FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZOES v MINISTER FOR IMMIGRATION & ANOR [2010] FMCA 686

MIGRATION – Review of Refugee Review Tribunal – refusal of a Protection (Class XA) visa – non-compliance with s.425 of the *Migration Act 1958* (Cth) –jurisdictional error.

The Applicant is not to be identified pursuant to s.91X of the *Migration Act 1958* (Cth) and has been given the pseudonym "SZOES".

Migration Act 1958 (Cth), ss.91X, 424, 425

Abram v Bank of New Zealand [1996] 18 ATPR 41-507
Craig v South Australia (1995) 184 CLR 163
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
Minister for Immigration and Citizenship v SZNVW [2010] FCAFC 41
Minister for Immigration and Multicultural Affairs v Bhardwaj [2002] 209 CLR 597
Minister for Immigration and Multicultural Affairs v SZFDE [2006] FCAFC 142
Minister for Immigration & Multicultural Affairs v Yusuf (2001) 206 CLR 323
Minister for Immigration and Multicultural and Indigenous Affairs v SCAR (2003) 128 FCR 553
Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) 207 ALR 12
Minister for Immigration and Multicultural and Indigenous Affairs v SZFML & Anor [2006] FCAFC 152
NABE v Minister for Immigration and Indigenous Affairs (No. 2) (2004) 144 FCR 1
Neil v Nott (1994) 121 ALR 148
Rezaei v Minister for Immigration and Multicultural Affairs [2001] FCA 1294
Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham (2000) 168 ALR 407
SZEHN v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1389
SZHKA v Minister for Immigration and Citizenship [2008] FCAFC 138
WAEE v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 75 ALD 630

Applicant:	SZOES
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG451 of 2010
Judgment of:	Lloyd-Jones FM
Hearing date:	2 August 2010
Delivered at:	Sydney
Delivered on:	9 September 2010

REPRESENTATION

Solicitors for the Applicant:	The Applicant appeared in person with the assistance of a Bengali interpreter.
Counsel for the Respondents:	Ms A Mitchelmore
Solicitors for the Respondents:	Sparke Helmore (Ms N Johnson)

ORDERS

(1) A writ of certiorari issue directed to the second Respondent, to quash the decision of the second Respondent made on 8 February 2010 in matter 0908903.

(2) A writ of mandamus issue directed to the second Respondent, requiring the second Respondent to determine according to law the application for review of the decision of the delegate of the first Respondent dated 24 November 2008.

FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY

SYG451 of 2010

SZOES
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

The proceedings

1. This is an application filed on 4 March 2010 pursuant to s.476(1) of the *Migration Act 1958* (Cth) ("the Act") for a review of the decision of the Refugee Review Tribunal ("the Tribunal") dated 8 February 2010 being a decision of Tribunal member Giles Short, RRT case reference number 0908903 which affirmed the decision of the delegate f the Minister for Immigration & Citizenship ("the Minister") to refuse the Applicant's application for a Protection (Class XA) visa.

2. The first Tribunal (differently constituted) affirmed the decision of the delegate of the Minister made on 8 July 2009. On 6 November 2009 the Federal Magistrates Court ordered, by consent that a writ of certiorari issued directed to the Tribunal quashing the decision of the first Tribunal and that a writ of mandamus issued directed to the Tribunal requiring it to determine the application made to it for review

of the decision of the Minister dated 24 November 2008 according to law. Appended to the Court's orders was a note stating that:

> *The Court notes that the first Respondent [the Minister] accepts that the application must be allowed on the basis that the Tribunal failed to consider the Applicant's claim that she was a Christian woman in Bangladesh.*

3. The evidence before the Court includes: a Court Book ("CB"); prepared by the Minister's solicitors and is marked "A"; an affidavit of the Applicant filed on 4 March 2010; and an affidavit of the Applicant sworn 4 June 2010.

Background information

4. The Applicant is female and aged in her early twenties. In her original application for a Protection visa she states that she was from a Bangladesh Indigenous Tribal Group and that she was a Catholic by religion. She states that she has completed a total of 14 years of education in Bangladesh. She stated that she was granted a visa to travel to Australia in order to attend World Youth Day. She returned to Bangladesh but came back to Australia again travelling on the same visa (which permitted multiple entries). In the statement accompanying her original application to the Tribunal, the Applicant says that her father had come from an Indigenous Tribal (Pahari) family in Gopalapur District Natore and that her mother was from a Bengali family from the same village. She says that both her families had been Catholic but they had faced criticism by their own families and their neighbours because of the differences in their backgrounds so in 1984 the family had moved to Mirjapur in District Dinajpur. She states that in that area there is a large population of Indigenous people but only 550 to 600 Christians and that the Christian community had some problems with the Muslim community (CB 397 at [19]-[20]).

5. The Applicant states that she was educated at a series of Christian schools and that, while travelling to and from one of the schools she attended she was harassed by a Muslim youth who made romantic advances towards her. The Applicant claims she refused his advances, which made him angry and one day he stopped her when she was travelling home, took her by force and assaulted and attempted to rape

her. The Applicant claims that after this incident she changed schools but she was mentally and physically disturbed. She claims that her family did not lodge a complaint against the boy as he had threatened her mother.

6. The Applicant claims that in February 2008 she gave a presentation about the Christian religion to a national youth leadership conference. Her talk was of interest to some Muslim girls and following the talk they asked her some more questions about her religion. The Applicant claimed that as she was on her way home she was accosted by Muslim boys who had seen her talking to the girls and thinking that she was attempting to convert them to Christianity, threatened to kill her if she spoke about her religion to others. The Applicant claimed that these boys continued to follow her making her fearful at all times.

7. The Applicant visited Australia in July 2008 for the World Youth Day and could have made an application at that time but she claims that she could not tell the priest that was looking after the group about her problems. She had made a commitment to go home and the priest had her passport. She returned to Bangladesh but came back to Australia a week later. The Applicant claimed that as a minority member and a woman if she returned to Bangladesh she would face serious harm from Muslim extremists and would be killed.

Tribunal decision

8. I rely on the written submissions prepared by the Respondent's counsel, Ms Mitchelmore, in respect of the summary of the Tribunal's findings. I have made no further direct attribution to the material as this would make the summary unwieldy. The information is provided to assist in the understanding of the nature of the application and not to establish any evidentiary point.

The proceedings

9. The second Tribunal (reconstituted) by a letter dated 25 November 2009 invited the Applicant to attend a hearing before it on 21 December 2009 (CB 252). The Applicant accepted the invitation (CB 254), but on 18 December 2009 her agent wrote to the Tribunal

requesting an adjournment because the Applicant was suffering from depression and psychological problems (CB 257). The Applicant attached to her letter a medical certificate stating that the Applicant was suffering from a medical condition (acute anxiety/stress) and that she would be "unfit to attend work/school/university" from 17 December 2009 to 31 December 2009 (CB 258). A psychological report was also attached to the letter which was prepared by Dr John Jacmon and was dated 16 November 2009. In the report Dr Jacmon expressed the view that the Applicant was suffering from a range of depressive and anxiety related disorders (CB 259).

10. On 18 December 2009 the Tribunal notified the Applicant that it did not accept that the medical evidence she provided indicated that she was unable for any medical reason to attend the scheduled hearing on 21 December 2009 (CB 297). On the afternoon of 20 December 2009, the Applicant's agent again wrote to the Tribunal requesting an adjournment (CB 299). Attached to this letter was a document entitled "Emergency Department Discharge Summary" from St George Hospital, which referred to the Applicant having attended the emergency department on 19 December 2009 and diagnosing her complaint as "postural hypotension" (CB 301). The Tribunal wrote to the Applicant on 21 December (day of the hearing) notifying her that it could see nothing in the discharge summary to indicate she was unable to attend a hearing scheduled for that morning, and that as she had not appeared the Tribunal may make a decision on a review without taking any further action to allow or enable her to appear (CB 304). By a letter dated 9 February 2010, the Tribunal notified the Applicant of its decision to affirm the decision of the Minister's delegate (CB 312).

11. In the Tribunal decision record there is a review of the Applicant's claims from the following sources:

    a) Her original statement attached to her application (CB 317 at [19]-[28]);

    b) Her interview with the delegate (CB 320 at [29]-[37]);

    c) Further submissions to the Department dated 16 October 2008 (CB 322 at [38], [41]);

d) Her evidence from the first hearing before the first Tribunal on 10 March 2009 (CB 323 at [42]-[74]);

e) Her response to the s.424A letter forwarded by the first Tribunal (CB 330 at [75]-[77]);

f) Her evidence at the second hearing before the first Tribunal on 1 June 2009 (CB 331 at [78]-[92]) and

g) Her submissions to the second Tribunal (CB 335 at [93]).

Findings

12. The Tribunal accepted that the Applicant was a Catholic, and that while she was attending St Phillips High School she may have been subjected to unwanted attention from a Muslim boy. However, it did not accept the Applicant's account of the attack by that boy in July 2006, nor did it accept that since then the boy had continued to threaten her family or that he had attempted to set their house on fire in March 2009 (CB 336 at [98]). The Tribunal found that the Applicant had greatly exaggerated the threat posed by the youth in an attempt to provide a basis for refugee status. The Tribunal noted that there were a number of inconsistencies in her account of the incident as contained in her original statement, her evidence at the first hearing and her written response to the Tribunal's s.424A letter (CB 336 at [99]-[102]). The Applicant had not suggested in her original statement that she had any further contact with the boy after the incident in July 2006, but at the first Tribunal hearing she said he had continued to threaten her in various ways and at the second Tribunal hearing she said he and one of the members of his group had attacked her family home (CB 337 at [102]).

13. The Tribunal took the view that the Applicant had grossly exaggerated her claims as to what occurred following her presentation at the National Youth leadership Group conference in February 2008. The Tribunal accepted that the Applicant spoke at this conference, and that some Muslim boys threatened her afterwards, but observed that at the first hearing she had said that they would cause more problems if she went back to the area where she had given the speech, when she had remained in the area from February to July 2008 with no harm before her (CB 337 at [105]). The Tribunal found that the Applicant had only

one chance encounter with these Muslim boys and that they did not have any continuing interest in her (CB 338 at [107]).

14. In rejecting the Applicant's claims, the Tribunal noted that they were corroborated to some extent by letters she had produced from two members of the clergy, namely Reverend Arobinda Sarker and Reverend Profulla Kumar Roy. However, because it did not accept the Applicant's evidence the Tribunal did not accept that there was a real chance that she would be harmed or killed or otherwise persecuted by the Muslim boy who allegedly attacked her in July 2006 or by the group of boys that harassed her in February 2008 (CB 337 at [104] and [107]).

15. The Tribunal accepted that the Applicant was a Christian woman from an Indigenous Pahari tribe. However, it did not accept on the evidence before it that Pahari Christians or female Pahari Christians in particular were subjected to constant injustice or torture, nor did it accept that the female members of the community lived in perpetual fear. It also did not accept that the Applicant's family barely survived day to day, noting that the Applicant's eldest sister was an administrative assistant with Caritas and that her brother had attended good schools and was now at university. The Tribunal found that the Applicant had been able to live her life as a Christian woman in Bangladesh "largely untroubled by any threat posed by Muslims" (CB 339 at [113]).

16. In so far as general violence against women in Bangladesh is concerned, the Tribunal accepted that violence against women continued to be a problem. However, in light of its findings as to the exaggerated nature of her claims, the Tribunal did not accept that there was a real chance that the Applicant would be attacked, raped, killed or otherwise persecuted for reason of her membership of a particular group of women in Bangladesh, if she returned to her home now or in the reasonably foreseeable future (CB 340 at [114]).

Amended application

17. On 4 June 2010 in accordance with the leave granted at the first court date directions hearing the Applicant filed an amended application in the following form:

1. By letter dated 25 November 2009 the RRT wrote to the Applicant's authorised recipient and invited the Applicant to appear before the Tribunal on 21 December 2009 (Green Book pp.250-253).

2. The Applicant completed and returned to the Tribunal a "response to Hearing Invitation" form indicating that she wished to take part in the Tribunal hearing on 21 December 2009.

3. On 17 December 2009 the Applicant attended Dr Nazma Alam and was diagnosed as suffering from acute anxiety/stress. Dr Alam signed a pre-printed Medical Certificate certifying that the Applicant was unfit to attend Work/School/ University from 17 December 2009 to 31 December 2009.

4. On Saturday 18 December 2009 the Applicant's representative wrote a letter to the Tribunal requesting a rescheduling of the hearing. That letter enclosed evidence in support of the rescheduling of the hearing and in support of the Applicant's application to the Tribunal.

5. The evidence submitted by the Applicant's representative on 18 December 2009 included an expert psychologist's report dated 16 November 2009, prepared by a qualified psychologist for the purpose of the Applicant's Application, who had set out his qualifications and experience and had certified, inter alia, that he understood that he had an overriding duty to assist the court impartially on matters relevant to his area of expertise, and that he was not an advocate for the Applicant.

The report prepared by the psychologist referred to in paragraph 4 above contained evidence relevant both to the Applicant's request for a rescheduling of the hearing and to the Applicant's claims to the Tribunal:

Particulars

A. The report of 16 November 2009 contained expert evidence that the Applicant was suffering from severe depression and clinically significant levels of anxiety and stress, diagnosed as

(a) major depressive disorder

(b) generalised anxiety disorder

(c) posttraumatic stress disorder (PTSD)

B. The report of 16 November 2009 contained expert evidence that the disorders in Particular A above were consistent with having experienced a traumatic event which continues to generate fear, distress and anticipation of further serious harm.

C. The report of 16 November 2009 contained expert evidence that:

> *(a) severe symptoms of depression and anxiety directly impinge on a person's capacity to make reasoned judgments*
>
> *(b) PTSD affects the entire functioning of an individual and the symptoms are a cause of great distress*

6. It is apparent on its fact that the report referred to in paragraph 4 above was not prepared for the purpose of seeking a rescheduling of a Tribunal hearing date.

Particulars

A. The report referred to in paragraph 4 was prepared prior to the letter referred to in paragraph 1 above being sent to the Applicant and prior to the date of the hearing being notified by the Tribunal to the Applicant.

B. The report acknowledges that it was prepared for the purposes of an application to the Department and contained a Certificate under s.177 of the Evidence Act.

7. On Saturday 28 December 2009 at 3.14pm the Tribunal sent a fax to the Applicant's representative advising that the Member reviewing your case had decided not to postpone the hearing and that the hearing would commence at 9.00am on Monday 21 December 2009.

8. On 19 December 2009 the Applicant attended St George Hospital Emergency Department at 10.41pm.

9. On 20 December 2009 at 6.17pm the Applicant's representative forwarded a report of the Applicant's visit to St George Hospital to the Tribunal,

10. On 21 December 2009 the Tribunal wrote to the Applicant's representative advising that because the Applicant did not appear before the Tribunal at the appointed time, the Tribunal had the power to determine the matter without taking any further ation to allow the Applicant to appear before the Tribunal.

Failure to Have Regard to Expert Evidence

11. The Tribunal, in breach of s.424(1) of the Migration Act 1958 ("the Act') failed to have regard to the report of 16 November 2009 in dealing with the Applicant's claims to be a person to whom Australia has protection obligations under the Refugees Convention.

Particulars

The only parts of the Tribunal's Decision Record referring to the 16 November 2009 report are at [15]-[16] and at [94]-[95] in the context of the interlocutory determination of whether or not to allow a rescheduled hearing.

Failure to Comply with s.425 of the Act

12. The Tribunal, in failing to reschedule the hearing on 21 December 2009 and determining the matter without affording the Applicant a hearing, failed to comply with s.425(1) of the Act.

Particulars

A. The requirement of a s.425(1) of the Act for an invitation to a hearing to give evidence and present arguments was not met in the circumstances where that was afforded was, even upon the Tribunal's own finding, at best only an opportunity to "attend" because of the Applicant's medical condition; Minister v SZFML (2006) 154 FCR 572 at [58]; SZHKA v Minister [2008] FCAFC 138 especially at [5]-[8]. Even a person in a coma could "attend" a hearing under this interpretation.

B. The requirement of s.425(1) of the Act for an invitation to a hearing to give evidence and present arguments was not met in the circumstances where the Applicant in fact was by reason of her medical condition under a significantly diminished capacity to participate in any oral hearing: Minister for Immigration & Multicultural Affairs v Bhardwaj [2002] 209 CLR 597 at [40]. Minister for Immigration and Multicultural and Indigenous Affairs v SCAR [2003] FCAFC 126; (2003) 128 FCR 553.

13. In determining (at [95]-[98]) that it was the Applicant's ability to "attend" a hearing which was relevant under s.425 and under s.426A of the Act and not the ability to "participate effectively" in a hearing by giving evidence and presenting arguments, the Tribunal misdirected itself, constituting an error of law and resulting in a failure to comply with s.425 of the Act.

Unreasonable, Capricious and Arbitrary Determination

The determination by the Tribunal (at [95]) that a medical certificate signed by a doctor on a pre-printed form dated 17 December 2009 stating that the Applicant was unable to attend work/school/university did not mean she was unable to appear before the Tribunal to give evidence and present arguments was reasonable, capricious and arbitrary in the circumstances of the case.

Particulars

The circumstances of the case include:

A. The diagnosis of the Applicant contained in the expert medical report dated 16 November 2009 which was certified by an appropriately qualified psychologist who acknowledged that he had a primary duty to the Tribunal, before any date had been set of the hearing in the Tribunal as constituted and which diagnosed the Applicant as suffering from major depressive disorder, generalised anxiety disorder and posttraumatic stress disorder.

B. The Applicant's attendance at and admittance overnight to St George Hospital on Saturday 19 December to Sunday 20 December 2009.

C. The Emergency Department Discharge Summary dated 20 December 2009 which contained:

> *Under the heading "Visit Information" the words "Patient has been seeing LMO in the last 6-7 months for depression…"*
>
> *under the heading "Plan", the words "Follow up with LMO – please refer to psychiatrist as seen needed".*

14. The determination by the Tribunal (at [97]) that on the evidence before it there was no medical reason why the Applicant was unable to appear before the Tribunal to give evidence and present arguments was unreasonable, capricious and arbitrary in the circumstances of the case. It was not for the Tribunal to speculate as to seriousness or otherwise of the diagnosis made by the doctor upon examination of the Applicant.

Particulars

A. The Applicant repeats the particulars in paragraph 13 above and in addition notes the failure of the Tribunal at the end of [96]

to make full and proper reference to the nature of the follow-treatment by the Applicant's general practitioner recommended by the hospital, which was "please refer to psychiatrist as seen needed" and "chase MSU m/c/s" and was not limited to treating "postural hypotension".

B. The circumstances of the case also include the absence of evidence of any medical qualifications held by the Tribunal member and the fact that the Tribunal member had never seen the Applicant, let alone examined and questioned her in a medical capacity.

15. The Tribunal acted unreasonably by disregarding in a material sense

(a) the medical certificate of 17 December 2009, (which was to the same effect as an appearance), and

(b) that part of the Discharge Summary of 20 December 2009 which recommended that the Applicant's doctor refer her to a psychiatrist as such referred was seen to be needed.

Consideration

18. At the first court date directions hearing the Applicant indicated that she wished to participate in the court sponsored legal advice scheme and a panel advisor was allocated to her. The Applicant attended a conference with the panel advisor, was provided with written advice and an amended application. At the directions hearing the Applicant was also requested to file and serve in the registry a short written outline of submissions and a list of authorities fourteen days before the hearing. The Applicant confirmed that this request had not been complied with. The Applicant did file an affidavit setting out the circumstances of her illness immediately prior to the scheduled Tribunal hearing on Monday 21 December 2009. Attached to that affidavit is a detailed medical report supplied by Dr John Jacmon, registered psychologist.

19. When invited to make oral submissions the Applicant via her interpreter stated:

If the honour can have some questions so that I can answer them.

After explaining to the Applicant the procedures of this Court and her obligation to advance her argument in seeking review of the Tribunal's decision the Applicant proceeded:

> *Yes I am telling. Last time, they asked me to come here, I couldn't attend a hearing because I was sick. On that basis, they have given me time so I can appear today and I want some justice.*

20. From the comments made by the Applicant it is abundantly clear that she had no understanding of the process of judicial review and was of the mistaken understanding that this was yet another step in obtaining a visa similar to the process for both the delegate of the Minister and the Tribunal.

I note my obligation that arises from the decision of *Abram v Bank of New Zealand* [1996] 18 ATPR 41-507 where the Full Federal Court applied the decision of the High Court in *Neil v Nott* (1994) 121 ALR 148 at 150 to the effect that where a party is not represented a court must assume a burden of endeavouring to ascertain the rights of a party which are obfuscated by their own advocacy. What a judicial officer must do to assist a litigant in person depends on the litigant, the nature of the case and the litigant's intelligence and understanding of the case.

21. In this case the Applicant has had the benefit of advice from a panel advisor who has prepared an amended application for her which is now before the Court. In these circumstances I believe the appropriate course is to consider the grounds of review set out in the amended application which have been prepared by a highly competent panel advisor.

Ground 1 – failure to have regard to expert evidence

22. This ground claims that the Tribunal breached s.424(1) by failing to have regard to the psychologist report of Dr Jacmon, dealing with the Applicant's claims to be a person to whom Australia had protection obligations. The sub-section provides that in conducting a review, a Tribunal may get any information it considers relevant, subject to the obligation to have regard to such information as it may get. However, it does not impose an obligation on the Tribunal to consider evidence put forward by an Applicant in support of his or her claims on review.

23. Ms Mitchelmore, in her written submissions, sets out the operation of this section and the supporting authorities which I believe is correctly stated. Those submissions state that an order to sustain an allegation that the Tribunal has failed to have regard to the report and that such findings constitute an error of law, the Applicant would need firstly to satisfy the Court that if it is appropriate to draw an inference that the Tribunal did not have regard to the report.

24. If the Court was satisfied that it could draw that inference, it would remain for the Applicant to establish that the report was "relevant" information, in the sense that the Tribunal was bound to take it into account, and that it would have materially affected the Tribunal decision: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 per Mason J at [39] – [40]. Section 430(1) of the Act requires that the Tribunal refer only to evidence on which its findings of fact are based: *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 per McHugh J at [64] – [65]. An omission to refer to a piece of evidence does not necessarily refer to a conclusion that it has been overlooked: *SZEHN v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1389 per Lindgren J where His Honour summarises the authority at [58].

25. Ms Mitchelmore referred the Court to the following material in support of the Minister's claim that this ground cannot be sustained. The Tribunal did refer to the psychology report in its decision record indicating that it had reviewed its contents in order to express the view that it did not advance the basis on which the Applicant was unable to attend the hearing before it on 21 December 2009 (CB 317 at [15] – [16] and CB 335 at [94] – [95]). Although these paragraphs relate to the Tribunal determining whether the Applicant should be granted an adjournment, they demonstrate its awareness of the contents of the report, which is contrary to the Applicant's submission, that the Tribunal did not have regard to its contents when considering the Applicant's claims.

26. Ms Mitchelmore argues that even if the Tribunal was found to have failed to consider the psychologist's report in the Applicant's substantive claim, jurisdictional error will only be established if the

failure to mention a particular piece of evidence supports an inference that the Tribunal failed to consider a claim that the Applicant advanced: *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 at [46] – [47]; *NABE v Minister for Immigration and Indigenous Affairs (No. 2)* (2004) 144 FCR 1 at [63]. While the plurality in *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82] approved of the statement of the Court in *Craig v South Australia* (1995) 184 CLR 163 at 179 that an administrative tribunal falls into error if, inter alia, it "ignores relevant material" Allsop J pointed out in *Rezaei v Minister for Immigration and Multicultural Affairs* [2001] FCA 1294 at [57] that:

> *Yusuf does not stand for the proposition that a relevant consideration has not been taken into account and the decision maker thereby has failed to embark on or complete his or her jurisdictional task merely because some piece of evidence which the Court thinks is relevant in the evidence or probative sense can be seen not to have been weighed and discussed.*

27. The psychological report contains an account that the Applicant gave to the psychologist about what she claimed happened to her in Bangladesh. It was not corroborative evidence given by an independent third party, but rested entirely on the Applicant's self-report. The report recorded by the psychologist did not take the Applicant's claims beyond those she made in her protection visa application. That does not make what the Applicant said to the psychologist relevant in the sense that the Tribunal was bound to take it into account. Further, assuming for present purposes that the material in the psychological report was relevant, it was not of such significance that the failure to take it into account could have materially affected the Tribunal decision: *Peko Wallsend* (supra) per Mason J at 40.

28. The psychologist report by Dr Jacmon is attached to the affidavit of the Applicant which was sworn and filed on 4 June 2010. That report essentially contained an account of the Applicant's claims of what occurred in Bangladesh in similar terms as that of her original claim before the Tribunal. The balance of the document is the psychologist's assessment of the Applicant in the diagnosis of her psychological condition. The two references in the Tribunal decision to Dr Jacmon's report and within the context of the comments made about that report

demonstrate that the Tribunal member was aware of the contents of that document. Essentially, the argument being advanced on behalf of the Applicant is that the clinical assessment and conclusion of that report are not referred to by the Tribunal in its decision. The psychologist specifically identifies the following issues:

- *[SZOES] appears to have a genuine fear that she would be subjected to sexual assaults on returning to Bangladesh*
- *She has been diagnosed with disorders consistent with having experienced a traumatic event which continues to generate fear and distress and anticipation of further serious harm*
- *Deportation to Bangladesh would likely have devastating effects on her psychological health. Her trauma is likely to intensify. Similarly her depression and anxiety are likely to worsen. The increased distress is likely to lead to general deterioration of her overall functioning. The research notes indicate that psychological impairments that result from these disorders. Treatment, if available, would not likely succeed because the disorders would be constantly fed by fear for further sexual assault or worse.*
- *Her plight and long term distress reveal compassionate circumstances supporting her protection visa.*

29. After reading the decision record and the psychologist's report, it is not apparent that the psychologist's report contains a particular piece of evidence that failed to consider a claim being advanced by the Applicant. The Tribunal's overall finding was that the claims of the Applicant were greatly exaggerated in respect to the threat imposed by the individual identified as paying her unwanted attention during the time that she attended St Phillips School. This view is at odds as to the severity of that incident relayed by the Applicant to the psychologist when setting-out her background details during the consultation. Based on the argument advanced by Ms Mitchelmore, I am satisfied that jurisdictional error has not been established and that this ground cannot be sustained.

Ground 2 – failure to comply with s.425 of the Act

30. This ground alleges that the Tribunal failed to comply with s.425 of the Act. Ms Mitchelmore in her written submissions, advances the

argument that contrary to the Applicant's contention that the Tribunal failed to consider her "significantly diminished capacity" when examining the medical evidence provided by her, including the psychological report, found that there was nothing in that material that indicated that she was "unfit to attend the Tribunal hearing" (CB 317 at [16]). Relevantly:

> *The Tribunal noted that, while the psychologist's opinion was relevant to the Applicant's ability to participate effectively in a hearing, the psychologist had likewise not suggested that the Applicant was unfit to attend a hearing before the Tribunal.*

31. It is submitted that to the extent that this ground of review rests on the Tribunal's use of the word "attend" in its determination that the Applicant was fit to "attend" a hearing, as indicating that the Tribunal was not considering the correct question. Ms Mitchelmore submits that it was clear from the context that the Tribunal was aware that the issue it had to determine was one of fitness or ability to participate in the hearing. I am not satisfied that the Tribunal provided the Applicant with a real opportunity to present argument.

32. Ms Mitchelmore advanced the argument that it was open to the Tribunal to assess the material before it, and reach the view that it did, that there was no evidence to demonstrate that the Applicant was unfit or unable to attend the hearing. Not being satisfied that what she had provided said anything about the Applicant's ability to participate in the hearing, s.425 of the Act did not require the Tribunal to press her for further information as to her psychological problems: *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12; *Minister for Immigration and Citizenship v SZNVW* [2010] FCAFC 41. Ms Mitchelmore submitted that the Applicant has not filed any evidence in these proceedings that establish she was unfit to attend the hearing: *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553. It is submitted that the Applicant's affidavit which attests to how she was feeling on the days leading up to the hearing is incapable of satisfying the Court to the requisite standard that she was unfit or otherwise unable to attend, particularly when it is read against the medical evidence that backdates to the time of the hearing.

33. The arguments advanced on behalf of the Applicant is that the requirements of s.425 of the Act are not met until the Applicant has had the opportunity to attend the hearing: *Minister for Immigration and Multicultural and Indigenous Affairs v SZFML & Anor* [2006] FCAFC 152 at [58] where their Honours Spender, French and Cowdroy JJ stated:

> ***[58]*** *It follows that where one of the conditions set out in s 425(2) is satisfied the entitlement to appear before a Tribunal established under s 425(1) either does not come into existence or ceases to exist and the Tribunal's duty to invite the Applicant to appear before it is discharged. The affording to an Applicant of an opportunity to attend a hearing and the duty to consider what is put at the hearing are elements of the review mandated by Div 4 of Pt 7. If a hearing is not afforded where it should be provided, then the duty to conduct a review is not fulfilled and the decision in such a case is infected by jurisdictional error. This is not simply a matter of procedural fairness at common law. A necessary condition for the decision-making power, mandated by the statute, will not have been satisfied.*

34. In *SZHKA v Minister for Immigration and Citizenship* [2008] FCAFC 138 per Gray, Gyles and Besanko JJ, His Honour Gray J at [5] – [8] stated:

> ***[5]*** *Section 425, like other provisions found in Div 4 of Pt VII, represents Parliament's expression, in terms appropriate for the task of reviewing decisions refusing to grant protection visas, of an aspect of the requirements of procedural fairness. If this proposition were ever doubted, it is now confirmed by the presence of s 422B, enacted subsequently to most of the other provisions in Div 4. Like the rules of procedural fairness in other contexts, the rights given to an Applicant by Div 4 are rights relating to the process by which decisions are made, rather than to the substantive content of those decisions. To say this, however, is not to diminish the importance of those rights. It has long been recognised that a statutory power, the exercise of which may affect adversely a person's interests, is impliedly subject to a requirement that the decision-maker afford procedural fairness to that person. The fact that, in the context of the Tribunal's task of reviewing decisions to refuse protection visas, Parliament has chosen to make the exercise of the Tribunal's substantive powers depend expressly upon the process rights contained in Div 4, and to spell out for that purpose what constitutes procedural fairness, does not diminish the importance of those process rights. Thus, it*

is recognised that the requirement of an invitation to a hearing, found in s 425(1), will not be met if what is actually afforded to the Applicant is not a hearing at which the Applicant is able to give evidence and present arguments relating to the issues arising in relation to the decision under review. See, for instance, Minister for Immigration & Multicultural & Indigenous Affairs v SCAR *[2003] FCAFC 126; (2003) 128 FCR 553 at [37].*

[6] *Section 425(1) has two particular features that are important in the determination of the larger issue in the present cases. The first is that the hearing to which an Applicant must be invited is for two purposes, for him or her to give evidence and for him or her to present arguments. Although the word "evidence" in relation to the material placed before an administrative decision-maker may not be entirely appropriate, the obvious intent of s 425(1) is that the Applicant should have an opportunity to provide information particularly within his or her personal knowledge to the person who will make the decision. This is an important right. No less important is the opportunity to present arguments. It is this opportunity that gives an Applicant the chance to persuade the decision-maker to accept the accuracy of the information provided by the Applicant, to reach the conclusion that that information should be regarded as more reliable, or as having more weight, than conflicting information that the Tribunal may have, or that apparent conflict between information supplied by the Applicant and that gathered by the Tribunal is not real or substantial. It is clear from the express inclusion of the right to present arguments that Parliament regarded the right to attend a hearing for this purpose, as well as for the purpose of providing information, as of great importance to an Applicant.*

[7] *The second important aspect of s 425(1) is that the evidence and arguments are to relate to "the issues arising in relation to the decision under review." The focus on this element of the subsection was the basis for what the High Court of Australia decided in* SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs *[2006] HCA 63; (2006) 228 CLR 152. For present purposes, it is not necessary to quote the whole of what the High Court said in [33]–[40], but certain points emerge clearly from that passage. First, the issues arising are not limited to the question whether the Applicant is entitled to a protection visa, but are more particular than that. Second, initially the issues will be defined by the reasons given by the person who made the decision under review, but the issues may, and often will, undergo change in the course of the Tribunal's conduct of the review of*

that decision. Third, because the Tribunal starts from the position of being unpersuaded by the material already before it, the hearing will inevitably explore the reasons why the Tribunal might not be persuaded by that material; the Tribunal will not perform its function adequately if it does not provide the Applicant with the opportunity to satisfy the Tribunal's specific reservations about the Applicant's case. Thus, to some extent at least, the issues arising in relation to the decision under review will depend upon the view that the ultimate decision-maker takes about the material before the Tribunal, and will therefore be shaped by that person's thought processes. This is not to say that the Tribunal member must expose all of his or her thought processes to scrutiny by the Applicant, as part of the hearing. The High Court recognised this in SZBEL *at [38]–[39]. The line between exposing every aspect of the reasoning process and making known to the Applicant the issues that the Tribunal member sees as arising may not be easy to recognise in all circumstances, but it does exist.*

[8] *If these propositions are accepted, it becomes difficult to see how a Tribunal member who takes up a review after an earlier Tribunal decision has been quashed can avoid the need to conduct a hearing. Simply to regard the rights given by s 425(1) as an item on a procedural check list, that the member can regard as having already been ticked off, would be for the Tribunal to abdicate its responsibility to conduct a review. Similarly, for the member to regard his or her task as being no more than to repeat the views and conclusions of the member responsible for the earlier Tribunal decision, without the jurisdictional error identified in the proceeding in which that decision was quashed, would be a failure to perform the function of reviewing the primary decision to refuse a protection visa. Once the member embarks on the process of considering the material before the Tribunal, including both the material provided originally by the Applicant and the material emerging from the earlier hearing, the Tribunal member's mind will begin to focus on reasons why he or she is not persuaded by the case that the Applicant put. If this were not so, and the member was persuaded as to the Applicant's case, then a visa would be granted and no further hearing would be required. The process of focussing on reasons for being unpersuaded will give rise to issues of the kind that the High Court identified in* SZBEL *as being issues arising in relation to the decision under review. It is these issues on which the Applicant is entitled by s 425(1) to be invited to provide information by giving evidence and to persuade by presenting arguments.*

35. Further argument is advanced on behalf of the Applicant that the requirements of s.425(1) of the Act for an invitation to a hearing to give evidence and present arguments were not met in circumstances where the Applicant in fact was, by reason of her medical condition, under a significant diminished capacity to participate in an oral hearing: *Minister for Immigration and Multicultural Affairs v SZFDE* [2006] FCAFC 142 per French J at [92] – [93]; *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] 209 CLR 597 at [40]; *Minister for Immigration and Multicultural Affairs v SCAR* (supra).

36. The material contained in the Court Book indicates that the Applicant completed a "Response to Hearing Invitation" form accepting the Tribunal's invitation to appear before it on 21 December 2009. She indicated that she required a Bengali interpreter and that she did not intend to call any witnesses or be assisted by her migration agent. That form was signed by the Applicant and returned on the requested return date. On the Friday immediately prior to the scheduled hearing, the Applicant's migration agent wrote to the Tribunal requesting an adjournment supported by various medical certificates. There was clearly a further deterioration in the Applicant's health over the weekend, requiring the Applicant to be admitted to St George Hospital. The nature of the Applicant's illness was a deteriorating psychological condition with accompanied physical manifestations. I am willing to accept that the Applicant was not sufficiently physically debilitated to prevent her physical movement and ability to attend the offices of her agent. The issue is whether the Applicant was in such a stressed psychological condition that it prevented her from attending the Tribunal hearing and being provided with a meaningful opportunity to advance her case by being able to give evidence and present argument relating to the issues arising in relation to the decision under review.

37. I acknowledge the statements made by the Applicant to her General Practitioner that she was unable to attend. This must be considered in the circumstances of a person who is not conversant in English as a first language and in a deteriorating psychological state to the extent of the onset of her physical illness. I accept that the Applicant has followed the appropriate steps in seeking an adjournment due to the onset of this psychological and physical deterioration of her health,

immediately prior to the scheduled Tribunal hearing and that her significantly diminished capacity prevented her from attending the hearing and being able to participate effectively to present evidence and arguments relating to her review.

38. I note by the Tribunal refusing to grant an adjournment, the Applicant was not provided with an opportunity to appear to give evidence: *Minister for Immigration & Multicultural Affairs v Capitly* [1999] FCA 193; *Applicant NAHF of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 140. It has been held that s.425 obligations have been breached in circumstances where an Applicant has been issued an invitation to attend a hearing but has not been able to attend due to ill health: *NAHF v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 140. I am satisfied that in this case the Applicant was not afforded an adjournment and a breach of s.425 resulted in light of her medical condition.

Ground 3 – unreasonable, capricious and arbitrary termination

39. This ground will not be addressed as I am satisfied that this matter be remitted to the Tribunal.

Conclusion

40. I am satisfied that this requested postponement of the Tribunal hearing does not appear to be a deliberate stalling tactic as the Applicant attended the First Court Date directions hearing and the final hearing in this Court, as scheduled. On both occasions she appeared with a Bengali interpreter in the presentation of her case, although I admit that she essentially relied on the issues raised in her Amended Application at the final hearing. The distressed condition that she claims to have been in at the time of the scheduled Tribunal hearing has not been repeated before this Court. Further, the Applicant had appeared on two separate occasions at the first constituted Tribunal hearing and complied with all directions made by that body.

41. The standard of the affidavits seeking an adjournment must be viewed in light of the fact that the applicant is a self-represented litigant with a complete absence of knowledge in respect of the formalities of this

Court. She was provided with a medical certificate from a legally qualified practitioner in response to a request for an appropriate document seeking to be excused from the Tribunal hearing because of her physical and psychological state she was in at the time. As the decision was made immediately after the scheduled hearing, she was not provided with time to prepare appropriate medical evidence seeking an application for an adjournment.

42. I am satisfied that the failure of the Tribunal to postpone the scheduled Tribunal hearing on 21 December 2009, after receiving a formal request for that postponement supported by medical documentation of that illness, resulted in the Tribunal falling into jurisdictional error. In the circumstances, I believe the matter should be remitted for rehearing.

I certify that the preceding forty-two (42) paragraphs are a true copy of the reasons for judgment of Lloyd-Jones FM

Associate:

Date: 9 September 2010