FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZOLM v MINISTER FOR IMMIGRATION & ANOR [2011] FMCA 305

MIGRATION – Persecution – review of Refugee Review Tribunal ("Tribunal") decision – visa – protection visa – refusal – application for extension of time to bring proceedings – discretionary considerations – prejudice caused by delay – whether adjournment of Tribunal's hearing owing to the applicant's ill health so brief as to amount to a breach of s.425 of the *Migration Act 1958* – whether Tribunal's requirement to obtain a medical certificate in seven days over the Christmas period was unfair or unreasonable.

Migration Act 1958, ss.5, 48B, 417, 420, 422B, 424, 425, 425A, 426A, 427, 474, 476, 477, 477A
Migration Legislation Amendment Act (No. 1) 2009, cl.7 of sch.2

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476
G v The Queen (1984) 35 SASR 349
Fisher v Minister for Immigration & Citizenship (2007) 162 FCR 299
SZNZI v Minister for Immigration & Citizenship [2010] FMCA 57
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541
Minister for Immigration & Multicultural & Indigenous Affairs v SZFML (2006) 154 FCR 572
Associated Provincial Picture Houses v Wednesday Corporation [1948] 1 KB 223
SZOFE v Minister for Immigration & Citizenship (2010) 185 FCR 129
Minister for Immigration & Citizenship v SZMOK (2009) 257 ALR 427
Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1
Coal & Allied Mining Services Pty Ltd v Lawler [2011] FCAFC 54
Minister for Immigration and Citizenship v SZIZO (2009) 238 CLR 627

Applicant:	SZOLM
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1204 of 2010
Judgment of:	Cameron FM

Hearing date:	3 November 2010
Date of Last Submission:	3 November 2010
Delivered at:	Sydney
Delivered on:	4 May 2011

REPRESENTATION

Counsel for the Applicant:	Mr L. Karp
Solicitors for the Applicant:	Teleo Immigration Lawyers
Counsel for the First Respondent:	Mr J. Smith
Solicitors for the Respondents:	DLA Phillips Fox

ORDERS

(1) The application be dismissed.

FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY

SYG 1204 of 2010

SZOLM
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant is a citizen of Egypt and claims to be a Coptic Christian. He alleges that, while in Egypt, he was involved in various religious activities and, as a consequence, was targeted by an Islamic organisation. He claims that the organisation will kill him if he returns to Egypt.

2. The applicant claims to fear persecution in Egypt because of his religion.

3. After his arrival in Australia on 29 May 2008, the applicant lodged an application for a protection visa. This was refused by a delegate of the first respondent ("Minister") on 1 October 2008. The applicant then applied to the Refugee Review Tribunal ("Tribunal") for a review of that departmental decision. The applicant was unsuccessful before the Tribunal and on 31 May 2010 filed an application in this Court for judicial review of the Tribunal's decision.

4. In these judicial review proceedings the Court's task is to determine whether the Tribunal's decision is affected by jurisdictional error as that is the only basis upon which it can be set aside: s.474 *Migration Act 1958* ("Act"); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

5. For the reasons which follow, the application will be dismissed.

Background facts

6. The facts alleged in support of the applicant's claim for a protection visa are set out on pages 4-7 of the Tribunal's decision. Relevant factual allegations are summarised below.

7. In his application for a protection visa, the applicant claimed that:

   a) the Egyptian authorities and the Jammaat Al Islamia raped his wife in order to force her to convert to Islam. She has escaped to the village but he needs to bring her to Australia immediately as her life is under threat;

   b) he would be killed or ill-treated by the Jammaat Al Islamia and the police because of his religious activities; and

   c) the Egyptian authorities would not protect his family.

8. In submissions to the Minister's department dated 19 September 2008 the applicant made the following additional claims:

   a) he is a deacon, a Coptic Christian and has been involved in many religious activities in Egypt;

   b) he has suffered persecution, discrimination, harassment, mistreatment and arrest because of his religious activities as a Coptic Christian, his imputed political opinions, his membership of a social group and because he has been involved in building churches and supplying building material;

   c) if he returns to Egypt he will be arrested and charged with insulting Islam and defaming the Egyptian government;

   d) members of the Islamic Brotherhood, "who are in power with the Egyptian authority", want to kill him and put pressure on him to

convert to Islam. They burnt down his business, denied him access to his own property and built an Islamic "warship" on his land without his permission; and

e) the "head commander police officer" is a member of the Islamic Brotherhood. He is corrupt and permits the use of torture to extract information. This might happen to the applicant if he returns to Egypt. The "head commander police officer" has also accused the applicant of insulting Islam, which is a crime in Egypt.

9. The Tribunal invited the applicant to a hearing on 19 December 2008. On the morning of the hearing the Tribunal received a fax from the applicant's representative informing it that the applicant was unable to attend due to illness. The applicant's representative provided a medical certificate in support as well as a copy of a letter from a radiology practice indicating that the applicant had been booked for a CT scan later in the week. The Tribunal rescheduled the hearing to 23 December 2008.

10. On 23 December 2008 the applicant's representative presented at the Tribunal's counter and advised the Tribunal that it was his understanding that the applicant was unable to attend the hearing as he was in hospital. Later that day, the Tribunal faxed a letter to the applicant's representative in the following terms:

> *This fax message is sent in confirmation of our phone conversation of this afternoon.*
>
> *The Tribunal notes that you attended at the Reception counter this afternoon to explain that it is your understanding that the applicant … is currently in hospital and consequently is unable to attend his hearing scheduled for today. The presiding Member in* [the applicant's] *case has asked that we inform you that if a medical certificate setting out* [the applicant's] *condition and how it prevents him from being able to attend a hearing is not received by the Tribunal by the end of Monday, 29 December 2008 the Member may proceed to make a decision on* [the applicant's] *application without further notice. Please note that if the certificate is sent after 24 December 2008 it should be sent by fax or mail as the Tribunal's offices will be closed on 29 December 2008.*

11. The Tribunal did not receive a medical certificate as requested. Consequently, and pursuant to s.426A of the Act, the Tribunal proceeded to make a decision on the review.

The Tribunal's decision and reasons

12. After discussing the claims made by the applicant and the evidence before it, the Tribunal found that it was not satisfied that the applicant is a person to whom Australia has protection obligations under the *United Nations Convention relating to the Status of Refugees 1951*, amended by the *Protocol relating to the Status of Refugees 1967* ("Convention"). The Tribunal's decision was based on the following findings and reasons:

    a) the Tribunal accepted that the applicant was a Coptic Christian and a deacon. It also accepted that Coptic Christians could be ill-treated in Egypt. However, considering the evidence as a whole, the Tribunal was not satisfied that the applicant suffered the harm he claimed, noting that:

        i) while he provided some details about his claims, fundamentally the applicant made a series of unsubstantiated and general assertions. For example, he made general and vague claims that he had suffered persecution, discrimination, harassment, mistreatment and arrest; and

        ii) without further detail, clarification and corroborative evidence, and without having had the opportunity to explore and test the applicant's claims at a hearing, the Tribunal could not be satisfied that he had suffered any of the claimed harm.

Proceedings in this Court

13. The applicant seeks an extension of time to bring these proceedings. In his application filed on 31 May 2010 he stated:

> *The Applicant applies for an order that the time for making the application be extended on the grounds that;*
>
> *1. The delay in applying to the Court was caused by his ill health combined with the unwillingness or inability of his previous legal advisor to assist him in applying to the Court.*
>
> *2. He has a strongly arguable case to establish jurisdictional error.*

14. The claim for final relief is made in an amended application. The amended application alleges:

> *1. The Tribunal acted in breach of section 425 of the Migration Act.*
>
> *Particulars*
>
> *(a) The hearing rescheduled from 19 December 2008 (because the applicant was sick), was rescheduled to 23 December 2008, that being unreasonably short notice.*
>
> *(b) In any event the applicant was too ill to attend on that day.*
>
> *2. The Tribunal's discretionary decision to require a medical certificate be procured between 23 December 2008 and 29 December 2008 (the latter being a date on which the Tribunal was closed) was arbitrary and unreasonable, such as to amount to jurisdictional error.*
>
> *3. The Tribunal's discretionary decision to require a medical certificate be procured between 23 December 2008 and 29 December 2008 (the latter being a date on which the Tribunal was closed) was in breach of the requirements of s 422B(2)* [sic] *of the Migration Act, read with s 427(1)(b).*

Evidence

15. The applicant stated in his affidavit sworn or affirmed on 17 August 2010 that on 18 December 2008 he was very ill and went to see his then treating doctor, Dr Borun, who gave him the medial certificate referred to above at [9]. Dr Borun organised for the applicant to have a CT scan on 22 December 2008. The applicant deposed that on 22 December 2008 he felt very ill.

16. The applicant further deposed that on 22 December 2008 he received a call from his then-solicitor and migration agent advising that the 19 December 2008 hearing had been rescheduled to the next day, i.e. 23 December 2008. The applicant deposed that he said to his solicitor and migration agent that he was still feeling very sick and that he might have to go to hospital. The following exchange is then said to have taken place:

He said, "This member rejects all Egyptian cases. It is not worth going to the hearing."

I said, "I think I need to go to the hearing. I need to say what has happened to my wife and I".

He said, "I will try to get another postponement. If you are lucky they will re allocate the matter to another member."

The applicant said that this conversation took place one or two days before the second Tribunal hearing date and that his solicitor and migration agent did not tell him about the need for a medical certificate. The applicant said that his solicitor and migration agent told him that it was better not to go and that he was lucky to be sick at that time because most cases were refused. The applicant said that he responded by saying that he wanted to attend the Tribunal hearing and that it was better for him if the Tribunal member saw him in his unwell condition. His evidence was that he wanted to go to the Tribunal hearing even though he was very sick.

17. The applicant deposed that he went to see Dr Borun "at around Christmas time" but the surgery was closed. He deposed that he felt very sick at the time. The applicant went on to state that Dr Borun died in 2009 but he did not indicate when.

18. The applicant said that prior to the Tribunal hearing he had seen no doctors other than Dr Borun although he may have seen an Egyptian psychologist. He saw Dr Borun in December 2008 because he was dizzy, had headaches and felt like collapsing. Dr Borun gave him some strong painkillers but they were not effective. In the following week he had very serious headaches together with vomiting and he felt as if he was going to fall down. In particular, on 23 December 2008 he had a very bad headache and was vomiting. Although he agreed that he was psychologically upset, he said that his problems were more physical than psychological.

19. The applicant conceded in cross-examination that it would have been easy for him to see a doctor on 23 December 2008 if he had wanted to but he waited until after Christmas to see Dr Borun in order to get the results of the scan taken on 22 December 2008. At that appointment

Dr Borun advised him that there was nothing wrong with his brain and his headaches must have been caused by stress.

20. The applicant deposed that he next heard from his then-solicitor and migration agent in January 2009 and was told that the Tribunal had refused the review application and that the member had given him until 29 December 2008 to obtain a medical certificate. He deposed that his solicitor then said words to the effect of:

> *You have a choice of making a request to the Minister for Immigration to allow you to stay, or going to Court. In your condition it would be best if you made an application to the Minister. It will be less stressful for you. You can go to Court later if you like.*

The applicant deposed that he then instructed his solicitor and migration agent to make representations to the Minister. The applicant was not cross-examined on this evidence.

21. The applicant deposed that his original solicitor and migration agent had never advised him that he only had 28 days to lodge an application for judicial review of the Tribunal's decision, which was the relevant time period at the time of the Tribunal's decision. He also deposed that he was not advised that if he did not apply to the Court within 35 days of the date of the decision, which subsequently became the relevant period, he would need to seek an extension of time to bring these proceedings. He was not cross-examined on this evidence.

22. The Court Book, comprising documents relevant to the applicant's visa application and subsequent dealings with the Minister's department and the Tribunal, reveals that the Tribunal affirmed the delegate's decision on 6 January 2009 and that on 9 March 2009 the applicant's first solicitor and migration agent wrote to the Minister requesting his intervention pursuant to s.417 of the Act. Section 417 relevantly provides:

> ***417 Minister may substitute more favourable decision***
>
> *(1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 415 another decision, being a decision that is*

more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.

…

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances.

The s.417 request was acknowledged on 12 May 2009 and on 3 June 2009 the applicant's original solicitor and migration agent submitted some documents to the Minister for consideration. On 21 September 2009 the department wrote to the applicant advising him that the Minister declined to intervene in his case.

23. The applicant's second migration agent, Ms Hogarth, then wrote to the Minister on 5 October 2009 asking him to reconsider his decision, submitting additional information in support of her request. The request was acknowledged on 20 October 2009 and on 22 December 2009, 14 January 2010, 17 February 2010 and 20 February 2010 Ms Hogarth submitted further information to the Minister. In her letter of 20 February 2010 Ms Hogarth also requested the Minister's intervention pursuant to s.48B of the Act which relevantly provides:

48B Minister may determine that section 48A does not apply to non-citizen

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 48A does not apply to prevent an application for a protection visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day on which the notice is given.

…

(6) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

24. On 9 March 2010 the department wrote to the applicant advising him that as his case did not meet the guidelines for ministerial intervention under s.48B, it was not referred to the Minister for consideration under that section. On 16 March 2010 the department wrote to the applicant advising him that as the further information he had provided did not meet the requirements for a second s.417 referral to the Minister, the department did not send his second request to the Minister and finalised the matter itself.

25. The applicant deposed that after his second request for ministerial intervention was refused he was advised by Ms Hogarth that he needed another lawyer. About a week or two after the applicant received the second s.417 refusal, he saw a solicitor who then referred him to his current solicitors who explained the procedure and the costs of going to court. As he could not afford their fees at that time he went to see his original solicitor and migration agent.

26. The applicant deposed that his original solicitor and migration agent drafted an application to this Court and an application for waiver of the filing fee and gave them to the applicant who took them to the Minister's department, although the annexure to the applicant's affidavit suggests that he actually faxed them to the Court. The documents were rejected by the Court's registry because of formal defects in the application. At an unidentified point after that the applicant's original solicitor and migration agent advised the applicant of the registry's rejection of the application whereupon the applicant returned to the solicitor who now acts for him in these proceedings. These proceedings were commenced by an application dated 27 May 2010 and filed on 31 May 2010.

27. In addition to his own affidavit, the applicant also relied on an affidavit sworn or affirmed by his second migration agent, Ms Hogarth, on 17 August 2010. She deposed that the applicant had said to her that he had been unwell on 23 December 2008, that his original solicitor and migration agent had told him that it would be a waste of time to attend the adjourned Tribunal hearing but had not said that he only had "28 days to make my request to the Minister".

28. The Minister read an affidavit of Julian D'Arcey Pinder affirmed 14 October 2010. Mr Pinder deposed to the attempts made by the

Minister's solicitors between receipt of Ms Hogarth's affidavit on 18 August 2010 and 14 October 2010 to make contact with the applicant's first solicitor and migration agent. Attempts to speak to him were made on 19 and 20 August 2010. He called back on 23 August 2010 but the solicitor who then had carriage of the matter at the Minister's solicitors was about to leave for court and arranged to speak to him by telephone later. When she rang him later that day, he was unavailable. Further attempts to telephone him were made on 25 and 26 August 2010, 22 and 29 September 2010 and 7 October 2010. On 8 October 2010 the Minister's solicitors wrote to the applicant's first solicitor by email and by post asking him to telephone them. A response to that letter was not received. Finally, on 14 October 2010 Mr Pinder spoke by telephone to the applicant's first solicitor and migration agent who said that he had had a stroke a number of weeks earlier, was interstate and was not at work. The applicant's original solicitor and migration agent said that he could work on an affidavit for the Court but only after he had seen his file. However, he advised that the file was in Sydney and that there was no one to send it to him. He also said that he could not attend the listed hearing because, as a result of the stroke, he was having difficulty with movement.

Application for extension of time

29. Section 477 of the Act provides the time limit which applies to proceedings for judicial review of Tribunal decisions in respect of which this Court has jurisdiction. Section 477 talks of the Court's jurisdiction under s.476 to review a "migration decision", and s.5 of the Act makes it clear that the decision of the Tribunal in this instance is a "migration decision". Therefore, the time limit under s.477 of the Act applies in this case.

30. Section 477 of the Act relevantly provides:

> ***477 Time limits on applications to the Federal Magistrates Court***
>
> *(1) An application to the Federal Magistrates Court for a remedy to be granted in exercise of the court's original jurisdiction under section 476 in relation to a migration*

decision must be made to the court within 35 days of the date of the migration decision.

(2) The Federal Magistrates Court may, by order, extend that 35 day period as the Federal Magistrates Court considers appropriate if:

(a) an application for that order has been made in writing to the Federal Magistrates Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and

(b) the Federal Magistrates Court is satisfied that it is necessary in the interests of the administration of justice to make the order.

(3) In this section:

***date of the migration decision** means:*

(a) …

(b) in the case of a written migration decision made by the Migration Review Tribunal or the Refugee Review Tribunal—the date of the written statement under subsection 368(1) or 430(1); or

(c) in the case of an oral migration decision made by the Migration Review Tribunal or the Refugee Review Tribunal—the date of the oral decision; or

(d) …

31. Because the Tribunal's decision was signed on 6 January 2009, the time limit in these proceedings is governed by the *Migration Legislation Amendment Act (No. 1) 2009* which made certain amendments to s.477.

32. The relevant transitional provision is found in cl.7 of sch.2 to the *Migration Legislation Amendment Act (No. 1) 2009*:

7 Application

(1) The amendments made by this Schedule apply to applications under section 477, 477A or 486A of the Migration Act 1958 made on or after the commencement of this Schedule.

> *(2) If the application relates to a migration decision made before the commencement of this Schedule, for the purposes of applying sections 477, 477A and 486A of the Migration Act 1958, treat the date of the migration decision as the date of that commencement.*

33. The commencement date, as understood by cl.7, was 15 March 2009. As these proceedings were commenced by an application filed on 31 May 2010, the effect of cl.7(1) of sch.2 to the *Migration Legislation Amendment Act (No. 1) 2009* is that s.477 in its current form applies to these proceedings. As the Tribunal's decision was made before 15 March 2009, s.477 of the Act operates as if the applicant had been notified of the Tribunal's decision on 15 March 2009. In those circumstances, any application to this Court for a review of the Tribunal's decision had to be filed by 20 April 2009 to be within time.

34. As the application initiating these proceedings was not filed until 31 May 2010 it was brought out of time. The consequence of this is that the Court must consider the two questions posed by s.477(2). The first of these is whether:

a) an application for an extension of time to bring the proceedings has been made to the Court in writing, which

b) specifies, whether in the application document itself or in its supporting affidavit or other document, why the applicant considers it necessary in the interests of the administration of justice to make an order extending time to bring the proceedings.

35. In this case the applicant made application in writing for an extension of time by including such a request in his application commencing these proceedings. In that application he specified why he said it was in the interests of the administration of justice for time to be extended. The initial criterion for the granting of an extension of time has therefore been satisfied.

36. The next matter to be considered is whether it is in the interests of the administration of justice to extend the time for the filing of the application commencing these proceedings. The applicant submitted that the term "the interests of the administration of justice" comprehended the process or giving of justice and conferred on a court the widest of

discretions encompassing many situations including those which are more suitably considered under the ground of undue prejudice or undue hardship: *G v The Queen* (1984) 35 SASR 349 at 351 per King CJ.

37. In *Fisher v Minister for Immigration & Citizenship* (2007) 162 FCR 299, Stone J considered s.477A of the Act which is concerned with imposing time limits on the bringing of proceedings in the Federal Court in relation to migration decisions and is, relevantly, identical to s.477. Although her Honour was considering ss.477 and 477A as they stood prior to the amendments made by the *Migration Legislation Amendment Act (No.1) 2009*, in both the earlier and later versions of those provisions the courts' discretion to extend time has been conditional on the court in question being satisfied that an extension of time would be in the interests of the administration of justice. In relation to this Court, her Honour observed:

> *The latter requirement would involve consideration not only of the reasons for not meeting the original time limit but also whether the application, were the extension of time to be granted, would have any prospect of success. An assessment of the prospects of success would require the FMC to consider at some level the merits of the application for judicial review …* (at 307 [35])

38. It is to be observed that her Honour did not state that the considerations to which she had regard were the only ones which could be relevant, merely that the test appearing in s.477 involved consideration of the two issues she mentioned. Whether an applicant has a reasonable explanation for delay and a case with reasonable prospects of success are critical considerations but the considerations which bear on the exercise of the discretion are unconfined and other considerations may be relevant: *SZNZI v Minister for Immigration & Citizenship* [2010] FMCA 57. In this case, also relevant is the prejudice which the Minister submits he would suffer were the time for the bringing of the proceeding to be extended.

Reasonable explanation for delay

Submissions

39. As to whether he had a reasonable explanation for the delay in commencing the proceedings, the applicant submitted that he took

action in a timely manner and did not sit on his hands and do nothing. He submitted that he pursued his claim for protection by making representations to the Minister on two occasions and that when that was unsuccessful he did what was in his power to lodge an application in this Court. He submitted that he was not responsible for the delay and that if his case was arguable it would be a miscarriage of justice were he to be denied an opportunity to put it.

40. The applicant also submitted that he had been given bad advice by his original solicitor and migration agent concerning when an application to the Court needed to be lodged and, further, that when the first attempt to lodge an application was made the document was rejected by the Court. He submitted that it was natural for him to follow his solicitor's advice and that it could not be said that an application to the Minister to exercise his discretion under s.417 of the Act did not amount to a reasonable excuse for delaying the commencement of proceedings. As to the length of the delay, the applicant pointed to the lengthy consideration which the Minister and his department gave to the applications for exercise of the s.417 discretion and to the fact that shortly after the second request failed his first solicitor and migration agent had unsuccessfully attempted to commence proceedings in this Court.

41. The applicant submitted that although the Act suggested that people should come to the Court sooner rather than later, the availability under the Act of the right to seek judicial review and the right to seek the exercise of the Minister's discretion to substitute the Tribunal's decision with one more favourable to an applicant demonstrated that the Act provided unsuccessful review applicants with a choice. He submitted that going to the Minister should not be a disqualifying action and that, in the circumstances, the delay in commencing the proceedings was explicable and reasonable.

42. The Minister submitted that the evidence demonstrated that the applicant knew that he was able to challenge the Tribunal's decision in court but decided to take an alternative path; the applicant made a choice to make representations to the Minister rather than to apply to the Court. It was submitted that this did not amount to a reasonable explanation for the delay in commencing the proceedings.

Consideration

43. Plainly, the delay between the handing down of the Tribunal's decision on 6 January 2009 and the commencement of these proceedings on 31 May 2010 is a considerable one in the context of the time limits imposed by s.477 both in January 2009 and from 15 March 2009. The issue presently presenting for determination is whether the applicant's explanation for that delay is a reasonable one.

44. The applicant's uncontested evidence is, and I find, that his original solicitor and migration agent advised him to pursue ministerial intervention and failed to advise him of the time limits applicable to the commencement of proceedings such as these. The applicant pursued the option of ministerial intervention until, on 16 March 2010, the Minister's department rejected Ms Hogarth's further request for intervention whereupon he did seek to file an application in this Court in April 2010. The document was rejected by the Court's registry because it was defective, a deficiency which reflects on the applicant's original solicitor and migration agent and not on the applicant. Thereafter, the applicant instructed his current solicitor and, at the end of May 2010, these proceedings were commenced.

45. Once the applicant sought ministerial intervention, progress depended on the responses of the Minister and his department and it can be seen from [22]-[24] above that they took some time to reach their decisions on the requests which were made on the applicant's behalf. Nevertheless, once that somewhat protracted process was concluded, the applicant acted to initiate these proceedings with what I consider, in the circumstances, to have been adequate despatch.

46. I conclude that the applicant's decision to pursue ministerial intervention was based on incomplete information and that it was not a fully informed decision. Because the delay in the commencement of these proceedings arose out of a decision which was made without the applicant being in possession of all relevant information, it can be distinguished from a decision where an applicant, knowing that time for the commencement of proceedings has started to run, nevertheless chooses to pursue ministerial intervention instead. In such circumstances, an applicant can be considered to have chosen one course in preference to another but the present applicant did not make a choice of that nature. Overall, the

applicant can be seen to have acted promptly on the advice he was given, whether that was to pursue ministerial intervention or to initiate proceedings in this Court, and to not have knowingly elected to pursue ministerial intervention over judicial review. In all the circumstances, I am satisfied that he has provided a satisfactory explanation for the delay in commencing the proceedings.

Prejudice

Submissions

47. The Minister submitted that when it came to considering the question of delay, consideration should be given to more parties than just the applicant and that it was therefore appropriate for the Court to consider any prejudice which might have been suffered by the Minister because the proceedings were not brought within time. In this connection, it should be recalled that as part of his principal application to have the Tribunal's decision set aside for jurisdictional error, the applicant alleges that the Tribunal breached s.425 of the Act by reason that:

> *(a) The hearing scheduled from 19 December 2008 (because the applicant was sick), was rescheduled to 23 December 2008, that being unreasonably short notice.*
>
> *(b) In any event the applicant was too ill to attend on that day.*

In this regard he submitted that there was no reasonable opportunity for him to attend the adjourned hearing because:

a) the notice of the adjourned hearing was too short;

b) he was considered by Dr Borun to be too ill to attend work before 21 December 2008 and had been booked in for a brain scan on 22 December 2008; and

c) he was ill on 23 December 2008.

An important part of the applicant's case also appears to be the advice he said he received from his original solicitor and migration agent about whether he should have attended the adjourned hearing.

48. In his submissions, the Minister referred to *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 where it was held that the extension of a limitation period would not do justice between the parties and would be properly refused if the delay in bringing the proceedings caused the defendant to suffer actual or even the real possibility of prejudice of a significant or material kind. The Minister submitted that the delay in commencing these proceedings had prejudiced him in two respects. He identified the applicant's health at or around the time of the adjourned Tribunal hearing as a relevant matter and submitted that one aspect of the prejudice he allegedly suffered arose out of his inability, by reason of the delay, to adduce evidence relevant to it. The Minister submitted that the death of Dr Borun in 2009 meant that evidence could not be obtained from him regarding whether the applicant was, in fact, not well enough to attend the Tribunal hearing on 23 December 2008 and whether his surgery had been closed at some time around Christmas 2008 when the applicant alleges he went to see him. The Minister submitted that the second prejudicial aspect of the delay arose out of the inability of the applicant's original solicitor and migration agent to give evidence in the proceedings. The Minister said that he was thereby prevented from addressing what the applicant said he had been advised by his solicitor and migration agent at around the time of the first scheduled Tribunal hearing and shortly before the second scheduled hearing. He submitted that those alleged statements were also relevant matters.

49. In response, the applicant submitted that Dr Borun could not have given evidence of his (the applicant's) state of health at about the time of the Tribunal's adjourned hearing because he did not see the applicant around that time. He also submitted in relation to the applicant's original solicitor and migration agent that if the latter was so important to the Minister's case, an adjournment should have been sought but was not.

Consideration

50. Turning first to the Minister's submissions concerning the applicant's original solicitor and migration agent, I accept what the applicant says on this point. It cannot be doubted that the Minister's solicitors made significant efforts in a short period of time to locate and make contact with the applicant's first representative. However, having ascertained the

latter's poor state of health and his inability to access his file or to attend court, no adjournment was sought in order to place his evidence before the Court at a later date. This was a choice which the Minister made and was the real reason why the solicitor and migration agent's evidence was not available, not the late commencement of these proceedings.

51. However, the inability of the Minister to test the applicant's allegations concerning his health at around the time of the adjourned Tribunal hearing is quite a different matter. The parties have not identified exactly when Dr Borun died but it was not suggested that his death occurred at a point in 2009 which made it irrelevant whether the applicant commenced judicial review proceedings in time or not. Although Dr Borun did not, on the applicant's evidence, see the applicant after 18 December 2008 until some point after Christmas, it could nevertheless be expected that the doctor could have given useful evidence as to the applicant's state of health at the relevant time. The doctor could also have given evidence concerning whether his surgery was shut at the time the applicant alleged.

52. The applicant's allegedly poor health at around the time of the adjourned Tribunal hearing is an important contested issue of fact in these proceedings and the delay in commencing the proceedings has ensured that the only evidence available on it is the applicant's. Had Dr Borun's evidence been available, a picture different from that painted by the applicant may have emerged. As McHugh J said in the *Brisbane South Regional Health Authority* case:

> *A verdict may appear well based on the evidence given in the proceedings, but, if the tribunal of fact had all the evidence concerning the matter, an opposite result may have ensued. The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose.* (at 551)

53. While it must not be overlooked that these proceedings involve alleged jurisdictional error on the part of the Tribunal and that they concern the applicant's claims to have a well-founded fear of persecution for a Convention reason, it is nevertheless important that such proceedings be brought within the time limits stipulated by the Act if delay will prevent the Minister from adducing evidence which is reasonably likely to be of significance in the resolution of important matters of fact

arising out of the applicant's allegations. I am satisfied that the unavailability of Dr Borun's evidence does significantly and materially prejudice the Minister's defence of the applicant's allegation that the Tribunal breached s.425 of the Act because it failed to adjourn its hearing to take account of his claimed ill-health on or around 23 December 2008.

Reasonable prospects of success

Breach of s.425 – rescheduling of hearing – submissions

54. Section 425(1) provides:

> ***425 Tribunal must invite applicant to appear***
>
> *(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.*

55. The applicant submitted that s.425(1) required the Tribunal to provide him with a meaningful opportunity to participate in the hearing. He referred to *Minister for Immigration & Multicultural & Indigenous Affairs v SZFML* (2006) 154 FCR 572 at 590 [82] where the Full Court of the Federal Court considered the Tribunal's power to adjourn a hearing and stated that an applicant's entitlement to attend a hearing cannot be compromised by rescheduling that hearing to another date on unreasonably short notice.

56. It was submitted that the rescheduling of the Tribunal hearing from 19 to 23 December 2008 was unreasonable because, either individually or in combination:

a) the notice of the adjourned hearing was short;

b) the Tribunal knew that the applicant was considered by his doctor to be disabled by vomiting and abdominal pain and unable to attend the Tribunal before 21 December 2008 and that he was booked in for a brain scan on 22 December 2008; and

c) the applicant was ill on 23 December 2008.

It was submitted that, in the circumstances, there was no reasonable opportunity for the applicant to attend the hearing.

57. The applicant observed that the adjournment was from a Friday to a Tuesday, that his medical certificate obtained on Thursday 18 December 2008 had indicated that he was unfit until Sunday 21 December 2008 and he was to attend for a brain scan on Monday 22 December 2008. It was further submitted that he was advised of the rescheduling only one or two days before the hearing and that this was unreasonable in circumstances where he had been unwell since his arrival in Australia. It was submitted that it would have been reasonable for the Tribunal to have given him sufficient time to achieve a full recovery given that the Tribunal's hearing was a matter of great importance to him and he was entitled to be at his best at the hearing.

58. The Minister submitted that the applicant's evidence as to his ill health on 23 December 2008 should not be accepted and that, on that basis, there was no reason why the applicant could not attend the hearing on that day. He submitted that, in those circumstances, the brief adjournment was not unreasonable.

59. The Minister also submitted that the Tribunal gave the applicant a reasonable opportunity to attend its hearing and that the exercise of the discretion to proceed to a hearing without giving him a further opportunity to attend did not miscarry. In this regard, the Minister submitted that the Tribunal had received from the applicant's original solicitor and migration agent, under cover of a letter dated 19 December 2008, two documents indicating the length of the applicant's incapacity, the first being the medical certificate which said he was unfit until 21 December 2008 and the second being the booking for the CT scan of his brain on 22 December 2008. The Minister submitted there was no evidence of any ongoing problem and that the adjourned date was realistic and reasonable.

60. The Minister also pointed to the applicant's oral evidence that his original solicitor and migration agent had said to him that it was better that he not attend the Tribunal hearing and to his affidavit evidence that his original solicitor and migration agent had said that it was not worth going to the hearing. The Minister submitted that the evidence did not suggest that the applicant was too ill to attend and that this was the

reason for his non-attendance but that, rather, his evidence had been that he wanted the Tribunal member to see him as he was. The Minister submitted that the applicant's absence from the adjourned hearing was because he had been advised that he should not attend, not because his health was such that he could not attend.

61. It was submitted that, in the circumstances, the rescheduling was not unreasonable and it could not be said that the applicant was denied a real opportunity to give evidence and present arguments to the Tribunal.

Breach of s.425 – rescheduling of hearing – consideration

62. The applicant's reference to reasonableness and to an alleged lack of reasonableness in the Tribunal's conduct is apt to confuse. His submissions did not suggest that the Tribunal's conduct was unreasonable in the sense considered in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 but, rather, that the adjournment was so brief that his right to attend the adjourned hearing was compromised.

63. In this regard, although the applicant alleges that the Tribunal's adjournment of his hearing was too brief in light of the state of his health, I have concluded that his health was not the decisive factor in his non-attendance before the Tribunal. His evidence was that he wanted to attend the hearing notwithstanding his ill-health because he thought it would be better if the Tribunal to saw him in his unwell condition. Whether the applicant's original solicitor and migration agent told him that it was better that he not attend the Tribunal hearing or told him that it was not worth attending, the fact is that that in substance the applicant was advised that he did not need to attend. I infer that the applicant took the advice of his solicitor and migration agent on this occasion, as he did later when advised to seek ministerial intervention under s.417 and then again when advised to commence these proceedings, and that his ill health would not have prevented him from attending the Tribunal hearing if his original solicitor and migration agent had advised him to attend. I conclude that the applicant did not attend the adjourned Tribunal hearing because he took the advice of his original solicitor and migration agent that he did not need to.

64. In light of this finding, although the statutory scheme under ss.425 and 425A for notifying an applicant of a Tribunal hearing cannot be compromised by rescheduling the hearing to another date on unreasonably short notice, the allegedly short notice of the new hearing date in this case did not deny the applicant an effective or adequate opportunity to attend the hearing or cause him any prejudice: *SZOFE v Minister for Immigration & Citizenship* (2010) 185 FCR 129. The applicant was not absent from the Tribunal hearing because he was given insufficient time to arrange himself to get there or to recover from ill-health but because he was advised that he could, or even should, stay away. That is to say, the length of the notice given by the Tribunal had nothing to do with the applicant's failure to attend its adjourned hearing.

65. However, if I am wrong in this conclusion and the resolution of the question concerning whether the adjournment of the Tribunal's hearing was too brief turns on whether the applicant was ill as he alleges, it must be noted that the delay in bringing these proceedings has made it impossible for the Minister to test that allegation by adducing evidence from Dr Borun. On that issue I refer to my finding earlier in these reasons concerning the prejudice which the Minister has suffered in this connection by reason of the lateness of the commencement of the proceedings.

Requirement to provide medical certificate by 29 December 2008 was unreasonable and unfair – submissions

66. In support of his allegation that the Tribunal required him to procure a medical certificate and that to require him to do so between 23 and 29 December 2008 was arbitrary and unreasonable, the applicant characterised what he described as the Tribunal's "power to require a medical certificate by a certain date" to be an implied power derived from the Tribunal's power under s.427(1)(b) to adjourn a hearing and its obligation under s.420(2)(b) to act according to substantial justice and the merits of the case. The applicant submitted that as 24, 25 and 26 December 2008 were Christmas Eve, Christmas Day and Boxing Day respectively, the only day when it was realistic for him to obtain a medical certificate was 23 December 2008. He submitted that, in such circumstances, it was manifestly unreasonable for the Tribunal to ask

him to submit a medical certificate in the period nominated and that a decision based on a discretion exercised so unreasonably was affected by jurisdictional error. He also submitted that it was unfair to require a person to obtain a medical certificate in a period of six days over Christmas and to set as the deadline for its provision to the Tribunal a day on which the Tribunal was closed.

67. The Minister submitted that the Tribunal had not actually required the applicant to produce a medical certificate and had merely stated that if one was not provided the Tribunal might proceed to make a decision on the applicant's review application without further notice.

68. The Minister also submitted that the medical certificate which the applicant gave to the Tribunal only indicated that he was unable to attend work or school from 18 December 2008 to 21 December 2008. It was submitted that although the Tribunal accepted that certificate as evidence that the applicant could not attend a hearing on 19 December 2008, it was reasonable for it to not be satisfied that the applicant was unable to attend a hearing on 23 December 2008 as the certificate did not say that he would be unable to attend on that day.

69. As to the requirement for a medical certificate, the Minister submitted that the Tribunal spoke to the applicant's original solicitor and migration agent at 2:38pm on 23 December 2008 advising him that unless a medical certificate was received by 29 December 2008 the Tribunal might proceed to make a decision on the review. It was submitted that in circumstances where the applicant had previously been able to obtain a medical certificate, the 23 December 2008 request was not unreasonable. The Minister further submitted that although the implication of the applicant's case was that he was unable to get a medical certificate because his doctor's surgery was shut, he had said it was easy to see a doctor and the evidence indicated that he had not sought another one out.

Requirement to provide medical certificate by 29 December 2008 was unreasonable and unfair – consideration

70. The provisions of the Act which are relevant to the applicant's allegation of unfairness and unreasonableness are s.424, which permits

the Tribunal to request information from an applicant, and s.427(1)(b) which permits the Tribunal to adjourn a hearing.

71. The applicant's submission that the Tribunal had failed to act fairly in relation to the medical certificate it invited him to provide does not reflect the meaning which the word "fair" carries in s.422B(3) where it is said that:

> *(3) In applying this Division, the Tribunal must act in a way that is fair and just.*

The sub-section should be understood as requiring the Tribunal to use its procedural powers in a way which is fair and just, not as creating a standard by which the substantive merits of the Tribunal's decisions and conclusions may be judged. As the Full Court of the Federal Court said in *Minister for Immigration & Citizenship v SZMOK* (2009) 257 ALR 427:

> *Section 422B(3) might therefore be understood as restoring fairness and justice as a procedural concept. In those circumstances, the requirement that the tribunal act in a way that is fair and just does not refer to substantive notions of justice or fairness but is more usefully to be compared with the content of the words "justice" and "fairness" in the expressions "natural justice" and "procedural fairness"* … (at 432 [18])

72. Moreover, and of particular significance, their Honours also said:

> *Section 422B(3) may be understood as an exhortative provision in the same way as s 420(1) is an exhortative provision. Just as s 420 does not create rights or a ground of review, additional to specific rights of review that are expressly given by the Act, so s 422B(3) should not be understood as creating a procedural requirement over and beyond what is expressly provided for in Div 4: see* Eshetu's Case *at [158]*. (at 432 [15])

That is to say, s.422B(3) is not a "free standing obligation" which creates rights which can be enforced. It does no more than give particular content to the obligations which div.4 of pt.7 of the Act imposes on the Tribunal. Consequently, any breach of the Tribunal's natural justice obligations must be framed by reference to particular provisions of div.4 of pt.7 which create those obligations, not by reference to s.422B(3).

73. As noted earlier, the provisions of the Act which are relevant to the applicant's allegation of unfairness and unreasonableness are ss.424, and 427(1)(b). In relation to s.424, it was not procedurally unfair of the Tribunal to request a medical certificate. The simple fact of such a request does not engage natural justice obligations. The relevant issue arises out of the discretionary power of adjournment provided by s.427(1)(b) and is whether the Tribunal's conditioning of its decision whether to further adjourn the hearing on the supply of a medical certificate by a particular date, specifically 29 December 2008, amounted to a denial of natural justice.

74. In that regard, in *Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 Gleeson CJ said in relation to a decision-maker's obligation to afford natural justice:

> *Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.* (at 14 [37])

McHugh and Gummow JJ put it this way:

> *The ends sought to be attained by the requirement of natural justice may be variously identified. But at least in a case such as this the concern is with the fairness of the procedure adopted rather than the fairness of the outcome.* (at 34 [105])

In order to determine whether the rules of natural justice were breached by the Tribunal's decision to condition the exercise of its discretion on the supply of a medical certificate by 29 December 2008, it is necessary to consider the practical consequences of that decision: *SZOFE* at 146 [67].

75. In this case, a breach of the Tribunal's natural justice obligations would exist if the period given to the applicant to supply the medical certificate was so brief that it was impracticable for him to have obtained and supplied one with the result that he was, in effect, denied an opportunity to appear before the Tribunal to give evidence and present arguments in relation to his claim. The applicant's evidence does not support a conclusion that it was. He did not say that he could not get a medical certificate from another doctor or why he could not. All he said was that he had wanted to see Dr Borun around Christmas 2008 but the surgery

was shut and he did not see him until some time later, on a date which was not specified and could possibly have been on or before 29 December 2008. In fact, the applicant said that it would have been easy for him to see a doctor on 23 December 2008. In the circumstances, I do not conclude that the deadline by which the applicant was required to submit a medical certificate, failing which the Tribunal would proceed to a decision, was so brief that he was denied an effective or adequate opportunity to put material before the Tribunal which it could then take into account when exercising its discretion whether to adjourn the hearing further or proceed to a final disposition of the review.

76. Further, the allegation that it was unfair to ask that the medical certificate be supplied, at the latest, on a day when the Tribunal was shut does not point to a breach by the Tribunal of its natural justice obligations. The fairness of the deadline is to be tested by whether the applicant was denied a hearing, not by whether the Tribunal was open for business on a particular day and the fact that the Tribunal was shut on 29 December 2008 is irrelevant to the issue of whether the applicant was denied an opportunity to appear before it. In reality, this is an allegation that it was unreasonable of the Tribunal to require the applicant to submit a medical certificate by a particular date, and to put him under time pressure in the process, even though it was going to be shut on that day and would not be looking at the medical certificate until some time later. This submission does not raise the procedural fairness of the deadline but whether it was unreasonable of the Tribunal to exercise its discretionary powers in this way.

77. Turning to the allegation of unreasonableness, I accept that the Tribunal's invitation to the applicant to supply a medical certificate was, in effect, a demand or a requirement, in that the applicant could supply the certificate or suffer the consequences. However, given the applicant's claims of ill-health I do not consider that it was unreasonable, and certainly not manifestly unreasonable, for the Tribunal to have requested a medical certificate from him before adjourning its hearing for a second time. Indeed it was a logical and sensible thing to do. The real question is whether the Tribunal's discretionary decision to proceed to a final decision on the review once the medical certificate was not supplied by the stipulated deadline of 29 December 2008 was so unreasonable that no reasonable decision-maker would have made it and amounted to an abuse

of power in the sense considered in the *Wednesbury Corporation case* and discussed in *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54 at [48]-[51].

78. The applicant's submission that the Tribunal's requirement that he obtain a medical certificate over the Christmas period was manifestly unreasonable was unsupported by evidence indicating that it actually was unreasonable. It was argued that the unreasonableness was demonstrated by the fact that three of the days in the period during which the applicant could have obtained the medical certificate were public holidays and by the further fact that few people work between Christmas and New Year. However, the applicant did not say that he would have been unable, whether through ill health or for any other reason, to see a doctor and obtain a medical certificate in the period specified by the Tribunal or that it would have been unreasonably difficult for him to do so.

79. Nor did the applicant demonstrate that the deadline for the provision of a medical certificate was manifestly unreasonable in a more general sense. For instance, he did not adduce evidence to suggest that it would have been impracticable for a reasonable person to have obtained a medical certificate in the period in question. In this regard, although it can be accepted that over the Christmas period the availability of medical practitioners is likely to be less than at other times of the year, public hospital outpatient services and at least some private medical centres remain open. Moreover, the period from the Tribunal's invitation on the afternoon of 23 December 2008 to its deadline of the end of 29 December 2008 was almost a full week of which only two days were public holidays, not three as submitted by the applicant.

80. Regard should also be had to the information to which the Tribunal had access when exercising its discretion. First, the information which the applicant had supplied to the Tribunal concerning his health, in particular Dr Borun's medical certificate of 18 December 2008 and the notification of the brain scan appointment, are insufficient to support a conclusion that the Tribunal knew or ought to have known that the applicant was unable to obtain a medical certificate by the stipulated deadline. Further, notwithstanding the reduced availability of medical

services over the Christmas period, the existence of public hospital outpatient services and private medical centres is well known and the Tribunal would have been aware of them. Moreover, based on what the applicant's first solicitor and migration agent told it at the counter on 23 December 2008, the Tribunal can be taken to have understood that the applicant was actually in hospital on that day and thus could easily have obtained a medical certificate confirming his inability to attend the adjourned hearing by reason of ill-health. In the circumstances, I find that the Tribunal's decision to require, on 23 December 2008, that the applicant supply a medical certificate by 29 December 2008 was not so unreasonable that no reasonable decision-maker would have made it.

81. Finally, I am not satisfied that no reasonable decision-maker would have required such medical certificate as the applicant may have wished to submit be submitted on a day when the Tribunal was closed and, specifically, on 29 December 2008. The test is not whether the request was reasonable in the sense of being sensible, balanced, moderate and one which the majority of people might make, but whether it was manifestly unreasonable in the *Wednesbury* sense. While it may have seemed to the applicant to have been a pointless and arbitrary deadline, it did not satisfy the *Wednesbury* test of unreasonableness.

82. In any event, even if the deadline which the Tribunal had imposed was manifestly unreasonable, the ultimate question would remain whether the Tribunal's decision on the review was affected by jurisdictional error and, in particular, whether it was so affected by reason of the miscarriage of discretion. An answer to that question requires consideration of the consequences of the miscarriage of the relevant discretion and, in the circumstances of this case, whether the Tribunal's decision to proceed to a determination of the review rather than ordering a further adjournment of the hearing meant that the applicant was denied natural justice in that he was denied an opportunity to give evidence and present arguments in relation to his claims. As was said in *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627, a failure to comply with procedural steps will not, itself, amount to jurisdictional error but

> … *will require consideration of whether in the events that occurred the applicant was denied natural justice.* … (at 640 [36])

In that case, it was held, in the context of a Tribunal hearing notification which was procedurally defective but effective in fact, that there had been no denial of natural justice. In *SZOFE* it was said:

> *In the case of an administrative tribunal, it is frequently necessary to consider the consequences of a departure from a statutory (or other) requirement before concluding that jurisdictional error has been committed. The exercise of jurisdiction by the tribunal must be, in some way, "affected" by the error or failure alleged.* (at 145-6 [66] per Buchanan and Nicholas JJ) (references omitted)

83. In this case, for the reasons already given, the applicant has not demonstrated that the Tribunal breached its natural justice obligations either by requiring that a medical certificate be provided to substantiate the appropriateness of a further adjournment of its hearing, by requiring that the certificate be supplied within six days over Christmas and by 29 December 2008 or by the fact that the Tribunal was shut on 29 December 2008. Consequently, even if the Tribunal's decision to not adjourn its hearing for a second time represented a miscarriage of discretion, the applicant was not denied natural justice thereby.

Reasonable prospects of success - conclusion

84. As a consequence of these findings, I conclude that the applicant has not demonstrated that the Tribunal's decision is affected by jurisdictional error. This leads to the further finding that the applicant's claim does not have reasonable prospects of success.

Conclusion

85. Although I have found that the applicant has provided a reasonable explanation for his delay in bringing these proceedings I have also found that they do not have reasonable prospects of success for the reasons which I have set out. As a consequence the application for an extension of time to bring the proceedings will be dismissed.

86. Further, should I be incorrect in my conclusion that the brevity of the adjournment of the Tribunal's hearing did not amount to a denial of natural justice because the applicant made a conscious decision to not attend the adjourned hearing and it is necessary to determine whether the brevity of the adjournment amounted to a denial of natural justice by reference to the applicant's state of health at the time, I would conclude that the relevant prejudice suffered by the Minister because the proceedings were commenced late was such that it would not be in the interests of the administration of justice to extend the time to bring the proceedings. If it were necessary, I would also dismiss the application on that basis.

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

Associate:

Date: 4 May 2011