HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, CRENNAN AND BELL JJ

MINISTER FOR IMMIGRATION AND CITIZENSHIP APPELLANT

AND

SZIZO & ORS RESPONDENTS

Minister for Immigration and Citizenship v SZIZO [2009] HCA 37
23 September 2009
S568/2008

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1 and 2 of the orders made by the Full Court of the Federal Court of Australia on 3 July 2008, and in lieu thereof order that:*

   (a) *order 2 of the orders made by the Federal Magistrates Court of Australia on 5 September 2007 be set aside; and*

   (b) *the appeal be otherwise dismissed.*

3. *Appellant to pay the first to sixth respondents' costs of the appeal to this Court.*

On appeal from the Federal Court of Australia

Representation

N J Williams SC with K A Stern for the appellant (instructed by Clayton Utz Lawyers)

B W Walker SC with B K Nolan for the first to sixth respondents (instructed by the first to sixth respondents)

Submitting appearance for the seventh respondent

CATCHWORDS

Minister for Immigration and Citizenship v SZIZO

Immigration – Refugees – Review of visa application before Refugee Review Tribunal ("RRT") – First respondent appointed third respondent as his "authorised recipient" to receive documents in connection with his review – Section 441G(1) of *Migration Act* 1958 (Cth) ("Act") required RRT to give review documents to authorised recipient instead of first respondent – RRT gave a notice inviting the respondents to attend a hearing to first respondent but not to authorised recipient – All respondents attended the hearing and no unfairness or prejudice arose from non-compliance with s 441G(1) of Act – Whether non-compliance with procedural steps in s 441G of Act compels conclusion that decision is invalid – Whether circumstances amount to denial of natural justice.

Words and phrases – "authorised recipient", "natural justice".

Migration Act 1958 (Cth), ss 422B, 425A, 441A, 441G.

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN AND BELL JJ. A decision made by the appellant, the Minister for Immigration and Citizenship ("the Minister"), or his delegate, refusing to grant a protection visa to an applicant who is physically present in the migration zone is reviewable by the Refugee Review Tribunal ("the Tribunal")[1]. The conduct of the review is governed by the provisions of Div 4 of Pt 7 of the *Migration Act* 1958 (Cth) ("the Act"). Section 422B(1) provides that the provisions of Div 4 are taken to be an exhaustive statement of the requirements of the natural justice hearing rule ("the hearing rule") in relation to the matters that they deal with. The manner of giving and receiving documents in connection with the review is governed by the provisions of Div 7A of Pt 7 of the Act. Section 422B(2) provides that the provisions of Div 7A, in so far as they relate to the conduct of reviews under Div 4, are to be taken to be an exhaustive statement of the hearing rule in relation to the matters that they deal with. An applicant for review may appoint a person, an "authorised recipient", to receive documents in connection with the review on his or her behalf. In the event that an applicant nominates an authorised recipient, the Tribunal is required to give review documents to that person instead of giving the documents to the applicant[2].

2 In this case, the Tribunal failed to give a notice inviting the applicants for review to attend a hearing to the authorised recipient in the manner that is prescribed by Div 7A. As will appear, this did not occasion any adverse consequence to any of the applicants for review, who are the first to sixth respondents to the appeal ("the respondents"). An effective response was made to the notice and all the respondents, including the authorised recipient, attended the hearing, which was not otherwise the subject of any procedural flaw.

3 The Full Court of the Federal Court of Australia (Moore, Marshall and Lander JJ) held that the Tribunal's failure to comply with the obligations imposed on it under Div 7A was a jurisdictional error. The Court considered that in the absence of exceptional circumstances it should not withhold relief in a case in which the Tribunal had failed to comply with imperative statutory obligations owed to an applicant for review[3]. Since there were no such exceptional

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1 Sections 411, 412 and 414 of the *Migration Act* 1958 (Cth). The relevant text of the Act is reprint 9.

2 Section 441G.

3 *SZIZO v Minister for Immigration and Citizenship* (2008) 172 FCR 152 at 168-169 [97] per Lander J (Moore and Marshall JJ concurring).

circumstances in this case the Court made orders quashing the Tribunal's decision and remitting the respondents' application for review to the Tribunal to be determined according to law.

4 The Minister appeals by special leave to this Court from the decision of the Full Court. For the reasons that follow the appeal should be allowed and the orders made in the Full Court should be set aside.

The facts

5 The respondents are a family, who come from Lebanon. The first respondent is the husband, the second respondent is his wife and the third to sixth respondents are their children. The family arrived in Australia on 21 March 2001. On 14 November 2005 they applied for protection visas. The first respondent made substantive claims to being a person to whom Australia owes protection obligations under the Refugees Convention[4] as amended by the Refugees Protocol[5] (together "the Convention")[6]. The remaining respondents applied for protection visas as the first respondent's spouse and dependants respectively[7].

6 On 13 January 2006 a delegate of the Minister refused the respondents' applications on the ground that none satisfied the criterion for the issue of a protection visa.

7 The respondents filed an application for review of the delegate's decision. Their application was submitted on a pro forma issued by the Tribunal. Multiple applicants for review are permitted to submit applications on the same form. The form which the respondents signed contained the following printed advice:

> "Each person is an applicant in his or her own right. Unless an included applicant advises the Tribunal otherwise, the Tribunal will communicate

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4 The Convention relating to the Status of Refugees done at Geneva on 28 July 1951.

5 The Protocol relating to the Status of Refugees done at New York on 31 January 1967.

6 Section 36(2)(a).

7 The second to sixth respondents' application was made pursuant to s 36(2)(b) of the Act.

with Applicant 1 or his or her authorised recipient. Applicant 1 must inform each applicant of the contents of any communication from the Tribunal and reply to the Tribunal for them."

8 The first respondent was named as Applicant 1 in the application. He nominated his eldest daughter, the third respondent, SZIZQ, as his authorised recipient. SZIZQ's address was given as the address of the premises at which all of the respondents were residing ("the family residence"). Telephone numbers for a landline and a mobile service were supplied as a means of contacting SZIZQ. The first respondent signed a declaration undertaking to inform each of the respondents of the contents of any communication from the Tribunal and to reply to the Tribunal on their behalf. The remaining five respondents, including SZIZQ, signed the application acknowledging that each had read and understood the information supplied in it and authorising the Tribunal to communicate with the first respondent or his authorised recipient about the application. The application was dated 6 February 2006. It was received by the Tribunal on 9 February 2006.

9 The Tribunal sent a notice by prepaid post addressed to the first respondent inviting him and the other respondents to attend a hearing, to be held on 23 March 2006 ("the notice of hearing"). The first respondent was instructed to inform each of the other respondents of its contents, including that any response would be regarded by the Tribunal as a joint response, unless the Tribunal was advised otherwise. A brochure explaining what would happen on the day of the hearing, and a "response to hearing invitation" ("the response form"), were enclosed with the notice.

10 Neither the first respondent nor the second respondent speak or are literate in English. SZIZQ speaks and is literate in the Arabic, French and English languages. The response form was completed in English. It was signed by the first respondent and dated 6 March 2006. It was expressed to be "[s]igned on behalf of, and with the consent of, all family members included in the application." The section of the response form containing a space for the provision of the name and contact details of the authorised recipient was left blank. The address of the family residence was given as the first respondent's home and mailing address. The same landline and mobile telephone numbers as had earlier been given as contact telephone numbers for SZIZQ were given as contact numbers for the first respondent. The response form recorded that the first respondent needed the services of an interpreter in the Arabic language at the hearing. Two persons were nominated as witnesses whose evidence the respondents wished to place before the Tribunal.

11 Each of the respondents attended the hearing on 23 March 2006. The two witnesses who had been nominated in the response form attended the hearing and gave evidence. A third witness also gave evidence in support of the respondents' application. The first and second respondents gave evidence at the hearing with the assistance of the interpreter. SZIZQ gave evidence without the assistance of an interpreter. In the course of the hearing the first respondent was shown his visa application and he said that his daughter had completed the form on his behalf on his instructions.

12 At the conclusion of the hearing the Tribunal member informed the respondents:

> "[I]f everybody is happy with this unless there is something else you want to put to me … is we will adjourn now close the hearing … ten days if you want to put anything else in that you think it's relevant to your case".

13 The Tribunal wrote to the first respondent by letter dated 27 March 2006 confirming the advice given at the hearing that the Tribunal had allowed 10 days in which to make further written submissions in relation to the review. The first respondent was asked to inform the other respondents of the contents of the letter. Written submissions signed by the first, second and third respondents were submitted to the Tribunal along with supporting documents. They were received by the Tribunal on 7 April 2006.

14 On 6 June 2006 the Tribunal handed down its decision, affirming the decision under review.

15 The respondents sought judicial review of the Tribunal's determination before the Federal Magistrates Court. The application was dismissed on 5 September 2007[8]. The respondents appealed from that decision. The appeal came before a single judge exercising the appellate jurisdiction of the Federal Court[9]. Counsel appearing for the Minister drew to the Court's attention that the notice of hearing had been given to the first respondent and not to his authorised recipient. This issue had not been raised before the Federal Magistrates Court. The appeal was referred to the Full Court[10]. The respondents were referred by

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8 *SZIZO v Minister for Immigration* [2007] FMCA 1339.

9 Section 25(1AA)(a) of the *Federal Court of Australia Act* 1976 (Cth).

10 Section 25(1AA)(b) of the *Federal Court of Australia Act* 1976 (Cth).

the Registrar of the Federal Court to a legal practitioner on the Pro Bono Panel for legal assistance in relation to their appeal. An amended notice of appeal was filed, which abandoned the grounds originally relied upon and substituted a single ground contending that the decision of the Tribunal had been attended by jurisdictional error.

The statutory scheme

16 If a valid application is made to review a decision to refuse to grant a protection visa the Tribunal must review the decision[11]. The Tribunal may, for the purposes of the review, exercise all the powers and discretions that are conferred by the Act on the person who made the decision[12]. Its powers include that it may set aside the decision and substitute a new decision, which is taken to be that of the Minister[13]. In carrying out its functions under the Act, the Tribunal is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick[14]. It is not bound by technicalities, legal forms or rules of evidence and is required to act according to substantial justice and the merits of the case[15].

17 Because the Tribunal was not minded to decide the review in the respondents' favour on the basis of the material before it, it was required to invite the respondents to appear at a hearing to give evidence and present any arguments relating to the issues arising in relation to the decision under review[16]. The obligation to give notice of the hearing was imposed by s 425A, which relevantly provides:

> "(1) If the applicant is invited to appear before the Tribunal, the Tribunal must give the applicant notice of the day on which, and the time and place at which, the applicant is scheduled to appear.

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11 Section 414(1).

12 Section 415(1).

13 Section 415(2)(d) and (3)(b).

14 Section 420(1).

15 Section 420(2).

16 Section 425.

(2) The notice must be given to the applicant:

(a) … by one of the methods specified in section 441A; …

(3) The period of notice given must be at least the prescribed period …

(4) The notice must contain a statement of the effect of section 426A."

18 The prescribed period of notice in the case of an applicant who is not a detainee is 14 days after the day on which the notice is received[17]. Section 441C sets out when a person is taken to have received a document that is given by one of the methods in s 441A.

19 Section 426A permits the Tribunal, in a case in which an applicant for review has failed to appear at a scheduled hearing, to make a decision on the review without taking any further action to allow or enable the applicant to appear before it.

20 The first respondent gave the Tribunal written notice of SZIZQ's name and address as his authorised recipient. This engaged the provisions of s 441G, which, relevantly, provides:

"(1) If:

(a) A person (the ***applicant***) applies for review of an RRT-reviewable decision; and

(b) the applicant gives the Tribunal written notice of the name and address of another person (the ***authorised recipient***) authorised by the applicant to do things on behalf of the applicant that consist of, or include, receiving documents in connection with the review;

the Tribunal must give the authorised recipient, instead of the applicant, any document that it would otherwise have given to the applicant.

Note: If the Tribunal gives a person a document by a method specified in section 441A, the person is taken to have received the document at the time specified in section 441C in respect of that method.

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17 Regulation 4.35D(b) of the Migration Regulations 1994 (Cth).

(2) If the Tribunal gives a document to the authorised recipient, the Tribunal is taken to have given the document to the applicant. However, this does not prevent the Tribunal giving the applicant a copy of the document.

…

(4) The Tribunal may communicate with the applicant by means other than giving a document to the applicant, provided the Tribunal gives the authorised recipient notice of the communication.

…"

21 The provisions of s 425A(2)(a) applied to the review of the respondents' application and the Tribunal was required to give the notice of hearing by one of the methods prescribed in s 441A. One such method is by a member, the Registrar or an officer of the Tribunal dating the notice and dispatching it by prepaid post to the last address for service, or the last residential or business address, provided to the Tribunal by the recipient in connection with the review[18]. The provision does not, in terms, state that the recipient's name is to be included on the envelope. However, the Minister did not contend that the notice, which was sent by prepaid post to the family residence, at which SZIZQ, the authorised recipient, was residing, had been given to her within the meaning of s 441G.

The Full Court's reasons

22 The Full Court considered that s 422B, which is contained in Div 4, indicated the Parliament's intention that there be "strict adherence to each of the procedural steps leading up to the hearing"[19]. Section 422B provides:

"**422B Exhaustive statement of natural justice hearing rule**

(1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.

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18 Section 441A(4).

19 *SZIZO v Minister for Immigration and Citizenship* (2008) 172 FCR 152 at 167 [87].

(2) Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with."

23 The Full Court pointed out that there are good reasons why the Tribunal is required to give notice to the authorised recipient instead of (or in addition to) the applicant; in many cases applicants for protection visas will not speak English or be literate in English and few may be expected to understand Australia's obligations under the Convention[20]. It considered that usually when an applicant nominates an authorised recipient it will be for the purpose of having that person assist the applicant to present his or her case at the hearing[21]. It concluded that "any failure by the Tribunal to comply with s 441G will, if uncorrected before the hearing takes place or the decision made, mean that the Tribunal will have committed jurisdictional error"[22].

The issue

24 It is well established that the denial of natural justice to an applicant for a visa may result in a decision that exceeds jurisdiction for which prohibition will go[23]. This is not such a case. The Full Court found that no unfairness or prejudice was visited upon any of the respondents by reason of the Tribunal's

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20 *SZIZO v Minister for Immigration and Citizenship* (2008) 172 FCR 152 at 167 [88]-[89].

21 *SZIZO v Minister for Immigration and Citizenship* (2008) 172 FCR 152 at 167 [90].

22 *SZIZO v Minister for Immigration and Citizenship* (2008) 172 FCR 152 at 167 [90].

23 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [5] per Gleeson CJ, 91 [17] per Gaudron and Gummow JJ; [2000] HCA 57; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 67 [26] per Gleeson CJ and Hayne J; [2001] HCA 22; *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1; [2004] HCA 62; *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470; [2005] HCA 77.

failure to comply with its statutory obligation[24]. It approached the matter on the footing that each procedural step in Divs 4 and 7A imposed an imperative duty on the Tribunal forming part of the statutory statement of the hearing rule[25].

25 The Act does not provide for the consequences of non-compliance with any of the provisions of Div 4 or Div 7A.

26 Written notice of the invitation to appear before the Tribunal to give evidence and to present arguments[26] came to the attention of the applicants for review (the respondents in this Court) and their authorised recipient[27] within the prescribed period[28]. The notice contained the matters prescribed by the Act[29]. The notice was given to one of the applicants for review (the first respondent) in one of the ways provided by s 441A. There was no dispute, however, that the Tribunal did not give the notice of hearing to the authorised recipient. When s 441G(1) provides that, if an applicant for review has nominated an authorised recipient, "the Tribunal must give the authorised recipient, instead of the applicant, any document that it would otherwise have given to the applicant", what consequence follows if an invitation to attend a hearing was not given to the authorised recipient, but was given to one of the applicants for review, and came to the attention of other applicants for review and the authorised recipient in due time? Was it a purpose of the legislation[30] that, despite holding a hearing at which all of the applicants for review, including their authorised recipient, appeared before the Tribunal to give evidence and to present arguments relating

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24 *SZIZO v Minister for Immigration and Citizenship* (2008) 172 FCR 152 at 167 [91].

25 *SZIZO v Minister for Immigration and Citizenship* (2008) 172 FCR 152 at 166-167 [87].

26 Section 425(1).

27 Section 441G.

28 Section 425A(3).

29 Sections 425A(1) and 426(1).

30 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-389 [91]; [1998] HCA 28.

to the issues arising in relation to the decision under review[31], the Tribunal could not validly decide the review?

The submissions

27 The respondents submit that the Full Court was right to conclude that compliance with each of the steps in Divs 4 and 7A conditions the Tribunal's jurisdiction to determine a review. In their submission the purpose of the statutory regime is to ensure that certainty attends Tribunal decisions; a decision made in conformity with each identified step is within jurisdiction and a decision not so made is not. They contend that the Parliament's intention was to remove debate in the courts about whether an applicant for review has been denied natural justice. In this respect they draw attention to the Minister's speech on the second reading of the Bill for the *Migration Legislation Amendment (Procedural Fairness) Act* 2002 (Cth), which introduced s 422B into the Act[32]:

> "In 1998, the codes of procedure for the Migration Review Tribunal and the Refugee Review Tribunal were enhanced.
>
> The purpose of each of these codes is to enable decision makers to deal with visa applications and cancellations fairly, efficiently and quickly.
>
> It was also intended that they would replace the uncertain common law requirements of the natural justice 'hearing rule', in particular, which had previously applied to decision makers.
>
> However, last year in the Miah case, the High Court found that the code of procedure relating to visa applications had not clearly and explicitly excluded common law natural justice requirements.
>
> This means that, even where a decision maker has followed the code in every single respect, there could still be a breach of the common law requirements of the natural justice hearing rule.

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31 Section 425(1).

32 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 March 2002 at 1106.

A further consequence of the High Court's decision is that there is legal uncertainty about the procedures which decision makers are required to follow to make a lawful decision."

28 The Minister submits that compliance with each of the identified steps in Divs 4 and 7A will always discharge the Tribunal's obligations under the hearing rule but that it does not follow that departure from any of the steps, including those dealing with the giving and receiving of review documents, is intended to exclude consideration by the court of whether the requirements of natural justice have been satisfied.

SAAP v Minister for Immigration and Multicultural and Indigenous Affairs

29 Before turning to the characterisation of the obligations imposed on the Tribunal under ss 441G and 441A, reference should be made to the decision of this Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*[33]. In that case the Tribunal failed to provide to the applicant for review written particulars of information that it considered would be the reason, or part of the reason, for affirming the decision under review. This was a breach of the requirements of s 424A, which is in Div 4. Justice McHugh, who was one of the Justices who formed the majority, concluded as follows[34]:

"However, because the Act compels the Tribunal in the conduct of the review to take certain steps in order to accord procedural fairness to the applicant for review, before recording a decision, it would be an anomalous result if the Tribunal's decision were found to be valid, notwithstanding that the Tribunal has failed to discharge that obligation. It is not to the point that the Tribunal may have given the applicant particulars of the adverse information orally. It is also not to the point that in some cases it might seem unnecessary to give the applicant written particulars of adverse information … If the requirement to give written particulars is mandatory, then failure to comply means that the Tribunal has not discharged its statutory function. There can be no 'partial compliance' with a statutory obligation to accord procedural fairness. Either there has been compliance or there has not. Given the significance

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33 (2005) 228 CLR 294; [2005] HCA 24.

34 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 321 [77].

> of the obligation in the context of the review process (the obligation is mandated in every case), it is difficult to accept the proposition that a decision made despite the lack of strict compliance is a valid decision under the Act."

30 Justice Hayne (with whose reasons on this aspect Kirby J agreed) observed that the evident purpose of Pt 7, and Div 4 in particular, is to afford procedural fairness to applicants[35]. His Honour identified the focus of the inquiry as to jurisdictional error as being the validity of the act done in purported performance of the Tribunal's obligation to review and decide the matter[36]. He concluded that[37]:

> "Where the Act prescribes steps that the Tribunal *must* take in conducting its review and those steps are directed to informing the applicant for review (among other things) of the relevance to the review of the information that is conveyed, both the language of the Act and its scope and objects point inexorably to the conclusion that want of compliance with s 424A renders the decision invalid."

31 It is to be observed that the obligation imposed by s 424A, that the Tribunal give an applicant written particulars of any adverse information including of the relevance of that information to the review, is of a different character to the obligation imposed on the Tribunal to give notice of a hearing in the *manner* that is prescribed by s 441A.

Consideration

32 *SAAP* was concerned with the Act as it stood before the introduction of s 422B. The validity of s 422B was assumed by the parties and this appeal does not raise consideration of the scope of its operation. In *SZBYR v Minister for Immigration and Citizenship*[38] Gleeson CJ, Gummow, Callinan, Heydon and

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35 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 350 [192].

36 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 353-354 [205].

37 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 354-355 [208] (emphasis in original).

38 (2007) 81 ALJR 1190 at 1195 [14]; 235 ALR 609 at 614; [2007] HCA 26.

Crennan JJ observed that in light of the introduction of s 422B it would be surprising if s 424A were interpreted as having an operation going well beyond the requirements of the hearing rule at common law. That observation is pertinent to the consideration of whether there is to be discerned from the legislative scheme an intention to invalidate in consequence of non-compliance with any of the obligations dealing with the manner of giving and receiving review documents.

33 The obligations imposed by s 425A with respect to giving notice of the hearing are directed to ensuring that an applicant has adequate time in which to prepare his or her case. (The requirement for service by a method prescribed by s 441A may be thought to serve a different purpose, which is to lay the foundation for the Tribunal to determine a review without further notice where an applicant has failed to appear at a scheduled hearing.) As the Full Court found, s 441G contains a statutory recognition that some applicants are unlikely to understand the purport of the notice or to be able to properly prepare their case without assistance. In this respect s 441G may be seen as being concerned with the provision of effective notice of the hearing.

34 In combination, ss 425A and 441G ensure that an applicant for review receives timely and effective notice of the hearing. They impose obligations which facilitate the conduct of a procedurally fair hearing. However, the *manner* of providing timely and effective notice of hearing is not an end in itself. The procedural steps dealing with the manner of giving notice are to be distinguished from other components of the statutory statement of the hearing rule, including the obligation to give particulars of adverse information[39] and to invite the applicant to appear to give evidence and to present arguments relating to the issues arising in the decision under review[40].

35 While the legislature may be taken to have intended that compliance with the steps in ss 441G and 441A would discharge the Tribunal's obligations with respect to the giving of timely and effective notice of the hearing, it does not follow that it was the intention that any departure from those steps would result in invalidity without consideration of the extent and consequences of the departure. The respondents acknowledge that they suffered no injustice by reason of the Tribunal's omission and they do not take issue with the Full Court's

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39 Section 424A(1).

40 Section 425.

characterisation of the result in the circumstances as being "rather absurd"[41]. The admitted absurdity of the outcome is against acceptance of the conclusion that the legislature intended that invalidity be the consequence of departure from any of the procedural steps leading up to the hearing[42]. In a case in which the Tribunal fails to comply with the requirements for the giving of notice of a hearing, the factual determination of whether the applicant for review and his or her authorised recipient received timely and effective notice of the hearing does not require the court to consider how the applicant might have presented his or her case differently had the Tribunal complied with the statutory procedures. No question arises, in the case of an applicant who has received timely and effective notice of the hearing, of the loss of an opportunity to advance his or her case.

36 Notwithstanding the detailed prescription of the regime under Divs 4 and 7A and the use of imperative language it was an error to conclude that the provisions of ss 441G and 441A are inviolable restraints conditioning the Tribunal's jurisdiction to conduct and decide a review. They are procedural steps that are designed to ensure that an applicant for review is enabled to properly advance his or her case at the hearing; a failure to comply with them will require consideration of whether in the events that occurred the applicant was denied natural justice. There was no denial of natural justice in this case.

37 For these reasons the appeal should be allowed.

Orders

38 As a condition of the grant of special leave the Minister undertook not to seek to disturb any orders as to costs which had been made in the courts below. The Full Court of the Federal Court allowed the respondents' appeal (order 1) and set aside the order made in the Federal Magistrates Court on 5 September 2007 (order 2) and ordered the Minister to pay the respondents' costs of the appeal (order 3). Accordingly, the orders that we propose are as follows:

1. Appeal allowed.

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41 *SZIZO v Minister for Immigration and Citizenship* (2008) 172 FCR 152 at 167 [91].

42 *SZIZO v Minister for Immigration and Citizenship* (2008) 172 FCR 152 at 167 [87].

2. Set aside orders 1 and 2 of the orders made by the Full Court of the Federal Court of Australia on 3 July 2008, and in lieu thereof order that:

   (a) order 2 of the orders made by the Federal Magistrates Court of Australia on 5 September 2007 be set aside; and

   (b) the appeal be otherwise dismissed.

3. Appellant to pay the first to sixth respondents' costs of the appeal to this Court.