FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v SZMTR [2009] FCAFC 186

CITIZENSHIP AND MIGRATION — ADMINISTRATIVE LAW — notification of applicant for protection visa of decision — *Migration Act 1958* (Cth) ss 66, 412, 494B, 494C — applicant for protection visa uses two names ML and HZ — holds Chinese passport in name of HZ, but says ML is correct name — applicant applies for protection visa under name ML — application is refused and envelope containing decision sent to address given by applicant but HZ's name only name on envelope —applicant received the decision —whether the statutory scheme for notification in Act required use of ML's name on envelope containing decision — methods in s 494B(4) of the Act permitting Minister to notify an applicant of a decision to refuse a visa

CITIZENSHIP AND MIGRATION — ADMINISTRATIVE LAW — notification of applicant for protection visa — *Migration Act 1958* (Cth) ss 66(2)(d)(ii) and (iv) — *Migration Regulations 1994* (Cth) reg 4.31 — a brochure referring to various circumstances including those relevant to applicant sent to applicant with notification of decision to refuse visa — whether brochure in that form complied with statutory requirement to notify the applicant of (1) the time in which the application for review could be made and (2) the place where that application for review could be made

Held:
(1) envelope used latest address for service provided by the applicant for visa and a name she had used in connection with her application; sufficient compliance with ss 66(1) and 494B(4)

(2) the brochure sufficiently set out the time frames for review and the various addresses of the tribunal registry

Migration Act 1958 (Cth) ss 45, 66, 412, 494B, 494C
Migration Regulations 1994 (Cth) reg 4.31

Capper v Thorpe (1998) 194 CLR 342 cited
Coulton v Holcombe (1986) 162 CLR 1 applied
Minister for Immigration and Citizenship v SZIZO (2009) 259 ALR 405 applied
Minister for Immigration and Citizenship v SZKPQ (2008) 166 FCR 84 considered
Pomare v Minister for Immigration and Citizenship (2008) 167 FCR 494 discussed
SZIZO v Minister for Immigration and Citizenship (2008) 172 FCR 152 discussed
Zhan v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 128 FCR 469 followed

MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZMTR and REFUGEE REVIEW TRIBUNAL

NSD 1106 of 2009

MOORE, RARES AND FLICK JJ
23 DECEMBER 2009
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1106 of 2009**

ON APPEAL FROM THE FEDERAL COURT

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

AND: **SZMTR**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **MOORE, RARES AND FLICK JJ**
DATE OF ORDER: **23 DECEMBER 2009**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by the Federal Magistrates Court on 9 September 2009 be set aside and in lieu thereof it be ordered that:

   (a) the amended application be dismissed;

   (b) the applicant pay the first respondent's costs.

3. The first respondent pay the appellant's costs.

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 eSearch on the Court's website.

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PLACE: **SYDNEY**

REASONS FOR JUDGMENT

THE COURT:

1 This is a case about the name and address on an envelope. A delegate of the Minister refused the first respondent's application for a protection visa. The first respondent used, in a variety of contexts, two names. One was HZ, the other was ML. The delegate sent an envelope containing the decision and reasons for it addressed to HZ at the address given in the application for the visa. The first respondent contended successfully before the Federal Magistrates Court that she had not been notified of the delegate's decision in accordance with s 66(1) of the *Migration Act 1958* (Cth). This is as because she had claimed to be another person, ML, and the envelope had not been addressed to ML. Despite this, the first respondent actually received the envelope and its contents within days of its despatch.

2 The first respondent is a citizen of China who arrived in Australia on what she claimed to be a false passport issued in the name of HZ. In late April 2006, about one month after her entry into Australia under the name of HZ, the first respondent applied for a

protection visa using the name ML. The passport indicated that HZ was born on a different day, about three years before ML. It is necessary to refer to the two relevant names of the first respondent by using acronyms without actually stating those names, by force of s 91X(2) of the *Migration Act 1958*.

3 The first respondent asserted in her application for the protection visa that she had used HZ's passport to enter into Australia because she was on a "blacklist" of the police and could not get a true travel document. She claimed to have a well founded fear of persecution, were she to remain in China, by reason of her membership and practice of the Christian religion.

4 The envelope addressed to HZ contained a letter of the delegate dated 22 June 2006 notifying HZ of the refusal of her application, the delegate's decision record setting out the reasons for the decision to refuse the visa and an information brochure from the Refugee Review Tribunal outlining the methods by which applications for review of decisions could be made to it.

5 The Federal Magistrates Court held that the tribunal had erred in finding that it had no jurisdiction to review the delegate's decision when ML applied to it in July 2008 to undertake such a review. The tribunal treated the June 2006 letter addressed to HZ as a sufficient notification to ML. The tribunal found that the application had been made more than 28 days after ML received the notification of the decision in June 2006. The last day on which she could have made an application to the tribunal was 31 July 2006.

Issues in the appeal

6 Essentially, two questions arose on the appeal, although the parties overlaid these with varying degrees of complexity. The first question was whether by addressing the envelope to HZ, and not ML, the delegate complied with the requirement of ss 66 of the Act "… to notify the applicant [for the visa] of the decision in the prescribed way".

7 The second question arose on a notice of contention by the first respondent. She asserted that the tribunal's information brochure did not accurately or sufficiently comply with the requirements of s 66(2)(d)(ii) and (iv) of the Act. This was because, she argued, the

brochure did not identify precisely, first, a time in which the first respondent might apply for a review of the delegate's decision and, secondly, where that application for review could be made.

Statutory Scheme

8 The resolution of the questions raised in this appeal depends upon the proper construction of a number of provisions of the Act. Rather than summarising the effect of those provisions, it will be more intelligible to set out below the relevant sections of the Act in force in June 2006:

> "**45 Application for visa**
>
> (1) Subject to this Act and the regulations, **a non-citizen who** wants a visa **must apply for a visa** of a particular class.
>
> **66 Notification of decision**
>
> (1) When the Minister grants or **refuses to grant a visa**, he or she is to **notify the applicant** of the decision in the prescribed way.
>
> (2) Notification of a decision to refuse an application for a visa must:
>
> …
>
> (d) if the applicant has a right to have the decision reviewed under Part 5 or 7 … **state**:
>
> …
>
> (ii) **the time in which the application for review may be made;** and
>
> …
>
> (iv) **where the application for review can be made.**
>
> …
>
> (4) Failure to give notification of a decision does not affect the validity of the decision.
>
> **412 Application for review by the Refugee Review Tribunal**
>
> (1) An application for review of an RRT-reviewable decision must:
>
> …
>
> (b) be given to the tribunal within the period prescribed, being a period ending not later than 28 days after the notification of the decision; and
>
> ..
>
> …
>
> **494B Methods by which Minister gives documents to a person**
>
> *Coverage of section*

(1) For the purposes of provisions of this Act or the regulations that:
   (a) require or permit the Minister to give a document to a person (the ***recipient***); and
   (b) state that the Minister must do so by one of the methods specified in this section;

the methods are as follows.

Giving by hand

(2) One method consists of the Minister (including by way of an authorised officer) handing the document to the recipient.

Handing to a person at last residential or business address

(3) Another method consists of the Minister (including by way of an authorised officer) handing the document to another person who:
   (a) is at the last residential or business address provided to the Minister by the recipient for the purposes of receiving documents; and
   (b) appears to live there (in the case of a residential address) or work there (in the case of a business address); and
   (c) appears to be at least 16 years of age.

Dispatch by prepaid post or by other prepaid means

(4) Another method consists of the Minister dating the document, and then dispatching it:
   (a) within 3 working days (in the place of dispatch) of the date of the document; and
   (b) by prepaid post or by other prepaid means; and
   (c) to:
      (i) the last address for service provided to the Minister by the recipient for the purposes of receiving documents; or
      (ii) the last residential or business address provided to the Minister by the recipient for the purposes of receiving documents.

Transmission by fax, e-mail or other electronic means

(5) Another method consists of the Minister transmitting the document by:
   (a) fax; or
   (b) e-mail; or
   (c) other electronic means;

to the last fax number, e-mail address or other electronic address, as the case may be, provided to the Minister by the recipient for the purposes of receiving documents.

When the Minister hands a document by way of an authorised officer

(6) For the purposes of sections 494C and 494D, a reference in those

sections to an act of the Minister includes, if the act is of a kind referred to in subsection (2) or (3) of this section, a reference to an act of the Minister by way of an authorised officer.

494C When a person is taken to have received a document from the Minister

(1) This section applies if the Minister gives a document to a person by one of the methods specified in section 494B (including in a case covered by section 494A).

Giving by hand

(2) If the Minister gives a document to a person by the method in subsection 494B(2) (which involves handing the document to the person), the person is taken to have received the document when it is handed to the person.

Handing to a person at last residential or business address

(3) If the Minister gives a document to a person by the method in subsection 494B(3) (which involves handing the document to another person at a residential or business address), the person is taken to have received the document when it is handed to the other person.

Dispatch by prepaid post or by other prepaid means

(4) If the Minister gives a document to a person by the method in subsection 494B(4) (which involves dispatching the document by prepaid post or by other prepaid means), the person is taken to have received the document:
(a) if the document was dispatched from a place in Australia to an address in Australia—7 working days (in the place of that address) after the date of the document; or
(b) in any other case—21 days after the date of the document.

Transmission by fax, e-mail or other electronic means

(5) If the Minister gives a document to a person by the method in subsection 494B(5) (which involves transmitting the document by fax, e-mail or other electronic means), the person is taken to have received the document at the end of the day on which the document is transmitted.

(6) Subsection (5) applies despite section 14 of the *Electronic Transactions Act 1999*."

How the decision to refuse the visa was notified

9 The delegate's decision record was included with the letter of 22 June 2006 and brochure inside an envelope addressed to HZ at the address of the premises that ML had given as her address for service in her protection visa application forms. The postal records

of the department indicate that the envelope addressed to HZ containing the delegate's decision and other documents was sent by registered post on 26 June 2006.

10 The delegate's decision record commenced with "applicant details". These gave the family name of "… Z"with the abbreviation "aka [also known as] L …". Underneath that entry the applicant's given names were set out as "H… aka M….". Her two different dates of birth, in the passport and the visa application, were also set out, separated by the acronym "aka". Thus, a person reading the decision record would understand that the delegate was treating the person, ML, who made the application for a protection visa as possibly being the same person, HZ, who was recorded on the passport which she used to gain entry to Australia. A copy of that passport had been attached to the application when it was made. Therefore, the passport was material to which the delegate was required to have regard by force of s 54(1) and (2)(b) of the Act.

11 Thereafter, the decision record referred to HZ as the person named in the passport and as the applicant. However, the delegate stated that she was unable to make a definitive finding in relation to the applicant's true identity for the purposes of making the assessment because of the discrepancies between the passport and the name in the application. She found that the applicant had used fraudulent documents to enter Australia and had not been granted a subclass 785 (temporary protection) visa before her application was made. She found that the applicant had not complied with s 172 of the Act and accordingly had not been immigration cleared. The delegate also refused to grant a subclass 866 protection visa. The delegate was not satisfied that the applicant's claims for protection had been established. She decided not to grant HZ a protection (class XA) visa because she had not met the criteria set out for either a class 866 or class 785 visa.

The first respondent's initial attempted application for review to the tribunal

12 It is common ground that under s 412(1)(b) of the Act, the tribunal's jurisdiction to conduct a review of the delegate's decision of 22 June 2006 depended on it having received a valid application for review on or before 31 July 2006. The latter date was calculated under reg 4.31(2)(b) of the *Migration Regulations 1994* (Cth). Additionally, reg 4.31(3)(a) prescribes that one method of lodging an application for review at a registry of the tribunal is

to post it to that registry. However, reg 4.31(4) provides that an application so posted is not taken to have been lodged until it is received at a registry of the tribunal.

13 The first respondent claimed that she had sent to the tribunal by post an application for review, dated 21 July 2006. The application used the name and date of birth of HZ. In that application HZ used, confusingly, a date of birth in 1972 which ML asserted was hers. However, it did refer to HZ's Chinese passport that she had used to enter Australia in the name of HZ (whose date of birth was in 1969).

14 According to the tribunal's records, the first time any application for review of the decision to refuse a protection visa was received from HZ was on 27 October 2006. A number of documents were date stamped with that date as having been received by the tribunal. If the application had been sent on or about 21 July 2006, it would have been likely to have arrived at the tribunal's offices in the ordinary course of post before 31 July 2006. Also date stamped on 27 October 2006, as having been received then by the tribunal, was a letter from the applicant's migration agent dated Tuesday 25 July 2006 referring to the application of HZ. The migration agent asserted the application for refugee status had been refused by the department on "22/10/2006". The parties agreed that this is a typographical error for 22 June 2006. It does, however, appear consistent with a document that might have been typed in October 2006, having regard to the tribunal's date stamp of 27 October 2006. The agent asserted "her RRT application was sent out on 21/07/06". The letter then went on to assert that this was in a normal white envelope but she had not received any information since then (i.e. as at the Tuesday following the letter being posted the previous Friday). The agent asserted that he had checked with the tribunal, as to whether the application had been received and had been told it had not.

15 A further application was made on 25 October 2006 by HZ but this had the name of the agent as an authorised recipient. Again, it was date stamped by the tribunal as having been received on 27 October 2006. Thus, if the date stamping by the tribunal on those various documents is correct, the applications by HZ were made out of time.

16 On 22 December 2006 the principal member of the tribunal determined that the tribunal did not have jurisdiction in the matter because no application for review had been received by the tribunal from HZ before 31 July 2006.

Events after the first tribunal decision

17 After this, the first respondent made a number of requests to the Minister to be allowed to pursue her application. She wrote an undated letter using the name ML, that was received by the Minister on 27 July 2007. In that letter ML referred to the name HZ as her "previous name", and wrote that:

> "On 26 June, I received a letter from the Immigration Department, which rejected my asylum application. On the same day, I took the letter to the migration agent's office. The agent told me that my asylum application was rejected and I had to lodge an appeal within 28 days. He asked me to sign a blank form and said they would take care of it."

18 She then complained in the letter that the agent had deceived her and that she only realised this about a month ago (seemingly June 2007). The Minister declined to intervene. Subsequently, ML wrote further letters to the Minister repeating her assertion that she had received the letter of refusal by 26 June, which was obviously in the previous year, some 4 days after the date of the letter enclosing the delegate's decision.

The first respondent's second attempted application for review to the tribunal

19 Next, after a number of refusals by the Minister to reopen her case or permit her to make a further application, the first respondent, in the name of ML, with the birth date 19 October 1972, sent to the tribunal an application for review dated 16 July 2008. On 5 September 2008 the tribunal determined that it did not have jurisdiction in the matter. This decision is the subject of this appeal.

The Trial Judge's Decision

20 The trial judge held that the name on an envelope containing the document notifying an applicant for a visa of its refusal had to be a "correct addressee name". His Honour said that this was a mandatory requirement of the scheme in s 494B. He reasoned that although s 494B(4) did not in terms prescribe the requirements for the appearance of the envelope in which a postal article had to be despatched, it assumed that normal practices in relation to the despatch and delivery to a person of a postal article would be observed. He said that normal practice for addressing mail included the name of the addressee being placed on the envelope.

21 In arriving at this conclusion, the trial judge relied on the decision of a Full Court of this Court in *SZIZO v Minister for Immigration and Citizenship* (2008) 172 FCR 152. After his reasons were delivered the High Court allowed an appeal in that case: *Minister for Immigration and Citizenship v SZIZO* (2009) 259 ALR 405. In *SZIZO* 172 FCR at 161 [58], Lander J (with whom Moore and Marshall JJ agreed) discussed the scheme of notification applicable to the tribunal in Div 7A of Pt 7 of the Act. In issue was whether the tribunal was obliged to send notices to the authorized recipient if the applicant for the visa had nominated one. Lander J observed that where the tribunal was dealing with notification of an authorised recipient, it would satisfy the service method prescribed in s 441G(1) if the envelope in which the document was enclosed "is addressed to the authorised recipient by *name* and residence". Next, Lander J rejected the argument of the Minister that there was no obligation to address the document at all and that it would be sufficient simply to post the notice to a person's address, without putting a name on the envelope. He said that s 441A(4), which provided that the notice could be sent by prepaid post, did not contemplate that the tribunal would send a letter to an address without indicating who was intended to be the recipient of the letter. And, he relied on the definition of "address" as "a direction as to name and residence inscribed on a letter, etc." in the *Macquarie Dictionary* to confirm that understanding of the ordinary and natural meaning of that word: *SZIZO* 172 FCR at 162 [63]-[64]. However, Lander J later noted (at [65]) that the notice had been sent to the authorized recipient's address though the addressee was not the authorized recipient.

22 Because HZ's name was on the envelope, and not ML's, the trial judge concluded that the notification was not addressed to the visa applicant by using the visa applicant's name. He accepted that if a visa applicant indicated in the application that he or she had two or more names, a notification could be addressed to only one of those names. However, because the first respondent had made her application for a protection visa using the name ML, his Honour held that the envelope notifying the decision was incorrectly addressed. This led to him finding that there had been a failure by the Minister strictly to comply with the notification requirements in s 66(1), so that the first respondent could never have been said to have been notified of the decision within the meaning of the Act.

23 His Honour also rejected the Minister's reliance on the admission by the first respondent that she had in fact received the delegate's letter on 26 June 2006 and because she

had taken it to her migration agent's office, she had suffered no prejudice. He had "some difficulty drawing confident findings that she was not prejudiced by the incorrect addressing of the letter". This was because the first respondent had not given evidence about the circumstances in which she made the two applications for review to the tribunal outside the prescribed time and her differing versions of events that she had given to the Minister and to the tribunal from time to time.

24 His Honour also said that he would be slow to assume that the first respondent had the capacity to identify whether correspondence addressed using English language characters was meant for her. He said that it was possible that the delegate's confusion about the names which the first respondent was using may have contributed to some further confusion on her part or the agent after receiving the notification which may have delayed the actions of either of them. In those circumstances, he was not persuaded that her conduct in relation to the previous use of the name HZ when travelling on a passport and her subsequent statements to the Minister and tribunal seeking to excuse her delay would provide reasons for declining to give relief.

This appeal

25 The first respondent supported his Honour's reasoning in this appeal. In addition, she relied on her notice of contention for the argument that there had been a failure by the Minister to comply with s 66(2)(d)(ii) or (iv). This was, she contended, because the contents of the brochure sent with the notification did not specify properly the time in which the application for review could be made and where it could be made.

26 It is evident from her own subsequent correspondence that the first respondent received the delegate's letter addressed to HZ very soon after it was posted. It is also clear that the tribunal did not receive any application for review of the delegate's decision prior to 31 July 2006. The question, however, is whether the statutory scheme for notification of the decision of 22 June 2006 has been satisfied.

Consideration

27 Section 66(1) requires the Minister to notify "the applicant" of a decision to refuse to grant a visa. That is a requirement to notify the *person* who made the application. That

person is identified in s 45 as the non-citizen who wants a visa. The first respondent, by whatever name she used, was such a person.

28 Ordinarily, a statutory command requiring a document to be "served" is perceived as requiring the contents of the documents to be delivered to the person to be served: *Capper v Thorpe* (1998) 194 CLR 342 at 351-352 [21]. There Gaudron, McHugh, Kirby, Hayne and Callinan JJ pointed out in many statutory contexts a document may also be "served" when it is brought to the notice of the person who has to be served. They continued:

> "At all events, it will be 'served' in such contexts if the efforts of a person who is required to serve the document have resulted in the person to be served becoming aware of the contents of the document."

Their Honours' construction depended, however, on provisions such as those contained in ss 28A and 29 of the *Acts Interpretation Act 1901* (Cth) and their analogues.

29 Here, the way in which notification can be made for the purposes of s 66(1) is prescribed by a different statutory scheme in ss 494A-494D of the Act. The purpose of that scheme is to cater for and to avoid the particular circumstances and difficulties that may occur in determining when and how a document can be taken to have been served. These provisions are intended to achieve certainty in respect of the manner and timing of service for the purposes of the Act, including s 66(1). The scheme avoids potential difficulties of language or in locating an applicant for a visa who may have changed addresses without notifying their new one and the like. If the Minister issues one of the prescribed methods of service or giving notice, the applicant for a visa will be taken to have been served or notified in order that other mechanisms and procedures in the Act can then be enforced.

30 Thus, relevantly, s 494B(1) identifies the purpose of the provisions that it contains as being to specify the methods by which the Minister must give to the applicant for a visa the documents required by s 66 to be notified to that person. The first of those methods is by personally handing the document to the intended recipient (s 494B(2)). In that situation there will always be a congruence between the person who is intended to receive the document and the recipient. Secondly, s 494B(3) enables service to be effected by handing the document to another person who satisfies three criteria, which are familiar in statutory schemes for deemed service, namely, that the other person is at the last residential or business address

provided to the Minister by the recipient (i.e. the visa applicant here) for the purposes of receiving documents, the person to whom the document is handed appears to live or work there and to be at least 16 years of age. Thus, where the Minister or an authorised officer attended at the last known address of the person entitled to receive the notification, if another person apparently over the age of 16 years of age who appeared to live at the residential address (or work at the business address) was there then, handing that person the document would be sufficient within the meaning of s 66(1) to notify the applicant for the visa of the decision.

31 No doubt the Parliament had in mind that in the ordinary course of things, as in similar situations where such a statutory device for the deemed service is used, the person apparently over the age of 16 years would be responsible enough to bring the document to the attention of its intended recipient. And, the Minister would be entitled to rely on the deemed service which the section provided notwithstanding that in fact the individual to whom the document had been handed never gave it to the intended recipient .

32 Next, and critically for the present purposes, the Minister could date the document and despatch it by complying with s 494B(4). This provision required the document, once dated, to be despatched within three working days of its dating, by prepaid post or other prepaid means (such as a courier) to either the last address for service provided to the Minister by the applicant for the visa for the purpose of receiving the documents or to the last residential or business address provided in that way. (Here, the applicant for the visa provided her residential address in her application for the visa.) The last methods of service included transmitting the document by fax, email or other electronic means to the last fax number, email address or other electronic address provided to the Minister by the recipient for the purposes of receiving documents (s 494B(5)). This method did not necessarily require that personal service be actually achieved, so long as the procedure was followed for providing notification to the applicant for the visa.

33 Next, if one of the methods of service in s 494B was used, s 494C made provision for when a document would be deemed to have been received by the intended recipient. Thus, where either of the methods under s 494B(2) or (3) is used by handing a document to a person, the person is taken to have received the document when it is handed to him or her.

Importantly, s 494C(4) provides that if the Minister gives a document to a person in Australia by despatching it in the post under s 494B(4), the person is taken to have received the document seven working days after its date. This prescribed time of service then interacts with s 412(1)(b), so that the person then has a further 28 days in which to make an application for review to the tribunal. Last, if s 494B(5) is engaged, the person is taken to have received the document at the end of the day on which it was transmitted.

34 The Minister pointed out that nothing in the text of ss 494B(4) or 494C(4) actually required a name to be placed on the document to be sent by post and "address" meant, in effect, a location to which the posted article was to be sent. He submitted that the address referred to was simply the physical place notified as the person's address, though appeared to accept that "posting" a notice would require a named addressee on the envelope enclosing the notice.

35 French CJ, Gummow, Hayne, Crennan and Bell JJ discussed a similar, but not identical, statutory scheme for service, in *SZIZO* 259 ALR at 415 [36]. They said that the use of mandatory language in the sections of the Act prescribing the scheme did not necessarily impose an inviolable restraint that excluded all other ways in which a document could be notified or given to a person. As they said:

> "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."

36 It is difficult to conceive how a person can be notified for the purpose of s 66(1) by a letter posted to his or her address if his or her name is not on the envelope. The words of s 494B(4) refer to a particular recipient. Common sense suggests that the name of that recipient be on the envelope. Identifying an addressee on an article sent by post is an ordinary if not universal incident of "posting". Indeed, as Emmett J said with Branson and Bennett JJ's concurrence, in order to despatch a document by prepaid post as contemplated by s 494B(4) "… it is a practical requirement that there be an envelope addressed to some person": *Minister for Immigration and Citizenship v SZKPQ* (2008) 166 FCR 84 at 88 [18], see too at 89 [22].

37 Here, the envelope was addressed to HZ. HZ was one name used by the person who had sought the protection visa. The non-citizen who had applied for the visa under s 45, namely the first respondent, in fact, received that document. She knew what it was and took it to her migration agent within days of its despatch. She intended to seek review of the Minister's decision. The name HZ was the name that the first respondent had used to enter Australia. She also had provided that name as part of her application for review to the Minister. It was a name that the person who applied for the visa under s 45 had used in order to obtain entry to Australia. She had informed the Minister that it was a name which she recognised as being applicable to her. The fact that she sought to disclaim that HZ was in fact her name did not preclude the Minister from using it to address the envelope containing the decision.

38 The envelope was sent by prepaid (and registered) post and addressed to the actual residential address provided by the applicant for the visa. It used one of the names that that person had used in connection with her application, being the name on the passport that she asserted was false. Given that these two matters appeared on the face of the envelope, the requirements of s 494B(4)(b) and (c)(i) were satisfied. It is not necessary to decide whether any name had to appear on the envelope or whether ss 66(1) and 494B(4) require a name to appear at all on an envelope containing a decision bearing the visa applicant's latest "address for service".

39 In our opinion, the Minister sufficiently addressed the envelope for the purposes of ss 66(1) and 494B(4) to ensure that it would come to the attention of the intended recipient, namely the person who had applied for the visa. And, it did. Notification of the delegate's decision to refuse a visa was actually received by the person who applied for the visa and had used the name on the front of the envelope addressed to her in order to come to and enter Australia. This was a sufficient means of identifying to the recipient of the envelope at the address she had given for service, that the envelope was in fact intended for the person who had applied for the visa.

40 Here, the non-citizen who applied for the visa received the document, as she was intended to receive it. The purpose for which the procedural steps were prescribed in s 494B(4) was thus fulfilled. For these reasons, his Honour erred in concluding that the use

of HZ's name, as part of the address on the envelope notifying the decision to refuse her a visa, failed to comply with a mandatory requirement of the Act. Rather, there was compliance in the circumstances of this case.

The notice of contention

41 It was common ground that the letter notifying the decision attached the decision record of the delegate and the tribunal's information brochure current as at June 2005. This brochure consisted of an A4 size piece of paper that contained eight columns of information. The first consisted of a cover page identifying the tribunal. The next posed and answered the question of what the tribunal was and who could apply for a review. In the next column, there was the question "When must I apply for a review?" The brochure then told the reader that if they wanted to apply for a review of the decision they needed to act quickly and stated that the tribunal could not extend the time limits set out below. The column continued with the following:

> "***If you are not in immigration detention***
> The tribunal must receive your application within 28 calendar days of the date that you were notified of the Department's decision.
> …
>
> ***When am I taken to be notified?***
> **…**
>
> … if you or your authorised recipient were notified by post, you are taken to have been notified 7 **working** days after the date of the notification letter."

42 On a subsequent page the question "Where do I send my application?" was asked and the following information was given:

> "If you live in NSW, QLD, NT or ACT, you should send or give your application to the Sydney office of the Tribunal … You may hand-deliver, post or fax the application to the Tribunal. The addresses and numbers of the Tribunal's offices are listed on page 7 of this brochure."

The address page of the brochure gave applicants living in NSW, QLD, NT and ACT, a postal address for the tribunal at a general post office box in Sydney. It then identified a new Sydney office location for the tribunal and stated its physical address together with telephone and fax numbers.

43 The first respondent argued that, for the purposes of s 66(2)(d)(ii) or (iv), the brochure did not notify the applicant whose visa had been refused, first, of the time in which the application for review could be made or, secondly, where it could be made. She relied on reg 4.31(3) and (4) which, relevantly, provided:

> "4.31
> (3) Subject to this regulation, an application must be lodged at a registry of the Tribunal:
>
> (a) by posting the application to that registry; or
> …
>
> (4) An application posted in accordance with paragraph (3)(a) … is not to be taken to have been lodged until it is received at a registry of the Tribunal."

44 The first respondent argued that the time in which the application had to be made was not specifically stated in the brochure. She argued this was because the brochure included superfluous information about other circumstances different to her individual position, it did not comply with the requirement to give notification under s 66(2)(d) of the matters prescribed. In addition, during the course of argument, the first respondent contended that reg 4.31(3) did not authorise the tribunal to nominate a post office box, as opposed to a physical address, to which documents could be sent.

Consideration

45 A brochure that simply identified the address of the Administrative Appeals Tribunal as a GPO box "in the capital city of your State" without stating that the application would not be received by the tribunal until it reached the registry of the tribunal did not comply with a requirement such as that in s 501G(1) of the Act: *Pomare v Minister for Immigration and Citizenship* (2008) 167 FCR 494. Lindgren J held that by specifying a post office box, the brochure made it impossible for the person and the tribunal to know when the application for review would reach, or had reached, the post office box and thus it would be uncertain when it was received or made: *Pomare* 167 FCR at 497-498 [23]-[24]. Lindgren J held that the brochure there did not comply with the requirements of s 501G(1)(c) to (f) to notify an applicant "where the application could be made": *Pomare* 167 FCR at 499 [31]. Thus, the first respondent argued, the tribunal's use of a post office box address in the brochure did not sufficiently state where or when the application should be made.

46 The scheme of the Act and regulations places the risk of postal delays on an applicant for review: *Zhan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 128 FCR 469 at 483 [66] per Allsop J. Here, the brochure contained all relevant information about the time in which the first respondent had to make any application for review. It informed her, as a person not in immigration detention, that the tribunal had to receive any application for review within 28 days of the date she had been notified of the decision. There is no suggestion that the first respondent was misled. This argument in the notice of contention of non-compliance with s 66(2)(d)(ii) should be rejected.

47 The second basis of the notice of contention was that the first respondent contended that the brochure did not inform the applicant for review where a valid application could be made and, so failed to comply with s 66(2)(d)(iv). The argument was that the brochure failed to state the effect of reg 4.31(4) with respect to postage to a post office box so as to alert an applicant for review of the potential for a delay from the time of delivery to the post office box to receipt at the registry of the tribunal.

48 This last argument put as a contention was somewhat expanded during the course of oral submissions. The first respondent sought to argue that, based on *Pomare* 167 FCR at 499 [31], it was possible for an applicant for review to send an application to the tribunal at a post office box which might not be "lodged" with the tribunal until it was later taken to the registry after the post office box had been cleared. This issue had not been raised during the hearing below. The Minister submitted that it may have been a matter capable of being addressed by evidence as to the practices of Australia Post and the tribunal in relation to documents delivered to the post office box. Having regard to that submission, it would not be appropriate to allow this issue to be raised for the first time on appeal: see *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8 per Gibbs CJ, Wilson, Brennan and Dawson JJ.

49 There was no evidence to support the proposition that such a delay could occur or about how mail addressed to the tribunal's post office box was delivered to its office (e.g. whether someone from the tribunal cleared mail from the post office box or the postal authorities delivered mail addressed to the post office box to the registry of the tribunal). The overwhelming evidence points to the first respondent having received the envelope and its

enclosures soon after 22 June 2006 and not having lodged any application for review with the tribunal until 27 October 2006. It follows that this contention fails.

Conclusion

50 The appeal should be allowed with costs, and the orders of the Federal Magistrates Court set aside and, in lieu, the application to that Court should be dismissed with costs.

I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Moore, Rares and Flick.

Associate:

Dated: 23 December 2009

Counsel for the Appellant:	S Lloyd SC and G Johnson
Solicitor for the Appellant:	DLA Phillips Fox
Counsel for the Respondents:	L Karp
Date of Hearing:	25 November 2009
Date of Final Written Submissions:	30 November 2009
Date of Judgment:	23 December 2009