced work with Mr. Marzukie on the basis that he was looking for a live-in-nanny.

5. When I commenced work with Mr. Marzukie, I did not know that he was a Migrant Agent until several days after commencing work, when on about 3 December 2004, Mr. Marzukie inquired about my Visa while in Australia.

6. When on about 3 December 2004, I told Mr. Marzukie about my Visa, Mr. Marzukie referred me to another Migrant Agent.

7. Later on about 3 December 2004, before the other Migrant Agent commenced his work, that Migrant Agent informed me of his fees, which I could not afford as I have just arrived in Australia, and had little money with me.

8. When I explained to Mr. Marzukie that I could not afford the fees of the other Migrant Agent, he said he will do the work for me, for free.

9. The following conversation took place when Mr. Marzukie told me that he will act as my Migrant Agent for free:

I said: Thank you very much.

He said: I will be your Migrant Agent provided you promise not to tell anyone that you are working for me as a live-in-

nanny, otherwise we could get in trouble with the government. Can I trust you to do this?

I said: *Why would we get into trouble with the government if they found out that I was working with you as a live-in-nanny?*

He said: *Don't ask questions. If I cannot trust you that you will not mention that you are working for me as a live-in-nanny, I will find someone else instead.*

I said: *I am very sorry, I will not do that again. You know that I cannot speak English, nor can I read and write English, and that there is nobody in Australia that can help me because I do not have any friends or relatives in Australia, and you are my only hope of escaping with my life from Indonesia, and even now that I am in Australia, I am still afraid because at any time I might be sent back to Indonesia.*

He said: *Do not worry, leave it to me. In your application for the protection visa I will put your residential address being that of one of the staff that work for me, you understand, because I said, there will be problems if I put your residential address as my house. You just have to trust me.*

I said: *You know better than me about these things, I trust you to do the right thing by me. You are the only one in Australia that is able to help me, I fully rely on you.*

He said: *Good, I will pay you $450.00 per week, and you have half a day every Thursday off work. That is, you will work for me six and a half days per week as a live in nanny. Remember, if you tell anybody about working for me, then you would most probably be sent back to Indonesia, do you understand? You tell nobody about this.*

I said: *Thank you very much, I promise I will tell nobody.*

10. *I have worked for Mr. Marzukie from 29 November 2004 to 23 December 2005, as a live-in-nanny.*

11. *As stated in paragraph 9 above, Mr. Marzukie paid me $450.00 per week, and I receive free board and lodging, worth about $100.00 per week.*

12. *As stated in paragraph 9, above, I worked for Mr. Marzukie 6 days and*

a half per week, where I have half a day off work every week, every Thursday afternoon. The time I spent working per day is on average 17 hours per day. The following is a summary of the work I did at Mr. Marzukie's house:

a. I wake up at 6.00am, and start work about 6.10am.

b. I then go to the kitchen and boil water for Mr. and Mrs. Marzukie, so that they can have hot water for their coffee when they come downstairs.

c. I then prepare Hermione's breakfast, who was about 2 years old.

d. For 2 to 3 days per week I prepare breakfast for Mr. and Mrs. Marzukie, which includes fresh fried rice and noodles.

e. By about 9.30am, I take a break of 30 minutes and go jogging outside the house.

f. By 10.00am Hermione comes down from her parent's bedroom which is upstairs.

g. I then wash Hermione, and toilet her, and then feed her breakfast.

h. I take care of Hermione while Mr. and Mrs. Marzukie go to the office in the city, and they return home by 8.30 pm.

i. While Mr. and Mrs. Marzukie are at the office, I do the cooking for all, the Marzukie family, and I also clean the house. Most of the cooking I do when Hermione is sleeping in my bedroom between 1.30 pm and 3.30 pm.

j. I also do all the laundry washing and ironing, for the whole house.

k. When Mr. and Mrs. Marzukie come home from the office at about 8.30 pm, I unload their shopping from their car, and they go upstairs to their bedroom to change their cloth.

l. While Mr. and Mrs. Marzukie are upstairs, I have to have the food heated so that it is hot when they come down stairs to have their dinner.

m. I eat with Mr. and Mrs. Marzukie, and when we are finished eating, I do all the dishwashing and tidy up the kitchen.

n. By about 10.15 pm, once the kitchen is all clean and tidy, I go

to do the laundry and do the laundry for all the towels that were used during the day.

o. *I then empty all the rubbish bins in the house and take the rubbish outside.*

p. *I am responsible for putting the garbage out every Thursday night.*

q. *Every second weekend, Mr. Marzukie's daughters from his previous marriage, Natasha and Sarah, come on Friday night and leave Sunday afternoon. I have to do extra work when they visit because they leave food all over the TV room which I have to clean up, and when they use the family bathroom they make a big mess which I have to clean up.*

r. *When on the weekend Mr. and Mrs. Marzukie go shopping they take me with them so that I can be with Hermione and so that I can help them carry their shopping bags.*

s. *On the weekends, Mrs. Marzukie will not feed Hermione because Hermione refuses to eat from Mrs. Marzukie, so Hermione only eats from me.*

t. *By 11.00 pm all the work is finished, I go to bed to wake up the next day at 6.00 am and do the above all over again.*

13. *Based from the above my income per week from Mr. Marzukie is $450.00 plus board and lodging worth about $100.00 per week, a total amount of being $550.00 per week, for working about 110 hours per week, which means my hourly rate while working for Mr. Marzukie is $5.00 per hour, and I am not entitled to sick leave or holiday leave. At $550.00 per week my annual total income from Mr. Marzukie would be $28,600.00.*

14. *On or about 17 October 2007 or 18 October 2007, after Mr. Marzukie had been served with this Appeal's filed documents, I received 3 phone calls from Mrs. Marzukie, which I did not answer, and an SMS message from her "Offering me part-time work", which I did not respond to.*

CONSIDERATION

18 The first issue in this appeal is the resolution of the appellant's application seeking leave to adduce further evidence in the appeal.

19 There was debate before me as to the relevant considerations that may lead to the reception of further evidence by reference to a number of authorities: see for example *Orr v*

Holmes (1948) 76 CLR 632, at 640-642; *Arnotts v Trade Practices Commission* (1990) 97 ALR 555 at 612; *Greater Wollongong City Council v Cowan* (1955) 93 CLR 435 at 444, and generally *Murdaca v Accounts Control Management Services Pty Ltd* [2007] FCA 577.

20 Section 27 of the *Federal Court of Australia Act 1976* (Cth) ('the Federal Court Act') permits this Court in its discretion to receive further evidence. The exercise of the discretion to receive further evidence must be exercised judicially and consistently with the judicial process. I am not confined to the common law considerations relating to the reception of fresh evidence. So much is clear from the principles enunciated in *CDJ v VAJ (No 1)* (1998) 197 CLR 172 at [52]-[53] per Gaudron J in dealing with an equivalent provision in the *Family Law Act 1975* (Cth). Nevertheless, there are well-established, sound principles surrounding admission of fresh evidence which should normally be considered as relevant to the exercise of the discretion to receive further evidence pursuant to s 27, but which should not constrain this Court in considering the overall demands of justice.

21 In my view, the demands of justice do not require the admission of the further evidence sought to be relied upon by the appellant for the following reasons:

(a) The further evidence was clearly capable of being adduced by the appellant in the court below, and there was no justification for the appellant not raising this evidence in the court below;

(b) The appellant submitted that the evidence sought to be tendered substantiated two grounds of appeal. The first ground was that the appellant was denied a real and meaningful invitation because of the conscious deception by her migration agent on the basis of the principles in *SZFDE v Minister for Immigration and Citizenship* (2007) 237 ALR 64. The second ground was that the Tribunal's failure to take a simple administrative step such as calling the appellant on the day of the hearing was a miscarriage of the Tribunal's discretion under s 426A. For reasons set out later, I do not consider these grounds of appeal could succeed even if the further evidence was received in this appeal; and

(c) There is the desirability of finality in litigation, particularly in refugee cases involving late allegations of agent fraud. It is highly desirable that those allegations be tested at

first instance, and not in the appellate jurisdiction of this Court. I understand that the stakes for the appellant are very high, and that she may hold subjective fears of serious harm or even death, by reason of her actions in Indonesia. The prejudice to the appellant is a factor to be considered. Finality in litigation is a significant factor, although it must be weighed in the balance with other aspects, including what is at stake for an appellant. In view of my conclusions as to the other matters relevant to the reception of further evidence, the consideration of finality simply serves to support the final view I have reached in this appeal.

22 In relation to the ability of the appellant to provide the further evidence and whether there was a justification in not adducing the further evidence in the court below, it is necessary to examine the position as it existed before the Federal Magistrate on 11 July 2007, the date of the hearing.

23 At the outset I indicate that I do not accept as contended by the appellant that in the circumstances of this case, it can be said that the ground of appeal based upon the High Court decision in *SZFDE* 237 ALR 64 was not available because the High Court decision now relied upon was not handed down until 2 August 2007. The ground itself was known and was capable of being agitated, even if only formally, in view of the earlier Full Federal Court's different position. In any event, the reality of the position is that the appellant, unrepresented before the Federal Magistrate, probably had no knowledge of the legal position, but could and should have sought to put to the Federal Magistrate the true factual position in support of her appeal . This, she simply did not do. I do not consider that the fact that the ground of appeal now sought to be agitated would necessarily have been unsuccessful before the Federal Magistrate was the reason that the further evidence now sought to be adduced was not tendered before the Federal Magistrates Court. The appellant in full knowledge of the facts, chose to misinform the Federal Magistrate of the true position.

24 It is important to realise that, as the appellant herself deposes, on or about 23 December 2005 Mr Marzukie terminated the appellant's employment as a nanny and told her that he would no longer help her in relation to her visa, and stated that she was on her own. Another migration agent was found by the appellant to help with her application before the Federal Magistrates Court. The appellant suggests she had trouble communicating with

this new migration agent due to language difficulties and was not in fact able to communicate her circumstances to anyone until August 2007.

25 Be that as it may, the facts and circumstances that are now sought to be relied upon by the appellant were obviously well-known to her at the time of the hearing of the Federal Magistrates Court. The appellant was no longer under the influence of Mr Marzukie or dependent on him for her livelihood, and had a new migration agent.

26 Before the Federal Magistrate no mention was made of any of the facts and circumstances now relied upon, and the appellant misinformed the Federal Magistrate that she was sick and that this was the reason she could not attend the Tribunal hearing.

27 The appellant now accepts that this was not true, and says that the reason why she misinformed the Federal Magistrate was because she did not want to break the promise she made to Mr Marzukie that she would not tell anyone that she was working as a nanny. She said she did not realise Mr Marzukie had taken advantage of her and that because of his actions she could be deported to Indonesia with possible serious consequences.

28 I should interpolate that these reasons for misinforming the Federal Magistrate were not sought to be put before this Court on this appeal, in that they were not read as being part of the evidence tendered by the appellant. However, the part of the affidavit containing these reasons was tendered by the first respondent as admissions of the appellant being contained in her first affidavit as filed (see par 31).

29 In my view, such reasons could only assist the appellant, as they seek to provide a justification for her deliberate misinforming of the Federal Magistrate. Without such evidence, this Court is only left with the fact that the appellant deliberately misinformed the Federal Magistrate that she was sick, and this was the reason she did not attend the Tribunal hearing, with no explanation sought to be made to explain the reason for the appellant so deliberately misinforming the Federal Magistrate. In the end, nothing turns upon the acceptance or otherwise of the reasons given for the appellant's conduct before the Federal Magistrates Court, but I have taken her explanation into account.

30 If Mr Marzukie still had some control over the appellant as at 11 July 2007 (the

Federal Magistrates Court hearing date), and the appellant did not have a migration agent to assist her (even if only in a limited way), I could perhaps understand the appellant misinforming the Federal Magistrate. However, by 11 July 2007 (nearly one year and six months after being sacked by Mr Marzukie), the appellant freely chose not to inform the Federal Magistrate of the facts and circumstances now relied upon, and instead said she was sick at the time of the Tribunal hearing and for this reason could not attend.

31 Even accepting that the discretion to accept the further evidence now sought to be adduced is very wide, and is not to be limited by enumerating an exhaustive list of relevant considerations, an important consideration is whether the evidence was capable of being adduced by the appellant in the court below and whether there is any justification for the evidence not being adduced. The hearing before the Federal Magistrates Court was the appellant's opportunity to advance her case, and inform the Federal Magistrates Court truthfully of the facts. I am satisfied that the appellant did have the free choice and the ability to inform the Federal Magistrate of the facts and circumstances now relied upon. If the reason for not doing so was because of her promise not to tell about her employment, that was not a proper basis for misinforming the Federal Magistrates Court.

32 It was argued by the appellant that at the time of the Federal Magistrates Court hearing the appellant still did not understand the process, the documents, the invitation to the Tribunal hearing and the Tribunal's decision. It is to be recalled that she did not speak, read or write English, and was socially isolated and unable to obtain translation assistance. However, as I have said, it seems to me that the essential facts and circumstances which are now relied upon as to the reason for not attending, namely her relationship with Mr Marzukie and the conversation she had with him, are all matters she had experienced herself and could easily have been retold from her own knowledge at the time of the hearing. The appellant merely had to tell the Federal Magistrate that she had the responsibility of looking after a child as a nanny on the day, that no one else could look after the child, that she was dependant on Mr Marzukie for her livelihood and was living in his house, and that she dared not oppose him. The appellant could have told the Federal Magistrate that Mr Marzukie was her migration agent, that she trusted him, and that when he would not let her go to the Tribunal hearing she thought that this would be fine because Mr Marzukie was looking after her. None of these matters was beyond the personal knowledge of the appellant, and none

requires an understanding of the documents or Tribunal processes.

33 I fully appreciate that the appellant was unrepresented before the Federal Magistrate, spoke no English, and did not appreciate the role and function of the Federal Magistrates Court. However, in response to the question of explanation for non-attendance, the appellant decided herself to misinform the Federal Magistrates Court when she had all the information at her disposal to properly inform the Federal Magistrates Court if she desired.

34 In any event, I take the view that the further evidence does not provide a basis for upholding the grounds of appeal now sought to be agitated by the appellant.

35 Looking at the contention regarding fraud on the Tribunal, the appellant relies upon the principles set out in the decision of the High Court of Australia in *SZFDE* 237 ALR 64.

36 It is important to consider the facts of that case and the relevant principle there identified.

37 The High Court stated the relevant facts as follows (at [39]-[49]):

> *The evidence of the first appellant was that when, with her husband, she met Mr Hussain* [the migration agent] *to discuss the tribunal's letter of invitation dated 27 June 2003, which invited attendance at a hearing of the tribunal, Mr Hussain used words to the effect:*
>
> > It is best not to go. If you go they will refuse you. They are not accepting any visa applications at all at the moment. I am going to take a different approach. I am going to write a letter to the Minister. I am worried that if you go to the [Tribunal] you will say something in contradiction to what I will write. Don't worry. I'm doing what is best for you.
>
> *A letter to the then minister, dated 15 September 2003, was composed by Mr Hussain in the name of the second appellant. It was headed "Application for Consideration [under] Section 417 of the Migration Act". Section 417 conferred a power upon the minister, if the minister thought it was in the public interest to do so, to substitute for a decision of the tribunal a decision more favourable to an applicant. This and further requests of this nature were rejected.*
>
> *The Federal Magistrate held that Mr Hussain had acted fraudulently in his dealings with the appellants for personal gain, that he had extracted money under false pretences and that the appellants had been dissuaded from*

> *attending the tribunal hearing "by the fraudulent behaviour of Mr Hussain". The result was to have "deprived the invitation to the hearing [of] its quality of being a meaningful invitation under s 425".*
> …
> *Neither the reasons of the Federal Magistrate nor the dissenting reasons of French J in the Full Court considered in any detail the question of the motives of Mr Hussain in acting as he did with respect to the rejection of the invitation to attend the tribunal hearing. The inference is well open upon the evidence that Mr Hussain acted as he did for self-protection, lest in the course of a tribunal hearing there be revealed his apparently unlawful conduct in contravention of restrictions imposed by Pt 3 Div 2 of the Act, particularly by s 281.*
> …
> *The fraud of Mr Hussain had the immediate consequence of stultifying the operation of the legislative scheme to afford natural justice to the appellants.*

38 The important point to note, in my view, is that the advice given by Mr Hussain directly and immediately had the consequence that the process of the Tribunal was stultified. The decision-making process was directly corrupted. As a direct result of the representation of Mr Hussain the appellant and her family were dissuaded from appearing before the Tribunal, and in fact did not appear. There was also in effect a conveying of a false impression to the Tribunal, namely that the appellant did not wish to appear.

39 Before this Court, the appellant has set out the basis of the fraud in the Further Amended Grounds of Appeal. This is important – as the High Court observed in *SZFDE* 237 ALR 64 (at [41]-[42]):

> *In the Full Court French J properly observed:*
>
> > … The finding of fraud should have specified, in one place in the reasons, what was said that was fraudulent, how it was fraudulent, and how it was acted upon. The finding of fact that the magistrate made however was not challenged in these proceedings.
>
> *In his reasons, French J developed the matter as follows:*
>
> > … The agent held himself out to be a practising solicitor and registered migration agent. He was neither. He gave fraudulent advice that the Tribunal was "not accepting any visa applications at all at the moment". He expressed a false concern that if [the first appellant] and her family appeared before the Tribunal they would say something inconsistent with his proposed submission to the Minister. The advice amounted to a representation that the Tribunal process was a sham and that participation in it might prejudice [the first appellant's] prospects of a successful outcome on the basis of a submission to the Minister.

> … The decision-making process, that is the process of review which incorporates an opportunity for a hearing on the conditions set out in Pt 7, was corrupted. The importance of the appearance before the Tribunal to the outcome of the review was highlighted by the Tribunal's reference, in its reasons, to matters which it did not have an opportunity to explore with [the first appellant] because of her non-appearance. On this basis, in my opinion, the decision of the Tribunal was vitiated. It was not a decision made under the Act and therefore not a privative decision protected by s 474.

40 If one analyses the position on the facts as sought to be adduced in this appeal, there is no evidence of a fraud on the Tribunal within the meaning of *SZFDE*.

41 In *SZFDE* 237 ALR 64 at [45] the High Court drew inferences about the conduct and motivation of the agent in question in order to uphold the finding of fraud. In that case, the agent falsely held himself out to the applicants as a registered agent and a solicitor when he was neither. He took their money for a service that he was prevented by law from performing: see *SZFDE* 237 ALR 64 at [40] and [42]. He gave deliberately false advice which was designed to stop them from attending the Tribunal hearing (at [42]). If his conduct had been discovered he risked imprisonment for 10 years (at [46]).

42 However, in this appeal before me the factual position is quite different. Even if the appellant's evidence were to be accepted in every respect, the Court would find that Mr Marzukie was motivated by his personal desire to have the appellant look after his child for the day (because it suited his personal needs) and was in no way motivated to prevent the Tribunal from conducting a hearing.

43 I do not consider that Mr Marzukie was motivated to hide anything from the Tribunal. The conflict of interest suggested between looking after the appellant's interests and his own personal needs, even if in breach of the Code of Conduct prescribed by the *Migration Agents Regulations 1998*, has not been shown to be a matter Mr Marzukie would have been concerned about, or would have motivated his conduct. The real reason not to have the appellant attend the hearing was just the fact that Mr Marzukie wanted his child looked after by the appellant. Mr Marzukie may have put his interests above the appellant's but that could not amount to a finding of fraud. He described the 'interview' as 'important', but asserted that work was 'more important', which is more properly to be characterised as 'bad' advice:

SZFDE 237 ALR 64 at [53]; see also *SZHBC v Minister for Immigration and Citizenship* [2007] FCA 1310 at [17]-[18] per Spender J; *SZHZT v Minister for Immigration and Citizenship* [2007] FCA 1661 at [3], [11] and [12] per Allsop J and *SZFNX v Minister for Immigration and Citizenship* [2007] FCA 1980 at [31]-[33] per Besanko J. Further, even if there had been a breach of the *Migration Agents Regulations*, this would not lead to a finding of fraud in the relevant sense.

44 It is noted that the evidence the appellant seeks to adduce concerns her working conditions (the amount paid to the appellant, the tasks she was required to perform, the hours she was required to work). However, the nature of the arrangements for payment (if any) for migration services cannot take the appellant very far, unless it could be established (as it was in *SZFDE*) that this was in some way connected to the deliberate 'stultification' of the legislative scheme or 'disabling' of the processes of the Tribunal: *SZFDE* 237 ALR 64 at [49] and [51]. In my view there is no connection between the working arrangements made and the processes of the Tribunal such that those processes were disabled or stultified by the conduct of Mr Marzukie.

45 The further evidence sought to be adduced by the appellant shows that Mr Marzukie gave the appellant at least some letters from the Tribunal, her own mobile number was supplied to the Tribunal in the application for review, the appellant was aware of the existence of the hearing and the date upon which it was to take place, she knew the hearing was 'important', and she intended to go to the hearing. Whilst the appellant was influenced by Mr Marzukie at the last minute not to attend (because she 'dared not oppose him'), she understood the Tribunal hearing was important, and she made the decision not to attend with that knowledge.

46 Further, Mr Marzukie's role and conduct as a registered migration agent is quite unlike that of the migration agent in *SZFDE*. Such things as encouraging the insertion of the incorrect address on the application form, and telling the appellant that the hearing was an 'interview' are not so significant as to warrant a finding of fraud upon the Tribunal. Further, the appellant herself was complicit and knowingly involved in the decision to mislead the Tribunal as to her place of residence.

47 *SZFDE* does not stand for the proposition that a failure by an applicant to attend the

Tribunal hearing due to the fault or conduct of a third person bears the result that the Tribunal decision to proceed under s 426A of the Act is always vitiated by error.

48 This is a case where the appellant did not attend the Tribunal hearing due to a combination of factors – her own lack of diligence, receipt of some misinformation or bad advice from a third party, and choosing after some persuasion not to attend. None of these matters amounts to fraud because there is no relevant 'fraudulent' conduct vis-à-vis the appellant. The real reason for the appellant not attending is not contained in the various matters particularised by the appellant in the Further Amended Notice of Appeal, but was the appellant's own decision not to attend. The appellant consciously consented to the Tribunal disposing of her case without her appearance, and in the circumstances the legislative scheme and processes of the Tribunal were not in any way disturbed.

49 In *Minister for Immigration and Multicultural Affairs v SZFDE and Anor* (2006) 236 ALR 42, French J said at [129]-[130]:

> *There are sound policy reasons why a person, whose conduct before an administrative tribunal has been affected, to his or her detriment, by bad or negligent advice, should not be heard to complain that the detriment was unfair in any sense that would vitiate the decision made. But where a person's participation in a decision-making process is affected by the material dishonesty of another which conveys a false impression to the decision-maker, then that dishonesty may be said to have distorted or vitiated the approach and to have affected the decision. Whether it has will depend upon a consideration of the circumstances of the particular case. In this case, on the findings made by the learned Magistrate which are not challenged as to the facts,* SZFDE *and her family were dissuaded from appearing before the tribunal by the fraudulent advice of the migration agent. The agent held himself out to be a practising solicitor and registered migration agent. He was neither. He gave fraudulent advice that the tribunal was "not accepting any visa applications at all at the moment". He expressed a false concern that if* SZFDE *and her family appeared before the tribunal they would say something inconsistent with his proposed submission to the minister. The advice amounted to a representation that the tribunal process was a sham and that participation in it might prejudice* SZFDE's *prospects of a successful outcome on the basis of a submission to the minister.*
>
> SZFDE's *negative response to the hearing invitation was procured by the dishonest conduct of her purported representative. To that extent her consent to the disposition of her application for review without a hearing was of no effect. She was denied, by fraud, the opportunity to appear at and be heard by the tribunal on a matter of vital importance to her future and that of her*

> *family. The decision-making process; that is the process of review which incorporates an opportunity for a hearing on the conditions set out in Pt 7, was corrupted. The importance of the appearance before the tribunal to the outcome of the review was highlighted by the tribunal's reference, in its reasons, to matters which it did not have an opportunity to explore with SZFDE because of her non-appearance.*

50 As the High Court said in the appeal of this decision (*SZFDE* 237 ALR 64) at [53]:

> *The significance of the outcome in this appeal should not be misunderstood. The appeal has turned upon the particular importance of the provisions of Div 4 of Pt 7 of the Act for the conduct by the tribunal of reviews and the place therein of the ss 425 and 426A. In the Full Court, French J correctly emphasised that there are sound reasons of policy why 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.*

51 It is also appropriate to mention at this point the recent decision of Finkelstein J in *SZIVK v Minister for Immigration and Citizenship* [2008] FCA 334. In that case, his Honour was of the view, having considered the decision in *SZFDE*, that where a migration agent 'falsely indicated in the response to hearing form that the appellant would attend the hearing when the agent knew that could not occur' or where an agent 'signed documents on the appellant's behalf without his knowledge, consent or authority … and forged [the appellant's] signature', then a court would likely find that there had been a fraud on the Tribunal. For the reasons already set out, *SZIVK* is distinguishable on the facts from those sought to be put to me on this appeal.

52 In this appeal, even accepting that the evidence suggests that the appellant's negative response to the hearing invitation was procured by her purported agent's coercion, this does and did not amount to dishonest conduct. The appellant's account of her conversation with Mr Marzukie on the morning of the hearing, demonstrating his refusal to take her and his direction that she mind his child in circumstances where she was unable to contact or reach the Tribunal on her own or to otherwise manage independently if she refused his direction, may give rise to an argument that might be characterised as duress. However, duress, while perhaps actionable on other grounds, does not amount to material dishonesty of another which conveys a false impression to the decision-maker such as to make the conduct complained of cognisable as fraud upon the Tribunal under the principles set forth in *SZFDE*.

53 In *Minister for Immigration and Citizenship v SZLIX* [2008] FCAFC 17 at [30]-[33] it

was made clear that even if an act or omission of a migration agent misleads the applicant, and even directly affects the discharge of the Tribunal's statutory duties in a manner adverse to an applicant, it does not mean that the acts are to be characterised as dishonest or a fraud on the Tribunal. The Full Court made the following comments at [32]:

> *We have already indicated that we do not consider that a finding that the agent was unregistered was open on the evidence. Even assuming it was, and assuming, moreover, that the respondent was thereby misled, we do not consider that all of the agent's acts or omissions vis-à-vis the respondent are thereby to be characterised as dishonest. Nor do we consider that any particular such act or omission which directly affects the Tribunal's discharge of its imperative statutory functions in a manner which is adverse to a person seeking Tribunal review can in turn be characterised as a "fraud on the Tribunal".*
>
> *The Parliament, in Div 2 of Pt 3 of the Act, has created a series of offences relating to the giving of immigration assistance by unregistered migration agents. It has not gone on to reverse, in the way proposed in the respondent's submission, such adverse consequences as may enure to a person in the enjoyment of the procedural fairness benefits provided by the Act as may be occasioned by reliance upon the immigration assistance supplied or to be supplied by an unregistered migration agent. Neither has the common law gone so far in its fraud doctrine: see* SZFDE *at [53]. This said, an agent may be fraudulent in his dealings with a visa applicant in such a manner as results directly in a fraud on the Tribunal in relation to the due discharge of its Pt 7 Div 4 functions.* SZFDE *is testament to this. But* SZFDE *requires that the agent in question is fraudulent in a way that affects the Tribunal's Pt 7 decision-making process. An omission to notify the date of a hearing to a visa applicant may have adverse consequences for that applicant if, as here, the Tribunal proceeds to make a decision under s 426A in the applicant's absence. But before that omission can properly be said to have occasioned a fraud on the Tribunal, it must itself be able properly to be characterised as a fraudulent omission vis-à-vis the visa applicant:* SZFDE*, at [51]. The simple fact of a failure to inform or bare negligence or inadvertence will not necessarily be sufficient to give rise to fraud on the Tribunal. As we have indicated, particularly having regard to the level of satisfaction required by* Briginshaw v Briginshaw *(1938) 60 CLR 336 at 363 and 368 in cases where fraud is alleged, we do not consider that it was open to his Honour to infer fraud.*

54 Whilst the appeal before me is not simply a case of a failure to inform or mere inadvertence, nor is it to be characterised as a case of fraud vis-à-vis the appellant, nor even then a fraud on the Tribunal. I appreciate, as Finkelstein J in *SZIVK* [2008] FCA 334 (at [33]) reminds us, that there are many ways in which fraud may be manifested. However, this is not a case where one can infer that the agent, in making the statements to the appellant

that resulted in her not attending, acted other than honestly; Mr Marzukie was just concerned about his own interests and put them above those of the appellant.

55 Accordingly, the appellant's first ground of appeal could not succeed even accepting the further evidence of the appellant.

56 The applicant's second ground of appeal—that the Federal Magistrate erred in failing to find that the Tribunal should have considered that the appellant's failure to attend the hearing could have been due to the fact that she could not understand the English language invitation, such that the invitation was not 'real and meaningful'—may be dismissed in much shorter order.

57 There is authority that 'there was no obligation on the part of the Tribunal to ensure that the hearing invitation was provided in a language which the appellant could understand': see *SZGWH v Minister for Immigration and Citizenship* [2007] FCA 543 at [12].

58 However, be that as it may, there was nothing to suggest in this case that the Tribunal had any need to consider the possibility that the appellant did not understand or could not be properly informed of the invitation – I can find nothing that would put the Tribunal on notice of such a circumstance. The application for review was apparently signed by the appellant, on its face without the aid of an interpreter. Prior to that, the appellant in the application for a visa had employed a migration agent. Admittedly the Tribunal was notified that the appellant needed an Indonesian interpreter. However, there is nothing that puts the Tribunal on notice that in giving an invitation it had to go any further than the method it adopted. The invitation, on the basis of the information provided by the appellant and the legislative scheme, could be sent to the appellant's nominated address and contact made on the nominated mobile number (which was in fact the appellant's number) and, just as the appellant obviously needed to have had assistance in completing the application for review, the Tribunal could assume similar assistance would be made available if any further correspondence took place.

59 The Tribunal was certainly entitled to assume the appellant had received the letter inviting her to attend – the fact that the appellant had not corresponded with the Tribunal since the original application for review was lodged does not mean that the Tribunal was aware of any irregularities or had an obligation to further chase up the appellant to attend the

hearing.

60 In fact, as we now know, the appellant was aware of the hearing date, and knew it was 'important'. The failure to attend had nothing to do, in fact, with the appellant's lack of familiarity with the English language.

61 As to the appellant's third ground, the appellant argues that the Tribunal failed to undertake a reasonably open and regular administrative procedural step necessary to provide the appellant with a real and meaningful invitation to the hearing, such as seeking to contact the appellant by telephone on the day of the hearing. In making this argument, the appellant relies on the principles set out in *SZJBA v Minister for Immigration and Citizenship* (2007) 164 FCR 14. However, that case is inapposite here for the reasons set out below.

62 In *SZJBA* 164 FCR 14, Allsop J said, starting at [53]:

> *On either basis, the obligation of the Tribunal to give a real and meaningful invitation to comment carried with it the obligation to take reasonably open and regular administrative procedural steps to permit or facilitate fulfilment of the real and meaningful nature of the invitation, where not to take such steps would undermine or subvert the meaningfulness or the reality of the invitation. That obligation involves such mundane things as opening letters, reading them once opened and taking at least basic simple steps that would be taken in any well-run commercial, professional or governmental office, conformable with the recognition of the importance of the response to the invitation to the rights of the applicant and the review process contained within Pt 7 of the Migration Act. This does not rest on some posited duty of inquiry. It is not engaging in steps that require for their enforcement some express statutory power. The letter that was received, on its face, told any person who read it that there was with it, or supposedly with it, a five page document which was a response to the relevant invitation. On the facts found by the Federal Magistrate, the five page document was not enclosed. The response was an important document. It must have been, or should have been, apparent that an error (human or machine) had occurred. …*
>
> …
>
> *In my view, the inaction of the tribunal for the reasons I have given, amounted to an undermining of the reality and meaningfulness of the invitation to comment that was given purportedly under s 424A or under s 424 or under the general executive power. As such, it was a jurisdictional error in that it undermined the steps in the conduct of the review undertaken pursuant to Pt 7 of the* Migration Act*, that were required by, or authorised by, the statute or authorised as the conduct of the general executive power under s 61 of the Commonwealth Constitution which had been undertaken by the Tribunal, and,*

> *once undertaken, were not to be frustrated by the action or inaction of the Tribunal in circumstances where, as I have said, it was obliged to take basic and simple administrative procedural steps.*
>
> …
>
> *Here, the question was not whether the Tribunal should have undertaken some evidence gathering task. The failure here was to take a simple administrative step of an office or housekeeping nature, the failure to take which could be seen on its face at the time to subvert the observance of the Tribunal of its obligation to give procedural fairness by the giving of the s 424A letter, or by the operation of s 424, or by the general executive power. Division 4 of Pt 7 is the statutory formulation of the giving of natural justice: see s 422B. Given the importance of procedural fairness for the principles of jurisdictional error sourced in s 75(v) of the Constitution: see* SZFDE *237 ALR 164 at [32], any subversion of the process of the tribunal is a matter of importance:* SZFDE *237 ALR 64 at [32].*
>
> *The same conclusion is to be reached by the application of the principles that in certain circumstances the decision of a Tribunal or decision-maker will be vitiated if some inquiry is not made. Most recently, Kenny J examined these cases in her Honour's comprehensive judgment in* Minister for Immigration and Citizenship v Le *[2007] FCA 1318. It can readily be accepted, as her Honour said, that there is no general obligation to inquire found in s 424(7), nor is there a general obligation to initiate inquiries or to make an applicant's case for him or her. I refer, without repetition, to the long list of cases referred to by Kenny J in* Le *[2007] FCA 1318 at [60]. The absence of such a general obligation of inquiry can be accepted, without denying the limited proposition supported by numerous other cases that, in certain exceptional cases, a failure to make some inquiry may ground a finding of jurisdictional error if it was plainly necessary to make some reasonably straightforward inquiry before the making of the relevant decision:* Prasad v Minister for Immigration and Ethnic Affairs *(1985) 6 FCR 155 at 169-70. Kenny J discusses this in* Le *at [60]-[67]. I adopt without repetition her Honour's reasons. The only qualification that I would make to her Honour's reasons is that the rubric of* Wednesbury *unreasonableness may cover circumstances that amount to jurisdictional error and those that amount to error within jurisdiction. It is unnecessary here to explore such possible differences. Here, the failure to take the steps, which in my view were required in the review process, subverted an opportunity to respond to an invitation contemplated or authorised by the statute as part of the review process and so amounted to jurisdictional error.*
>
> [Emphasis added]

63 As the quoted extracts suggest, the Tribunal must, where there is material before it that on its face suggests that an error has occurred or that the Tribunal is not in receipt of all materials responding to the invitation (in *SZJBA*, the letter stating that a five page document was enclosed but without any such enclosure), take simple administrative steps to address the

issue (eg make a phone call or send a letter inquiring as to the potentially missing material). In this appeal, however, the appellant cannot demonstrate that there was any material before the Tribunal that would have put the Tribunal on notice of an error or irregularity in the record which needed to be followed up administratively.

64 In *SZICU v Minister for Immigration and Citizenship* [2008] FCAFC 1, the Full Court distinguished *SZJBA* on the basis that that decision was different because in that case 'there was a failure to inquire into readily available and centrally relevant information' (at [29]). Similarly, in my view the factual position confronting Allsop J in *SZJBA* was very different from that which arises in this appeal, and the failure to inquire cannot be seen on its face to subvert the observance of the Tribunal of its obligation to give procedural fairness.

65 The appellant's fourth and final ground—that the Federal Magistrate erred in finding that the appellant received certain letters from the Tribunal in the absence of any evidence of receipt of the letters—is also unsustainable.

66 The Federal Magistrate said:

> *I am unable to accept that she* (the appellant) *did not know the telephone number of the Tribunal because she had received several letters from it, all of which contain its telephone number.*

67 The Federal Magistrate merely used the fact of receipt of the several letters as a factor which led the Federal Magistrate in not accepting certain evidence of the appellant. At its highest the use made of the fact of receipt of several letters led the Federal Magistrate to disbelieve the appellant. As it turns out, the appellant did in fact deliberately mislead the Federal Magistrate as to the reason for her non-appearance. Nevertheless, whether or not the Federal Magistrate had an evidentiary foundation for such a view is a matter which will not assist the appellant in the relief she seeks. Unless this error leads to a conclusion that the Tribunal itself fell into jurisdictional error, it cannot result in setting aside the Tribunal's decision. In view of the above reasons relating to the other grounds of appeal, no basis exists for concluding that jurisdictional error occurred, even on the basis of the further evidence sought to be adduced by the appellant. In these circumstances even if the Federal Magistrate fell into the error alleged by the appellant, it could not result in the appellant obtaining the relief she ultimately seeks.

68 In my view, the reference to the receipt of the several letters could not impact upon the conclusion of the Federal Magistrate that there was no jurisdictional error on the part of the Tribunal. The Tribunal exercised its discretion to proceed in the absence of the appellant, no error has been demonstrated in it adopting that course, and its decision affirming the decision of the delegate must remain.

CONCLUSION

69 In my opinion, for the reasons given above, the appeal should be dismissed with costs.

I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Middleton.

Associate:

Dated: 6 May 2008

Counsel for the Appellant:	Mr J Mitchell
Solicitor for the Appellant:	Afoltern Solicitors
Counsel for the Respondent:	Ms L Clegg
Solicitor for the Respondent:	Blake Dawson Waldron
Date of Hearing:	30 October 2007, 1 November 2007
Date of Judgment:	7 May 2008