FEDERAL COURT OF AUSTRALIA

SZKUO v Minister for Immigration and Citizenship [2009] FCAFC 167

MIGRATION – power of the Minister for Immigration and Citizenship to remove an unlawful non-citizen from Australia – whether visa application finally determined in accordance with s 198(6)(c)(i) *Migration Act 1958* (Cth) – whether application finally determined where decision of the Refugee Review Tribunal subject to jurisdictional error but application dismissed on a discretionary ground

Held: appeal dismissed

Migration Act 1958 (Cth), ss 5(9), 189(1), 196(1), 198(6)(c)(i), 425, 426A, 430
Migration Regulations 1994 (Cth), Sch 2 cl 010.511(b)(iii)(A)

Al-Kateb v Godwin (2004) 219 CLR 562; [2004] HCA 37 referred to
Bolea v Minister for Immigration and Multicultural Affairs (2001) 113 FCR 387; [2001] FCA 1129 cited
Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd (1979) 42 FLR 338 discussed
Commissioner of Taxation of the Commonwealth of Australia v Futuris Corporation Limited (2008) 237 CLR 146; [2008] HCA 32 referred to
GJ Coles & Co Ltd v Retail Trade Industrial Tribunal (1986) 7 NSWLR 503 cited
Lansen v Minister for Environment and Heritage (2008) 174 FCR 14; [2008] FCAFC 189 cited
Ma v Minister for Immigration and Citizenship [2007] FCAFC 69 cited
Minister for Home Affairs v Tervonen (2008) 166 FCR 91; [2008] FCAFC 24 referred to
Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597; [2002] HCA 11 distinguished
Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476; [2003] HCA 2 cited
SZKUO v Minister for Immigration & Anor [2007] FMCA 2073 referred to
SZKUO v Minister for Immigration (No 2) [2009] FMCA 498 affirmed
SZKUO v Minister for Immigration and Citizenship [2009] FCA 93 referred to
Tchoylak v Minister for Immigration and Multicultural Affairs (2001) 111 FCR 302; [2001] FCA 872 cited
Tervonen v Minister for Justice and Customs (No 2) (2007) 98 ALD 589; [2007] FCA 1684 referred to

SZKUO v MINISTER FOR IMMIGRATION AND CITIZENSHIP

NSD 552 of 2009

MOORE, JAGOT AND FOSTER JJ
3 DECEMBER 2009
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 552 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZKUO** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Respondent**

JUDGES:	**MOORE, JAGOT AND FOSTER JJ**
DATE OF ORDER:	**3 DECEMBER 2009**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs of the appeal as agreed or taxed.

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

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NEW SOUTH WALES DISTRICT REGISTRY
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BETWEEN:	**SZKUO** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Respondent**

JUDGES:	**MOORE, JAGOT AND FOSTER JJ**
DATE:	**3 DECEMBER 2009**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

THE COURT:

1 This appeal concerns the power of the Minister of Immigration and Citizenship (**the Minister**) to remove the appellant from Australia as an unlawful non-citizen. The Minister can exercise this power in respect of the appellant only if the facts (which are agreed) satisfy the description in s 198(6)(c)(i) of the *Migration Act 1958* (Cth) ("the grant of the visa has been refused and the application has been finally determined"). The appellant claims that this statutory description is not satisfied in circumstances where the decision of the Refugee Review Tribunal (**the Tribunal**) affirming the refusal of the appellant's visa application is affected by jurisdictional error but the appellant's challenge to the validity of that decision was dismissed on a discretionary ground (delay in bringing the challenge without any adequate explanation). According to the appellant, a decision affected by jurisdictional error is no decision at all and thus the application has not been finally determined.

BACKGROUND TO APPEAL

2 The appeal is made in the following circumstances. The appellant applied for a protection visa on 3 October 2000. The Minister's delegate refused the application on 18 October 2000 and granted a bridging visa to the appellant for a period of 28 days from

notification of the decision. On 21 November 2000 the appellant applied to the Tribunal for review of the decision. The Tribunal invited the appellant to appear at the hearing by letter dated 2 February 2001. The appellant notified the Tribunal that he wished to appear in his response received by the Tribunal on 18 February 2001. The matter was listed for hearing before the Tribunal on 1 March 2001. The appellant did not appear at the hearing. The appellant attended the Tribunal's premises for the hearing. He showed the receptionist his hearing invitation and was invited to take a seat until called. However, he was not called and instead was advised he could go home. In its decision delivered on 26 July 2001 the Tribunal dismissed the review application on the basis that the appellant failed to attend the hearing without any explanation (as permitted by s 426A(1) of the Migration Act).

3 On 22 June 2007 the appellant commenced a proceeding in the Federal Magistrates Court seeking judicial review of the Tribunal's decision. The Federal Magistrate delivered his decision on 21 December 2007 (*SZKUO v Minister for Immigration & Anor* [2007] FMCA 2073). The Federal Magistrate accepted the appellant's evidence about what occurred on the day of the hearing before the Tribunal (at [13]). The Federal Magistrate (at [14]) was satisfied that the Tribunal erred in dismissing the application in reliance on s 426A of the Migration Act because the criteria for the operation of that provision (the appellant failed to attend the hearing) were not satisfied. Despite finding jurisdictional error the Federal Magistrate considered that, in the circumstances, it was necessary to consider the discretion to grant or withhold relief. The Federal Magistrate found that the appellant knew in 2001 that he needed to apply to the Federal Magistrates Court to have the decision set aside but took no action. The appellant's failure to act for a period of almost six years had not been explained. The Federal Magistrate in the exercise of discretion thus concluded that relief should be denied to the appellant. The Federal Magistrate summarised the position as follows in [28] of his reasons:

> Although jurisdictional error on the part of the Tribunal has been demonstrated, relief will nevertheless be denied by reason of the unwarrantable delay in the bringing of these proceedings.

4 The Department detained the appellant on 9 April 2008 relying on the powers in s 189(1) of the Migration Act ("(i)f an officer knows or reasonably suspects that a person in

the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person").

5 On 12 December 2008 the appellant commenced a proceeding in this Court seeking an extension of time in which to file a notice of appeal against the Federal Magistrate's decision of 21 December 2007. The Court dismissed this proceeding on 16 February 2009 (*SZKUO v Minister for Immigration and Citizenship* [2009] FCA 93) on the following basis (at [36]):

> The Applicant has availed himself of his right to seek review by the Federal Magistrates Court and that Court, in the exercise of an admitted discretion, refused him relief. He has now been given the opportunity to again explain his circumstances and the reasons for his delay in a number of *Affidavits* filed in this Court and the opportunity to give oral evidence. Notwithstanding the finding as to jurisdictional error on the part of the Tribunal, it is considered that an extension of time should be refused. Rather than pursuing an application to this Court, he refrained from doing so and sought intervention by the Minister. The delay in bringing the application does not constitute "*special reasons*" within the meaning of O 52 r 15.

6 On 17 March 2009 the appellant commenced another proceeding in the Federal Magistrates Court. In this proceeding the appellant sought a declaration that he was not liable to detention or removal from Australia as an unlawful non-citizen, in effect, because his visa application had not been "finally determined" within the meaning of s 198(6)(c)(i) of the Migration Act. The Federal Magistrates Court dismissed this proceeding on 27 May 2009 (*SZKUO v Minister for Immigration (No 2)* [2009] FMCA 498 (***SZKUO (No 2)***)).

7 On 5 June 2009 the appellant filed a notice of appeal against the decision of the Federal Magistrates Court in *SZKUO (No 2)*. The appellant claims that the Federal Magistrate erred in *SZKUO (No 2)* in three respects. First, the appellant's application for a protection visa has not been "finally determined" within the meaning of s 198(6)(c)(i) of the Migration Act. Second, the appellant's bridging visa continues. Third, the appellant's detention and threatened removal from Australia is unlawful.

THE APPELLANT'S CASE ON APPEAL

8 The appellant's submissions involved a number of interdependent propositions.

9 The starting point of the appellant's submissions is s 196(1) of the Migration Act. That sub-section provides that:

> (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
>
> (a) removed from Australia under section 198 or 199; or
>
> (b) deported under section 200; or
>
> (c) granted a visa.

10 From this provision it follows, submitted the appellant, that detention must be for one of the purposes specified in (a) to (c). If not for one of those purposes, detention is unlawful (*Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37).

11 The only potentially relevant purpose in the appellant's case is s 196(1)(a). The appellant submitted that the question is thus whether the appellant is being detained for the purpose of removal under s 198.

12 Section 198 specifies the circumstances in which a person is to be removed from Australia. The only provision of potential application to the appellant is s 198(6). Section 198(6) sets out cumulative requirements in these terms:

> (6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
>
> (a) the non-citizen is a detainee; and
>
> (b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
>
> (c) one of the following applies:
>
> (i) the grant of the visa has been refused and the application has been finally determined;
>
> (iii) the visa cannot be granted; and
>
> (d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.

13 Section 5(9) defines "finally determined" as follows:

> (9) For the purposes of this Act, an application under this Act is finally determined when either:
>
> (a) a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Part 5 or 7; or
>
> (b) a decision that has been made in respect of the application was subject to some form of review under Part 5 or 7, but the period within which such a review could be instituted has ended without a review having been instituted as prescribed.

14 The appellant noted that Pt 5 of the Migration Act, as referred to in the definition of "finally determined", governs the review of decisions by the Migration Review Tribunal. Part 7 of the Migration Act, also referred to in that definition, governs the review of decisions by the Refugee Review Tribunal concerning protection visas and thus is relevant to the appellant's case. Part 7 includes s 425 ("(t)he Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review"). This section imposes a mandatory obligation on the Tribunal. The jurisdictional error by the Tribunal in this case arises because of the Tribunal's failure to comply with this obligation.

15 Given that the Tribunal relied on s 426A of the Migration Act to dismiss the application by reason of its mistaken belief that the appellant had failed to attend the hearing when invited to do so, the Tribunal had failed to comply with one of its inviolable obligations (to afford a hearing). This is the basis for the original decision of the Federal Magistrates Court that the Tribunal's decision was affected by jurisdictional error.

16 According to the appellant, in circumstances where the Tribunal has not complied with its obligation under s 425 of the Migration Act, the process of review under Pt 7 remains incomplete. It is one thing, the appellant said, to accept that the appellant cannot compel the Tribunal to complete its review (because the Federal Magistrates Court's exercise of discretion to refuse the appellant relief is binding upon the appellant). It is another to characterise the review process as complete in accordance with law. A decision affected by jurisdictional error has no legal effect (*Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; [2002] HCA 11). Because the appellant has not been given a hearing in accordance with s 425 the appellant submitted that it also follows that there has been no "decision on review" of the Tribunal as required by s 430 of the Migration Act. Nor can it be said that the Tribunal has given the appellant a copy of the decision under s 430(1) as required by s 430A(1) of the Migration Act. Finally, on the appellant's case, the appellant's bridging visa remains valid in accordance with the terms of cl 010.511(b)(iii)(A) of Sch 2 to the *Migration Regulations 1994* (Cth). This provides that a bridging visa remains in effect until "28 days after notification of the decision of the review authority". For the

reasons given, the appellant submitted that there has been no decision and thus no notice of the decision.

17 The appellant drew on various statements in *Bhardwaj* to support this analysis.

(1) By failing to provide the appellant with an opportunity to appear before it the Tribunal "did not conduct a review as required by the Act" and its decision was not a "decision on review" for the purposes of the Act (at [43]-[44] per Gaudron and Gummow JJ (McHugh J agreeing).

(2) Further, at [51], their Honours said:

> There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all [see *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420, where Jordan CJ stated that constructive failure to exercise jurisdiction left "the jurisdiction in law constructively unexercised". See also *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243, per Rich, Dixon and McTiernan JJ; *Posner v Collector for Inter-State Destitute Persons (Vict)* (1946) 74 CLR 461 at 483, per Dixon J; *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 at 483, per Gibbs J; *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338 at 349-350, per Wilson, Deane and Gaudron JJ; *Craig v South Australia* (1995) 184 CLR 163 at 179; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 227 [82], per Kirby J; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 453 [189], per Gummow and Hayne JJ]. Further, there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be other than as recognised by the law that will be applied if and when the decision is challenged. A fortiori in a case in which the decision in question exceeds constitutional power or infringes a constitutional prohibition.

(3) These statements led to the conclusion at [53] that:

> As already pointed out, a decision involving jurisdictional error has no legal foundation and is properly to be regarded, in law, as no decision at all. Once that is accepted, it follows that, if the duty of the decision-maker is to make a decision with respect to a person's rights but, because of jurisdictional error, he or she proceeds to make what is, in law, no decision at all, then, in law, the duty to make a decision remains unperformed.

(4) To the same effect Hayne J referred to a decision affected by jurisdictional error as having "no relevant legal consequences" (at [153]). Callinan J described the Tribunal's conduct in such a case as "a failure to exercise jurisdiction" (at [163]).

18 The appellant submitted that decisions subsequent to *Bhardwaj* also support this analysis. In *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476; [2003] HCA 2 at [76] the High Court cited *Bhardwaj* saying that "(t)his Court has clearly held that an administrative decision which involves jurisdictional error is 'regarded, in law, as no decision at all'". This Court applied the same approach in *Tervonen v Minister for Justice and Customs (No 2)* (2007) 98 ALD 589; [2007] FCA 1684 at [115]. While this decision was varied on appeal (*Minister for Home Affairs v Tervonen* (2008) 166 FCR 91; [2008] FCAFC 24) the Full Court did not express any doubt about the correctness of the principle on which the primary judge relied. Similarly, in *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14; [2008] FCAFC 189 Moore and Lander JJ at [164]-[168] said:

> [**164**] … The courts have always recognised that a decision made by an administrative decision-maker which is ultra vires the power reposing in the decision-maker lacks any legal effectiveness. It was often said that the decision was a nullity or void, although these descriptions are neither necessary nor helpful: *Bhardwaj* 209 CLR at 613. If the Court declares a decision to have been made in excess or want of jurisdiction, the decision-maker will in conformity with the rule of law treat the decision as having no legal force or effect. Although the decision always lacked any legal effect, the decision-maker was not required to treat it so until the Court so declared. There was no legal obligation on the decision-maker to treat an ultra vires decision as legally ineffective and of no consequence.
> …
> …
>
> [**168**] We must proceed upon the clear understanding that a decision infected by jurisdictional error is no decision at all as indeed the Full Court of this Court did in *Lobo v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 93 at 106-107.

19 The same point was made by McHugh JA (as he then was) in *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 525 as follows:

> One of the basic doctrines of common law jurisprudence is that the failure to perform a *mandatory* condition imposed by statute invalidates the doing of any act dependent on the fulfilment of that condition. In so far as such an act imposes duties or creates rights, the effect of non-fulfilment of the condition is that the act is totally incapable of creating legal consequences. For legal purposes, the act has no effect and may be disregarded. Administrative and constitutional law provide many illustrations of this

basic doctrine.

20 An integral part of the appellant's case is that the Minister has no power to remove the appellant under s 198(6) until the application has been "finally determined". According to the appellant, as the Tribunal's decision is affected by jurisdictional error the Tribunal has not yet made a decision having legal effect. The refusal of relief to the appellant to have the Tribunal's decision set aside on a discretionary basis, said the appellant, does not alter the basic common law doctrine that the decision "has no effect and may be disregarded" (*GJ Coles* at 525). The consequence, on the appellant's case, is only that the appellant may not compel the Tribunal to perform its statutory duty. The Tribunal, however, could decide to perform its duty. Alternatively, the Attorney-General could apply to the Court for an order compelling the Tribunal to fulfil its statutory duty. The appellant said it followed from these submissions that as the Minister has no power to remove the appellant his detention is unlawful (and tortious). His removal would also be tortious (as a trespass to the person). The appellant is entitled to restrain this tortious conduct by injunction irrespective of his lack of entitlement to the constitutional writs to quash the Tribunal's decision (*Commissioner of Taxation of the Commonwealth of Australia v Futuris Corporation Limited* (2008) 237 CLR 146; [2008] HCA 32 at [47]).

21 The appellant submitted that the Federal Magistrate in *SZKUO (No 2)* thus erred by treating the Tribunal's invalid decision as having "operational effect" (at [43]). *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 42 FLR 338, on which the Federal Magistrate relied to reach this conclusion, concerned the reviewability of a decision affected by jurisdictional error, not whether the decision had legal effect.

DISCUSSION

22 The Minister's submissions concisely identified the flaw in the appellant's argument. We adopt those submissions as summarised below.

23 As the Minister pointed out, the reference to "decision" in s 5(9)(a) of the Migration Act (which provides that an application is "finally determined" when "a decision that has been made in respect of the application is not, or is no longer, subject to any form of review

under Part 5 or 7") is to the decision of the Minister or the Minister's delegate to grant or refuse to grant a visa. It is this decision which is capable of being reviewed under Pts 5 or 7.

24 It follows that s 198(6)(c)(i) of the Migration Act (requiring removal of an unlawful non-citizen if, relevantly, "the grant of the visa has been refused and the application has been finally determined") does not require the Tribunal's decision to be valid or otherwise. The section requires only that the visa application "is not, or is no longer, subject to any form of review under Part 5 or 7".

25 We agree with the Minister's submissions that the legal effect of the orders made by the Federal Magistrates Court on 21 December 2007 (dismissing the application for review of the Tribunal's decision on discretionary grounds) and of this Court on 16 February 2009 (refusing an extension of time to appeal against the Federal Magistrates Court's orders) is that the delegate's decision refusing the grant of the visa is no longer subject to any form of review.

26 We agree also that the result for which the appellant contends (the impracticality of which is self-evident) is not dictated by any legal principle properly understood. As the Full Court of the Federal Court said in *Ma v Minister for Immigration and Citizenship* [2007] FCAFC 69 at [27]:

> [**27**] *Bhardwaj*, however, cannot be understood to stand for the proposition that jurisdictional error on the part of an administrative decision maker always means that the decision is no decision or a decision without legal consequences. The consequences of a decision infected by jurisdictional error will be determined by the Act which empowers the decision: *Project Blue Sky Inc v Australian Broadcasting Authority* (1948) 194 CLR 355 at 388–389; *Jadwan v Department of Health* (2003) 204 ALR 55 at [42] and [64].

27 *Brian Lawlor* is relevant, as the Federal Magistrate found. Consistent with the reasoning in *Ma*, it discloses that decisions affected by jurisdictional error can have legal and practical consequences depending on the statutory context. As the Minister submitted (para 20 of the Minister's written submissions):

> The appellant's argument involves relying on a statement made in one context and seeking to extrapolate and apply it in a quite different context and for a quite different purpose.

28 The circumstances of the present case bear no resemblance to those in *Bhardwaj*.

29 In *Bhardwaj* the hearing before the Migration Review Tribunal took place on 15 September 1998, the tribunal being unaware of the applicant's communication about his illness and inability to attend. The tribunal dismissed the application on 16 September 1998. Instead of seeking judicial review of that decision the applicant contacted the tribunal on 18 September 1998 drawing the tribunal's attention to the missed communication about his illness. The tribunal scheduled the matter for another hearing on 23 September 2008 after which the tribunal found in the applicant's favour. In other words, the tribunal itself recognised its decision was made on the basis of a fundamental error and, by reason of the applicant's swift action, was able to treat it as no decision at all.

30 In the present case, the appellant apparently made no attempt to contact the Tribunal after it dismissed his application for review in 2001. The appellant waited for some six years before applying for judicial review of that decision and being refused relief by reason of inadequately explained delay. He waited another year before seeking an extension of time in which to appeal against the Federal Magistrate's decision to refuse relief and was unsuccessful. In contrast to *Bhardwaj*, therefore, a court of competent jurisdiction has expressly determined that the Tribunal's decision should not be the subject of any order in the appellant's favour. The appellant has exhausted his rights of review of the decision.

31 The submission that, in the present case, the Tribunal could renew its consideration of the appellant's application of its own motion does not support a conclusion that the delegate's decision refusing the appellant's visa application falls outside the description of a decision which "is not, or is no longer, subject to any form of review" under Pt 7 of the Migration Act. Nor does the capacity for the Attorney-General to seek an order compelling the Tribunal to perform its functions in accordance with law. There is no factual basis for inferring that either possibility may come to pass. Moreover, in the face of the orders of the Federal Magistrates Court dismissing the appellant's application for judicial review of the Tribunal's decision and this Court dismissing the appellant's application to extend time to appeal against the orders of the Federal Magistrates Court, the possibility to which the appellant adverted is

both theoretical and difficult to reconcile with the proposition stated in *Lansen* at [166] to the effect that "(t)he refusal to issue the constitutional writs means that the Court will not compel the decision-maker to treat the decision as no decision at all". In short, if the person most interested in the decision, the appellant, has no capacity to compel the Tribunal to perform its statutory duty and the Tribunal has no obligation to treat its decision as no decision at all, it cannot be said that the delegate's decision is other than not, or no longer, subject to any form of review under Pt 7 of the Migration Act.

32 Nor do we find persuasive the appellant's submission that, if the Minister is correct, s 198(2) compels the Minister to seek removal of an unsuccessful applicant for a visa immediately upon the Tribunal making its decision, whether the decision be valid or not. This submission, and the appellant's reference to the engagement of the Minister's obligation to remove the unsuccessful applicant whether the decision is valid or not, has rhetorical appeal but confronts the legal difficulty that the test which the legislation imposes is not the validity or otherwise of the decision of the Tribunal; the test is whether the delegate's decision is or is not or is no longer subject to any form of review under Pt 7 of the Migration Act. Further, as the submissions for the Minister pointed out, the obligation in s 198(2) is that an unlawful non-citizen be removed "as soon as reasonably practicable". The duty is thus qualified by considerations of practicality which would have to be determined on a case-by-case basis. This would include consideration of whether the unlawful non-citizen had regularly commenced proceedings of substance in a court challenging the validity of the Tribunal decision which had not been determined: see *Tchoylak v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 302; [2001] FCA 872 at [50]-[53] and *Bolea v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 387; [2001] FCA 1129.

33 The same reasoning process defeats the appellant's submissions about the bridging visa. Clause 010.511(b)(iii)(A) of Sch 2 to the Migration Regulations provides that a bridging visa remains in effect until "28 days after notification of the decision". As the Minister submitted, the provision, properly construed, operates only when notice (meaning a valid notice) has been given. The provision, however, does not require that the decision of which notice has been given to have been validly made. The word "decision", in this specific

context, means all types of decisions provided for in the Act whether purported decisions or not.

34 Accordingly, we consider that the Federal Magistrate in *SZKUO (No 2)* was correct to dismiss the appellant's application. The appeal against the Federal Magistrate's orders of 27 May 2009 should be dismissed with costs.

I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Moore, Jagot and Foster.

Associate:

Dated: 3 December 2009

Counsel for the Appellant:	Mr S Lloyd SC and Mr P Reynolds
Counsel for the Respondent:	Mr H Burmester QC
Solicitor for the Appellant:	Fragomen
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	26 August 2009
Date of Judgment:	3 December 2009