FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZOGB v MINISTER FOR IMMIGRATION & ANOR [2010] FMCA 748

MIGRATION – Review of decision of Refugee Review Tribunal – capacity or fitness of applicant to give evidence at Tribunal hearing – applicant not denied a real and meaningful opportunity to present evidence – Tribunal did not misconstrue the meaning of s.91R(3) – no jurisdictional error – application dismissed.

Migration Act 1958 (Cth), ss.91R, 424A, 425, 476
Evidence Act 1995 (Cth), s.69

Stankowski v Commonwealth [2003] NSWSC 1022
Ringrow Pty Ltd v BP Australia Ltd [2003] FCA 933
Minister for Immigration & Multicultural & Indigenous Affairs v SCAR [2003] FCAFC 126
Minister for Immigration & Citizenship v SZNVW [2010] FCAFC 41
SZNCR v Minister for Immigration & Citizenship [2010] FMCA 45
SZIWY v Minister for Immigration & Citizenship [2007] FMCA 1641
NAMJ v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 76 ALD 56
Minister for Immigration & Citizenship v SZJGV (2009) HCA 40; (2009) 238 CLR 642
Minister for Immigration and Citizenship v SZJXO (2009) HCA 40; (2009) 238 CLR 642

Applicant:	SZOGB
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG574 of 2010
Judgment of:	Nicholls FM
Hearing date:	7 July 2010
Date of Last Submission:	7 July 2010

Delivered at:	Sydney
Delivered on:	6 October 2010

REPRESENTATION

Counsel for the Applicant:	Mr Godwin
Counsel for the Respondents:	Mr Reilly
Solicitors for the Respondents:	DLA Phillips Fox

ORDERS

(1) The application made on 17 March 2010, and amended on 3 June 2010, is dismissed.

(2) The applicant to pay the first respondent's costs set in the amount of $6,500.

FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY

SYG574 of 2010

SZOGB
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application made under s.476 of the *Migration Act 1958* (Cth) ("the Act") on 17 March 2010 and amended on 3 June 2010 seeking review of the decision of the Refugee Review Tribunal ("the Tribunal") made on 12 February 2010, which affirmed the decision of the delegate of the Respondent Minister to refuse a protection visa to the applicant.

Background

2. The applicant is a national of the Peoples Republic of China ("China") who arrived in Australia on 22 October 2007 as the holder of a student guardian visa. She applied for a protection visa on 17 August 2009. (See Court Book – "CB" - CB 1 to CB 26).

The Applicant's Claims To Protection

3. The applicant's claims were initially set out in a statement attached to her protection visa application (CB 27 to CB 32). She claimed to fear persecutory harm in China because of her religion.

4. She claimed to have become active in local church activities. While distributing religious materials in the month before Christmas 2006 she was involved in a road accident. The police found the religious materials. As a result she was detained and mistreated. Her family secured her release on bail. She claimed that thereafter she was "black listed" as a member of an underground church.

5. She claimed that on 19 October 2007 the police raided a church service at her home. She escaped. But the police discovered she was the owner of the home. She was served with a summons. She fled and went into hiding.

6. She had previously been issued with an Australian student guardian visa. She purchased an airline ticket and came to Australia.

7. She avoided "contact" with others in Australia. During Easter 2009 she met a fellow believer at a Church in Flemington who made relevant inquiries and told her that she could apply for a protection visa.

The Delegate

8. Amongst other matters, the applicant submitted a letter from a Catholic priest in support of her claim to have attended church in Australia (CB 59).

9. The applicant attended an interview with the delegate on 2 November 2009. The delegate refused the application on 11 November 2009 (CB 64 to CB 80).

The Tribunal

10. The applicant applied for review to the Tribunal on 7 December 2009 (CB 116 to CB 119). On 23 December the Tribunal sent her two letters. The first invited her to attend a hearing scheduled for 9 February 2010

(CB 121 to CB 122). The second invited her comments on information which the Tribunal said would be the reason or a part of the reason for affirming the decision under review (CB 123 to CB 126). A second similar letter was sent on 24 December 2009 (CB 127 to CB 130).

11. The Tribunal found the applicant "… to be completely lacking credibility." ([64] at CB 187). It found the applicant to have been "… often evasive and unresponsive to its questions, that the Tribunal was required to repeat questions many times… before any meaningful response could be elicited…" The Tribunal noted that she appeared to have "… memorised her statement and often recited it, irrespective" of the questions asked and that she had difficulty in providing information about matters not contained in her statement.

12. The Tribunal found that the delay in applying for a protection visa in Australia demonstrated that she did not fear persecution in China ([65] at CB 188 to [69] at CB 189).

13. The Tribunal had "considerable concerns" about her inability to provide "a coherent description of the events in China, even taking into account her nervousness and limited education" ([70] at CB 189). It found further inconsistencies in her evidence ([71] at CB 189). The Tribunal found that the applicant had shown minimal knowledge of Catholicism ([72] to [74]).

14. It also found that a police certificate showing she had no convictions which she had provided to obtain her visa for Australia was inconsistent with her claim to have been blacklisted ([75] at CB 190).

15. Further, that she had fabricated her claims as they related to claimed events in China and therefore, found there was no real chance she would be persecuted if she were to return due to anything that was said to have occurred prior to her departure ([77] to [78] at CB 190 to CB 191).

16. The Tribunal accepted that the applicant had attended church in Australia. But disregarded this conduct because of s.91R(3) ([79] to [80] at CB 191).

Before the Court

17. The amended application contains two grounds:

> *"1. The Tribunal failed to comply with s 425 of the Act*
>
> *Particulars*
>
> *the applicant was denied a 'real and meaningful' opportunity to participate in the hearing and to have her evidence fairly assessed by the Tribunal in the light of her diagnosed mental impairments.*
>
> *2. The Tribunal wrongfully disregarded the applicant's conduct in participating in Church activities in Australia in reliance upon s 91R(3) of the Act as that section had no application to that conduct because the Tribunal was not engaged in a chain of reasoning leading to a determination in favour of the applicant which was based in whole or in part on inferences drawn from that conduct".*

18. At the hearing before the Court Mr Godwin of counsel appeared for the applicant. Mr Reilly of counsel for the First Respondent.

19. Mr Godwin sought to have read into evidence the applicant's affidavit of 9 June 2010 which annexed a letter from a consultant psychiatrist. He relied on s.69(1) of the *Evidence Act 1995* (Cth) (*"Evidence Act"*) to submit that the letter was admissible and referred to various parts of the Tribunal's decision record to support a contention of relevance. The letter asserts an opinion that the applicant suffers symptoms of post traumatic stress disorder and major depression.

20. In support of the admissibility aspect I was referred to *Stankowski v Commonwealth* [2003] NSWSC 1022 per O'Keefe J especially at [5] in support of the proposition that a psychologist's report can form part of the business records of that psychiatrist. Further, to *Ringrow Pty Ltd v BP Australia Ltd* [2003] FCA 933 per Hely J [18] to [21] in support of the proposition that s.69 of the *Evidence Act* is capable of operation even where the asserted fact is an opinion. Therefore, making the doctor's report in the current case admissible.

21. Ultimately, no authorities were put in opposition by the Respondent.

22. Given the state of the authority presented I would be inclined to agree that the document is admissible in the current case as a business document. However, for the reasons set out below it does not assist the applicant.

Consideration

Ground 1

23. Ground one asserts that the Tribunal failed to comply with s.425 of the Act, in that the applicant was denied a real and meaningful opportunity to participate in the Tribunal hearing and to have her evidence fairly assessed because of her mental impairments.

24. The applicant's argument is that the Tribunal made an adverse finding as to the applicant's credit. This was the principal reason for affirming the delegate's decision. This finding was based on the view taken by the Tribunal of the applicant's evidence. In particular that her evidence was confused and lacked coherence.

25. The Tribunal was aware that the applicant had claimed in a written statement that she was forgetful because of the pressure of losing her business in 2006 and suffering a mental breakdown at the time which in turn resulted in poor memory. (See item 11 at CB 140 and [28] at CB 175).

26. The argument however, is that the Tribunal was not aware of the applicant's psychiatric condition as it was said to arise from the events of 2006. (The road accident and subsequent detention by the authorities). That the psychiatrist's report related her symptoms of post traumatic stress disorder and major depression directly to her religious persecution in 2006 and the events following. The report was prepared and dated after the Tribunal's hearing and therefore not available to the Tribunal. (Date of report: 30 April 2010, date of hearing: 9 February 2010. For that matter it post-dated the date of decision.)

27. In short, the applicant's attack is that if the Tribunal had been aware that the applicant was "psychiatrically ill", that this would have been relevant to its assessment of her credibility and it would have needed to

take this into account. The failure to do so amounts to a failure to comply with s.425 of the Act and therefore is a jurisdictional error.

28. The applicant relies on the following authorities.

29. First, *Minister for Immigration & Multicultural & Indigenous Affairs v SCAR* [2003] FCAFC 126 ("*SCAR*") per Gray, Cooper and Selway JJ:

1) (At [25]) The facts in that case as found were that the applicant was not in a fit state to represent himself before the Tribunal. The Tribunal did not know this. There was nothing before the Tribunal that should have alerted it to this.

2) (At [37]) "… it is also clear that s.425 of the Act imposes an objective requirement on the Tribunal. 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 could defeat that obligation…"

3) (At [40]) The findings by the Tribunal in that case as to credit were critical to the ultimate conclusion. They were based in part on its conclusion that the applicant's answers to questions were vague. The psychologist's evidence gave a possible explanation for that vagueness. The unfair process may well have affected the conclusion reached by the Tribunal.

4) (At [41]-[42]) The Tribunal had therefore not complied with the obligation under s.425.

30. The submission was that the circumstances of the current case mirror those in *SCAR* and the direction of the Full Court in that case must be followed.

31. Second, *Minister for Immigration & Citizenship v SZNVW* [2010] FCAFC 41 ("*SZNVW*") per Keane CJ, Emmett and Perram JJ:

1) At [37] per Keane CJ: "… Nor was this a case where the integrity of the hearing under s.425 was subverted by a want of an appreciation on the part of the Tribunal that the respondent's presentation of his case might have been adversely affected by an impaired mental state of which the Tribunal was oblivious."

2) At [84]-[86] per Perram J:

> *"[84] The present case comes then with two difficulties. The first is the fact, agreed by both parties, that the respondent's disability was somewhat less in extent than that which afflicted the applicant in SCAR; the second, that the respondent's impairment would not have prevented him, at least at a theoretical level, from seeking evidence of the impairment's existence to put before the Tribunal.*
>
> *[85] … Less tangentially, in the related field which deals with the effect of substandard translations on the Tribunal's hearings, it is accepted that translation problems will result in a failure to conduct a review both when it is possible to say that the applicant has, in substance, not given evidence (Singh v Minister for Immigration and Multicultural Affairs [2001] FCA 1376; (2001) 115 FCR 1 at 6 [27] per the Court; Perera v Minister for Immigration and Multicultural Affairs [1999] FCA 507; (1999) 92 FCR 6 at 17 [21] per Kenny J) but also, more importantly, when errors made by the translator were material to adverse conclusions drawn by the Tribunal (Soltanyzand v Minister for Immigration and Multicultural Affairs [2001] FCA 1168 at [18] per the Court; cf. Appellant P119/2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 230 at [18] per Mansfield and Selway JJ).*
>
> *[86] Thus the Tribunal may be held to have conducted no review in a variety of circumstances falling short of complete incapacity on the part of an applicant to conduct a hearing…"*

32. By analogy, in the current case the psychiatric evidence was sufficient to say that if the Tribunal had been aware that the applicant was psychiatrically ill, it was of such relevance that the Tribunal would have needed to take it into account in making its assessment of credibility.

33. Third, *SZNCR v Minister for Immigration & Citizenship* [2010] FMCA 45 per Scarlett FM (at [118] to [125]). In that case His Honour found there was no evidence that the Tribunal was aware of the applicant's psychiatric illness. He applied the relevant reasoning of Smith FM in *SZIWY v Minister for Immigration & Citizenship* [2007] FMCA 1641 ("*SZIWY*") to the effect that had the Tribunal known of the applicant's medical or mental state, it was probative that it would have materially affected its evaluation of credibility. In these circumstances the

applicant was denied a proper opportunity to give evidence. The requirements of s.425 of the Act were not met.

34. The argument therefore, was that as the circumstances of the current case are materially similar I should follow Scarlett FM and also find a failure in relation to s.425.

35. I do not accept that the Tribunal fell into jurisdictional error for the following reasons.

36. First, as to the opinion in the letter from the consultant psychiatrist:

> *"**Opinion and Management***
>
> *[The applicant] is suffering symptoms of **post-traumatic stress disorder** and **major depression** in the context of her religious persecution in 2006 and difficulties subsequently encountered in fleeing China, being in Australia and facing uncertainties of her refugee status application.*
>
> *I concur with your choice of Avanza and I explained to her its benefits and possible side effects. I further suggested a dosing between 30-60mg pending on her tolerance and response in future weeks and prescribed PRN Temazepam in case she was not able to tolerate Avanza.*
>
> *I intend to continue seeing [the applicant] if she is able to attend. Otherwise she should receive counselling from psychologists or from the Transcultural Mental Health Centre. If her tolerance to Avanza is unsatisfactory, a course of Lexapro between the doses of 10-40mg with aid of PRN Temazepam would be suitable options for both her PTSD and depressive symptoms…"*

37. Mr Reilly submitted that this opinion was based on what the applicant herself had told the psychiatrist. The psychiatrist's opinion is based on facts provided by the applicant, which the Tribunal had found not to have occurred.

38. Mr Reilly referred to what he described as the conundrum averted to in *NAMJ v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 76 ALD 56 per Branson J, especially at [48]. That is the observation that it was unlikely that s.425 reflected an intention that the Tribunal could not proceed with a hearing because of some

psychological stress condition on the part of the applicant. (See also the reference in *SZNVW* at [33]).

39. The submission was that where the psychiatrist's opinion, as in this case, is based on facts found by the Tribunal not to have occurred, then the opinion should be given little weight. Mr Reilly did not refer to any authority to directly support this proposition.

40. In any event, in the current case the answer in my view is to be found in the opinion itself. It is not correct, as was submitted, that the psychiatrist was not aware that the applicant was seeking refugee status. Such an awareness is plainly expressed in the first sentence. But beyond that there is nothing in the report as a whole, nor the "opinion" that says anything about the applicant's capacity to give evidence to the Tribunal at the hearing.

41. The relevant test as I understand it (see further below) is the capacity or fitness to give evidence at the Tribunal hearing or rather the incapacity such that the opportunity is not meaningful.

42. Even if the psychiatrist's opinion were given weight, it says nothing more than as at 30 April 2010, well after the hearing, that the applicant was suffering symptoms of post traumatic stress disorder and major depression. It is true that this was said to arise "in the context" of her religious persecution in 2006. But the report is silent as to when it actually arose.

43. It is also true that the psychiatrist reports on symptoms of depression in the last three to four years. But plainly this was based on what the applicant had told him. There is nothing to suggest that this was based on his own, or any other actual medical observation.

44. It is also clear that there is nothing in the report to say how these symptoms affect the applicant's capacity to function generally. The report was not prepared for the purposes of assessing the impact of the applicant's condition on her capacity to manage the presentation of her case to the Tribunal and, more particularly, the impact of how and what she said to the Tribunal.

45. What is clear on the applicant's evidence before the Court, is that in March 2010 she sought treatment from a general medical practitioner

who then referred her to the psychiatrist who wrote the report. All of this occurred after the hearing and after the making of the Tribunal's decision.

46. Mr Godwin asks the Court to draw an inference that her reported medical condition existed at the time of the hearing. Even if that inference were to be drawn, what is missing in the applicant's evidence is that even if she had such conditions, that they affected her capacity to give her evidence, and further, that the level of this affect was such as to make the opportunity offered at the Tribunal hearing meaningless.

47. It may be equally open to draw an inference that having seen the Tribunal's decision record, the applicant went to these medical professionals told them certain things in the hope or expectation that a report would be written that would "explain" what the Tribunal saw as the deficiencies in her evidence.

48. This inference may be supported by the psychologists noting that although the general practitioner had prescribed certain medication, she still had not started taking the medication at best a month later when she saw the psychiatrist.

49. Of course there may be other explanations for this. But that is the point. I do not draw such an inference, because the state and strength of the evidence would render it unsafe to do so. As in the case of the inference that the applicant seeks to raise.

50. So I do not raise this point other than to illustrate that this Court can only proceed on the evidence provided. While of course inferences can be drawn from evidence, and quite often are, such inferences cannot be conjured out of mere speculation.

51. It is in this sense therefore that I find that even if the psychiatrist's report is accepted on its face, even if weight is given to it, and even if it is accepted that the applicant was suffering the reported symptoms and condition at the relevant time, there is nothing in the report nor any other evidence to say what impact, if any, this had on her capacity and presentation at the Tribunal hearing.

52. The Court bears no expertise in psychiatry or the impact of psychiatric conditions. But even if it did, this would not relieve the applicant from

the burden of providing evidence to support, even if only inferentially, the contention raised in her pleading.

53. There is nothing in the applicant's own evidence, nor indeed in the report, to support on the balance of probabilities even an inference that the symptoms presented to the psychiatrist had, or even could have had, an impact on the conduct of the hearing, such as to deprive her of a meaningful opportunity before the Tribunal such as to reveal a breach of s.425.

54. The applicant relies on *SCAR.* In my view there is an important factual difference between what was found in that case and the current circumstances.

55. In *SCAR* the applicant was in immigration detention at the material time. The facts as found by the primary judge involved the circumstances that the applicant in that case was informed of his father's death four days before the Tribunal hearing, he sought medical treatment in the period before the hearing, and he was given medication. (See *SCAR* at [12] to [14]).

56. Importantly, in evidence was a letter from a psychologist at the immigration detention centre at which the applicant was held. The letter reported the psychologist's observations of the applicant on the day of the hearing itself. This is not the case in the present circumstances.

57. Further, and also of importance in the evidentiary context, was that based on this first hand observation the psychologist was able to professionally opine that the applicant: "… was in no condition to handle this interview" (in context the Tribunal hearing). The opinion continues: "… Not only was he totally unable to think clearly, but he was quite unprepared as he did not even know what day it was…" (at [12]).

58. The Full Court in *SCAR* considered the question of whether or not the Tribunal's decision was affected by jurisdictional error based on the following facts determined by the primary judge in that case (at [25]):

> "…

(a) The respondent was not in a fit state to represent himself before the Tribunal;

(b) The Tribunal did not know that he was not in a fit state to represent himself;

(c) There was nothing before the Tribunal that should have alerted it to the respondent's condition"

59. The state of the applicant's evidence before the Court now in my view does not permit such, or similar, findings of fact to be made.

60. As Mr Godwin himself described in submission, in *SCAR*: "… There was contemporary psychological assessment…". There is no such "contemporary" evidence before the Court in the current case. The nature of that assessment was directly focussed not only on the applicant's mental and emotional state, but directly applied as to how that state affected the applicant's capacity to present his evidence.

61. The Tribunal's assessment of the applicant's evidence in *SCAR* was described as "vague and confused…". This echoes the current circumstances, albeit the Tribunal, if the current case went further. But it was the state of the evidence before the primary judge that enabled the finding to be made that the "applicant" in that case "… was not in a fit state to represent himself…".

62. In my view the applicant in the current case has not achieved this level of evidence in support of the stated contention. This want of evidence means that whether or not the Tribunal was capable of knowing that she was not in a fit state is irrelevant. Without establishing the applicant's state of unfitness in the evidentiary sense, there is nothing for the Tribunal not to know.

63. Further, the finding in *SCAR* that in that case there was nothing before the Tribunal that would have alerted it to the applicant's condition, does not quite hold in the current circumstances.

64. It is true that there was no evidence before the Tribunal such as to alert it that the applicant suffered from post traumatic stress disorder or major depression.

65. But unlike as in *SCAR*, there was some evidence before the Tribunal that went directly to the applicant's state to represent herself to the Tribunal and her capacity to do so.

66. In her statement attached to her protection visa application, the applicant stated that following a business disaster that had occurred to her family in 2000 she had suffered distress and that this: "… almost had driven me to the total nervous breakdown." (CB 27.7.)

67. There is nothing before the Court to challenge the accuracy of the Tribunal's report of what the applicant told the delegate at the interview on 2 November 2009. During the course of that interview the applicant explained her inability to name the sacraments of the Catholic Christian faith as arising from her illiteracy and that: "… Her brain cannot remember" (CB 171.10).

68. The Tribunal wrote to the applicant pursuant to s.424A (see CB 127 to CB 130). Amongst other matters, the applicant was asked to comment on the limited level of knowledge of Christianity and Catholicism that she had displayed to the delegate. The relevance to the Tribunal's decision was explained that it may cause the Tribunal to find she had not been truthful in her claims of religious conviction and practice and that this could lead to an adverse finding as to her credibility (CB 129).

69. The applicant responded by way of statutory declaration made on 18 January 2010 (CB 139 to CB 145) and a communication sent to the Tribunal on 20 January 2010 (CB 146 to CB 148).

70. In the declaration the applicant sought to explain that her difficulty was that she was illiterate and could not read the Bible. That she was forgetful because of the business setback in 2000. However in this declaration her position changed from what she had previously said and she asserted that she had actually suffered a "mental breakdown" in 2000 and "… since then my memory has not been very good" (CB 140.10).

71. In her response of 21 January 2010 she explained her inability to name the Catholic sacraments to the delegate in the following terms (CB 146):

> *"6 – Because at that moment felt head ache, it was passed so many years, these matters has not been solved, I was very stressed and nervous, I unable to express my answer properly…"*

72. She further explained her difficulty before the delegate as being because she was "nervous and upset" as being "afraid" and "scared" by Government officials (CB 141.5).

73. There is no transcript of the Tribunal hearing in evidence before the Court. This leaves the Tribunal's account of the hearing in that sense unchallenged before the Court as to what may otherwise have happened.

74. This account reveals that the Tribunal variously and properly noted with the applicant that it had difficulty with her answers. For example: evasive (at [39]); that her answers had the appearance of being memorised (at [40]); her difficulty in answering (at [40]-[41]); not answering the question posed (at [42]).

75. To the extent that the applicant provided an explanation it was again said to be because of her education and "because she was nervous". She described her brain as "muddled" (see, for example at [50], and also at [52]).

76. A number of matters need to be noted. First, unlike as it appears in *SCAR*, the applicant herself gave evidence to the Tribunal that her inability to satisfactorily answer the Tribunal's (and the delegate's) questions was because, at least in part, also her mental and emotional state.

77. Second, while not said to have arisen from the events of 2006, the applicant had previously suffered a "mental breakdown" because of events in 2000. While clearly this was not expressed in terms of "post traumatic stress disorder" or "major depression", the applicant's mental and emotional state in the context of her capacity to satisfactorily answer the Tribunal's questions was squarely put to the Tribunal by the applicant herself.

78. Third, the question arises as to why on 30 April 2010 the applicant gave the psychiatrist an account which linked her stress and depression to the events in 2006 and not 2000, yet before the Tribunal on

12 February 2010 she linked the beginnings of her mental breakdown and nervous disposition to the events of 2000.

79. This illustrates the problem with the state of the evidence presented by the applicant to the Court. There is nothing before the Court to show whether the applicant told the psychiatrist of her mental condition prior to 2006.

80. But even putting this to one side, what emerges is that unlike as in *SCAR*, while the Tribunal may not have known of the precise description subsequently given to her condition by the psychiatrist, it knew that the applicant claimed to have suffered a mental breakdown, was of a nervous disposition and that this was said, at least in part, to explain the deficiencies in her answers to the Tribunal's questions.

81. The claims by the applicant in this regard were made obviously by a non-medical lay-person. In context, the Tribunal, also a lay-Tribunal, would have understood that, in answer to its concerns about her evidence, the applicant was asserting some mental and emotional disability. Whether or not the Tribunal understood this as stress or depression, it is not correct to say there was nothing before the Tribunal that would have alerted it to the applicant's claimed condition.

82. The distinction with *SCAR* can also been seen in that the Tribunal addressed this issue and was not persuaded that it provided a satisfactory explanation for the deficiencies in her evidence. If there was more to be put to the Tribunal in this regard, then the applicant, having been alerted to the Tribunal's concerns, had ample opportunity to have provided further support for her case.

83. The applicant was not alone in Australia. She had her adult son in Australia who had been here for some years. She had friends at her church. All of whom could have assisted her in visiting the doctor she ultimately consulted. The applicant's evidence that she had not consulted a doctor from her time of arrival to the date of the Tribunal hearing remains unexplained and somewhat inexplicable if she herself recognised at least, as at the time of the making of her application for a protection visa (17 August 2009), that she had "almost" been driven "to the total nervous breakdown" (CB 27.6), and that she was "quite depressed" (CB 30.1).

84. The applicant also relies on what was said in *SZNCR*, particularly with reference to [123] to [125] of that case:

> *"[123] In my view, the decision in SZIWY is relevant to the present case and, with respect, I find his Honour's reasoning persuasive.*
>
> *[124] Had the Tribunal been aware of the applicant's mental state, it may have formed different conclusions about his credibility. It was the Tribunal's adverse view of the applicant's credibility that was the primary reason for its decision to affirm the delegate's decision.*
>
> *[125] In my view the applicant was denied a proper opportunity to give evidence and present arguments due to his mental state and, consequently, the requirements of s.425 of the Act have not been complied with. For this reason, and for the failure to consider relevant material as set out in [87] above, I find that jurisdictional error has been made out."*
>
> [See *SZIWY* per Smith FM.]

85. In light of what was said by Keane CJ in *SZNVW*, with whom Emmett J agreed (at [49]), it is no longer open to this Court to adopt the reasoning that informed FM Scarlett's conclusion.

86. In *SZNCR* His Honour was persuaded by the reasoning in *SZIWY* (at [123]) for the proposition that in circumstances where the Tribunal's decision was arrived at as a result of an adverse credibility finding, and there was a relevant medical condition not known to the Tribunal, where if it had been known to the Tribunal it may have led the Tribunal to form a different conclusion about the applicant's credibility, that this absence of knowledge leads to a failure to comply with the requirements of s.425 of the Act.

87. I agree with submissions by Mr Reilly that this line of reasoning was essentially the reasoning of Smith FM in *SZNVW* which was the subject of the appeal before the Full Court. Reasoning which was overturned on the appeal.

88. In resolving the current matter, it is to the reasoning of Keane CJ with whom Emmett J agreed that I am bound to look. Whatever differences in the reasoning of Perram J the applicant seeks to rely on does not

assist, as I am quite clearly bound by the reasoning of a majority of the Full Court.

89. I understand that reasoning relevantly to be that the starting point for such consideration is s.425 itself. It is any breach of that section that gives rise to jurisdictional error.

90. The question is not simply whether or not the applicant suffers from any psychological condition that was not known to the Tribunal such as the Tribunal may have come to a different conclusion about the applicant's credibility, but whether there is evidence that the applicant was denied a "real and meaningful" opportunity to present her evidence.

91. The fact that a Tribunal is unaware of the existence of a psychological condition, or as in the current case, the extent or exact medical description of that condition, is not sufficient of itself to meet the relevant test as explained in *SZNVW*.

92. Nor is the fact merely of the existence of a certain psychological condition sufficient.

93. What is required is evidence that links the psychological condition to the applicant's presentation at the hearing, such that a finding can be made that the applicant was at the relevant time disabled to such an extent that she was not able to give evidence, answer questions or make rational decisions about the conduct and presentation of the case before the Tribunal.

94. In the current case the evidence presented does not establish such a link. Relevantly I note what Keane CJ said at [34]:

> *"… To say only that it is possible that a different view might have been taken of the respondent's credibility had more information been made available to the Tribunal as to his psychological problems is to fall short of demonstrating that the respondent was denied a 'real and meaningful' opportunity of giving evidence and presenting arguments in support of his application…"*

95. Mr Godwin also relied on the last sentence at [37] of Keane CJ's judgment:

> *"… Nor was this a case where integrity of the hearing under s 425 was subverted by a want of an appreciation on the part of the Tribunal that the respondent's presentation of his case might have been adversely affected by an impaired mental state of which the Tribunal was oblivious."*

96. First, in the current case it is not true to say that the Tribunal was unaware of the applicant's claimed mental and emotional state. (See above.)

97. But far more importantly, even if it had been unaware, the sentence relied on by the applicant does not support the proposition contended by the applicant now. When read in context of the entire judgment, even if just read in context of [37], this sentence in my respectful view does not stand for the proposition that a hearing pursuant to s.425 is subverted simply because the Tribunal did not know that the applicant's case may have been adversely affected by some mental or emotional impairment.

98. If nothing else, this is what was put in *SZNCR*, relying on the same reasoning in *SZNVW* at first instance. Reasoning which was clearly not accepted by the Full Court (per Keane CJ and Emmett J).

99. In all, therefore, given the absence of evidence to support the proposition that the applicant's mental and emotional state was such as to render her incapable of meaningfully participating in the hearing, ground one is not made out.

Ground Two

100. In ground two the applicant asserts that the Tribunal misconstrued s.91R(3). That misconstruction affected its approach to the applicant's conduct in Australia, which led it to fall into jurisdictional error.

101. The applicant provided to the Tribunal a letter from the Columbian Mission Institute in Australia which stated that the applicant had been attending a Christian Initiation Program and "Chinese Catholic Mass" at a church in Australia since 13 July 2008 (CB 59).

102. The Tribunal accepted that the applicant had attended church in Australia ([80] at CB 191):

> *"Nevertheless, the Tribunal accepts that the applicant had been attending a church in Australia. The Tribunal found that the applicant was not a person of credibility and that she had no involvement in, and no commitment to, Christianity and Catholicism in China. The applicant has not satisfied the Tribunal that she engaged in religious activities in Australia otherwise than for the purpose of strengthening her claims to be a refugee. The Tribunal disregards such conduct, as required by s. 91R(3) of the Act."*

103. The applicant relies on what she now submits was said by the High Court in *Minister for Immigration & Citizenship v SZJGV* (2009) HCA 40; (2009) 238 CLR 642 ("*SZJGV*") to argue that because the Tribunal's analysis did not include a process of reasoning leading to a conclusion that would have supported the applicant's claim for recognition as a refugee, then s.91R(3) was not enlivened. Therefore it was not open to the Tribunal to have disregarded the applicant's attendance at church in Australia.

104. Mr Godwin referred to the history of the introduction of s.91R(3) to the Act to explain that this informed the decision in *SZJGV* and what was described as the "limitation" which was said to arise from the judgment of French CJ and Bell J.

105. Section 91R(3) is in the following terms:

> ***Persecution***
>
> …
>
> *(3) For the purposes of the application of this Act and the regulations to a particular person:*
>
> > *(a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;*
>
> *disregard any conduct engaged in by the person in Australia unless:*
>
> > *(b) the person satisfied the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the*

meaning of the Refugees Convention as amended by the Refugees Protocol."

106. The applicant relies on [12] of *SZJGV* (per French CJ and Bell J):

> *"The proposition that s 91R(3) is concerned with the process of determination after the primary facts have been found does not meet the textual difficulty generated by the ordinary meaning of the word 'whether'. However, the Solicitor-General's submission does lead to consideration of an alternative constructive, which is to read 'whether' as 'that': not introducing alternatives, but indicating only processes of reasoning leading to a favourable determination. The usage is awkward and probably reflects a misuse of the term 'whether' in par (a). But such misuse is not entirely without precedent. In this case, the substituted text corrects what would be an obvious drafting error were 'whether' to be construed according to its ordinary and natural meaning. On the alternative construction, par (a) hypothesises the existence of a chain of reasoning leading to a determination in favour of the applicant where that determination is based in whole or in part upon inferences drawn from conduct engaged in by the person in Australia. The command in s 91R(3) therefore requires that the decision-maker not apply any such chain of reasoning unless the condition in par (b) is satisfied with respect to the relevant conduct. We consider that to be the correct construction. It meets the purpose of the sub-section and avoids absurd results. Upon that construction the appeals must be allowed."*
>
> [Footnotes omitted.]

107. The applicant reads this part of *SZJGV* as saying that the work needed to be done by s.91R(3) is only engaged once the Tribunal has formed the view that an applicant is to be recognised as a refugee.

108. I understood the argument to be that by substituting the word 'whether' in s.91R(3) with 'that', French CJ and Bell J should be understood as saying that it is only in the process of determining that an applicant is a refugee that the Tribunal is required to disregard the conduct (assuming that the conduct was engaged in for the purpose of strengthening the refugee claim).

109. There is no need to disregard such conduct where the Tribunal was not going to find the applicant to be a refugee in any event. This is because

the "evil" that the legislature sought to address in introducing s.91R(3) to the Act does not arise in such circumstances.

110. In essence I understood this historical "evil" to be that the purpose of s.91R(3) is to stop applicants who were otherwise going to be given refugee recognition from achieving such a status because of conduct in Australia whose purpose was solely to strengthen the refugee claims.

111. I do not agree with the applicant's understanding of what was said in *SZJGV*.

112. Mr Godwin reminded the Court that he was part of the Minister's legal representation before the High Court. It may be as a result that he has insights into the Minister's case before the High Court not available to this Court.

113. What this Court does have however, is the Full Federal Court judgment which was the subject of the appeal, with respect the clear words of the joint judgment on which the applicant now relies, but also the joint judgment of Crennan and Kiefel JJ, and the judgment of Hayne J in dissent.

114. The relevant issue before the High Court in *SZJGV* (and for that matter in *Minister for Immigration and Citizenship v SZJXO* (2009) HCA 40; (2009) 238 CLR 642 heard at the same time) was whether s.91R(3) operates to prevent, relevantly the Tribunal, from drawing on an applicant's conduct in Australia and the reason for engaging in that conduct, to make adverse findings to that applicant's claims to be a refugee. In short, whether s.91R(3) provides that the relevant conduct is to be disregarded for all purposes in the relevant determination (see in particular *SZGJV* at [3] per French CJ and Bell J, at [17] per Hayne J and [27] per Crennan and Kiefel JJ).

115. I respectfully understand the two joint judgments to relevantly stand for the proposition that s.91R(3) does not require the applicant's conduct in Australia to be disregarded by the Tribunal for all purposes relevant to the review. The intent of s.91R(3) is to provide that an applicant cannot obtain an advantage from conduct in Australia which was engaged in solely for the purpose of strengthening their refugee claims.

116. I understand the reasoning of the French CJ and Bell J on which the applicant now relies, to be that when the word 'whether' in s.91R(3)(a) is read as meaning 'that', this means that s.91R(3)(a) hypothesises the existence of a chain of reasoning leading to a finding in favour of the applicant where such a determination is based, whether in whole or in part, from inferences taken from the conduct engaged in Australia.

117. It is on this part of the Court's reasoning that the applicant now relies. In my view that cannot be read in isolation from what follows in the same paragraph. That is, the command in s.91R(3) requires relevantly the Tribunal not to apply any such chain of reasoning unless the condition in s.91R(3)(b) is satisfied in relation to that conduct.

118. Bearing in mind how the matter came before the High Court, that is the judgment on appeal from the Full Federal Court, the purpose of s.91R(3) does not require that such conduct be disregarded in circumstances where it is adverse to an applicant's credibility.

119. That is that the conduct falling within s.91R(3) does not have to be disregarded for all purposes in the resolution of the review.

120. I agree with Mr Reilly that the reasoning in both joint judgments does not require some explicit chain of reasoning by the Tribunal as to why the relevant conduct may be favourable to the applicant. Nor does the reasoning require some explicit chain of reasoning as to why the applicant would be recognised as a refugee before the consideration subsequently of s.91R(3).

121. At its highest, I understood the applicant's case to be that the absence of such an explicit chain of reasoning in the current case was inconsistent with the relevant understanding of s.91R(3) in one of the joint judgments, and therefore found the legal error asserted in the ground.

122. Given that I do not agree with the understanding of the High Court's reasoning proposed by the applicant, the ground does not succeed on that basis.

123. In the current case I cannot see that the Tribunal acted inconsistently with the reasoning in either of the two joint judgments. In the current case the applicant claimed to have been a practicing Christianity in

China. She claimed to have attended a Christian church in Australia. The Tribunal accepted that this conduct had occurred. But was not satisfied it had been engaged in other than for the purpose of strengthening her refugee claims.

124. In making the claim that she had engaged in this conduct, it was at least implicit that the applicant was seeking to strengthen her claim to have been a Christian in China. As Mr Reilly submitted, the applicant's claim to have been a Christian in China would more likely be believed if the applicant had continued such practice in Australia.

125. I do not see that *SZJGV* required the Tribunal to have engaged in any explicit reasoning in this regard. What I understood to be a consequence of *SZJGV,* is that in circumstances where a Tribunal found the conduct had occurred but disregarded it pursuant to s.91R(3), such conduct could still be taken into regard by the Tribunal for another purpose in connection with the review. For example its use in any adverse credibility finding in relation to an applicant.

126. This of course is not the relevant circumstance of the current case. Here the Tribunal comprehensively rejected the applicant's factual account of what she said had occurred in China based on the adverse view it took of her credibility in relation to those claims.

127. While it accepted she attended church in Australia, it properly disregarded such conduct. The applicant's conduct was not in itself adverse to her credibility. Such a comprehensive finding was made without regard to the conduct in Australia. But in light of that finding and its finding that she had no commitment to, or practice in, Christianity in China, the Tribunal could not be satisfied that the conduct in Australia was engaged in other than for the purpose of strengthening her claim to be a refugee.

128. In all, ground two is not made out.

Conclusion

129. With the benefit of legal representation the applicant has put two grounds before the Court. Neither ground reveals jurisdictional error on the part of the Tribunal. In these circumstances the application, as amended, is to be dismissed.

I certify that the preceding !Syntax Error, **and** !Syntax Error, **(129) paragraphs are a true copy of the reasons for judgment of Nicholls FM**

Associate:

Date: 6 October 2010