FEDERAL MAGISTRATES COURT OF AUSTRALIA

MZXAR v MINISTER FOR IMMIGRATION & ANOR *[2006] FMCA 1926*

MIGRATION – Protection visa – Refugee Review Tribunal – whether jurisdictional error – issue concerning quality of interpreter – Georgian language.

Migration Act 1958, ss.420, 422B, 424A, 425(1), 427(7)

MZWKN v Minister for Immigration & Anor [2006] FMCA 413
VAT v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 255
NALQ v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 121
Mazhar v Minister for Immigration & Multicultural & Indigenous Affairs (2000) 103 ALR 188
SZDLA v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 1048
Minister for Immigration and Multicultural and Indigenous Affairs & Anor v SZFHC [2006] FCAFC 73
Perera v Minister for Immigration and Multicultural Affairs (1999) 92 FCR 6
Tobasi v Minister for Immigration & Multicultural Affairs (2002) 122 FCR 322
SZAFJ v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 291
WABY v Refugee Review Tribunal [2005] FCA 209

Applicant:	MZXAR
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	MLG 726 of 2005
Judgment of:	McInnis FM
Hearing dates:	15 February 2006, 21 April 2006, 8 June 2006 and 19 June 2006
Delivered at:	Melbourne
Delivered on:	21 December 2006

REPRESENTATION

Applicant:	In person
Counsel for the First Respondent:	Mr R. Knowles
Solicitors for the First Respondent:	Clayton Utz

ORDERS

(1) A writ of certiorari issue directed to the Second Respondent, quashing the decision of the Second Respondent dated 27 April 2005.

(2) A writ of mandamus issue directed to the Second Respondent, requiring the Second Respondent to determine according to law the application for review.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 726 of 2005

MZXAR
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. In an application filed 17 June 2005, the Applicant seeks judicial review of a decision of the Refugee Review Tribunal (the Tribunal) dated 27 April 2005. In its decision the Tribunal affirmed a decision of a delegate of the First Respondent refusing to grant a protection visa to the Applicant.

2. In this court the Applicant has appeared self represented with the assistance of Georgian interpreter. It is relevant, for reasons which will become apparent, to set out in some detail the procedure which has been followed by this court in considering the application. The Applicant has relied upon an Amended Application filed on 26 September 2005.

Background

3. The Applicant is a citizen of Georgia who arrived in Australia on 19 March 2004. On 14 May 2004, he lodged an application for a

protection visa with the First Respondent's Department. On 17 June 2004, a delegate of the First Respondent refused to grant the protection visa and the Applicant then applied for review of that decision before the Tribunal.

4. The Applicant claimed that he faced a real chance of persecution by the Georgian authorities if he returned to Georgia in the reasonably foreseeable future. He claimed that in Georgia he had never previously been persecuted for his political views but rather claimed that as a result of his actual or imputed political opinion critical of the Georgian government, and its failure to implement democratic reforms, he now faced a real chance of persecution by the Georgian authorities.

5. The Applicant was a dancer with a Dance Company. He claimed that during that company's tour of Australia he complained to the company's management about conditions of employment and in particular the dancers' wages set out in a letter dated 14 May 2004 to the Department (Court Book pp.1-2) where the Applicant's agent relevantly states,

> *"The tension within the dancing group occurred three weeks after their arrival in Australia. According to the applicant they had been promised $100 for each concert plus diurnals. Instead they were paid just $45 altogether for each concert. The Applicant was the one who had been 'authorised' by the group members to have a talk with their management. During the conversation he was told 'if he does not like the conditions he is free to go at any time'. Being in Adelaide the applicant had another conversation with the director ... He threatened that he, as well as other four other members of the dancing group, will not participate in forthcoming concerts should the fee matter is not resolved (sic)."*

6. Further in the same letter, the agent states:

> *"The following day he was asked to come to see the director, who said the following 'You might heard that I am the best friend of ... (the Georgian president) and I promise you, I will do my best you will end up in jail as soon as you come back to Georgia. I know how you hate the authorities and I will ensure that they have a closer look at you ... From now on you are dismissed."*

The Tribunal Hearing

7. The Tribunal conducted a hearing on 11 February 2005. The Applicant was represented and gave evidence, purportedly with the assistance of a Georgian interpreter.

8. The transcript prepared by the transcription service (the first transcript) of the hearing was filed with the court and relied upon by both parties. The first transcript reveals that initially the Applicant appears to have provided background material, particularly in relation to the dance company. He was asked questions about his background training and university studies. He was further asked questions about his relatives and in particular his parents and sister who reside in Georgia.

9. He recited the difficulties with management concerning the salaries paid to dancers. He referred to his claimed sacking, which occurred after the Adelaide performances.

10. It is noteworthy that in the first transcript an issue arose concerning the quality of the interpretation provided. The following appears in the transcript at page 11. The Tribunal is 'Mr Gentile" and the Applicant's agent is "Mr Volonski".

> *"MR GENTILE: Look, I think we're nearly to the end, nearly towards the end. I don't see any particular reason - - -*
>
> *MR VOLONSKI: Because I would like to talk to the applicant about a quite important issue, because the interpreter is unable to interpret properly.*
>
> *MR GENTILE: How do you know the interpreter is unable to interpret properly? You speak Georgian now, do you?*
>
> *MR VOLONSKI: I speak a little bit Georgian, yes. But the point is, I want to - - -*
>
> *MR GENTILE: Hold on a minute. If you have a problem with the interpreter it's for me, not for you in discussion with the applicant.*
>
> *MR VOLONSKI: That's fine. I just would like to say to the applicant that the hearing is to be rescheduled.*
>
> *MR GENTILE: Why?*

MR VOLONSKI: Why? All right, because yesterday I had a long conversation with his - can you interpret, please? Yesterday I had four hours' conversation with Tamas, his friend he is living with, and that was - I asked lots of questions about this particular case.

MR GENTILE: Yes?

MR VOLONSKI: Through the interpreter. I mean, through the - Tamas speaks Russian quite well and he interpreted properly everything and the answers here is absolutely different.

MR GENTILE: So why are you - - -

MR VOLONSKI: And also I would like to - - -

MR GENTILE: Sorry, go on.

MR VOLONSKI: And another thing is - - -

MR GENTILE: Just let her interpret, please.

MR VOLONSKI: And I can prove easily, we can verify the tape by another qualified Georgian because he speaks, say, 100 words and the interpreter says just five words. It's not possible.

MR GENTILE: That's a different issue altogether.

MR VOLONSKI: No, it's not a different issue. The interpreter is not - Mr Gentile, actually I've been in the court on a number of occasions arguing the interpreter issue.

MR GENTILE: Yes, and - - -

MR VOLONSKI: And you are unable to understand the case be the interpreter is unable to interpret the applicant's accounts.

MR GENTILE: Can you interpret that, please.

MR VOLONSKI: That's what I wanted to tell him and if you want to - - -

MR GENTILE: Just give her a chance to interpret, okay?

INTERPRETER: He says that he doesn't understand English very well and he - - -

MR VOLONSKI: I can provide a statutory declaration stating that the accounts here is absolutely different and I can - even here

I put some questions and answers and there were a great deal of discrepancies.

MR GENTILE: Look, we're not about to - - -

MR VOLONSKI: And he will understand the issue, that's the point, and he will get a refusal because of incorrect interpretation, and I'll go to the court and will be, you know, trying to argue the case.

MR GENTILE: Yes, all right - sorry.

MR VOLONSKI: Just so it's clear that the interpretation is not good.

MR GENTILE: That is your opinion, okay, and - - -

MR VOLONSKI: And I want it to be heard in the course of the hearing and I would like it to be recorded in the tapes.

MR GENTILE: It is recorded. If you're speaking it's being recorded.

MR VOLONSKI: Yes, that's fine. That's why I ask - but trying to raise the issue of absolutely incorrect interpretation.

MR GENTILE: Okay, I understand that. But I'm not about to adjourn the hearing. If you believe that the interpreting is not adequate I would like you to make a submission to me at the end of the hearing about what is inadequate, what is inadequate about the interpreting.

MR VOLONSKI: I've just done that.

MR GENTILE: No, you haven't. You've just made general - - -

MR VOLONSKI: That's fine.

MR GENTILE: You've made general statements about the interpreting.

MR VOLONSKI: Because I don't understand - - -

MR GENTILE: Sorry, you've made general statements about the interpreting. You haven't told me what is inaccurate about her interpreting, okay?

MR VOLONSKI: And I wouldn't say so - - -

MR GENTILE: Just because whatever you heard before has not come out, right?

MR VOLONSKI: It's not "whatever".

MR GENTILE: No, whatever, I mean - - -

MR VOLONSKI: It's the applicant's whole story and I spent four hours yesterday trying to sort it out.

MR GENTILE: Look, Mr Volonski, I'm asking the questions. He's answering the questions, okay? Now, if your argument is that the questions are not being interpreted then I would like you to make a submission on what - - -

MR VOLONSKI: Why you don't interpret now? Your role is to interpret.

INTERPRETER: Sorry, Mr Gentile, I'm sorry.

MR GENTILE: Can you just let her interpret now?

INTERPRETER: He said that he knows to speak with - also he says his adviser (indistinct)

MR VOLONSKI: If you are here, you know, just to listen to some shortened, incorrect version of what he's said, and on that basis to make a decision, that's fine.

MR GENTILE: Mr Volonski, first of all, there is no evidence before me that you are an interpreter. Secondly, there's no evidence before me that you speak Georgian, okay?

MR VOLONSKI: I can understand the word - - -

MR GENTILE: Sorry.

MR VOLONSKI: - - - "politic", I can understand the - - -

MR GENTILE: Just a minute. Just let me finish, okay? If you wish to make a submission about the interpreting you do that. I refer to the case of Pereira which goes through the issue of interpreting in this tribunal. The tribunal has gone to considerable trouble to obtain a Georgian interpreter because there are very few or none. Can you interpret what I'm saying?

MR VOLONSKI: Yes, but it's not the applicant - - -

MR GENTILE: Could you just wait till the interpreting is done?

INTERPRETER: I translated it.

MR GENTILE: Then what was the answer? What was the response? He just said something. I'd like to hear what he said.

INTERPRETER: He's saying if I'm interpreting well and as is necessary he refers it to myself.

MR GENTILE: The other issue that I need to mention is that in your application form it says that you speak Russian. Wait just a second. When I suggested that we get a Russian interpreter for you I was told that you did not speak Russian.

MR VOLONSKI: No, isn't correct.

MR GENTILE: That your Russian was not very good, I was told.

MR VOLONSKI: Yes, not very good. Horrible I would say, horrible Russian.

MR GENTILE: Just a minute.

INTERPRETER: He speaks very little Russian, yes.

MR GENTILE: A few minutes ago though you said you speak, read and write Russian.

MR VOLONSKI: No, he didn't - yes, again incorrect interpretation by the way.

INTERPRETER: No.

MR VOLONSKI: How is no? I speak with him yesterday - - -

MR GENTILE: Sorry, can I just - - -

MR VOLONSKI: - - - through the telephone. I was unable to speak to him in Russian yesterday.

MR GENTILE: Right. Can we just let her interpret?

MR VOLONSKI: And you tell me that he speaks Russian properly.

MR GENTILE: I'm not telling you, I'm repeating what I was told.

INTERPRETER: He say - - -

MR GENTILE: Okay. Mr Volonski, what is it with you this morning? Are you in a belligerent mood? I'm trying to run this hearing and you're trying to disrupt it.

MR VOLONSKI: I'm not trying to disrupt this hearing because let me tell you something, because all the time you - - -

MR GENTILE: No, wait till we get the interpreting.

INTERPRETER: He does (indistinct) he can continue to learn Russian but he can a little bit speak, he can read and he can write.

MR GENTILE: Okay. We have gone through all the agencies we can find in this country to get a Georgian interpreter which we have here this morning, okay? If it is your contention that the interpretation is not adequate you have the perfect right to send me a submission about why it's inadequate, okay? After that, my only suggestion I can make is that we receive written submissions from the applicant, seeing that we cannot find interpreters. We could have 15 hearings. If we find - there seems to be no NAATI Georgian interpreters in Australia who are competent and we made extensive search for this case to get a Georgian interpreter, okay? So that's my suggestion. I'm aware that the person that we've got here this morning is not NAATI accredited because there is no accreditation in Georgian.

INTERPRETER: Yes, I'm not certified.

MR GENTILE: I understand that. I knew that before I said yes.

INTERPRETER: They're looking for professional interpreter, certified one, but they couldn't find.

MR GENTILE: Well, that's precisely what I'm saying, Mr 'Applicant'. So what I'm suggesting to you is that it seems to me pointless to try and organise another hearing where we know that there is a lack of Georgian interpreters.

INTERPRETER: Well, this is (indistinct) his right to go from him without my interpretation.

MR GENTILE: No, this is a tribunal and what your adviser is here for is to make submissions to the tribunal. It is not a court, okay?

INTERPRETER: He wants to continue interpreting as usual.

MR GENTILE: Well, I'm - - -

INTERPRETER: If Mr Volonski - if he is not against (indistinct)

MR GENTILE: I would like to hear what Mr Volonski has to say now.

MR VOLONSKI: Yes, thank you, because the issue is that there was a - not identical but very similar issues and probably you're aware of this issue. My former client, actually he agreed to have a hearing in Russian and the application was refused for the second time because according to the tribunal member - it was probably here, I don't remember exactly - he was unable to explain his political views. But again he was unable to speak Russian properly and because of his inability to speak Russian the application was refused. Before that, before that, the very client, my client - actually there was a hearing and it was a Georgian interpreter but it was a man. He was a man - - -

MR GENTILE: I'm sorry, just let her interpret now.

MR VOLONSKI: He had difficulty interpreting and then the application was refused.

MR GENTILE: Can you just - - -

MR VOLONSKI: And the (indistinct)

MR GENTILE: Can you just be patient for a minute?

INTERPRETER: Yes, I translate.

MR VOLONSKI: The matter went to the court. Then, you know, the court decided that (indistinct) error in law and referred the matter back to the tribunal and again they provided a Russian interpreter on the basis that the applicant might speak Russian, because in his application it was that he can speak Russian. But of course his knowledge of Russian was very limited and he was unable to explain his political views in Russian, and again that's why his application was refused. And now, again the matter is in the court, a similar situation to the one here.

MR GENTILE: Right, hang on. Okay. This is why I'm suggesting an alternative, okay? I'm satisfied that we have made extensive searches for Georgian interpreters and the conclusion that we've come to is that there are very, very few and those that are available, according to you, are not doing a proper job. Now, without making any comments about your assertions as to why

decisions are made in a certain way it is my legal duty to take evidence from the applicant. Since we cannot do it orally what I'm suggesting is that this be provided in writing to me. Do you understand, Mr 'Applicant', what I'm saying?

INTERPRETER: On Georgian I put in writing?

MR GENTILE: No, it has to be in English. But obviously there is somebody that can communicate with you.

INTERPRETER: He can't understand.

MR GENTILE: What I'm saying, Mr 'Applicant', is that we have come to this point where your adviser believes that your case is being affected by the fact that the interpreter is not doing a good job. Without expressing a view I've asked him to give me a submission as to why he feels that this interpreter is not doing a good job. At the same time he has said that a Russian interpreter is not appropriate for you, okay? So I know that it is extremely difficult, if not impossible, to find another Georgian interpreter because before this hearing this tribunal has tried as many agencies as there are in Australia, just about. I'm therefore suggesting that you present your claims to the tribunal in writing, in English of course. Is that clear to you?

(Transcript p.11 line 41 to p.18 line 45)

I have deliberately set out that lengthy exchange to illustrate that significant confusion arose in relation to the expressed dissatisfaction by the Applicant in relation to the quality of the interpreter. Ultimately the Tribunal suggested that the Applicant should put evidence in writing.

11. I note in particular the comment, *"... we made extensive search for this case to get a Georgian interpreter, okay?"*

12. Further it is relevant to set out the following from the transcript,

"MR GENTILE: Look, if the issue here is that I'm not getting a good interpretation there's no point proceeding. We're being hypocritical here, all right? If the contention is that the interpreting is not sufficiently of a high standard for you to give your claims then I'm suggesting that's what we're doing. We've decided that I will get a written statement from you. So, Mr Volonski, can we discuss the time frame for this?"
(Transcript p.21, lines 26 – 32)

13. It should be noted that the Applicant in fact submitted written submissions which appear to have been prepared by his then migration agent dated 18 February 2005 (Court Book pp.83-87). Those written submissions in part state the following:

> *"The submission is provided due to the Georgian interpreter's inability to interpret the applicant's accounts during the course of the hearing held on 11 February 2005."*

14. The written submissions then go into detail about relevant topics, including the Applicant's political opinion, and address specific questions concerning the Applicant's political views and activities. It is clear that there are a number of typographical errors in that written document, but nevertheless it is equally clear that a number of issues are referred to and raised by the Applicant in that written correspondence.

15. The Applicant specifically refers to the dispute over money with the dance company and its director and provides further detail in answer to the question, *"Do you think you will be 'punished' because of the money issue?"* In part, in answer to that question, he states the following at paragraph 16 of the letter:

> *"After I expressed my view to director ... and stated that four other members of our group would not perform in incoming (sic) concerts I was threatened and thrown out from the group. Hence the main reason for my being dismissed and threatened was not 'the money issue'".*

16. The same letter also asserts that there were some inaccuracies in the Applicant's initial written submissions which are claimed to have resulted from a lack of understanding. The inaccuracies are referred to in the following terms in paragraph 26 of the letter (Court Book p.87):

> *"There are a number of inaccuracies resulted from the lack of understanding. They are as follows: a) the applicant worked in the group not 4 but 3 years; b) it's stated that 'tension' within the group occurred 3 weeks after they arrived in Australia. In fact there has always been a tension between the members of the group and the management. However, before Australia no one expressed their disagreements with the management; c) it's said that (the Applicant) expressed his disagreement because he (and others) were underpaid. The money issue was not the main*

reason of his decision to speak up nor the reasons of his persecution."

17. Due to the issues raised in this application, which referred directly to the inadequacy of the interpreting, the court ultimately received a further interpretation from the tape-recording of the proceedings before the Tribunal by a qualified Georgian interpreter. I shall make reference to that document further in this judgment.

The Amended Application

18. The Amended Application relied upon by the Applicant sets out the following grounds in support of the application:

> *"1. As the applicant has previously stated he was not give the opportunity to give evidence and present arguments relating to his case during the course of the hearing held on II February 2O05.*
>
> *2. The Tribunal was unable to engage a qualified interpreter. The engaged interpreter was not accredited interpreter (by the National Accreditation Authority (NAATI) and was incapable of interpreting the applicant's claims and the Tribunal's questions. According to the Tribunal 'the Tribunal level of satisfaction with the interpreting was also low (p.5).*
>
> *3. Given the seriousness and complexity of the applicant's case the Tribunal was to engage an accredited or, at least, an experienced and qualified interpreter.*
>
> *4. The Tribunal's failure to comply with its obligation under sections 420 and 425 of the Migration Act resulted in the applicant's inability to understand various questions, to address relevant issues and to make any further oral submissions.*
>
> *5. Furthermore, as the provided interpreter was obviously incapable of interpreting from and into Georgian (and English), the applicant's agent requested to adjoin the hearing until a qualified interpreter is provided or, alternatively, to give the applicant the opportunity to make a detailed written submissions to address the issues raised during the course of the proceedings.*
>
> *6. The Tribunal consented to stop the hearing and to allow the applicant's advisor to supply, on the applicant's behalf, additional information.*

7 The detailed written submissions were provided on 18.02.2005.

8 The Tribunal made its decision on 27 April 2005. The decision was based on the following:

(i) 'the applicant's expressions of opinion about the situation in Georgia constitutes elements which are unremarkable in terms of the effects on the applicant on his return';

(ii) the Tribunal did not accept that the applicant's parents had been visited by Georgian authorities who 'told stories about his alleged commission of a theft of a money and the threat that he would be persecuted';

(iii) the Tribunal did not accept that 'a story had been fabricated about alleged crimes in Australia in relation to the applicant', nor it accepted that 'that the claim that this story has been fabricated so that he would not express his opinions publicly in Australia, thereby adversely affecting the President's image:

(iv) the Tribunal did not accept that 'Georgian authorities would view him as a traitor';

(v) there are sone matters 'not contemplated by the Refugee Convention';

(vi) the impact of this threat on the applicant on return is likely to be confined to mailers related to contractual arrangements.

9. The information concerned was clearly about the applicant therefore, pursuant to s. 424(A)1 of the Act, he was to be given the opportunity to comment upon these matters, particularly in light of the fact (that he had no such an opportunity at the hearing.

10. The failure to give particulars to the applicant as well as to ensure that he understood the relevance of it and to give him an opportunity to comment was in breach of s. 424A(i) and constituted a jurisdictional error: WAEJ v MIMIA [FCAFC] 188; Kioa v West (1985) 159 CLR 550, 629; Re Minister for Immigration and Multicultural Affairs; Ex parte Miah (2001) 206 CLR 57, 97.

11. If breach of either s 424A or the general law obligation to accord procedural fairness (and failure to comply with ss. 420 & 425 of the Act) is established, then the decision of the Tribunal is affected by jurisdictional error."

The Court Proceedings

19. As a result of difficulties with interpretation, the court proceedings in this application have been somewhat disjointed. It is relevant to note that the first hearing of this matter occurred on 15 February 2006. On that occasion the hearing was adjourned because a Georgian interpreter was not in attendance. The court then indicated that in another unrelated matter where the quality of interpreting was in issue, also involving a Georgian interpreter, that the First Respondent had obtained a copy of the transcript of the Tribunal hearing which included the English translation of what was said in languages other than English.

20. The hearing resumed on 21 April 2006. At that time the First Respondent filed and served a transcript of the Tribunal hearing prepared by a Georgian interpreter. The second transcript claimed to have recorded what had been said in English and what was said in Georgian at the hearing. The second transcript included an English translation in brackets beneath the Georgian text.

21. It is clear from a proper reading of the second transcript that the person preparing that transcript has failed to accurately record the English words that were uttered by the Tribunal and the agent representing the Applicant at the Tribunal hearing. To that extent I prefer, and regard as accurate, the transcript provided by the transcription service, Spark and Cannon, insofar as it relates to the English words used before the Tribunal.

22. The second transcript, however, clearly reveals some difference in the extent to which the Georgian words were translated before the Tribunal by the interpreter engaged by the Tribunal. By way of just one example I note that the following appears at p.54 of the second transcript,

> *"Mr Jentile* *No. But wait. Can we get the interpreting?*
>
> *Interpreter* *Nu... tsota...tsota... itsi rusuli? Mara tsera, kuthva...*
>
> ***[Do you know Russian a little bit? Writing, reading?..]***

Applicant	*Tsota ar aris sakmarisi me rom tsavikvano chemi interviu rusulad. Mashin me tsavikan…*
	[My limited knowledge of Russian is not enough to be interviewed in Russian. In this case I would…]
Interpreter	*He can… he can't continue in Russian, but he can speak, he can a little bit speak, he can read, and he can write." (sic)*

23. That appears to be equivalent to the extract which appears in the first transcript as follows,

> *"MR GENTILE: No, wait till we get the interpreting.*
>
> *INTERPRETER: He does (indistinct) he can continue to learn Russian but he can a little bit speak, he can read and he can write."*
>
> (Transcript p.16 lines 31-35)

24. It will be noted from a simple comparison of the two transcripts that in the second transcript the words appear, *"My limited knowledge of Russian is not enough to be interviewed in Russian. In this case I would …"* and those words do not appear in the first transcript at all.

25. I have read through both versions and note throughout the second transcript that on a number of occasions words appear to be recorded that have been uttered by the Applicant in Georgian but which have simply not been interpreted at all in the first transcript. The discrepancy between the transcripts in my view is sufficient to enable me to draw a conclusion that it would have been extremely difficult for the Tribunal to rely upon the interpreting provided to it at the hearing in a manner that would facilitate an open and free exchange between the Tribunal, the Applicant and the Applicant's agent.

26. In any event, after hearing initial submissions by the parties on 21 April 2006, I decided to stand the matter down until later in the afternoon to enable the Applicant to consider the second transcript with the assistance of a Georgian interpreter and I invited the Applicant to then refer to particular aspects of the interpreting at the Tribunal hearing which were not satisfactory and which were otherwise to be relied upon by the Applicant before this court.

27. Upon resuming at 3.30 pm on 21 April 2006, the Applicant made further general submissions. He also filed in court on that day handwritten submissions in English which, through the interpreter, he claimed that he wished to rely upon in support of his Amended Application. I accept that those submissions essentially repeat the matters raised in the Applicant's Amended Application.

28. He specifically stated, however, in those written submissions the following:

> *"During the Tribunal hearing I was denied the opportunity to give evidence because the interpreter was not qualified."*

29. He further claimed that in assessing his claims, the Tribunal denied him natural justice or failed to comply with s.424A of the *Migration Act 1958* (the Migration Act).

30. The Applicant did not complete oral submissions on 21 April 2006. The application was then further adjourned to 8 June 2006. Orders were made that the Applicant file and serve submissions written in Georgian by 10 May 2006 and that those submissions be translated from Georgian into English by 31 May 2006, with a copy of the translated submissions to be forwarded to the parties by 1 June 2006.

31. Consistent with those orders, the court received additional written submissions in Georgian with an English translation from the Applicant dated 8 May 2006. The translation into English was declared to have been translated by Tatiana Bakhtadze. It should be noted that that interpreter was the same interpreter who provided the second transcript. The second transcript was attached to an affidavit by the interpreter which had been affirmed on 24 May 2004. For present purposes I am satisfied that Tatiana Bakhtadze is a qualified interpreter, and as indicated earlier, at least the English translation from the Georgian language of the Tribunal proceedings is sufficiently accurate to be relied upon by the court in this hearing and to be used by way of comparison with the Tribunal's official transcript provided by the transcription service.

32. As indicated, I am not satisfied that the English words recorded in the second transcript are accurate and I prefer the Tribunal's official transcript in that regard.

33. At the resumed hearing on 8 June 2006, apart from relying upon the translated submissions, the Applicant otherwise repeated the earlier complaints concerning the Tribunal's conduct at the review. He further submitted that the facts of his application were similar to those considered by this court in the matter of *MZWKN v Minister for Immigration & Anor* [2006] FMCA 413.

34. Due to court commitments, the resumed hearing on 8 June 2006 did not conclude the hearing as the First Respondent had been requested to make oral submissions in reply to the Applicant's translated submissions. The court then ordered, for the convenience of the parties and to ensure the Applicant had a fair opportunity to understand submissions of the First Respondent, that the First Respondent file and serve supplementary submissions by 14 June 2006.

35. The court then adjourned the further hearing to 2.15 pm on 19 June 2006. It requested the interpreter to be present and available for the assistance of the Applicant from 10 am on that day so that the supplementary submissions of the First Respondent could be translated.

36. By permitting the Applicant to file and serve submissions in Georgian, then translated by a qualified interpreter, and by arranging for the tape-recording of the Tribunal's proceedings to be transcribed by another interpreter, and further, allowing time for the Applicant, with the assistance of the current Georgian interpreter, to consider submissions in writing of the First Respondent, the Court has tried to ensure that the Applicant, at least before this court, has been afforded procedural fairness, notwithstanding the difficulties arising from the use of interpreters.

37. It is not in issue in this case that there is a significant difference between the Georgian and Russian languages, which I mention in passing as it became evident through the Tribunal's hearing that some reference was made to the Russian language.

The Tribunal's Findings

38. The Tribunal, after referring to the relevant definition of "refugee" within the meaning of the Refugees Convention, otherwise set out judicial and legislative authorities which are clearly relevant to an

application of this kind. It then recorded the Applicant's claims and his evidence in some detail (Court Book pp.99-107).

39. In fact the Tribunal set out verbatim the entire contents of the written submission made after the hearing by the Applicant. It is common ground that there was no further hearing arranged by the Tribunal which then proceeded to make its findings based upon the first interrupted hearing and the written submissions relied upon by the Applicant after the hearing.

40. It is perhaps significant to note that the Tribunal itself understandably expressed a level of dissatisfaction with the interpreting process. Indeed in its decision the Tribunal relevantly states at Court Book p.100 the following:

> *"At the Tribunal hearing on 11 February 2005 the Tribunal engaged an interpreter in the Georgian language and English languages. This person was found after a number of attempts were made to locate a Georgian interpreter throughout Australia. The interpreter in question did not have NAATI accreditation as the latter is not available for the Georgian language. Some way into the hearing the adviser complained to the Tribunal about the quality of the interpreting – his knowledge of the Georgian language was sufficient to indicate what he claims were major distortions of meaning and summaries rather than full interpretation of the utterances of the parties. The Tribunal's level of satisfaction with the interpreting was also low and it was decided to abort the hearing and allow the adviser to supply, on behalf of the applicant, information which the applicant had given the adviser the previous day and which was unable to be gotten across by the interpreter. The Tribunal followed for 14 days for this to occur. The Tribunal will now summarise what it heard at the hearing and will then reproduce the submission by the adviser."*

41. After making those observations, the Tribunal then made certain findings in relation to the Applicant's claim, which commence at page 112 of the Court Book. I am satisfied that the First Respondent has accurately set out the key findings in the First Respondent's Contentions of Fact and Law as follows:

> *"3.3 In reaching its decision, the Tribunal made the following findings:*

(a) the applicant was a Georgian citizen [CB 112.10];

(b) the applicant was a member of the dancing company [CB 112.101;

(c) during the dancing company's tour of Australia, the applicant complained to the management of the troupe and was excluded from some performances as a method of punishment [CB 112.10];

(d) the applicant was later sacked from the dancing company [CB 113.1];

(e) the applicant had expressed general views about democratic reform which, on the basis of relevant country information supplied by the applicant, were not of a kind likely "to raise any eyebrows", their lack of specificity and targeting making them innocuous both in their statement and their effect [CB 113.7-114.1];

(f) as a result, the chance of the applicant being harmed for espousing and expounding the political views which he had put to the Tribunal was remote and insubstantial [CB 114.1-2];

(g) the dance company was an icon of Georgian culture and an ambassador for Georgia in its overseas tours [CB 114.2];

(h) if a dancer from the dance company resigned or was fired, this would lead to some questions being asked in Georgia [CB 114.3];

(i) it was plausible that, if a member of the dance company did not return with the troupe to Georgia after a. tour, his or her family would be visited by the Georgian authorities "in order to establish the whereabouts and the circumstances of the lack of the return" [CB 114.3-4];

(i) the applicant's parents were not told a story about the applicant's alleged commission of a theft and about the threat that he would be prosecuted [CB 114.4];

(k) the Georgian authorities would not regard the applicant as a traitor and would not believe that he remained in Australia in order to criticise Georgia [CB 114.7];

(1) any disciplinary action taken against the applicant pursuant to "his contract or employment arrangements he might have had with the State Dance Company" would involve matters not contemplated by the Convention [CB 114.8-9];

(m) the impact of any threat made by the director of the dance company to the applicant was "likely to be confined to matters related to contractual arrangements" [CB 114.9-115.2];

(n) there was no indication that the applicant's relationship with the management of the dance company was based on any political connection [CB 115.3];

(o) there was no indication that any punishment that the applicant might receive would be for issues other than those related to his role in the dance company, nor that any punishment would be meted out to him for a Convention reason [CB115.4]."

Applicant's Submissions

42. As indicated earlier, the Applicant sought to rely upon submissions written in Georgian which at the direction of the court were translated into English and dated 8 May 2006, yet otherwise provided handwritten submissions to the court which were filed on 21 April 2006.

43. The Applicant sought to make oral submissions but in doing so tended to repeat what appears in either the Amended Application or the written submissions. When the matter concluded on 19 June 2006, the Applicant, although having had the opportunity of considering, with the assistance of an interpreter, the First Respondent's supplementary submissions, did not seek to advance his submissions in any further detail before this court, apart from referring to terminology concerning what might be described as "internal agencies in Georgia" to which reference will be made later in this judgment.

44. In the written submissions dated 8 May 2006, the Applicant, when responding to what are the errors in the Tribunal's decision, set out the following paragraphs:

"1. The Tribunal has violated Immigration Act Section 424A (1), because it did not give me the possibility to make any comments on the information about myself, and on the basis of which I have got the refusal. (I will not talk here what the information was about, because, as I have already stated before, there was not any discussion at the Tribunal session, and even if there was any, I did not understand what they were talking about. Thus, the whole

information on the basis of which I have got refusal, and which was about me, is in the scope of the Immigration Act Section 424.

2. I am familiar with the case of one of my friends (MLG 640/2004). That case has been twice already at the court hearing, and twice it was sent back to Tribunal, to be considered there again (last time it was sent twice back to Tribunal just 2 months ago), and for the second time the Tribunal repeated its previous decision, making the absurd verdict. I ask the Court to take into consideration that the mentioned case has got much in common with my case. If we will take into account that such cases already have been considered, and the decision was in favor of the applicant, I believe that there is no need to start everything from the beginning, and to invent the bicycle again, but it is better to take the existing decisions into account, and to send my case back for new hearing.

3. The Tribunal's argument was that they could not find the qualified interpreter that is probably very significant. But, what it has to do with my case? Why should I suffer because of that? Just because the Tribunal failed to find the interpreter? Let us presume that, the Tribunal will not find the qualified interpreter. So, why would not the Tribunal write in English what problems the Tribunal sees in my case, after receiving all documents from my agent? Why the Tribunal would not give me the right to make comments on the information which lies in the basis of the Tribunal's decision? Was not it necessary to find the qualified Georgian interpreter in order to keep me informed about the reason of my refusal?"The First Respondent's Submissions

Section 420 of the Migration Act

45. The First Respondent submitted that any purported failure by the Tribunal to observe the requirements of s.420 of the Migration Act would not give rise to a reviewable error (see *VAT v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 255 at [25]) where the court relevantly states the following:

"25 Section 420 of the Migration Act cannot provide any foundation for establishing excess of jurisdiction: Minister for Immigration and Multicultural Affairs v Eshetu [1999] HCA 21; (1999) 197 CLR 611. The Ridgeway case states principles applicable to the weighing of public interest considerations in the usage of unlawfully obtained evidence. So far as it refers to the public interest in maintaining the integrity of the courts and in

> *ensuring the observance of the law and minimum standards of propriety, we do not consider that public interest to be put at risk by the questioning quoted earlier in these reasons. That is so even acknowledging that the functions of the Tribunal are an exercise of executive rather than judicial power. The Tribunal member was entitled under the Migration Act to question the first appellant. Even if some of the questions were ultimately seen to be irrelevant, the asking of those questions did not involve non-observance of any law."*

46. It was submitted that in any event it could not be claimed that in carrying out its functions under the Act the Tribunal did not pursue the objective of providing a mechanism of review that was "fair, just, economical, informal and quick".

47. It was submitted that the Applicant's representative accepted the proposal that the Applicant's evidence be set out in written submissions and the Applicant himself understood the proposal when it was put to him. It was noted the proposal was made due to complaints by the Applicant's representative about the adequacy of the Georgian interpreter at the Tribunal hearing and the unavailability of other suitably experienced and qualified Georgian interpreters.

48. Accordingly it was submitted that there was "little else that the Tribunal could have done to provide for the Applicant to present further evidence".

Section 425 of the Migration Act

49. The First Respondent set out the relevant provisions of s.425 of the Migration Act as follows:

> *"(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.*
>
> *(2) Subsection (1) does not apply if:*
>
> > *(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or*
> >
> > *(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or*

(c) subsection 424C(1) or (2) applies to the applicant.

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

50. It was submitted that the provision required the Tribunal to issue a "genuine invitation" to the Applicant to appear at the hearing. However, it was submitted it did not generally bear on the procedures to be followed at or after the hearing which resulted from acceptance of that invitation.

51. Reference was made to a decision of the Full Federal Court in the matter of *NALQ v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 121 at [30]-[32] where the court stated:

> *"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.'"*

52. It was submitted that in this instance it could not be claimed the invitation was not genuine and that in response to the request the Tribunal made "significant efforts to arrange for a Georgian interpreter".

53. The Applicant attended the hearing with his representative and the hearing took place over a period of one and a half hours. During that time the Tribunal did ask the Applicant questions about his claims and evidence. Accordingly it was submitted the invitation was real and meaningful and could not be described as an empty gesture (see *Mazhar v Minister for Immigration & Multicultural & Indigenous Affairs* (2000) 103 ALR 188 at [31]).

54. In the First Respondent's supplementary submissions, reference was made to other authorities in support of the submission that there had been no breach of s.425 of the Migration Act. Specifically reference was made to the decision of the Federal Court in *SZDLA v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1048 (SZDLA) where Conti J stated at [43] the following:

"43 The section was introduced, in its present form, by the Migration Legislation Amendment Act (No 1) 1998 *(Cth), the relevant parts of which came into force on 1 June 1999. The provisions apply to the Tribunal's review of a delegate's decision:*

Sch 3, Pt 2, Item 20(2). Pursuant to s 425, the Tribunal is therefore under a statutory obligation to issue an invitation to an applicant to attend a hearing. While so much indicates a legislative intention that an applicant is to have an opportunity to attend an oral hearing for the purpose of giving evidence and presenting submissions, the obligation imposed by the section is directed to the issuing of an invitation, rather than to the manner of subsequent conduct of the hearing itself."

55. It was noted that the decision of Conti J in *SZDLA* was the subject of an application to the High Court for special leave which was refused by the court on 3 February 2006.

56. Further reference was made to a decision of the Full Court of the Federal Court when considering the obligations imposed on a Tribunal by s.425 of the Migration Act. The First Respondent relied upon the decision of the court in *Minister for Immigration and Multicultural and Indigenous Affairs & Anor v SZFHC* [2006] FCAFC 73 (SZFHC) where in a joint judgment of Spender, French and Cowdry JJ their Honours state the following at paragraphs [33] to [36]:

> *"33 The question to be determined by the Court is whether compliance with s 425A of the Migration Act exhausts the obligation of the Tribunal to invite an applicant under s 425, or whether additional steps must be taken by the Tribunal to comply with its obligation under s 425. It is of course clear that internal management mechanisms within the Tribunal, such as the checklist in the present case, cannot alter the extent and content of the duty imposed by the statute.*
>
> *34 The Minister submits that ss 425 and 425A are clearly connected, with s 425 setting out the obligation on the Tribunal and s 425A setting out the methods by which that obligation may be complied with. Accordingly, the Minister says compliance with s 425A constitutes compliance with s 425. The Minister refers to VNAA and Anor v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 136 FCR 407 ('VNAA'), in which Sundberg and Hely JJ said (at 413):*
>
>> *'The claim put to the primary judge and repeated before us that the methods specified in s 441A by which a document may be given to a person do not apply to an invitation given under s 425 must be rejected. Section 441A applies only when a provision requires or permits the Tribunal to give a document to a person and states that it must do so by one of*

the methods specified in the section. Section 425A so states. Section 425 does not. It is, however, plain that the sections are to be read together. Section 425 merely requires the Tribunal to invite an applicant to appear. It contains no mechanism by which the invitation is to be extended. That is done in s 425A. If the Tribunal invites the applicant to appear, it must be done in the manner there set out, namely by notice specifying the date, time and place at which the applicant is to appear. That this is the proper construction of the provisions is established by decisions at first instance, with which we agree. See QAAB of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 1220 at [13] per Cooper J, SAAA v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 101 at [8] per Mansfield J, Mohammad v Minister for Immigration and Multicultural Affairs [2000] FCA 466 at [17] per Katz J and NAOZ v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 820 at [19] per Sackville J. It would be absurd to treat Parliament as intending by s 425 that by some unstated means the Tribunal is to issue an invitation to appear before the Tribunal, and by s 425A that it is to dispatch a notice containing details of the date, time and place for the appearance, but not containing the invitation itself.' (original emphasis)

35 The respondent submits that the obligation imposed on the Tribunal by s 425 extends beyond the method of notification provided in s 425A. He says that following the prescribed method of inviting an applicant to appear does not exhaust the obligation on the Tribunal contained in s 425 to invite an applicant to appear. The respondent submits that the obligation under s 425 is to provide an applicant with a real opportunity to appear before the Tribunal: see Budiyal v Minister for Immigration and Multicultural Affairs (1998) 82 FCR 166 ('Budiyal'); Minister for Immigration and Multicultural Affairs v Capitly (1999) 55 ALD 365 ('Capitly'); Haddara v Minister for Immigration and Multicultural Affairs (1999) 166 ALR 401 ('Haddara'). The respondent says that the obligation to provide the applicant with a real opportunity to appear before the Tribunal may require the Tribunal to take further steps in addition to complying with s 425A. The respondent says that s 425A merely sets out the minimum requirement which the Tribunal must comply with when inviting an applicant to appear before it.

36 In support of its submission, the respondent refers to Uddin v Minister for Immigration and Multicultural Affairs (1999) 165 ALR 243 at [30] ('Uddin'), in which Hely J observed:

> *'If one approaches the matter as a question of principle, one would conclude that s 425 requires the RRT to give the applicant a real opportunity to appear before it and give evidence, and that it is a necessary, but perhaps not a sufficient, step in the performance of that duty, that actual notice (subject, perhaps, to the regulations) of the s 426 entitlements be given to the applicant. Even if the regulations are effective so as to provide for deemed receipt of a document, and even if deemed receipt of a document amounts to performance of the statutory obligation that the RRT "must notify", the s 425 duty is not necessarily performed or discharged by service, or deemed service, of a document.'"*

57. Further reference was made to the Full Court decision in *SZFHC* at paragraph 39 where their Honours state:

> *"39 The submissions of the respondent in this respect are rejected. In view of the decision in VNAA, it is clear that ss 425 and 425A of the Migration Act are to be read together. Accordingly, the Tribunal, having complied with one of the methods prescribed in s 425A (in fact, two), was under no further obligation to search the papers lodged with it to discover if there might be some other avenue of communicating with the applicant."*

58. It was noted that in the court's decision in *SZFHC* a distinction was drawn between s.425 in its present form and its previous form where at [40] – [41] the Full Court states the following:

> *"40 Our conclusion is reinforced by a closer consideration of the decisions relied upon by the respondent, and in particular Uddin. Section 425 of the Migration Act in its present form has only existed since 1 June 1999, when the amendments effected by Act No 113 of 1998 came into effect. The application under consideration in Uddin was decided under a previous version of s 425, which provided:*
>
> > *'(1) Where s 424 does not apply, the Tribunal:*
> >
> > > *(a) must give the applicant an opportunity to appear before it to give evidence; and*

...'

41 The comments of Hely J in Uddin are relevant to the former s 425 of the Migration Act, which requires the Tribunal to provide an applicant with an opportunity to appear. The current version of s 425 is in different terms. It requires that the Tribunal invite an applicant to appear, and provides a method which the Tribunal must follow to satisfy this requirement."

59. It was submitted in the present case the invitation issued by the Tribunal complied with the requirements of s.425A of the Migration Act and should be found to be a genuine invitation.

60. It was further submitted in relation to s.425 of the Migration Act by the First Respondent in supplementary submissions that a fair assessment of the transcript "demonstrates that at the hearing the Applicant's representative accepted the proposal for written submissions". It was apparent, according to the First Respondent's submissions, that despite any problems with the interpreter, the Applicant himself understood the proposal and that it was explained to him.

61. It was further submitted that the course of conduct during and after the hearing demonstrates that pursuant to s.425(2)(b) of the Migration Act, the Applicant consented to the Tribunal stopping the hearing and his claims and evidence being presented in post-hearing written submissions. Consequently it was submitted s.425(1) of the Migration Act did not apply.

62. It was further submitted in the alternative that even if s.425 did apply, the Applicant has not demonstrated how the Tribunal failed to comply with it. It was submitted that the Applicant has not indicated precise errors the interpreter purportedly committed. Although acknowledging that the second transcript suggests some interpreting errors occurred at the Tribunal hearing, it was submitted that a comparison between the first transcript prepared by an authorised transcript provider and the second transcript prepared by an interpreter tends to bring the reliability of the second transcript into question.

63. When this issue was agitated before the court it seemed clear that the First Respondent was confining the criticism to the English words set

out in the second transcript, which I have already found I do not prefer over and above the authorised transcript.

64. I do not take the First Respondent to be necessarily critical of any specific details of the accuracy of the Georgian words in the second interpretation and the English translation of those Georgian words by the second interpreter.

65. It was submitted by the First Respondent that it remains difficult to ascertain what inconsistencies or inaccuracies can be established on the evidentiary material before the court (see *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6 at [45] (Perera)).

66. In any event it was submitted that the Applicant has not shown what additional evidence he would have given if the hearing had not been stopped. The Applicant's representative did not complain about the standard of interpreting until the Tribunal had questioned the Applicant about most, if not all of the issues raised previously and subsequently in any written material.

67. Moreover, it was submitted that in reaching its findings about the Applicant's claims, the Tribunal did not rely on any problems with the Applicant's oral evidence which might have been attributable to the alleged deficiencies in the interpreting at the hearing (see *Mazhar* at [39] and *Tobasi v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 322 at [50] and [61]).

68. It was further submitted that the Tribunal was not required to put to the Applicant its disbelief of his claims (see *SZAFJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 291 at [31]-[32] and *WABY v Refugee Review Tribunal* [2005] FCA 209 at [69]) where the court relevantly states the following:

> *"69 In my opinion, the Tribunal was not required to pre-test its conclusions on any of these matters with the applicant before finalising its reasons. Each were conclusions about and characterisations of the evidence put to the Tribunal by the applicant. They were conclusions and characterisations which the Tribunal was entitled to reach. The Tribunal questioned the applicant in a somewhat sceptical fashion on a number of matters in the course of the hearing. It gave the applicant the opportunity*

to make further written submissions to further bolster his case after the conclusion of the hearing. Even had it not done so, there would have been no failure of procedural fairness in this case. It is open to the Tribunal to reject or not be persuaded by an applicant's evidence without specifically putting to the applicant that the evidence has not convinced or persuaded it. This is true of all the matters in respect of which complaint is now made."

69. It is also noted that during the course of the supplementary submissions of the First Respondent, reliance was placed upon s.422B of the Migration Act which relevantly provides as follows:

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

70. It was submitted that that section applies to the Tribunal's conduct of its review in the present case. I accept that that section did apply at the relevant time. It was submitted that as a result of s.422B of the Migration Act, any common law natural justice hearing rule did not apply to the review before the Tribunal. Reference was made to *Minister for Immigration and Multicultural and Indigenous Affairs v Lay Lat* [2006] FCAFC 61 (Lay Lat) at [63] to [70] where the court after listing various judgments of single Judges relevantly states,

> *"63. We do not propose to repeat or analyse the division of opinion as to the ambit of the provisions which is revealed in those authorities. The differing views are fully set forth in the passages from the judgments to which we have referred.*
>
> *64. It is true that the words "in relation to the matters it deals with" might be thought to be ambiguous or, perhaps, as Heerey J said in VXDC, obscure. However, reference to the Explanatory Memorandum and the Second Reading Speech makes it plain that s 51A and the related provisions of the Act, were intended to overcome the effect of the High Court's decision in Re Minister for Immigration and Multicultural Affairs; Ex Parte Miah (2001) 206 CLR 57 ("Miah").*

65. Heerey J set out in VXDC at [23] – [25] the relevant passages from the majority judgments in Miah and the salient portions of the Explanatory Memorandum and the Second Reading Speech. The words "exhaustively state" are, as Heerey J pointed out, picked up in the Explanatory Statement from the majority judgments in Miah. We agree with the observation at [30] in VXDC that the drafters of the Explanatory Statement and the Minister could hardly have made the intention of the 2002 amendments any clearer.

66. What was intended was that Subdivision AB provide comprehensive procedural codes which contain detailed provisions for procedural fairness but which exclude the common law natural justice hearing rule.

67. Other aspects of the common law of natural justice, such as the bias rule are not excluded; see VXDC at [27].

68. The intention to exclude the common law rules in the present case is especially plain when s 51A(1) is read with s 57(3). The Legislature could hardly have intended to provide the full panoply of common law natural justice to visa applicants who are required to be outside Australia when the visa is granted, while conferring a more limited form of statutory protection upon onshore applicants.

69. Counsel for the respondent submitted that the words "in relation to the matters it deals with" mean that the decision-maker must, in each case, consider whether there is an applicable common law rule of natural justice and then examine the provisions of subdivision AB to see whether it is expressly dealt with.

70. We reject this submission. As was said in VXDC at [31], the decision-maker is likely to be a person without legal qualifications. Parliament could not have intended that "the uncertainties of the common law rules were in some unspecified way and to some unspecified extent, to survive."

71. Reference was also made to the Full Court decision in *SZCIJ v Minister for Immigration & Multicultural Affairs & Anor* [2006] FCAFC 62 (SZCIJ) at [7]-[8] where the court relevantly states the following:

"7 In another decision handed down today, Minister for Immigration and Multicultural and Indigenous Affairs v Lay Lat [2006] FCAFC 61, we have dealt with the same point in relation

to s 51A of the Act, which is the equivalent of s 422B in relation to visa applications at Departmental level (see also s 357A in relation to reviews by the Migration Review Tribunal).

8 For the reasons given in Lay Lat at [59]-[67] we hold that the common law natural justice hearing rule did not apply. The appeal will be dismissed with costs."

72. It was submitted that apart from any allegation of a failure by the Tribunal to comply with procedural requirements set down by the provisions of the Migration Act, the Applicant cannot otherwise rely upon any argument that he was denied procedural fairness.

73. For the sake of completeness, it should be noted that in the First Respondent's contentions of fact and law filed 8 November 2005, submissions were made that the Applicant in any event was not denied a reasonable opportunity to present his case and that no denial of procedural fairness occurred.

Relevance of MZWKN

74. The First Respondent noted that the Applicant has referred to the decision of this court in *MZWKN*. It was further noted in that case the Applicant, as well as speaking Georgian, could also speak some Russian. In that instance the Tribunal conducted the hearing with the assistance of a Russian interpreter and did not employ a Georgian interpreter.

75. At the commencement of that hearing the Applicant informed the Tribunal that while he spoke Russian "there will be certain words that my vocabulary doesn't extend, especially the political sense". The Applicant in that case gave oral evidence to support his claimed involvement in a political organisation in Georgia.

76. It was submitted that although the court in *MZWKN* held the Tribunal's approach constituted a denial of procedural fairness, that the present case is distinguishable on its facts from that decision. In the present case it is submitted the Tribunal's decision did not rest in any way whatsoever on any perceived deficiency in the Applicant's oral evidence at the Tribunal hearing.

77. It was submitted on a fair reading of the Tribunal's decision as a whole there is no indication that the Tribunal reached any adverse conclusion on the basis of perceived problems with the Applicant's oral evidence at the hearing.

78. It was otherwise submitted that in *MZWKN* the court had found the Tribunal had denied the Applicant procedural fairness. In the present case it was noted that the Applicant is bound by the application of s.422B of the Migration Act which results in common law natural justice hearing rules not applying to this application.

Reasoning

79. It is appropriate to commence with consideration of the application of s.422B of the Migration Act which I accept applies to the present application and further accept that this Court is bound by the decision of the Full Court of the Federal Court in *Lay Lat* which I note was applied by the same Full Court in *SZCIJ*.

80. However, on my reading of the second transcript it is clear that there are numerous errors and that the complaint concerning the quality of the interpreter who was not qualified is well made out.

81. I accept the principles in relation to interpreting have been appropriately considered by the Federal Court in *Perera*. It is sufficient for present purposes to note from the head note in that case which I accept is an accurate reflection of the judgment the following key points:

> *"Held: (1) If an applicant for refugee status before the Refugee Review Tribunal is unable to give evidence in English, the effect of s. 425(1)(a) of the Migration Act 1958 (Cth) (the Act) is to necessitate the making of a direction, pursuant to s 427(7) of the Act, that communication proceed through an interpreter.*
>
> *(2) Given that, absent an interpreter, the Tribunal is unable to afford an effective opportunity to a non-English speaking applicant to give evidence, then the Tribunal lacks jurisdiction to continue the hearing before it unless it provides an interpreter.*

(3) If the Tribunal were to proceed, its decision would be reviewable under s 476 of the Act as failing to observe the procedures required by the Act.

(4) The function of an interpreter in the Tribunal is to place a non-English speaker as nearly as possible in the same position as an English speaker.

(5) Interpretation must be of a high enough quality to ensure that justice is done and seen to be done.

(6) It may be that an applicant can speak English for some purposes, even professional purposes, but that she/he may need an interpreter to adequately communicate under the pressures of the hearing before the Tribunal.

(7) It is open to an applicant to demonstrate by reference to the transcript of the Tribunal alone that the interpretation was so incompetent that he/she was effectively prevented from giving her/his evidence."

82. In my view the interpretation in this application was critical in order to permit the Applicant to answer directly and effectively the questions raised by the Tribunal. The mere provision of written submissions after the Tribunal hearing which remained untested and which ultimately were effectively rejected by the Tribunal mean that the Applicant could not be regarded as having been placed as nearly as possible in the same position as an English speaker.

83. I accept that the effect of s.425(1)(a) of the Migration Act is to require the making of a declaration pursuant to s.427(7) of the Migration Act that communications proceed through an interpreter. In the present case whilst communications proceeded through an interpreter it is clear that the interpreter was neither qualified nor competent. So much is evident as a result of discrepancies some of which I have pointed out in this judgment which appeared between the first translation and the second translation. The Tribunal indicated at an early stage in the proceedings that it was "not about to adjourn the hearing". Hence, it proceeded despite being aware at an early stage that attempts to obtain a qualified interpreter had failed. Whilst one can sympathise with the Tribunal's frustration concerning the availability of a qualified Georgian interpreter, this does not rectify the failure to provide appropriate and adequate interpreting which may need to be sought by

either audio link or other means from overseas or interstate. Even the assistance this Court obtained from the Georgian interpreter who provided the second transcript was somewhat limited and as I have indicated significant errors occurred in the transcription of the English words used before the Tribunal. I share the Tribunal's frustration with the quality of Georgian interpreters which appears to be the case in Australia based on the material set out in the Tribunal's transcript and decision and also based on the Court's own experience. Nevertheless to give proper effect to s.425(1)(a) a direction made pursuant to s.427(7) of the Migration Act for communications to proceed through an interpreter should not be an empty gesture. Where issues of fact are agitated and need to be tested and were ultimately assertions made by an Applicant who rejected, as in this case, by the Tribunal then the need for a qualified interpreter becomes paramount. Failing to provide that interpreter is in my view a failure to comply with the appropriate provisions of the Migration Act. That failure is not a denial of procedural fairness of a kind which would be avoided by the operation of s.422B of the Migration Act and leads as in this case in my view to jurisdictional error of a kind which would permit the Court to allow the application.

84. I note that in general terms there is a duty on the Tribunal to necessarily pre-test the conclusions it may make on the Applicant before finalising its reasons. I accept and apply the reasoning of French J in *WABY v Refugee Review Tribunal and Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 209 where the Court relevantly states the following,

> *"69 In my opinion, the Tribunal was not required to pre-test its conclusions on any of these matters with the applicant before finalising its reasons. Each were conclusions about and characterisations of the evidence put to the Tribunal by the applicant. They were conclusions and characterisations which the Tribunal was entitled to reach. The Tribunal questioned the applicant in a somewhat sceptical fashion on a number of matters in the course of the hearing. It gave the applicant the opportunity to make further written submissions to further bolster his case after the conclusion of the hearing. Even had it not done so, there would have been no failure of procedural fairness in this case. It is open to the Tribunal to reject or not be persuaded by an applicant's evidence without specifically putting to the applicant*

> *that the evidence has not convinced or persuaded it. This is true of all the matters in respect of which complaint is now made."*

85. However, in the present case the Court is not confronted with a Tribunal which is required to pre-test its conclusions on the Applicant but rather a Tribunal which due solely to the inadequacy of the interpreter available has been unable to embark upon a useful exchange on the critical matters which were the subject of the adverse findings made by the Tribunal. Specific adverse findings include confining the impact of any threat made by the director of the dance company to matters related to contractual arrangements and there being no indication that the Applicant's relationship with the management of the dance company was based on any political connection. A further adverse finding was made that there was no indication that any punishment the Applicant might receive would be for issues other than those related to his role in the dance company nor any punishment would have been dealt out to him for a Convention reason.

86. For the reasons given it therefore follows the application should be allowed.

I certify that the preceding eighty-six (86) paragraphs are a true copy of the reasons for judgment of McInnis FM

Associate:

Date: 21 December 2006