FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZQCN v MINISTER FOR IMMIGRATION & ANOR *[2011] FMCA 606*

MIGRATION – RRT decision – Nepali applicant claiming fear of Maoists and persecution for religion – refusal of Tribunal to adjourn hearing due to agent's unavailability – refusal to consider request to allow post-hearing submission – request received on date appearing on Tribunal's statement of decision and reasons, and before decision given to applicant – effect of s.430(2) of Migration Act – decision took effect at first moment on date appearing on decision – Tribunal was *functus officio* at time of receiving request – no jurisdictional error vitiating decision – application dismissed.

Migration Act 1958 (Cth), ss.366A, 414, 424A, 424AA, 425, 427, 430, 430A, 430B, 430D
Migration Legislation Amendment Act (No. 1) 1998 (Cth)
Migration Legislation Amendment Act (No. 1) 2008 (Cth)

Applicant NAFF of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 221 CLR 1
Applicant V346 of 2000 v Minister for Immigration and Multicultural Affairs (2001) 111 FCR 536
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384
Hossain v Minister for Immigration [2009] FMCA 1100
Le v Minister for Immigration & Citizenship (2007) 157 FCR 321
Minister for Immigration & Citizenship v SZNVW [2010] FCAFC 41
Minister for Immigration & Multicultural Affairs v Bhardwaj (2002) 209 CLR 597
Project Blue Sky Inc. v Australian Broadcasting Authority (1998) 194 CLR 355
Roskell v Snelgrove [2008] FCA 427
Semunigus v Minister for Immigration & Multicultural Affairs (2000) 96 FCR 533
Singh v Minister for Immigration and Multicultural Affairs (2001) 109 FCR 18
SZBWJ v Minister for Immigration & Citizenship (2008) 171 FCR 299
SZNSF v Minister for Immigration [2009] FMCA 1208
X v Minister for Immigration and Multicultural Affairs (2001) 116 FCR 319

Bennion, F., *Statutory Interpretation*, 2nd Ed, Butterworths, 1992
Pearce, D. & Geddes R., *Statutory Interpretation in Australia*, 5th Edition, Butterworths, 2001

Applicant:	SZQCN
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 610 of 2011
Judgment of:	Smith FM
Hearing date:	26 July 2011
Date of Last Submission:	6 September 2011
Delivered at:	Sydney
Delivered on:	23 September 2011

REPRESENTATION

Counsel for the Applicant:	In Person
Counsel for the Respondents:	Ms L Clegg
Solicitors for the Respondents:	DLA Phillips Fox

ORDERS

(1) The application is dismissed.

(2) The applicant must pay the first respondent's costs in the amount of $6,240.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 610 of 2011

SZQCN
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This case raises a 'nice' legal point as to the exact time when a Tribunal decision is 'made' on the date appearing on its written statement of reasons, or is deemed by statute to have been made, so as to render the Tribunal *functus officio* and unable to address a reasonable procedural request received from the applicant's agent at 3pm on the same day. It is also necessary to review generally the legality of the present Tribunal's decision, which was to affirm the refusal of a protection visa to the applicant.

2. The applicant arrived in Australia as a visitor in March 2010. On 19 March 2010, a migration agent lodged a protection visa application on behalf of the applicant. His claims to fear persecution in his country of nationality, Nepal, were later summarised by the Tribunal:

> *54. The applicant claims that he will be harmed by Maoists in Nepal because he did not and does not support the Maoists. He claims that a political opinion has been attributed to him by the Maoists and they will seek to harm him for reasons of political*

> *opinion. The applicant further claims that he will be subjected to persecution by Hindu extremists because he converted to Christianity. He claims the YCL and the authorities will seek to harm him because he converted to Christianity. The applicant claims that he was refused protection by the authorities because he converted to Christianity and he claims that he will be denied protection by the state in the future for the same reason. The applicant claims that Maoists attempted to extort money from him when he returned to Nepal from Kuwait. He claims he was beaten when he refused to comply. The applicant claims that he will suffer similar harm in the future. He claims that the authorities in Nepal cannot and will not protect him from the persons he fears.*

3. In his evidence to the delegate and Tribunal he said that that he had lived in Kuwait from 2003 until 2008, having fled his village in 2001 after harassment and threats of forcible recruitment by the Maoists. The assault and extortion attempt by the YCL (the youth wing of the Maoist party) occurred soon after his return to Nepal, when he was living in a hotel in Kathmandu. He converted to Christianity while in Kuwait, and was baptised in a Baptist Church after his return to Nepal.

4. The delegate interviewed the applicant on 6 September 2010, and subsequently received a submission from the applicant's agent, which enclosed bulky attachments containing information concerning the activities of the Maoist party, but not specifically about the applicant.

5. On 16 December 2010, the delegate made a decision to refuse the visa application. In his reasons, the delegate said that he found the applicant's evidence to have been *"lacking in veracity and substance"* and his claims to be implausible. Nor did the delegate accept his claims that he had converted to Christianity. The delegate was not satisfied that he had a well founded fear of persecution for any of the Convention reasons.

The proceedings before the Tribunal

6. The applicant appealed to the Tribunal, and continued to be represented by his migration agent throughout its proceedings. On 3 February 2011, the Tribunal sent to the agent an invitation for the applicant to attend a hearing on 3 March 2011. This received the following response from the agent, by letter sent by facsimile to the Tribunal on 28 February 2011:

I would like to confirm the receipt of "Invitation to appear before the Tribunal" dated 3 February 2011. The applicant is invited to appear before the Tribunal at 1 PM on 3 March 2011.

I got nasty leg fractured on 25th December 2010. I am currently recovering at home, I can not walk and have not gone to work since then. According to the treating specialist, I will not be able to walk for at least the next 4 months. However, I am expecting to go to office, at least part time, after two months with the help of crutches.

The above applicant is not well educated and my presence at the hearing is very important for him.

For this reason, I would like to request you to defer the hearing for about two months from today's dat. I expect your co-operation in this matter.

7. The agent was informed by telephone, on the same day, that the hearing would not be postponed. The agent then repeated his request, by letter sent by facsimile on the same day:

As indicated in the letter, my attendance during the hearing is very important in making fair and correct decision. My presence helps Tribunal to understand the case in all aspects and to decide the case in accordance with the law.

My client is not well educated and he is intellectually poor. Based on my past experience, many misunderstanding may occur during the hearing between the applicant and presiding member because of the misinterpretation and / or cultural issues and / or intellectual capacity of the applicant. This may occur even in the presence of an interpreter.

Ensure that the Tribunal makes the correct decision, my attendance is important. For this reason I have requested extension of hearing based on the circumstances not in my control. I have not been allowed to work by my doctor and I do not think that Tribunal expect me to attend the hearing putting my health at risk.

I again would like to request to extend the hearing for two months. If two months is not reasonably allowable time for extension please consider to defer the hearing for one month only. Risk of coming for hearing after a month is less than risk at present.

I request to consider my request based on the merit of my request.

I have attached the evidence of my claimed leg fracture for your reference.

The enclosed 'discharge referral' is dated 4 January 2011. It recorded that the agent had suffered a fall whilst playing football on 25 December 2010, and that when he was discharged he was *"mobilising with crutches 20 metres with crutches"*.

8. The Tribunal responded by letter dated 1 March 2011:

Your requests for a postponement of the hearing scheduled for (the applicant) received on 28 February 2011 have been considered. The Tribunal has decided to decline your request and the hearing will proceed as scheduled.

As you are aware, the adviser has a limited role to play at the hearing, and the hearing is essentially an opportunity for the applicant to discuss his claims with the Tribunal. In this regard, the Tribunal is confident that with or without an adviser, the applicant will not be disadvantaged in presenting his claims orally. The Tribunal will determine at the hearing whether further submissions are required and, if that is determined to be the case, then the applicant will be given time to provide further submissions. If that situation arises, the applicant may require your assistance.

9. The agent did not press further for an adjournment, but presented 'by hand' a written submission on 2 March 2011. The submission summarised the applicant's refugee claims, and concluded:

I would like to request you to conduct hearing considering his poor intellectual ability.

The applicant did not have any document in hand during the processing of his application at DIAC. However, he has obtained some documents from independent sources. The documents are attached herewith.

Should you require any further information, please feel free to advise.

The enclosed documents consisted of translations of documents confirming the applicant's identity, citizenship, family background, and baptism in 2064 (on the local calendar). No submissions were made

concerning these documents, and no documents were submitted to establish that the applicant suffered from any diagnosable intellectual or mental condition or impairment. There is now no such evidence before the Court.

10. The hearing then proceeded, as appointed for 3 March 2011. Neither party has tendered a transcript, and the Tribunal gives only a summary account of the proceedings. I have no reason not to accept that account. It records that "*the applicant attended the hearing alone"*, and does not indicate whether anything was said about the agent's absence. It makes no reference to the claim that the applicant had 'poor intellectual ability', nor how the Tribunal assessed that assertion in the course of the hearing. It contains no suggestion that the Tribunal encountered anything in the course of the hearing which caused, or should have caused, it to consider a possible problem of communication arising from a mental or behavioural condition exhibited by the applicant. It makes no mention of anything being said at the hearing as to whether the applicant's agent would be requested, or given an opportunity, to make a post-hearing submission.

11. There is no sworn evidence as to the events concerning the making of the Tribunal's decision and statement of reasons. However, it is reasonable for the Court to draw some inferences about this from the documents reproduced in the Court Book tendered by the Minister. This contains two 'transmission logs' for the MRT/RRT Sydney, showing that at 14.31 (ie. 2.31 pm) and again at 16.15 (i.e. 4.15 pm) on 9 March 2011 there were attempts to send documents, including a notification of a decision in relation to the applicant's matter, to the agent's facsimile number provided in the application to the Tribunal. Both logs show that the attempted transmission was unsuccessful due to 'busy', i.e the agent's facsimile machine was failing to respond by accepting the transmission.

12. A copy of the notification letter in the Court Book has a handwritten annotation "total 24 pages", which suggests, and I find, that the attempted transmission probably included the Tribunal's 'decision record' which is reproduced in the Court Book. This shows on its first page "*Date: 9 March 2011"*, and carries the Tribunal member's signature on the last page without any dating or timing annotation.

There is no evidence as to the precise date or time when the member signed the statement of decision and reasons.

13. An additional copy of the last page of the document has a certificate signed on behalf of the District Registrar:

> *I certify that this is a true copy of the Tribunal's statement of decision and reasons.*
>
> (Signed)
>
> *For District Registrar:* *Date: 9 March 2011*

There is no evidence before me as to the precise time on 9 March 2011 when this page was signed on behalf of the District Registrar.

14. In the absence of any other relevant evidence, I would draw an inference only that, in fact, at some unknown time prior to 2.31 pm on 9 March 2011 the Tribunal member had signed a copy of his statement of reasons, the District Registrar had signed another copy, and an intention had been formed within the Tribunal to attempt to publish the decision by transmitting it to the applicant's agent. I would also find that, in fact, no publication of the decision by communication to the applicant's agent or otherwise had occurred prior to 4.15pm, on 9 March 2011.

15. Another copy of the notification letter is reproduced in the Court Book with a 'registered post – sender to keep' sticker, which suggests that the documents were also sent to the applicant's agent by post. It is possible that the posting of the decision and statement of reasons also occurred on 9 March 2011, although it seems unlikely that this occurred prior to the two attempts to communicate the decision by way of facsimile machine. A case note which I shall reproduce below, confirms that the posting probably did not occur until 10 March 2011. It is reasonable to infer that the applicant received this copy of the decision and statement of reasons soon after that date. He commenced his present application, with a copy of the decision statement attached to his affidavit, on 1 April 2011, which was within the time provided under s.477 calculated from 9 March 2011.

16. The Court Book contains a copy of a facsimile of a letter sent to the Tribunal by the applicant's agent on the 9 March 2011 between the

times of the two unsuccessful attempts to transmit the decision. It has a sender's header suggesting that it was transmitted at 15.00 (i.e. 3.pm) on 9 March 2011 from a different number from that which had been given to the Tribunal. It has a recipient's footer, showing that it was received by the Tribunal's machine at *"3:05:44 pm (AUS Eastern Daylight Time)"*. I find that it was, in fact, received at that time. It said:

> *I would like to refer to the recent hearing with respect to the above applicant.*
>
> *I got notification from my office that I have received hearing tape of the hearing.*
>
> *As you are aware that my request for hearing deferral was rejected and I was not able to attend the hearing. I would like to request to grant me two weeks time from today's date to examine the hearing and make submission (if required after listening to the hearing tape).*
>
> *However, please go ahead to make decision if you are making positive decision.*
>
> *Should you require any further information, please feel free to advise.*

17. It is clear that this letter came to the attention of the member who had constituted the Tribunal, on the same day. A case note records a conversation at 4.56pm on 9 March 2011:

> *Contacted the Rep on his mobile phone to advise that his fax submission received today had been brought to the Presiding Member's attention, but the Presiding Member has advised that the request won't be granted because a decision has already been made in relation to the case.*
>
> *I further advised that as he was aware, we had been unable to fax the decision through to his office, so would post the decision tomorrow. I affirmed that the postal address in Case Mate is correct.*
>
> *The Rep confirmed that he was aware of the problems with the fax line in his office, and indicated that he was happy for the decision to be posted instead.*

18. A letter confirming the opinion of the Tribunal member that he regarded himself as having become *functus officio* at some time prior to the receipt of the agent's request, was dated and posted on 10 March 2011. It said:

> *The Tribunal received your submission dated 9 March 2011 on 9 March 2011.*
>
> *The submission was forwarded to the Presiding Member and your request was carefully considered. However, the Presiding Member has decided not to reopen this case.*
>
> *The Tribunal made its decision in this case on 9 March 2011. Once the Tribunal has made a decision under the Migration Act 1958, it becomes functus officio and has no power to take any further action on the review.*
>
> *The Tribunal is not in a position to assist you any further on this issue.*

19. I shall consider below whether the Tribunal member's opinion was correct in law, that he had no power to consider the agent's application for an opportunity to make a post-hearing submission.

The Tribunal's decision

20. The Tribunal's statement of reasons recounted the applicant's claims and his evidence to the delegate and to the Tribunal. It cited country information concerning the current situation relating to "*Maoist activities, human rights conditions and security in Nepal"*, which it had put to the applicant in the course of the hearing.

21. In its 'findings and reasons', the Tribunal said:

> *55. The Tribunal accepts that that the applicant was harassed by Maoists in his village while he was attending secondary school during the civil war; it accepts that the applicant considers himself to be a Christian; and that an attempt was made to extort money from him when he returned to Nepal from Kuwait. However, it finds that other aspects of the applicant's claims have been exaggerated or fabricated to enhance his application.*

22. The Tribunal then explained these conclusions. It did not accept that the applicant had been a person of interest to the Maoists after he had moved away from his village in 2001 or 2002, and found that "*the*

applicant fabricated the claim that he was a person of particular interest to the Maoists in Nepal to enhance his application."

23. The Tribunal accepted that there was an attempt to extort money from the applicant after his return from Kuwait, but concluded that he "*was targeted by criminals seeking money from him*", and that the incident was unrelated to his political opinion and that the claimed involvement of the Maoists was 'fabricated'.

24. The Tribunal noted inconsistent evidence about the applicant's claim to have been denied protection because he was a Christian, and did not accept that this claim was credible. It also found that he had not subsequently been "*targeted or harmed by Hindus or anyone else for converting to Christianity.*" The Tribunal thought that these claims were not consistent with country information, which suggested that the applicant "*will not be a person of interest or concern to the Maoists in Nepal*". It said:

> *71. ……The applicant's description of his religious activities in Nepal indicates to the Tribunal that he was able to practice his religion without difficulty. The Tribunal is satisfied that the applicant, a Hindu who has converted to Christianity, will be able to practice his religion freely and safely in Nepal.*
>
> *72. Accordingly, the Tribunal finds that the applicant's fear that he will be harmed by Hindus, the YCL, and the authorities in Nepal, because he converted to Christianity, is not well-founded.*
>
> *State protection*
>
> *73. The Tribunal has considered the applicant claim that the authorities in Nepal will be unable and unwilling to protect him. The Tribunal has found, for reasons already provided, that the applicant is not a person of particular adverse interest to any individual or group in Nepal and that he will not be denied protection by the authorities for the reasons provided.*
>
> *74. The Tribunal is satisfied that if the applicant requires state protection in Nepal, in the reasonably foreseeable future, he will not be denied protection, or discriminated against in terms of protection, and he will have access to the same level of protection which is commonly available to the citizens of Nepal.*

The grounds of review

25. The application asks the Court to set aside the Tribunal's decision and to remit the matter for further consideration. I have power to make these orders only if I am satisfied that the Tribunal's decision is affected by jurisdictional error. I do not have power myself to decide whether the applicant should be recognised as a refugee nor whether he should be given permission to reside in Australia.

26. The grounds of the application are:

> *1. The Tribunal failed to comply with mandatory procedure prescribed by the Act in failing to comply with section 424AA(b)(iv) & section 425 of the Act.*
>
> *2. The Tribunal has wrongly applied the law to the facts as found in relation to the seriousness of harm that constitutes persecution.*
>
> *3. The Tribunal applied the wrong test in relation to whether or not a Convention reason was an essential and significant reason for the persecution.*

27. These grounds have not been explained in any amended application or written or oral submission. Indeed, the applicant had nothing to say to me at the hearing.

28. Unaided by any submissions, I am unable to find substance in the grounds, except to the extent that they might raise the *functus officio* point which I shall consider below.

29. In relation to Ground 1, I can find no failure to follow a procedure mandated by s.424AA(b)(iv) of the Migration Act. This paragraph requires the Tribunal to adjourn its proceedings and provide the applicant with an additional time to respond to adverse information which has been put to him orally at a hearing, where the information falls within s.424A(1) and if the applicant requests this opportunity. However, the occasion for such a procedure did not arise in the present Tribunal's proceedings, since none of the information which provided its reasons for affirming the decision came within s.424A(1). The country information which was put to the applicant at the hearing was excluded from that category, by effect of s.424A(3)(a).

30. Nor do I consider that the Tribunal denied the applicant the opportunity required to be given under s.425(1) as interpreted by the Courts, i.e. that of having a 'meaningful' opportunity *"to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review"*. There is no evidence that the applicant, in fact, suffered from any impediment at the hearing due to the absence of his agent, nor from some impairment of communication with the Tribunal otherwise arising.

31. The applicant had no right to have a representative at the hearing to present his evidence to the Tribunal, and this was expressly precluded by s.427(6), which provides:

> ***427 Powers of the Refugee Review Tribunal etc***.
>
> ….…
>
> *(6) A person appearing before the Tribunal to give evidence is not entitled:*
>
> *(a) to be represented before the Tribunal by any other person; or*
>
> *(b) to examine or cross-examine any other person appearing before the Tribunal to give evidence.*

In this respect, it is notable that the Act does not even confer a right to have a person present *'to assist'* an applicant appearing before the RRT, which is given to applicants before the MRT (see s.366A and cf. *Hossain v Minister for Immigration* [2009] FMCA 1100 at [39]-[46])

32. In the present case, I am unable to find in the evidence before me any impediment encountered by the applicant at the hearing which he attended, due to the absence of his agent on that occasion. The situation was, in my opinion, comparable to that which I found in *SZNSF v Minister for Immigration* [2009] FMCA 1208 at [32]-[40].

33. There is certainly no evidence suggesting that *"the [applicant's] psychological condition denied him the opportunity to give such evidence and present such arguments in support of his application as he thought appropriate"* or *"impaired in any substantial way his capacity for rational decision-making in his own interests so far as the presentation of his case was concerned"* (see *Minister for Immigration*

& Citizenship v SZNVW [2010] FCAFC 41 per Keane CJ at [15], also at [20], [22], and [36]-[37], and Emmett J at [48]-[49], and Perram J at [84] and [86])

34. I am therefore not persuaded that any jurisdictional breach of obligations arising under s.425(1) of the Migration Act occurred, as a result only of the Tribunal's refusal to accede to the agent's request for the postponement of the hearing.

35. In relation to Grounds 2 and 3, no meaningful particulars have been given of the allegations of *"wrongly applied the law to the facts as found"*, or *"applied the wrong test"*. Unaided by these, I am unable to locate any such errors in the reasoning of the Tribunal. In my opinion, the reasoning and the conclusions reached by the Tribunal were open to the Tribunal as a matter of law, on the evidence which was before it.

36. I am therefore unable to identify any jurisdictional error vitiating the Tribunal's decision, unless such an error arises from the Tribunal's refusal on the day that its decision was made to entertain the agent's request for an opportunity to make a post-hearing submission.

37. In my opinion, his request was clearly reasonable in the circumstances, and the Tribunal did not suggest that it was refused after consideration of its merits. The applicant, through his agent, had earlier indicated a desire that his agent should have an opportunity to make a submission as to the effect of the applicant's oral evidence to the Tribunal and generally on the applicant's case. He had requested a postponement of the hearing to allow him that opportunity at an attendance at a hearing. The Tribunal's rejection of this request had appeared to acknowledge that it might be appropriate to allow the agent an opportunity after the hearing *"to provide further submissions"*. There is no evidence showing whether or not the Tribunal member told the applicant at the hearing that it had decided not to allow that opportunity. The evidence suggests that the Tribunal provided a copy of the recording of the hearing to the agent soon after the hearing. The agent's request to be given time to make a submission was made promptly, within six days after the hearing.

38. The postponement request therefore deserved to be considered on its merits, unless the Tribunal was precluded from doing so by law.

Moreover, in my opinion, if, in law, the Tribunal was not *functus officio*, it was bound to address the merits of deferring the making of its decision until, at least, first considering the agent's post-hearing application on its merits.

39. This follows from its overriding obligation under s.414 '*to review the decision*' by reference to the evidence and submissions presented by the applicant in the course of the proceedings. That duty would not be properly exercised if the Tribunal proceeded to complete its exercise of jurisdiction without considering the merits of a reasonable procedural request of which it was aware (c.f. *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [14]-[15], [40]-[43], [163]-[164] and *Applicant NAFF of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 221 CLR 1 at [27], [33]).

40. The jurisdictional error raised by the present case is, therefore, equivalent to the error when a Tribunal refuses to consider relevant evidence submitted after the member and Tribunal have completed a statement of reasons and decision, but before it takes legal effect under the Migration Act, based upon an incorrect opinion that it was *functus officio* (see *X v Minister for Immigration and Multicultural Affairs* (2001) 116 FCR 319 per Gray J at [13-18] with whom Moore J agreed at [48]-[32], *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 18 per Merkel J at [19]-[27], and *Applicant V346 of 2000 v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 536 per Ryan J at [77])

41. As I understood her submissions, counsel for the Minister conceded that jurisdictional error would have vitiated the Tribunal's decision which is presently before me, if the Tribunal member was incorrect in law in his opinion that he had no power, in effect, to consider the merits of the procedural application made by the applicant's agent and, if he acceded to it, to withdraw the decision which he had intended to make and publish, and to reconsider the matter in the light of any ensuing submission. Counsel also accepted that the Court should itself determine whether the Tribunal was, as a matter of jurisdiction, *functus officio* at the time when the agent's request was received at 3pm on

9 March 2011 and when it was rejected by the Tribunal member prior to 4.56pm on the same day.

42. Counsel submitted, and I accept, that it is well established that once the Tribunal has, in law, 'made' its decision it becomes *functus officio* and cannot reconsider a decision which validly has completed the exercise of its statutory function (see *SZBWJ v Minister for Immigration & Citizenship* (2008) 171 FCR 299 and cases cited therein).

43. My narration of what happened on 9 March 2011 therefore raises the 'nice' legal point which I identified at the commencement of this judgment.

Did the Tribunal become *functus officio* before 3pm on 9 March 2011?

44. The procedures of the Tribunal in relation to the completion of its jurisdiction by the making of a legally operative decision have changed in its practice and legislation over its lifetime. Under normal administrative law principles, and absent any specific legislation defining the commencement time of a legally operative decision, a 'decision' made under a statutory power to decide a matter takes operative effect only when some act of 'communication or manifestation' of the decision has occurred (see authorities cited by Higgins J in *Semunigus v Minister for Immigration & Multicultural Affairs* (2000) 96 FCR 533 at [67]-[68]).

45. The judgments in *Semunigus* accepted that these principles applied to a decision of the present Tribunal which was made at a time when the Migration Act referred only to the Tribunal having 'made' a decision, and then required it to give the applicant a copy of a written statement setting out the decision and its reasons (see s.430 in its terms prior to 1999). Their Honours held that no decision was 'beyond recall' prior to publication of the decision, in the absence of any specific provision governing the time when the Tribunal became *functus officio* (see Spender J at [13], Higgins J at [75] and [78], and Madgwick J at [103]).

46. Under the procedures at one time followed by Commonwealth administrative tribunals who were in the same position, certainty was given to the point of time when irrevocable publication of a decision

occurred, by the tribunal emulating the practice of courts and appointing a hearing purely for the purposes of publishing its decision. Express provision for such a procedure by the present Tribunal was inserted in the Migration Act by *Migration Legislation Amendment Act (No. 1)* 1998 (Cth), which commenced in December 1998. Under these amendments, unless the Tribunal had given an oral decision at its hearing, it was required to give notice of an intended 'handing down' of a Tribunal decision, and was then required to publish the decision by giving a copy to the applicant or his agent and the Secretary (if they attended) *"on the day, and at the time and place, specified in the notice"*. It was then provided that *"the date of the decision is the date on which the decision is handed down"* (see previous s.430B(2) and (4)). An alternative provision allowed the Tribunal to give *"an oral decision"*, and deemed the decision to be notified on that date (s.430D). An implication of these provisions was that the Tribunal became *functus officio* at the precise time when the 'handed down' occurred or an oral decision was announced.

47. These procedures may have led to precision as to the time of effect of a Tribunal decision, but they also led to a sometimes substantial hiatus within the Tribunal's proceedings, between the completion of the member's preparation of his or her decision and statement of reasons and the handing down event. A series of cases, including those cited above, pointed out that the Tribunal member was bound to recall and reconsider his or her decision and reasons, if further material was submitted during that hiatus period. Over time, the handing down procedure also became administratively inconvenient to the Tribunal.

48. The present provisions governing the making of the Tribunal's decision resulted from the *Migration Legislation Amendment Act (No. 1)* 2008 (Cth). They abandoned the previous 'handing down' procedure, and the making of a decision is now governed only by ss.430, 430A and 430D, which provide:

> ***430 Refugee Review Tribunal to record its decisions etc.***
>
> *(1) Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:*
>
> *(a) sets out the decision of the Tribunal on the review; and*

(b) sets out the reasons for the decision; and

(c) sets out the findings on any material questions of fact; and

(d) refers to the evidence or any other material on which the findings of fact were based.

(2) A decision on a review (other than an oral decision) is taken to have been made on the date of the written statement.

(3) Where the Tribunal has prepared the written statement, the Tribunal must:

(a) return to the Secretary any document that the Secretary has provided in relation to the review; and

(b) give the Secretary a copy of any other document that contains evidence or material on which the findings of fact were based.

430A Notifying parties of Tribunal's decision (decision not given orally)

(1) The Tribunal must notify the applicant of a decision on a review (other than an oral decision) by giving the applicant a copy of the written statement prepared under subsection 430(1). The copy must be given to the applicant:

(a) within 14 days after the day on which the decision is taken to have been made; and

(b) by one of the methods specified in section 441A.

(2) A copy of that statement must also be given to the Secretary:

(a) within 14 days after the day on which the decision is taken to have been made; and

(b) by one of the methods specified in section 441B.

(3) A failure to comply with this section in relation to a decision on a review does not affect the validity of the decision.

430D Notifying parties when Tribunal gives an oral decision

If the Tribunal gives an oral decision on an application for review, the Tribunal must give the applicant and the Secretary a copy of the statement prepared under subsection 430(1) within 14

days after the decision concerned is made. The applicant is taken to be notified of the decision on the day on which the decision is made.

49. In her helpful supplementary submissions, counsel for the Minister referred me to the explanatory memorandum for these amendments:

> *4.* Purpose of s 430(2). *The purpose of s 430(2) is not immediately evident on its face. However, the Revised Explanatory Memorandum to the Migration Legislation Amendment Bill (No.1) 2008 (**revised EM**) makes clear that the purpose of s 430(2) is to identify the day on which the decision is made for the purposes of determining notification of the Tribunal's decision. At paragraph 54 the EM provides that s 430(2):*
>
> > *"…relates to the [insertion of ss 430A to 430C] which will remove the requirement in the Act to hand down decisions of the RRT and replace the existing procedures for notifying the parties of a Tribunal decision with a **simpler procedure**". In other words, it was considered necessary to insert s 430(2) so as to make clear the day the decision was taken to be made for the purpose of the notification provisions in Division 5 of Part 7 of the Act".*
>
> *5. The legislature did not suggest that the purpose of s 430(2) was to make clear the day on which the Tribunal becomes* functus officio.
>
> *6.* Legislative and policy context. *However, the revised EM also makes clear that the legislature regarded the new s 430(2) as effectively replacing the former s 430B(4). At paragraph 57 the revised EM states:*
>
> > *"A decision of the RRT, other than an oral decision, is taken to have been made on the date of the written statement prepared under subsection 430(1) of the Act. Currently, subsection 430B(4) provides , in effect, that in cases where a decision of the RRT is to be handed down, the date of the decision is the date the decision is handed down. **As existing section 430B and the handing down requirement is being removed (item 20), it is necessary to insert a provision – new subsection 430(2) – which specifies a date for when an RRT review decision is taken to have been made."***

(emphasis given by counsel)

50. Counsel for the Minister submitted, and I accept, that the present issue turns upon the correct construction of s.430(2). I also accept that this subsection is intended to operate not only as a provision governing the calculation of time for the purposes of time limits on judicial review and otherwise, but also to deem a point in time when a valid decision of the Tribunal takes legal effect and is incapable of recall or reconsideration by the Tribunal, even if the decision and statement of reasons has not actually been published or transmitted to an applicant at that time.

51. In relation to the calculation of time limits running from the making of the decision, the effect of the provision is assisted by s.36 of the *Acts Interpretation Act 1901* (Cth), which provides:

> ***36 Reckoning of time***
>
> *(1) Where in an Act any period of time, dating from a given day, act, or event, is prescribed or allowed for any purpose, the time shall, unless the contrary intention appears, be reckoned exclusive of such day or of the day of such act or event.*
>
> *(2) Where the last day of any period prescribed or allowed by an Act for the doing of anything falls on a Saturday, on a Sunday or on a day which is a public holiday or a bank holiday in the place in which the thing is to be or may be done, the thing may be done on the first day following which is not a Saturday, a Sunday or a public holiday or bank holiday in that place.*

However, this provision does not address the point of time on the deemed date of decision when the decision takes operative legal effect, so as to render the Tribunal *functus officio* and incapable of recalling the decision so as to consider a last minute tender of material or a procedural application such as was made in the present case.

52. Nor can the present issue be solved by a presumption in relation to some species of instruments, that their legal effects commence at the start of the day of making (cf. Bennion '*Statutory Interpretation*', 2nd Ed. At p.180, and Pearce & Geddes '*Statutory Interpretation in Australia'* 5th Edition, at [6.3]). Nor by presumptions in relation to the

measurement of statutory time periods (c.f. Lindgren J in *Roskell v Snelgrove* [2008] FCA 427 at [43], and Pearce & Geddes at [6.45]).

53. Although, as Lindgren J noted *"ordinarily the law takes no account of parts of a day"*, the application of the *de minimis* principle must be abandoned if the statute indicates that *"a substantial point turns on regard being had to a precise moment of time"* (see Bennion at p.781).

54. The above considerations lead back to an examination of the history, language, context and policy of s.430(2) to solve the present point.

55. Counsel for the Minister accepted that the present point is not solved by any express indication in s.430(2) nor by other legislation. She submitted, and I accept, that it must be solved on the normal principles of statutory construction, by which the Court considers the language and purpose of the words used by Parliament so as to arrive at a constructed intention of the legislature (she cited *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] and *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408).

56. It therefore is necessary to find the precise temporal effect of s.430(2) in relation to *functus officio,* by a construction of the intention of that provision in the light of its statutory context and objectives. Three possible constructions could be considered:

    i) The Tribunal decision is deemed to take effect upon the first moment in time on the date appearing on the written statement of reasons for the decision, regardless of the actual times when the decision reached finality in the mind of the Tribunal member, when the statement of reasons was completed within the Tribunal, and when it was published to the applicant; or

    ii) upon the time occurring on the date appearing on the decision when the decision and written statement of reasons was in fact 'made' – whether on that date or on an earlier date; or

    iii) upon the last moment in time on the date appearing on the written statement as the date of its making.

57. On my above findings of fact in the present case, if construction (i) is correct, then the present Tribunal member correctly was of the opinion that he no longer had power to consider the request to be allowed time for a post-hearing submission. If construction (ii) is taken, then the correctness of the member's opinion turns upon an investigation of when the decision was in fact 'made' on or before 9 March 2011. If construction (iii) is correct, then the member's opinion was incorrect, and his refusal to entertain the application gave rise to jurisdictional error vitiating the decision subsequently published to the applicant.

58. Counsel for the Minister submitted that construction (ii) should be taken, and that a Tribunal decision should be regarded as having been actually 'made' at the point of time when *"the written statement is dated and signed"*, and that *"other administrative procedures or Tribunal documents may assist in coming to a view about the point at which a written statement is signed"*. She submitted that the present evidence did not establish when this occurred, but allowed the inference that it had occurred no later than 2.31 pm on 9 March 2011 when the Tribunal first attempted to send the decision and statement to the applicant's agent. She submitted that it was therefore *functus officio* when the agent's request for postponement was received at 3.05pm.

59. Her submissions have some attraction, but I have concluded that they lead into the very uncertainties which the 2008 amendments were intended to remove. Importantly, they are the uncertainties of discovering and exploring the internal Tribunal processes of preparing a written decision and statement of reasons, which led to the normal principle that an administrative decision is not to be regarded as coming into effect until it has been published or manifested by some public or overt act, thereby providing an objectively discoverable point of time when the decision-maker has irrevocably demonstrated a commitment to the finality of a prepared written decision and statement of reasons. In my opinion, the legislature must have been aware of the undesirability of requiring exploration of the internal processes prior to an overt act, and to have sought to identify a time of effect which was 'simply' discoverable from something manifested on the face of a published statement of reasons of the Tribunal.

60. The statutory intention of s.430(2) was, in my opinion, to identify one element on the face of a 'written statement' prepared under s.430(1) and published under s.430A, which would simply, in all cases, and without the need for any internal investigation of the preparatory processes of the Tribunal, identify a precise time of legal effect for the published decision, as well as a date for calculating time periods for any applications for judicial review etc.

61. The only element which could serve this purpose and which is implicitly required by s.430(2) and 430A, is the specification of a 'date of the written statement' in the document notified to the applicant. In my opinion, if the legislation intended an act of signature on a document, whether by the Tribunal member, his or her secretary or other agent, or a registry official, to provide the exact time of effect on the date of a decision, then it would have so provided. Similarly, if any other possible criterion for locating a deemed time of effect of a Tribunal decision was intended, it would have been specified. I therefore do not accept the solution suggested by the Minister's counsel.

62. For the same reasons, I would not find any other solution within the uncertainties raised by construction (ii). In particular, I do not consider that the new s.430(2) intended that a time of effect on the date marked on the written statement would occur only when the decision and statement were 'made' on that date, in the sense of communicated to an applicant or his or her agent on that date. The intention of the amendments was clearly to give a final legal effect to a Tribunal decision, before any such communication or other overt manifestation had occurred or was attempted.

63. In my opinion, the 'simple' policy adopted by the present amendments in relation to the time of effect of a Tribunal decision, was akin to the simple, but sometimes ruthless, solutions to other administrative uncertainties found elsewhere in the Migration Act, for example, in its constructive and conclusive notification provisions, which focus upon a recorded date of dispatch to a nominated address regardless of actual receipt (cf. *Le v Minister for Immigration & Citizenship* (2007) 157 FCR 321 at [25])

64. The 2008 amendments imposed a procedural obligation on the Tribunal always to specify "a date" on the face of the written statement required to accompany its decision and to be published to an applicant, with the intention that this would conclusively provide the precise date and time for the intended operation of its decision. They did not require any other formality or factual inquiry to determine a time of effect for the decision. By implication from this scheme, the specified date on a statement given to an applicant must be a date after the Tribunal member has decided to become irrevocably committed to the contents of the decision and written statement. Thus, a future date can be specified, for example, to anticipate some internal delay before the statement will be published or for some other relevant reason. Manifestly, it would be an abuse of the power if the Tribunal specified a date of effect which 'back-dated' the statement of reasons to a point of time earlier than the formation of the requisite intention of finality and the completion of the statement of reasons. However, if properly exercised, the specification of a date on a written statement of reasons subsequently notified to the applicant pursuant to the provisions of s.430A is intended to provide a conclusive and certain point of time when a published decision of the Tribunal is deemed to have taken legal effect and when the Tribunal is to be taken to have become *functus officio*.

65. In my opinion, the intended administrative simplicity and certainty suggests that the true construction of s.430(2) is that the decision is deemed to have become final at all points of time on the date specified as the "date" of the written statement prepared under s.430(1) and notified under s.430A. That is, that the sub-section provides that a decision is deemed to have taken legal effect at the first point of time on the date specified in the statement as the date of its making. The first construction suggested above is, therefore, the correct construction.

66. In the present case, I therefore find that the Tribunal member correctly was of opinion that he had no power to re-open his proceedings on the applicant's review, so as to entertain the agent's request for an opportunity to lodge a post-hearing submission, which was received in the afternoon of the date appearing on the Tribunal's published decision and statement of reasons.

67. Since I have found no jurisdictional error vitiating the Tribunal's decision, it is a privative clause decision, and I must dismiss the application.

I certify that the preceding sixty-seven (67) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate:

Date: 23 September 2011