FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v SZNCR [2011] FCA 369

Citation:	Minister for Immigration and Citizenship v SZNCR [2011] FCA 369
Appeal from:	SZNCR v Minister for Immigration & Citizenship & Anor [2010] FMCA 45
Parties:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZNCR and REFUGEE REVIEW TRIBUNAL**
File number:	NSD 149 of 2010
Judge:	**TRACEY J**
Date of judgment:	15 April 2011
Legislation:	*Migration Act 1958* (Cth) Part 7, s 425
Cases cited:	*Minister for Immigration and Citizenship v SZNPG* [2010] FCAFC 51 cited, applied *Minister for Immigration and Citizenship v SZNVW & Anor* (2010) 183 FCR 575 considered, applied *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 cited, distinguished *SZDXZ v Minister for Immigration and Citizenship* [2008] FCAFC 109 cited, applied *SZIWY v Minister for Immigration & Anor* [2007] FMCA 1641 considered *SZNCR v Minister for Immigration & Citizenship & Anor* [2010] FMCA 45 overturned *SZNVW v Minister for Immigration & Citizenship & Anor* [2009] FMCA 1299 considered
Date of hearing:	6 August 2010
Place:	Sydney
Division:	GENERAL DIVISION
Category:	No catchwords
Number of paragraphs:	73
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IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 149 of 2010**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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

JUDGE:	**TRACEY J**
DATE OF ORDER:	**15 APRIL 2011**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The first respondent pay the appellant's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

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AND:	**SZNCR** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**TRACEY J**
DATE:	**15 APRIL 2011**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 This is an appeal against a judgment of a Federal Magistrate: *SZNCR v Minister for Immigration & Citizenship & Anor* [2010] FMCA 45. The Federal Magistrate granted an order in the nature of certiorari to quash the decision of the Refugee Review Tribunal ("the Tribunal") which had affirmed the decision of a delegate of the Minister for Immigration and Citizenship not to grant a protection visa to the first respondent (the visa applicant), and ordered that the application be remitted to the Tribunal for determination according to law.

BACKGROUND

2 The visa applicant is a citizen of Sri Lanka who arrived in Australia on 15 February 2008. On 27 March 2008 he lodged an application for a protection visa with the Department of Immigration and Citizenship. A delegate of the Minister refused the application on 20 June 2008. On 15 July 2008 the visa applicant applied to the Tribunal for a review of that decision.

3 The visa applicant claimed to have supported a political party in Sri Lanka, originally called the United National Party ("UNP"), but currently known as the United National Front ("UNF"). He claimed to have come into contact with a politician called Mervyn Silva, who

was corrupt and backed by underworld gangs and illegal business operators. He claimed that Mr Silva threatened him and told him not to work with another politician in the same party, a Mr Premadasa, who was one of Mr Silva's political rivals. The visa applicant continued to work with Mr Premadasa and not with Mr Silva. One night he was putting up political posters when he was beaten up by a mob of people loyal to Mr Silva. He was admitted to hospital for treatment of his injuries. He claimed that Mr Silva switched his allegiance to the party that had won government at the election and was appointed a Minister. He claimed that Mr Silva again threatened him in January 2000.

4 In February 2007 he became involved in a task force which had been established to stop the spread of illegal drugs. He claimed that he became aware in August of that year that Mr Silva was one of the people behind the illegal drug trade. The visa applicant and a colleague, a Mr Dayarathna, informed the police about the shipment of a large quantity of heroin. The police raided the premises where the heroin was stored and seized it. A short while later Mr Dayarathna was murdered. The day after Mr Dayarathna's body was found Mr Silva telephoned the visa applicant and threatened him. He went to the police to make a complaint about the threats made by Mr Silva, but they were unable to assist him due to the lack of evidence. The next day he was arrested by the police, and was accused of being responsible for the murder of Mr Dayarathna. He was kicked and beaten for about an hour, and made to sign a statement admitting that he had falsely accused Mr Silva of involvement in the murder. He needed medical treatment for a week following this incident.

5 He claimed that he decided to quit politics as a result of this incident. Later that same month he was attacked when walking home from work by some men who tried to kill him with a sword. He ran away but suffered cuts to his hands and legs. He did not go home but went into hiding. He claimed that thugs went to his home looking for him. Later the police came looking for him, saying that he was involved in Mr Dayarathna's murder. He decided to leave Sri Lanka.

REFUGEE REVIEW TRIBUNAL

6 The Tribunal conducted two hearings. The first took place on 23 September 2008. About two weeks later the visa applicant wrote to the Tribunal complaining about the quality of the translation provided by the Sinhalese interpreter. The visa applicant sought a further hearing with a different interpreter. The Tribunal acceded to this request. The second

hearing was held on 13 November 2008. No complaint was made about the quality of translation at this hearing.

7 The Tribunal found that certain central claims made by the visa applicant were not credible. The Tribunal did not accept that the visa applicant provided information to the police about the drug run involving Mr Silva which led to the death of the visa applicant's friend, or that he was threatened, detained and tortured. The Tribunal found that his evidence in this regard was vague and unpersuasive, incongruent, and unconvincing. The Tribunal referred to a medical certificate from Sri Lanka dated April 2008 which stated that the visa applicant had been treated for cuts, bruises and abrasions on 6 August 2007 and had given a history of a violent police assault. It did not accept this as independent evidence of the visa applicant's claim to have been tortured by the police.

8 As a result the Tribunal did not accept that the visa applicant had provided information to the police about a drug deal; that the visa applicant's friend was subsequently murdered; that the visa applicant was threatened and tortured by corrupt police; that further threats were made on the visa applicant's life; or that he was known to or of interest to Mr Silva by reason of his political activities. Accordingly, it did not accept that Mr Silva considered the visa applicant to be a political foe, or that he had organised people to harm the visa applicant in the past or would seek to harm him in the future if he were to return to Sri Lanka.

9 The Tribunal was not satisfied that the visa applicant was a person to whom Australia owed protection obligations under the Convention, and affirmed the decision under review.

FEDERAL MAGISTRATES COURT

10 The visa applicant filed an application for judicial review of the Tribunal's decision in the Federal Magistrates Court on 5 January 2009. A further amended application was filed on 15 April 2009, containing 15 grounds. The following grounds were pressed at hearing:

> *6. The RRT made jurisdictional error in dismissing the weight to be afforded to a medical certificate of April 2008 without reference to its corroborating a further medical certificate in evidence of the assault on the applicant dated 6 August 2007.*
>
> *9. The Second Respondent made jurisdictional error by so misunderstanding or misconstruing the claims and evidence of the applicant as to the nature of the information given by the applicant to the police as to constitute failure to consider*

the claims and evidence.

10. The Second Respondent made jurisdictional error by refusing to place weight on a medical certificate in April 2008 relating to injuries suffered by the applicant in August 2007 by reason only that the certificate was consistent with the applicant's claims in relation to the incident in August 2007 leading to those injuries.

11. The Second Respondent made jurisdictional error by confining consideration of whether in the future there was a real chance that the applicant would be harmed by reason of the Convention ground of political opinion to the issues of the political opinion of the applicant personally, thereby excluding the political motivation of others including those wishing to preserve their own influence or domain.

12. The Second Respondent made jurisdictional error by failing to give proper, genuine and realistic consideration to the applicant's claims in that the Second Respondent failed to consider the hypothesis that a Minister of Government involved in the drug trade and a "person of notoriety" might harm relatively minor activists seeking to mobilise the community against drugs and/or to provide useful information to the police to prosecute drug crimes.

13. The second respondent made a jurisdictional error by reason that the applicant was denied a fair opportunity to present his case because of impairment arising from the applicant's psychiatric and mental condition.

14. The second respondent made jurisdictional error by acting in breach of the second respondent's obligations under s. 425(1) of the Migration Act.

15. The second respondent made jurisdictional error by reason of its assessment of the applicant's evidence given at the hearing as if he were a person without impairment.

11 The Federal Magistrate held that grounds 9, 11 and 12 were not made out. His Honour upheld the remaining grounds.

12 In respect of grounds 6 and 10, the Federal Magistrate held that the Tribunal had overlooked the medical certificate in question, and that, as a result, it had not considered a relevant matter that went to a significant issue in the visa applicant's case. This oversight constituted a jurisdictional error.

13 The Federal Magistrate considered grounds 13, 14 and 15 together. He described the critical issue raised by these grounds as being "whether the applicant was so affected by a psychiatric disorder that he was unable to give proper evidence to the Refugee Review Tribunal at two hearings". The visa applicant had relied on a medical report by Dr Jonathan Phillips, a consultant psychiatrist. The report was dated 7 August 2009. This report was annexed to an affidavit sworn by Dr Phillips. Dr Phillips also gave oral evidence. The

opinions which he expressed were based on a single long interview which he conducted with the visa applicant on 14 July 2009.

14 Dr Phillips gave evidence to the effect that the visa applicant suffered, at the time of the Tribunal hearings, from a major depressive disorder that had arisen "in the context of political stress and frank torture in his homeland, and separation from his wife and sons". Further, the visa applicant was affected in three ways at the time of the two Tribunal hearings: he had a traumatically induced fear of authority figures, including persons within the Tribunal; his cognitive impairment associated with major depressive disorder, interfering with his capacity to think rationally, to marshal information, to give evidence and to face cross-examination and/or interrogation in the legal arena; and his ongoing problems with communication in Australian English. The Federal Magistrate found Dr Phillips to be an impressive and persuasive expert witness, and accepted his evidence in its entirety.

15 The Federal Magistrate accepted the evidence of Dr Phillips to the effect that the visa applicant was suffering from cognitive impairment associated with major depressive disorder, which interfered with his ability to give evidence at the Tribunal hearing. His Honour noted that there was no evidence that the Tribunal was aware of the visa applicant's psychiatric issues. His Honour found that, had the Tribunal been aware of the visa applicant's mental state, it may have formed different conclusions about his credibility. He observed that the Tribunal's adverse assessment of the visa applicant's credibility was the primary basis for its decision to affirm the delegate's determination. His Honour concluded, following the decision of Smith FM in *SZIWY v Minister for Immigration & Anor* [2007] FMCA 1641, that the visa applicant was denied a proper opportunity to give evidence and present arguments due to his mental state and that, as a result, the requirements of s 425 of the *Migration Act 1958* (Cth) ("the Act") had not been complied with.

APPEAL TO THIS COURT

16 The Minister's appeal challenged the Federal Magistrate's findings that a contravention of s 425 of the Act had occurred and that the Tribunal had made a jurisdictional error by failing to have regard to both of the medical certificates which had been relied on by the visa applicant.

17 The visa applicant filed a notice of contention in which he sought to uphold the Federal Magistrate's decision on the grounds that the Tribunal had erred in the manner alleged in grounds 9 and 11 which had been pressed, unsuccessfully, before the Federal Magistrate.

THE SECTION 425 POINT (GROUNDS 1 AND 2)

18 Section 425(1) of the Act imposes an obligation on the Tribunal to invite an applicant to appear before it "to give evidence and present arguments relating to the issues arising in relation to the decision under review." The Federal Magistrate held that the Tribunal had denied the visa applicant "a proper opportunity to give evidence and present arguments due to his mental state …". As a result it had failed to comply with the requirements of s 425 and thereby committed a jurisdictional error.

19 The reasoning that led the Federal Magistrate to this conclusion was as follows:

> "[110] [Dr Phillips'] expert opinion was that the applicant was affected in three ways at the time of the two Tribunal hearings:
>
> i. His traumatically induced fear of authority figures, including persons within the Tribunal;
>
> ii. His cognitive impairment associated with major depressive disorder, interfering with his capacity to think rationally, to marshal information, to give evidence and to face cross-examination and./or [sic] interrogation in the legal arena; and
>
> iii. His ongoing problems with communication in Australian English.
>
> …
>
> [112] I accept [Dr Phillips'] evidence in its entirety.
>
> …
>
> [118] There is no evidence that the Tribunal was aware of the applicant's psychiatric issues. This, then, raises the question as to whether there was a failure to comply with s.425 of the Act.
>
> [119] This was an issue considered by Smith FM in *SZIWY v Minister for Immigration & Anor*. The facts of that case are that the applicant's Legal Aid solicitor had raised concerns about the applicant's mental state at the time of submitting the application for a protection visa. However, the applicant's medical history was not conveyed by the Secretary to the Tribunal. What did happen, though, was that the applicant's solicitor repeated her concerns about the applicant's mental health in her submission to the Tribunal. The solicitor did not attend the Tribunal hearing. It

appears that the Tribunal was not made aware of the applicant's full medical history.

[120] Smith FM observed at [28]:

> *I consider that had the tribunal known of her medical condition it is probable that its evaluation of the credibility of the applicant's history would have been materially affected, and it is quite possible that the conclusions it drew might have been significantly different.*

[121] His Honour went on to consider in some detail the authorities … and held that:

> *… a breach of s.425 can occur as a result of circumstances unknown to the Tribunal and beyond its control. It also supports the Full Court's opinion at [38] as to the jurisdictional nature of the requirements implicit in s.425.*

[122] In the present case, the Tribunal was not aware of the applicant's mental health problems and, consequently, had no obligation to make its own inquiries about his mental state.

[123] In my view, the decision in *SZIWY* is relevant to the present case and, with respect, I find his Honour's reasoning persuasive.

[124] Had the Tribunal been aware of the applicant's mental state, it may have formed different conclusions about his credibility. It was the Tribunal's adverse view of the applicant's credibility that was the primary reason for its decision to affirm the delegate's decision.

[125] In my view the applicant was denied a proper opportunity to give evidence and present arguments due to his mental state and, consequently, the requirements of s.425 of the Act have not been complied with. For this reason, and for the failure to consider relevant material as set out in [87] above, I find that jurisdictional error has been made out."

20 The Minister's first ground was that the Federal Magistrate had erred, having regard to the evidence before him, in making the findings contained in paragraph [110] i) and ii) and the finding that the visa applicant was affected by these conditions at the Tribunal's hearings on 23 September and 13 November 2008.

21 The Minister's second ground was that the Federal Magistrate had erred in concluding that the Tribunal is unable validly to exercise its jurisdiction if an applicant is subsequently determined by the Court to have had a relevant mental impairment at the time of the Tribunal's hearing.

22 As will become apparent the Minister's first and second grounds are related. It will be convenient to deal, first, with ground 2.

23 It is clear, from his reasons, that the Federal Magistrate was strongly influenced by the decision of Smith FM in *SZIWY* when concluding that a contravention of s 425 of the Act had occurred. In *SZIWY* Smith FM had held that a breach of s 425 could occur if an applicant, unbeknown to the Tribunal, suffered from a mental impairment at the time of a hearing and that this impairment may have affected the outcome of the appeal.

24 Smith FM had adopted the same analysis in a later decision. In *SZNVW v Minister for Immigration & Citizenship & Anor* [2009] FMCA 1299, he followed his previous decision in *SZIWY*. The Minister appealed from Smith FM's decision in *SZNVW*. In *Minister for Immigration and Citizenship v SZNVW & Anor* (2010) 183 FCR 575 the Full Court of this Court set aside Smith FM's decision. This occurred after the Federal Magistrate had given judgment in the present proceeding.

25 In *SZNVW* Smith FM, acting on evidence from a psychologist and a psychiatrist which had not been before the Tribunal, found that the visa applicant "probably gave his evidence to [the Tribunal] when suffering from mental impairments affecting his memory, ability to recall details, and capacity to engage in discussions about his history and opinions." His Honour concluded (at [64]-[65]) that:

> "[64] I accept the submission of the Minister … that the evidence now before me does not indicate that the applicant was entirely unfit to attend the Tribunal's hearing and answer its questions … However, I am satisfied with the benefit of the additional evidence now before the Court, that the Tribunal was deprived of the opportunity to assess the evidence given by the applicant in the light of his diagnosed mental impairments, and that the applicant was denied a *"real and meaningful"* opportunity to participate in the hearing and to have his evidence fairly assessed by the Tribunal in the light of his impairments.
>
> [65] Importantly to the grant of relief in this situation, the Tribunal in its reasoning and its ultimate decision has plainly given a great deal of weight, even overriding weight, in arriving at its adverse conclusions about the applicant's credibility upon matters of demeanour, memory, and consistency. In relation to all of these matters, the applicant was denied a fair opportunity of having the Tribunal assess whether those defects were attributable to a mental impairment, or to concerns about veracity."

26 On appeal, Keane CJ (with whom Emmett J agreed) held that these findings by Smith FM did not support his conclusion that the Tribunal had failed to comply with the requirements of s 425(1) of the Act. His Honour said (at 586) that:

> "[34] It was not demonstrated that the Tribunal was wrong to regard the respondent as a witness who was not worthy of belief. It has not even been shown that the Tribunal was wrong to attribute the respondent's poor performance before

> it to dishonesty rather than to the effects of his psychological problems. At the highest for the respondent it may be said that more information relating to his psychological problems might have led to a different view of his credibility. To say only that it is possible that a different view might have been taken of the respondent's credibility had more information been made available to the Tribunal as to his psychological problems is to fall short of demonstrating that the respondent was denied a "real and meaningful" opportunity of giving evidence and presenting arguments in support of his application. In this case … it has not been established, as a fact, by the evidence subsequently adduced before the magistrate, that the Tribunal's adverse view of the respondent's credibility reflects an impaired opportunity for him to give evidence and present arguments.
>
> …
>
> [36] There was, in my respectful opinion, no foundation for the magistrate's ultimate conclusion that "the applicant was denied a fair opportunity of having the Tribunal assess whether those defects [in addition to demeanour, memory, and consistency] were attributable to a mental impairment, or to concerns about veracity." The Tribunal was not obliged to conduct an inquiry to discover whether the respondent's case might be better put or supported by other evidence. The applicant had the opportunity to adduce such evidence as to his psychological state and its impact on his 'demeanour, memory and consistency", as he wished. There is no suggestion that his capacity to make decisions in his own interests in that regard was impaired by his condition.
>
> [37] … The further evidence subsequently adduced before the magistrate was not apt to, and was not found to, demonstrate an unfitness to "give evidence and present arguments" at the hearing. Nor was this a case where the integrity of the hearing under s 425 was subverted by a want of an appreciation on the part of the Tribunal that the respondent's presentation of his case might have been adversely affected by an impaired mental state of which the Tribunal was oblivious."

27 The Minister submitted that the Federal Magistrate's conclusion that the Tribunal committed jurisdictional error by failing to comply with the requirements of s 425(1) of the Act and the reasoning that supported that conclusion cannot stand, consistently with the Full Court's decision in *SZNVW*.

28 The visa applicant submitted that ground 2, as framed in the notice of appeal, did not cover the Minister's submissions insofar as they were based on the Full Court's decision in *SZNVW*. Under cover of that objection the visa applicant accepted that *SZIWY*, after *SZNVW*, could no longer be taken as correctly expounding the law. *SZNVW* was, however, distinguishable because the Federal Magistrate, in the present case, had expressly found that the visa applicant "was denied a proper opportunity to give evidence and present arguments due to his mental state". No such finding had been made by Smith FM.

29 A semantic argument could be mounted in support of the proposition that the Minister's submissions in support of ground 2 were not framed in such a way as to make it immediately obvious that they were intended to advance that ground. Despite this the visa applicant was alerted to the Minister's argument in advance of the hearing and the issues were fully debated. The visa applicant suffered no disadvantage as a result of any uncertainty which might otherwise have arisen.

30 The argument focussed on what an applicant must prove in order successfully to establish a contravention of s 425 of the Act. Following *SZNVW* an applicant who has a diagnosed mental impairment which does not render him or her "entirely unfit" to attend a Tribunal hearing and answer questions cannot be held to have been denied a "real and meaningful" opportunity to participate in the appeal hearing. It must be demonstrated that the applicant was unfit (in the sense of being unable) to give evidence, present arguments and answer questions in the course of the hearing.

31 The visa applicant argued that the Federal Magistrate's ultimate decision in relation to s 425 was founded on an acceptance of the reasoning of Smith FM in *SZIWY and* a separate and independent finding, in paragraph [125], that the visa applicant had been "denied a proper opportunity to give evidence and present arguments due to his mental state." That mental state had been identified by Dr Phillips as including "cognitive impairment associated with major depressive disorder" which interfered with the visa applicant's capacity "to think rationally, to marshal information, to give evidence and to face cross-examination and/or interrogation in the legal arena …"

32 I am not persuaded that the Federal Magistrate made a separate finding of the kind attributed to him by the visa applicant. A fair reading of his reasons suggests that, in paragraph [125], he expressed ultimate findings based on an application of *SZIWY* to the facts of the case before him. The reference to the visa applicant's "mental state" is, it is tolerably clear, a reference back to what was said in paragraph [122] about the visa applicant's "mental health problems" and "his mental state" and to paragraph [124] which deals with the possible effect of the visa applicant's "mental state" on the Tribunal's assessment of his credibility. The visa applicant did not invite the Federal Magistrate to uphold grounds 13, 14 or 15 on a free standing ground that he was unfit to pursue his case before the Tribunal. His submission to the Federal Magistrate was that Dr Phillips's evidence supported a favourable finding for

the reasons expounded in *SZIWY*. The Federal Magistrate recorded that the submission was that "he was suffering from a major depressive disorder which *interfered* with his capacity to think rationally, to marshal information and to face questioning, these matters being to the applicant's considerable disadvantage": at [63]. (emphasis added). Nowhere in his reasons did the Federal Magistrate record that he had been invited to make a favourable finding on an independent basis and he did not, expressly, make any such finding. For reasons which I have already given, no such separate finding is, implicitly, to be found in paragraph [125].

33 It should be noted, in passing, that the Federal Magistrate's penultimate conclusion in paragraph [124] is plainly consistent with *SZWIY* but inconsistent with *SZNVW*. The mere possibility that the Tribunal, had it been aware of an applicant's mental state, may have formed a different conclusion about the applicant's credibility is not sufficient to establish a contravention of s 425(1) of the Act.

34 It is also to be observed that Dr Phillips went no further than finding that the visa applicant's "mental state" had *interfered* with his capacity to advance his case before the Tribunal. Dr Phillips did not opine that the visa applicant was *unfit* to prosecute his application.

35 I return now to ground 1. I do so lest I be mistaken in upholding ground 2.

36 The Minister challenged the Federal Magistrate's acceptance of Dr Phillips's evidence for a number of reasons. The Minister had submitted, before the Federal Magistrate, that an examination of the transcripts of the hearings before the Tribunal disclosed that the visa applicant had given coherent and responsive answers to questions put to him and had, at no time, suggested that he was labouring under any disability, mental or otherwise. Dr Phillips had acknowledged that, in forming his opinion about the visa applicant's mental state at the time of the hearing, he had not read either of the transcripts. He had, however, relied on the visa applicant's account of events in Sri Lanka which was contained in a statutory declaration attached to his protection visa application. The Tribunal had declined to accept many of these claims. Dr Phillips had not read the Tribunal's reasons for decision.

37 In these circumstances the Minister submitted to the Federal Magistrate that it was not open to him to find that the visa applicant was unfit to prosecute his case before the Tribunal. The Federal Magistrate's reasons failed to deal with any of these submissions.

38 The visa applicant submitted, in this Court, that ground 1 amounted to a challenge to findings of fact made by the Federal Magistrate at [110] and [112]. The challenge must, it was submitted, fail because Dr Phillips had been found to be an impressive witness and the Federal Magistrate was entitled to accept and act on his evidence.

39 The Federal Magistrate may not have felt it necessary to deal with the Minister's objections to the acceptance of Dr Phillips's evidence because of the favourable view which he took of the approach taken by Smith FM in *SZIWY*. Whatever the reason, it was not open to the Federal Magistrate, consistently with *SZNVW*, to make the findings about the visa applicant's "mental state" without dealing with the Minister's submissions. The Minister was entitled to rely on the transcript of the hearings before the Tribunal in order to contradict the visa applicant's contention that he was suffering from mental incapacity at the time of the hearings. Whilst Dr Phillips was, no doubt, as the Federal Magistrate found, an impressive witness, his opinion about the visa applicant's mental state during the hearings was based on an interview conducted some nine months after the second of the two hearings had taken place. If the Minister was right and the transcript of the hearings (which Dr Phillips had not read) demonstrated that the visa applicant was able properly to represent his interests before the Tribunal, this evidence would have tended against any finding that he was unfit (in the *SZNVW* sense) to participate in the hearings. This evidence could not be ignored.

40 In any event, for the reasons already given, even if the Federal Magistrate's acceptance of Dr Phillip's evidence is unimpeachable, that evidence does not establish that the visa applicant's condition was sufficiently serious to meet the standard required by *SZNVW*.

THE MEDICAL CERTIFICATES (GROUND 3)

41 As already noted the Federal Magistrate had upheld the visa applicant's challenge to the Tribunal's decision, in part, because he considered that the Tribunal had failed to take into account and give weight to a medical certificate on which the visa applicant had relied.

42 By letter, dated 29 April 2008, the visa applicant submitted to the Department two medical reports which he said had been obtained from Sri Lanka in order to support his application. The documents were said to be scanned copies of originals. Both documents are on the letterhead of the "Medical Center – Kathaluwa". The author of both documents was Dr U Pemadasa.

43 The first letter was hand written and dated 6 August 2007. It was addressed to the manager of the hotel Eva Lanka where the visa applicant was then working. It certified that the visa applicant was "treated for a trauma (due to an assault)" and certified a need for the visa applicant to have 14 days leave.

44 The second letter was dated 27 April 2008. It was typed. It was addressed "to whom it may concern". The letter read:

> "This is to certify that I had medically treated and healed from 06/08/2007 to 20/08/2007 for the cuts, bruises and abrasions of [the visa applicant] due to physical assault.
>
> He mentioned that he was a victim of violent police assault.
>
> …
>
> This letter is been [sic] issued at his request."

45 In its reasons for decision the Tribunal noted:

> "… that the applicant has provided a brief medical certificate from Sri Lanka dated April 2008 indicating that the applicant was seen for cuts, bruises and abrasions on 6 August 2007. The certificate includes the notation that the applicant 'mentioned that he was a victim of violent police assault.' Given that the certificate repeats the applicant's claim the Tribunal does not place weight on this document as independent evidence of the applicant's claim that he was tortured by police."

The Tribunal made no specific reference to the handwritten certificate dated 6 August 2007.

46 The Tribunal's decision not to place weight on the April 2008 certificate as independent evidence of the visa applicant's claim that he had been tortured by the police was one of the reasons for it not accepting his claim to have been mistreated by the police.

47 The Federal Magistrate considered that the August 2007 certificate provided corroborative evidence of the visa applicant's claim to have been assaulted the previous day by the police. It could not, he held, "be so lightly dismissed that the very existence of the

document is never even mentioned [in the Tribunal's reasons]": at [86]. He concluded (at [87]) that:

> "In my view the Tribunal has overlooked this medical certificate and has therefore not considered a relevant matter that goes to the applicant's case. In my view this oversight of a relevant piece of evidence is a jurisdictional error."

48 The Minister's third ground challenged the Federal Magistrate's conclusion that the Tribunal had not had regard to both of the medical certificates which had been tendered by the visa applicant. Further, and in the alternative, the Minister alleged that the Federal Magistrate had erred by failing to distinguish between a relevant piece of evidence and a relevant consideration (or an integer of a claim). He contended that the failure of a decision-maker to mention evidence in its reasons does not, of itself, amount to jurisdictional error and that an error by the Tribunal in finding facts (had there been one) would not constitute jurisdictional error.

49 The visa applicant contended that the Federal Magistrate was correct in holding that the August 2007 certificate had been overlooked by the Tribunal and that, having regard to its significance in supporting the visa applicant's case, the oversight constituted jurisdictional error. He accepted that it was not necessary for a decision-maker to refer to every piece of evidence in giving reasons for its decision, but submitted that a failure to refer to some evidence may indicate that that evidence was not considered material by the decision-maker. In such cases the failure will amount to jurisdictional error because, so it was argued, such failure would prevent a review of the kind required by Part 7 of the Act being undertaken.

50 I do not accept that the Tribunal overlooked the August 2007 certificate. Such an oversight is highly unlikely given that the two certificates were provided to the Tribunal under cover of the same letter. Moreover, the April 2008 certificate specifically referred to the treatment provided by Dr Pemadasa to the visa applicant between 6 and 20 August 2007. The more likely explanation is that the Tribunal considered that the April 2008 certificate was the more comprehensive of the two and that, because it incorporated all of the information contained in the August 2007 certificate, it was unnecessary to refer to that earlier document.

51 The visa applicant's case was not prejudiced by the Tribunal's failure specifically to advert to the August 2007 certificate. The Tribunal did not reject his claim to have suffered cuts, bruises and abrasions shortly before 6 August 2007 or that those injuries were sustained

as a result of an assault. Nor did the Tribunal fail to take the information contained in the document into account. The only item of information, to which the Tribunal was not prepared to accord any weight, appeared in the April 2008 document but not in the earlier certificate. That item was the visa applicant's claim that he had been violently assaulted *by the police*. The Tribunal was not prepared to accept that the visa applicant's statement to his doctor that the police had caused his injuries was supportive of that claim given that the visa applicant was the source of the claim and that the Tribunal had, earlier in its reasons, rejected this and other claims on credibility grounds.

52 In *SZDXZ v Minister for Immigration and Citizenship* [2008] FCAFC 109 the Full Court considered a case in which it was alleged that the Tribunal had failed to consider one of three documents which had been forwarded to the Tribunal by the applicant's lawyers under cover of the same letter. In its reasons the Tribunal had referred to two of the documents but not the third. The Tribunal's reasons had, however, given consideration to the issues dealt with in the third document. The Court said (at [25]) that it was:

> "… regrettable that the Tribunal referred to only two of the three letters sent to it under cover of the letter from the appellants' lawyers … We agree that the express reference to two only of the three letters is capable of supporting an inference that the Tribunal did not consider the Police letter. However, the appellants are obliged to do more than point to material capable of supporting an inference that the Tribunal did not consider the Police letter. It is necessary for the appellants to demonstrate that, having regard to all of the evidence and other material before the Court, it would be appropriate to draw that inference; that is, the appellants must demonstrate, on the balance of probabilities, that the Tribunal did not consider the Police letter."

53 For the reasons which I have given, I have concluded, in this case, that the visa applicant has failed to demonstrate that the Tribunal did not consider the August 2007 certificate.

54 Even if the Tribunal had (contrary to my view) overlooked the August 2007 certificate, such an oversight, in the circumstances of this case, did not constitute jurisdictional error. As North and Lander JJ observed in *Minister for Immigration and Citizenship v SZNPG* [2010] FCAFC 51 at [28]:

> "…an error of fact based on a misunderstanding of evidence or even overlooking an item of evidence in considering an applicant's claims is not jurisdictional error, so long as the error, whichever it be, does not mean that the [Tribunal] has not considered the applicant's claim …"

There can be no doubt that the Tribunal considered and rejected the visa applicant's claim to have been assaulted by the police in early August 2007.

MISUNDERSTANDING OF CLAIMS AND EVIDENCE (NOTICE OF CONTENTION GROUND 1)

55 The visa applicant alleged that the Tribunal had misunderstood or misconstrued his claims and evidence relating to the nature of certain information which he said he had given to the police.

56 The visa applicant gave evidence to the Tribunal that he was a member of a group of concerned citizens (which he described as a "taskforce") who sought to prevent drug trafficking in the area in which he lived. From time to time the taskforce passed on information to the police about the activities of drug traffickers. He said that, in early August 2007, a businessman friend had told him that an associate of a government minister, Mr Silva, would be bringing drugs from Colombo to the south of the country. The businessman had not wished himself to inform the police and had told the visa applicant because he knew him to be a member of the "taskforce". The visa applicant had passed the information to the police and the associate had been arrested. The traffickers had become aware that the visa applicant had provided the police with the tip-off and had sought to kill him. He escaped and came to Australia. He feared that he would be killed by the drug traffickers were he to return.

57 In order to understand the argument developed by the visa applicant it is necessary to record part of his evidence to the Tribunal at the second hearing. In the following exchanges "M" refers to the Tribunal member and "I" to the visa applicant who was giving evidence through an interpreter. The member commenced by asking:

> "M: Now you said that you informed the Police.
>
> I: In relation to what?
>
> M: In relation to when you had that information about the drugs coming down south of Colombo.
>
> I: Yes.
>
> M: And the Police acted on that information.
>
> I: Yes.

M: And that as a result of that the person was arrested, is that correct?

I: Certainly, yes.

M: How many people were arrested?

I: To my knowledge two of them.

M: And how do you know?

I: Narcotics told us.

M: So you have, you know people in narcotics?

I: Yes, yes.

M: So when did they tell you?

I: The following day after the arrest.

M: And how did they tell you?

I: They said that the (sic) thanked us for the information that we gave and based on that information they were able to capture.

M: And what was the information?

I: The information that we provided was to the effect that a certain individual was involved in transporting drugs to a certain area.

M: Is that exactly what you told them?

I: Within these days, within these days in a month a person by the name of Kuduajith, a person by the name of Kuduajith will be transporting a certain amount of drugs from Colombo to Matara.

M: Is that all the information?

I: Yes, that's all. That's what we got, that's the information that we received."

58 In dealing with this evidence the Tribunal said that:

"[87] The Tribunal does not accept that the applicant had information about a drug run, which involved Mr Silva, and which the applicant passed on to the police … The Tribunal found the applicant's oral evidence about these claims to be unpersuasive in several aspects such that when considered collectively they lead the Tribunal to reject these claims.

[88] The applicant was vague and unpersuasive about the information which he claims to have passed on to the police and which he claims enabled them to carry out a successful drug raid. As discussed with the applicant at the hearing the applicant claimed that the information passed to the police enabled them to carry out a drug raid. When pressed as to the content of this information the applicant was vague and ambivalent in his responses, stating

> that he did not know the source and suggesting that they only informed the police that some drugs would arrive from Colombo in a day or so."

59 The Federal Magistrate rejected the ground that is now relied on. His Honour said (at [91]) that:

> "Whilst the Tribunal's summary of the applicant's role in the drug taskforce appears to make light of his claims, I am not of the view that the Tribunal has been shown to have misconstrued or misunderstood his claims. The applicant appears, with respect, to be trespassing onto the ground of challenging the Tribunal's factual findings, which goes into the area of merits review."

60 The visa applicant submitted that the Tribunal's statement that he "only informed the police that some drugs would arrive from Colombo in a day or so" did not merely make light of his claims but was "plainly wrong". He accepted that it was open to the Tribunal to accept or reject his account. The Tribunal could not, however, disregard the possibility that the "taskforce" had started to pose a potential danger to the drug traffickers who had a lot to lose and whose response might well have been disproportionate to the threat posed by what might otherwise appear to be an innocuous group of concerned citizens. This was not an attempt to have the Federal Magistrate engage in merits review; it constituted a failure by the Tribunal to consider the claim.

61 In *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at 20 [63] the Full Court said:

> "… that a failure by the Tribunal to deal with a claim raised by the evidence and the contentions before it which, if resolved in one way, would or could be dispositive of the review, can constitute a failure of procedural fairness or a failure to conduct the review required by the Act and thereby a jurisdictional error. It follows that if the Tribunal makes an error of fact in misunderstanding or misconstruing a claim advanced by the applicant and bases its conclusion in whole or in part upon the claim so misunderstood or misconstrued its error is tantamount to a failure to consider the claim and on that basis can constitute jurisdictional error."

On the other hand, as North and Lander JJ held in *SZNPG*, an error of fact based on a misunderstanding of evidence will not constitute jurisdictional error unless it leads to the Tribunal failing to consider an applicant's claim.

62 It is not clear to me why the Federal Magistrate referred to the Tribunal having, in his opinion, made light of the visa applicant's claims concerning his (the applicant's) role in the taskforce. Ground 9, with which the Federal Magistrate was dealing, alleged that the Tribunal had erred by misunderstanding or misconstruing the visa applicant's claims or evidence "as to the *nature of the information*" given by the visa applicant to the police. The

error was not said to have arisen in relation to the Tribunal's treatment of evidence concerning the visa applicant's "role in the drug taskforce."

63 The Tribunal did not make light of the visa applicant's claims relating to the nature of the information given by him to the police. It considered the evidence to be vague and unpersuasive and, therefore, did not accept it. The evidence which the visa applicant gave to the Tribunal appears above at [57]. It may fairly be characterised as "vague and unpersuasive". The visa applicant claimed to have told the police no more than that a named person would be transporting drugs from Colombo to Matara "within these days in a month." That was "all the information" which was conveyed and yet it was said to have enabled the police to carry out a successful drug raid. The Tribunal did not misunderstand or misconstrue the visa applicant's claim about the nature of the information he had given to the police. It dealt with it on the basis of the evidence which the visa applicant had given.

64 In this Court the visa applicant's argument focussed not on the nature of the information given to the police, but rather on what were said to be the consequences of the provision of that information. Once the Tribunal had concluded that the visa applicant had not given evidence to the police it could not have, logically, concluded that his life was threatened by drug traffickers because he had done so. The Tribunal was not invited to conclude that the visa applicant faced harm from the drug traffickers because they mistakenly believed that he had given evidence to the police.

65 This ground must fail.

A REAL CHANCE OF PERSECUTION (NOTICE OF CONTENTION GROUND 2)

66 The visa applicant argued that the Tribunal had erred by confining its consideration of the Convention ground of political opinion to *his* opinions thereby failing to have regard to the possible political motivation to harm him which was harboured by others.

67 The error was said to have emerged from the Tribunal's reasoning and conclusions (at [94-96]) that:

> "[94] Accordingly, for the reasons set out above, the Tribunal does not accept that the applicant was involved in providing information to the police about a drug deal and that subsequently his friend was murdered, the applicant was threatened and tortured by police and further threats were made upon his life.

> As the Tribunal does not accept these claims it does not accept that the applicant's life is in danger from associates of Mr Silva on his return to Sri Lanka by reason of these claimed events.
>
> [95] The Tribunal accepted that the applicant has supported and is a member of the UNP party from some time back. The Tribunal accepts that the applicant may have supported Mr Premadasa rather than Mr Silva in the late 1990s. However, the Tribunal does not accept that the applicant is known to or of interest to Mr Silva by reason of the applicant's political activities with the UNP. The Tribunal makes this finding on the basis that the applicant did not substantiate this claim in giving his oral evidence over and above a general reference to Mr Silva seeking political revenge.
>
> [96] As the Tribunal does not accept that the applicant is considered by Mr Silva to be a political foe the Tribunal does not accept that Mr Silva organised associates to harm him in the past or that Mr Silva will seek to harm the applicant on his return to Sri Lanka by reason of the applicant's political opinion."

68 The Federal Magistrate did not find that the Tribunal had erred in dealing with this aspect of the visa applicant's claim. He held at [97] that:

> "I am not of the view that this ground has been made out. I agree with the submission by counsel for the Minister that the Tribunal considered what motivation Mr Silva might have to harm the applicant. The Tribunal found at paragraph 96 that it did not accept that the applicant was considered by Mr Silva 'to be a political foe' and, in my view, this finding encompasses Mr Silva's motivations for harming the applicant by reason of political opinion, whether that political opinion was that of Mr Silva or the applicant."

69 In this Court the visa applicant submitted that the Tribunal had confined its attention to the question of whether he might be harmed by Mr Silva because Mr Silva considered him to be a political opponent. In doing so, so it was submitted, the Tribunal had ignored the possibility that Mr Silva was motivated to harm the visa applicant in order to protect his own (Mr Silva's) political position. The visa applicant cited, by way of example, the possibility of a politician threatening harm to an investigative journalist who he feared might expose him. This, it was submitted, could amount to persecution even if the journalist had no political views or even shared the same political opinions with the politician.

70 The Minister accepted that the political opinion ground could be made out if it were established that the alleged persecutor acted for his or her own political reasons. He submitted, however, that the Tribunal had taken this possibility into account.

71 An examination of the Tribunal's reasons, set out above at [67], supports the Minister's submission. The Tribunal commenced by rejecting the visa applicant's claim to

have given information to police concerning drug dealing by associates of Mr Silva. This was the only reason suggested by the visa applicant as to why it was that associates of Mr Silva might wish to harm him should he return to Sri Lanka. The Tribunal then turned its attention to a general allegation, made in evidence by the visa applicant, that Mr Silva would seek political revenge against him. The Tribunal accepted that, in the late 1990s, the visa applicant had supported another politician in preference to Mr Silva. It did not, however, accept that the visa applicant was presently considered, by Mr Silva, to be "a political foe". The Tribunal can thus be seen to have considered and rejected the visa applicant's claims that Mr Silva might seek to harm him because Mr Silva perceived him to be a political opponent *and* because Mr Silva was concerned to protect his own political position which the visa applicant might threaten by alleging that Mr Silva was associated with drug traffickers.

72 This ground must also fail.

DISPOSITION

73 The Minister's appeal will be allowed. The appellant should pay the Minister's costs of the appeal.

I certify that the preceding seventy-three (73) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tracey.

Associate:

Dated: 15 April 2011