FEDERAL MAGISTRATES COURT OF AUSTRALIA

MZXRE v MINISTER FOR IMMIGRATION & ANOR *[2009] FMCA 99*

MIGRATION – Review of Refugee Review Tribunal's decision – Tribunal conducted a full hearing but later dismissed the review application for want of jurisdiction – by consent, on review of that decision to FMC the matter was remitted to the Tribunal for determination on the merits – the same member determined the matter without a further hearing – applicant advised of right to a further hearing by registered post which was not collected – prior to hand down of its decision the Tribunal was advised by applicant that he was not given a further hearing – hand down proceeded – whether entitled to a new hearing – procedural fairness – whether remittal from Federal magistrates Court necessitates a new hearing – discussion of *SZHKA v MIAC* – review dismissed.

Migration Act 1958 (Cth), ss.415, 420, 421, 422B(2), 422B(3), 424A, 424C(1), 424C(2), 425, 425(2(c), 441A(4)(c), 441C(4) and 474(2)
Migration Amendment (Review Provisions) Act 2007; Item 33

Minister for Immigration & Multicultural Affairs v Bhardwaj (2002) 209 CLR 597
NBKM v Minister for Immigration & Citizenship [2007] FCA 1413
SAAP v Minister for Immigration, Multicultural and Indigenous Affairs (2005) 215 ALR 162
SZBJL v Minister for Immigration and Citizenship [2007] FCA 1238
SZDKOV v Minister for Immigration & Citizenship [2007] FMCA 1807
SZEPZ v Minister for Immigration and Multicultural Affairs (2006) 159 CFR 291
SZHKA v Minister for Immigration and Citizenship [2008] FCAFC 138
SZILQ v Minister for Immigration & Citizenship [2007] FCA 942
SZJRH v Minister for Immigration & Citizenship [2007] FMCA 2037

Applicant:	MZXRE
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	MLG 273 of 2008

Judgment of: O'Dwyer FM

Hearing dates: 15 July & 31 October 2008

Delivered at: Melbourne

Delivered on: 17 February 2009

REPRESENTATION

Counsel for the Applicant: Mr Fernandez

Solicitors for the Applicant: Mano Associates

Counsel for the Respondents: Ms Walker

Solicitors for the Respondents: Clayton Utz

ORDERS

(1) That the application filed on 5 March 2008 is dismissed.

(2) The Applicant pay the First Respondent's costs.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 273 of 2008

MZXRE
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. By his application the applicant seeks to review a decision of the Refugee Review Tribunal (the Tribunal) dated 18 January 2008 by which decision the Tribunal affirmed an earlier decision of the first respondent's delegate to refuse to grant the applicant a protection visa.

2. Because the Tribunal's decision is a privative clause decision within the meaning of s.474(2) of the *Migration Act 1958* (the Act), to be successful it is necessary for the applicant to show that the Tribunal made a jurisdictional error.

3. A hearing took place before me on 15 July 2008 and my judgment was reserved. Subsequent to that date, a decision of the Full Court of the Federal Court of Australia (*SZHKA v Minister for Immigration and Citizenship* [2008] FCAFC 138) (*SZHKA*) was handed down (5 August 2008) which touched upon some of the issues before me in July.

Accordingly, the parties were afforded an opportunity to make further submissions as to how, if at all, that Full Court decision affected the proceeding before me.

Background

4. The applicant arrived lawfully in Australia on 25 November 2006. He is a citizen of Malaysia and prior to his arrival in Australia was resident in Malaysia. He is a Christian and the basis for his claim for protection was his fear of persecution for reasons of his religion.

5. The applicant claimed that on 5 September 2006:

- his sister and her daughters had been present in a church in Malaysia that had been surrounded by Muslims;
- he had gone to the church to help them;
- on his way to the police station to report the incident he had been assaulted;
- the police had refused to take any details and had handcuffed him and detained him for several hours; and
- he filed a complaint about the police treatment, after which he claimed he received a threatening phone call.

6. After this incident the applicant left for Australia in fear.

7. The Tribunal (the First Tribunal) held a hearing at which the applicant gave oral evidence. At that hearing the First Tribunal indicated that it had doubts about whether it had jurisdiction to determine the application for a review, but, nonetheless, decided that it would hear the evidence on the merits of the applicant's claim in case it determined it did have jurisdiction. By a decision dated 8 June 2007 the application for review was refused by the First Tribunal on the basis of a lack of jurisdiction to entertain it. The basis for that finding was the applicant’s late filing of his application for review of the delegate’s decision in breach of time limits imposed.

8. The First Tribunal's decision came before this Court on 21 June 2008 on an application for review. On that date orders were made by consent remitting the matter to the Tribunal for consideration according to law. It was conceded by the first respondent that the First Tribunal had erred in concluding that it had no jurisdiction to consider the application for review.

9. The Tribunal then wrote, by a letter dated 29 October 2007, to the applicant informing the applicant that his case would be allocated to a new member (that is someone other than the First Tribunal member who determined that there was no jurisdiction) and that the new member may seek further information from him and invite him to a hearing.

10. The letter also informed him that all future correspondence would be sent to the address he had provided to the Tribunal. Although the applicant received this letter, he did not respond to it, or provide any further information to the Tribunal. The applicant, instead, he says, waited for notification of the new hearing date.

11. On 5 November 2007 the Tribunal again wrote to the applicant. By that letter he was invited to provide any additional evidence he considered relevant. Pertinently, the letter informed the applicant that the Tribunal would take into account written and oral evidence previously given and there would not be a further hearing unless the applicant considered it appropriate. The letter went on to say that should the applicant believe a further hearing was necessary he could request one. A deadline of 29 November 2007 was set for the filing of any further material.

12. That letter was sent by registered post to the address the applicant had provided the Tribunal, but was returned to the Tribunal with a notification that it had not been collected. The applicant argues that the Tribunal was on notice that he was not informed of his option to request a further hearing.

13. On 21 January 2008 the Tribunal again wrote to the applicant informing him that the Tribunal's decision was to be handed down on 8 February 2008. He was invited to attend. Apparently in response, on 7 February 2008 the applicant provided a statutory declaration that

complained that the applicant had not been invited to a hearing. He also provided copies of three media reports concerning incidents in Malaysia associated with religious persecution.

14. There appears to be no issue that the Tribunal considered this statutory declaration and the further material, and, having done so, nonetheless handed down its decision, which decision is the subject of this review application, on 8 February 2008.

The Tribunal's Decision

15. The Tribunal, constituted by the same member as the First Tribunal, affirmed the decision of the delegate to refuse to grant the applicant a protection visa. The Tribunal in reaching its decision relied upon independent Country Information that indicated that an incident, such as the one described by the applicant, had occurred at a church in Silibin on 5 September 2006, but contrary to the applicant's initial description of events, police and security forces arrived promptly and encircled the church, protecting the occupants. They then dispersed the crowd without further trouble.

16. This incidence was one of some notoriety and the Prime Minister of Malaysia had publicly stated that those responsible would be punished. This Country Information was manifestly different from the story told by the applicant to the Tribunal.

17. The Tribunal did not accept as "truth, or even plausible, the applicant's claimed involvement in this incident." In reaching this conclusion the Tribunal made observations to the effect that the applicant's evidence was vague and inconsistent in important respects; the applicant's account lacked any supporting evidence and the applicant's attempts to answer the concerns raised by the Tribunal about his evidence were "suspicious and disingenuous".

18. The Tribunal rejected the applicant's testimony about the crucial facts said to give rise to a well founded fear of persecution. The Tribunal noted the applicant's submission that he had never suffered any similar incident in his lifetime in Malaysia and that he and his family had not been mistreated either before or after this incident.

19. It was also noted by the Tribunal that, on the basis of Country Information, it was satisfied that this incident was an isolated one and that while Christians constitute a minority in Malaysia, all enjoyed the protection of the State authorities.

20. The Tribunal concluded that the applicant had not suffered in the past for reasons of his religion, or any other Convention related ground; nor did he have a fear of persecution for any Convention related reason; nor was there any real chance of the applicant being persecuted now or in the reasonably foreseeable future for any Convention related reason if he was to return to Malaysia.

The Applicant's Grounds for Review

21. The applicant set out 5 grounds for review in his initial written submissions and added a further ground under s.422B(3) of the Act in his second written submissions.

The first ground

22. The first ground for review was an alleged denial of procedural fairness and natural justice arising from the fact that, as evidenced by the applicant's statutory declaration on 7 February 2008, he did not receive any notice from the Tribunal regarding a hearing date, which concern appears to have been ignored by the handing down of the decision on 8 February 2008.

The second ground

23. The second ground alleges the Tribunal made a jurisdictional error by breaching s.425 of the Act by not providing a fair hearing as evidenced by an apparent failure of the Tribunal to enquire as to why the registered letter was returned to the Tribunal, which failure supports the contention of the applicant that the offer to seek a hearing was "no more than a hollow shell".

The third ground

24. The third ground alleged a breach of Div 3 of Pt VII of the Act in that the same member whose decision was earlier remitted by the Federal Magistrates Court was appointed to determine the review of the delegate's decision.

The fourth ground

25. The fourth ground alleges a breach of Div 4 of Pt VII of the Act in that the Tribunal utilised the evidence from a previous hearing for its decision and attempted to discuss that evidence gained earlier.

The fifth ground

26. The fifth ground alleged a failure to act under the Convention in that the Tribunal failed to consider the applicant's claim in substance, but only looked at it from a simplistic viewpoint.

Ground based on s.422B(3)

27. In the written and oral submissions made subsequent to the handing down of *SZHKA*, the applicant also submitted that the provision in s.422B(3) of the Act militated against the earlier submission made by the first respondent that s.422B was an exhaustive statement of the requirements of natural justice in relation to matters coming under the Act. The applicant highlighted that s.422B(3), although it became operative from 29 June 2007, should nonetheless have application in relation to the decision under review.

28. In summary, s.422B(3) provides for a Tribunal to act in a way that is fair and just. The applicant, as I understood the submission, argued that having regard to all the circumstances giving rise to an expectation on the part of the applicant that he would be informed (effectively) of a new hearing date before a new member, that it would not be fair and just to allow the decision to be made before the same member, when it should have been before a different member.

29. I have no hesitation in rejecting the submissions based upon s.422B(3) because that provision, which was introduced into the Act by Item 17 of Sch 1 to the *Migration Amendment (Review Provisions) Act* 2007 also provided in Item 33 of that schedule that:

> *The amendments made by this schedule apply to an application made, after this item commences; ...*
>
> *(b) under s.412 of the Migration Act 1958 for review of an RRT-Reviewable Decisions.*

30. As stated, s.422B(3) commenced on 29 June 2007 whereas the application the subject of this review was an application made under 412 on 18 December 2006. (See *SZBJL v Minister for Immigration and Citizenship* [2007] FCA 1238 at [24]). Accordingly, s.422B(3) has no application to this proceeding.

The applicant's contentions

31. The applicant in his written and oral contentions, in broad terms, argued that as a matter of procedural fairness the applicant should have been afforded a new hearing to which he should have been given an effective invitation that would have allowed him to attend. Further, the new hearing should have been before a new member as earlier advised in correspondence from the Tribunal. The applicant contends that the Full Court decision in *SZHKA* reinforces the applicant's contention that judicial error was committed by the Tribunal in having the same member determine the application without affording a further hearing as promised.

32. The applicant contends that *SZHKA* stands for the proposition that when a matter is remitted to the Tribunal by this Court, automatically the Act requires the remitted hearing to be conducted by a different member and that reliance cannot be placed upon the evidence elicited at the first hearing.

The first respondent's contentions, and the determination of issues

33. I am persuaded after reading the first respondent's written submissions and hearing oral submissions in support of them, that the position of the first respondent is the one that, in the circumstances of this case, sets out the law to be applied and, when applied, leads to the inevitable conclusion that no jurisdictional error was made by the Tribunal.

34. In addressing each of the issues as they appear to have been raised by the applicant, I have, in large part, adopted the first respondent's written submissions as they articulate, in my view, the correct analysis of the law and the application of it to the facts of this case.

The first ground

35. In relation to the first ground, the applicant alleges that there was a failure to take into account the statutory declaration and a failure to grant a rehearing. The statutory declaration, as I understand the applicant's case, brought to the attention of the Tribunal the fact that the applicant was not informed of the offer of a rehearing, and was precluded from presenting further argument because there had not been a rehearing.

36. Implicit in the applicant's position is that the failure to take into account the statutory declaration and act upon it in a way that would ensure a rehearing amounted to a breach of procedural fairness and a breach of natural justice.

37. In the letter of 5 November 2007 the Tribunal, as required by s.424B(2) of the Act, specified a date by which further information should be provided. The applicant failed to provide further information by the specified date. He did provide further information on 7 February 2008, after the Tribunal had made its decision, but one the day before the decision was to be handed down.

38. Section 424C(1) of the Act provides that should a person who has been invited to provide additional information and does not before the time specified, then the Tribunal will make a decision without taking any further action to obtain the additional information. In those

circumstances, the Tribunal was not required to take into account the further material provided by the applicant on 7 February 2008. (See *SAAP v Minister for Immigration, Multicultural and Indigenous Affairs* (2005) 215 ALR 162 at [19]).

39. In any event, the Tribunal in fact had regard to the contents of the statutory declaration and media reports attached. It is evident from the material before me that the member did consider the "submissions and attachments" provided by the applicant, and having considered them, concluded that that additional material did not provide grounds for recalling the decision.

40. In respect of the failure to hold a further hearing, I am of the view that there is no statutory requirement that the Tribunal hold a further hearing upon remittal in the circumstances of this case. This is the situation despite the determination in *SZHKA,* which is discussed in more detail below.

41. It is to remember that in this case the Tribunal member conducted a full hearing of the applicant's claims, notwithstanding a concern by the Tribunal member over whether there was jurisdiction to do so. The Tribunal conducted the hearing on the presumption that, until determined otherwise, it did have jurisdiction, but should it determine that it did not, then that would be the end of the matter. Should it determine that it did, then a decision would be made subject to any need on the part of the Tribunal to explore any issues that remained unresolved for it.

The second ground

42. The Tribunal's obligation to satisfy requirements of natural justice and procedural fairness are set out in s.422B of the Act, which provides that Div 4 of Pt VII of the Act is "an exhaustive statement of the requirements of natural justice in relation to the matters it deals with". It falls then to the applicant to persuade me that there has been a breach of Div 4.

43. The applicant relies on s.425 of the Act which provides that the Tribunal must invite the applicant to appear. This, of course, did happen at the First Tribunal hearing. When determining whether there

has been a breach, however, of s.425 by failing to hold a further hearing after the decision was set aside on the question of jurisdiction, the following principles, I am satisfied, apply.

1) The first decision, being infected by jurisdiction error, was no decision at all. (See *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [51])

2) However, as the Full Federal Court observed in *SZEPZ v Minister for Immigration and Multicultural Affairs* (2006) 159 CFR 291 at [39]):

> *It does not follow that all steps and procedures taken in arriving at that invalid decision are themselves invalid. The Tribunal still has before it the material that were obtained in a decision that had been set aside was made.*

3) There are a limited class of cases in which the Tribunal is required to invite the applicant to a further hearing after a matter has been remitted. These include:

   i) Cases where the decision set aside was affected by bias or a breach of procedural fairness. (See *SZJRH v Minister for Immigration & Citizenship* [2007] FMCA 2037).

   ii) Cases where the Tribunal intends to rely upon additional material to which the applicant has not had an opportunity to respond. (See *SZILQ v Minister for Immigration & Citizenship* [2007] FCA 942).

   iii) Cases where the matter is remitted to a re-hearing before a different member. (See *SZHKA*).

44. The applicant found considerable reassurance in the decision in *SZHKA* in that the applicant asked me to take that decision as laying down a requirement that all matters remitted from the Federal Magistrates Court to the Tribunal required a new hearing at which the applicant would be afforded an opportunity to attend and be heard.

45. It is fair to say, in my view, that the majority in *SZHKA* were of the view that in circumstances where a matter is remitted for rehearing

before a differently constituted Tribunal, a re-hearing should be granted in order to afford the new member an opportunity to personally evaluate the evidence and the witnesses giving that evidence.

46. They were of the view that it is not appropriate that the new member rely upon recordings of the earlier hearing. The first respondent, however, contends that *SZHKA*, in the circumstances of this case, has no application. The distinction drawn with this case and those under consideration in *SZHKA* is that the decision was to be made by the same member and the only cause for the matter to be remitted was on the very base question of whether the Tribunal had jurisdiction which the Tribunal, in error, found it did not.

47. The first respondent argued that there was no suggestion, in this case, of any bias on the part of the Tribunal member, or that the Tribunal member who heard the matter and made the final determination had not been availed the opportunity of assessing witnesses and hearing all the evidence he thought necessary to make a determination. In those circumstances, the concerns that the majority in *SZHKA* had to ensure procedural fairness and a fair and just outcome, do not apply to this case.

48. The first respondent contends, with which contention I agree, that *SZHKA* should properly be considered as standing only for the proposition that the ultimate decision maker is required, by s.425 of the Act, to afford the applicant for review a hearing before the ultimate decision maker. Thus upon remitter, if the Tribunal was differently constituted, an invitation to a further hearing must be given and if accepted a further hearing must be conducted.

49. *SZHKA* does not require the conclusion that, upon being remitted to the same Tribunal member who has already conducted a hearing, a further hearing was required in all cases. It is significant in this case that the same Tribunal member who made the decision was also the one that conducted the hearing because:

    a) The applicant already had an opportunity to persuade that member of the truth of his claims;

b) The member had already heard the applicant give evidence and had an opportunity to assess his credibility and ask him questions;

c) The member already had an opportunity to form a view as to the issues relevant to his review of the delegate's decision;

d) A letter dated 29 October 2007 inviting the applicant to provide further material to the Tribunal had been sent to and received by the applicant. The applicant had not responded to that letter. Incidentally, it is to be noted that the applicant before me did not give any indication, despite being invited to do so, of any, or what, further evidence he would have presented to the Tribunal at a new hearing if given that opportunity;

e) A letter dated 5 November 2007, again inviting the applicant to provide further material to the Tribunal had been sent to the applicant pursuant to the requirements of s.441A(4)(c) of the Act and was thus "taken to have been received" by the applicant pursuant to s.441C(4). The applicant did not respond to that letter within the time specified. It is acknowledged that the letter was not in fact received by the applicant but that fact raises a separate issue not directly relevant to the question of the further hearing;

f) There was relatively little delay between the hearing and the determination of the review application on its merits; and

g) It was thus open to the member to conclude that no new issues had arisen that would require him to hold a further hearing in relation to the applicant's claims, even after the member had taken into account and given due regard to the content of the applicant's statutory declaration made on 7 February 2008.

50. Further, in contrast to the circumstances in *SZHKA*, although the earlier decision on jurisdiction had been set aside, this had not occurred because the Tribunal had improperly exercised its jurisdiction, rather, it had mistakenly concluded that it had no jurisdiction. Arguably, the consent orders made on 30 August 2007 should not have been framed in terms of setting aside a "decision" as is commonly understood by that term, because the Tribunal had not purported to exercise any

statutory decision making power. The proper order was mandamus, to require the Tribunal to make a decision under s.415 of the Act.

51. In any event, there was no decision by the Tribunal on the merits of the applicant's claims which could be said to be infected by jurisdictional error and no error established (such as, for example, apprehended bias or a failure to issue an invitation correctly) that impugned the conduct of the hearing. This made it feasible, and appropriate, in my view, for the same member to exercise the Tribunal's jurisdiction based on the hearing that had already occurred, and by doing so it did not perpetuate or fail to remedy the error identified in relation to the earlier determination of the Tribunal. In other words, the jurisdictional error was not one that had "infected" the hearing so as to require a further hearing.

52. It should be noted, however, that various comments made by the majority in *SZHKA* could be taken to suggest that a rehearing should be an automatic consequence of a matter being remitted back to the Tribunal. In that regard, Gyles J stated:

> *However, as presently advised, it is difficult to see an escape from the proposition that once an administrative decision is set aside for jurisdictional error, the whole of the relevant decision making process must take place again…mandatory statutory obligations must be carried out…the proceedings are administrative, not judicial, and the Tribunal can have regard to all relevant material, including a transcript of what took place at the previous hearing, subject to compliance with the statutory regime.*

53. In addition Gray J concluded in *SZHKA* at [23] with the statement:

> *It follows that, when a Tribunal member is called upon to exercise the Tribunal's decision making function, that member can only do so following an invitation to the relevant applicant to a hearing that complies with s.425(1) before that member, unless the case falls within one of the exceptions in s.425 itself.*

54. I am persuaded by the respondent's submissions, however, that the comments made by Gray and Gyles JJ are *obiter* and in any event they do not go so far as to set down a requirement that in all instances where a matter has been remitted to the Tribunal there is a necessity for another hearing.

55. It is the respondent's contention, with which I agree, that, indeed, the circumstances of this case brings it within one of the exceptions in s.425. In that regard s.425(2)(c) has application. That sub-section provides that where s.424C(1) or (2) applies, provisions which relate to the situation where an invitation is given to give additional information within a given time and which information is not given, as in this case, then there is no compulsion to invite the applicant to appear before the Tribunal to give evidence and present arguments.

56. In this case the Tribunal wrote to the applicant informing him that he could provide further information and submissions to the Tribunal if he wished (the letter of 29 October 2007). The applicant does not assert that he did not receive that letter. The Tribunal also invited the applicant to provide further information and to request a further hearing if he thought it necessary in the letter of 5 November 2007. That letter specified a date by which further information must be received or an extension of time sought. The Tribunal received no direct response to either letter by the dates specified.

57. Thus no issues were raised by the applicant in relation to his claim, and no further hearing was sought by the applicant. In the words of the Federal Court in *SZILQ* at [33] he had "foregone an opportunity to put further material".

58. In respect of the second ground, I am satisfied that there is no jurisdictional error on the basis claimed. The fact that the Tribunal was aware that the 5 November 2007 letter had not been collected by the applicant, since it had been returned to the Tribunal, does not alter the position in relation to its duty to hold a further hearing. Contrary to the grounds of appeal and the applicant's contentions, the letter 5 November 2007, in my view, was not an invitation to appear at a hearing.

59. The letter informed the applicant it would not hold a further hearing unless it thought one appropriate. It then informed the applicant that he could request a further hearing. Implicit in this letter was the proposition that the Tribunal would consider his request and hold a hearing if it thought it appropriate to do so; that a further hearing was not automatic, even if requested by the applicant.

60. The return of the letter of 5 November 2007 to the Tribunal did not render the effect of that letter "a hollow shell". The letter was sent in accordance with s.441A(4)(c) of the Act, which provides for the Tribunal to give a document to a person by posting it to the applicant. This is precisely what the Tribunal did. Having done so, there was no obligation on the Tribunal to make further enquiries in relation to that letter even if, as here, it was eventually returned to the Tribunal. (See *SZDKOV v Minister for Immigration & Citizenship* [2007] FMCA 1807 at [6] - [7], [21]).

61. The Act itself expressly deals with the question of the effect of giving a person that document in accordance with s.441 of the Act. Section 441C(4) provides that the person is taken to have received the document seven working days after despatching it (by post). That section operates as a deeming provision and a person is taken to have received it at the expiration of the seven working days, regardless of whether it was in fact received.

62. As harsh as it may seem, there is no scope for a person to argue that they did not receive the document. Nor can it be said, in my view, in light of the statutory provisions, that the Tribunal has any duty to enquire about a letter that is returned to it. The letter is, even then, taken to have been received by the intended recipient. There is no obligation, as suggested by the applicant that in circumstances where registered mail is returned because it has not been collected, that the first respondent should make enquiries, through the medium of a contact telephone number set out in the applicant's application as suggested by the applicant, as to why it may not have been collected. Clearly, in my view, the first respondent has complied with the statutory regime set out for these matters.

The third ground

63. In respect of the third ground, as stated earlier, I am of the view that the Tribunal had not committed an error by constituting the Tribunal with the same member whose decision had earlier been overturned on judicial review on the limited question of whether the Tribunal had jurisdiction.

64. The power to constitute the Tribunal is contained in s.421 of the Act. The power is broad and contains no requirement that, where there has been a review of a Tribunal decision, the Tribunal shall be constituted by a different member. There is no reason to apply any limitation on the principal member's power in this regard.

65. Further, the terms of s.420 of the Act (on which the applicant relies) militate against any such limitation. That section provides that in carrying out its functions the Tribunal is to pursue the objectives of providing a mechanism of review that is fair, just, economical, informal and quick. In my view, to have the same member determine the review on its merits, in the circumstances of this case, meets all of these objectives.

66. It is not clear from the applicant's contentions how the constitution of the Tribunal with the same member involves a breach of s.420. To the contrary, utilising a member who had already heard the matter contributes to ensuring that the review is "economical" and "quick" as the member already has a familiarity with the applicant's case and does not need to hold a further hearing, having already heard the applicant's oral evidence, unless, of course, there are new issues raised.

67. The applicant also takes issue with the fact that in the letter of 29 October 2007 it was indicated that the Tribunal would be constituted by a member who had not had any prior involvement in the applicant's case. It is not unfair to describe that statement as building an expectation in the applicant. But, whilst that statement was not adhered to, it was not, in my view, binding on the Tribunal.

68. The principal member of the Tribunal has the power under s.421 to determine which member shall constitute the Tribunal. That power is not fettered by the statement made to the applicant. It also should be noted that the frustration of any expectations created in the applicant, which frustrations are not as a consequence of any breach of statutory steps or requirements, as in this case, cannot found a finding of jurisdictional error should those expectations are not satisfied.

The fourth ground

69. In respect of the fourth ground, I agree with the respondent's submission that the Tribunal has not committed any error by having regard to the evidence presented to it at the earlier hearing. As already set out above the Tribunal is not required to hold a further hearing unless new issues are raised, or unless the first hearing involved bias or a breach of natural justice as provided for under the Act. It must follow that the Tribunal is entitled to rely upon evidence given at the first hearing in reaching its decision.

70. In any event, this ground of appeal is inconsistent with the decision of the Federal Court in *NBKM* (see [33] - [35]). No explanation or expansion in oral submissions was given by the applicant as to how reliance on the evidence presented at the first hearing constitutes a breach of Div 4 of Pt VII of the Act.

The fifth ground

71. In respect of the fifth ground, I am in agreement with the first respondent that it does not disclose any error capable of constituting a jurisdictional error. I also agree with the categorisation of this ground as an attempt to engage this Court in a merits review. In oral submissions the applicant did not expand upon this ground.

72. In any event, it is apparent from the Tribunal's reasons that it had regard to the substance of the applicant's claims. It set out those claims and addressed them in some detail, relying upon Country Information as it was entitled to do.

73. The fact that the Prime Minister of Malaysia made a public statement about the Silibin incident was a matter to which the Tribunal had, and was entitled to have, regard. Neither the fact the statement was made, nor the Tribunal's reliance upon it, can provide any basis for this Court to now review the Tribunal's decision.

74. There was an attempt, admittedly not a vigorous attempt, on the part of the applicant, to suggest that there may have been a breach of the requirements of s.424A. I am not satisfied that there has been any breach of that section by the Tribunal. I am more than satisfied that the

Tribunal did not rely upon any information other than that which was discussed at the hearing and to which the applicant had ample opportunity to respond. It was therefore not required to provide the applicant with an opportunity to respond to such information pursuant to that section.

Conclusion

75. For the above reasons the application for review filed on 5 March 2008 should be dismissed and an order made that the applicant pay the first respondent's costs.

I certify that the preceding seventy-five (75) paragraphs are a true copy of the reasons for judgment of O'Dwyer FM

Associate:

Date: 17 February 2009