HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, CRENNAN AND KIEFEL JJ

MINISTER FOR IMMIGRATION & CITIZENSHIP APPELLANT

AND

SZGUR & ANOR RESPONDENTS

Minister for Immigration & Citizenship v SZGUR [2011] HCA 1
2 February 2011
S179/2010

ORDER

1. *Appeal allowed.*

2. *Set aside paragraphs 1 and 2(a) and (b) of the order of the Federal Court of Australia made on 4 March 2010, as varied by the order of that Court made on 26 March 2010, and in their place order that the appeal to that Court be dismissed.*

3. *The appellant pay the costs of the first respondent in this Court.*

On appeal from the Federal Court of Australia

Representation

S B Lloyd SC with G R Kennett for the appellant (instructed by Clayton Utz Lawyers)

G C Lindsay SC with L J Karp for the first respondent (instructed by Dobbie and Devine Immigration Lawyers Pty Ltd)

Submitting appearance for the second respondent

CATCHWORDS

Minister for Immigration & Citizenship v SZGUR

Immigration – Refugees – Review by Refugee Review Tribunal ("RRT") –Where visa applicant's migration agent asked RRT to arrange "independent assessment of [applicant's] mental health, if required" – Section 427(1)(d) *Migration Act* 1958 (Cth) gave RRT power to require Secretary to arrange for making of medical examination – Whether duty on RRT to consider exercising power under s 427(1)(d) – Whether general duty to inquire.

Words and phrases – "information".

Migration Act 1958 (Cth), ss 424, 424A, 427(1)(d), 430.

FRENCH CJ and KIEFEL J.

Introduction

1 The function of the Refugee Review Tribunal ("the Tribunal") in reviewing decisions under the *Migration Act* 1958 (Cth) ("the Migration Act") has been described as inquisitorial. That designation does not mean that there is any general duty imposed on the Tribunal, as part of its review function, to use, or to consider using its investigative powers to obtain information relevant to the review.

2 In this case, an applicant before the Tribunal, the first respondent SZGUR, supported by statutory declarations from acquaintances and certificates from a psychiatrist, told the Tribunal that he was suffering from depression, Bipolar Mood Disorder and forgetfulness. The information was provided by his migration agent in explaining the existence of contradictions and inconsistencies in SZGUR's submissions and testimony to the Tribunal, about which the Tribunal had invited his comment. The agent asked the Tribunal to arrange an "independent assessment of his mental health, if required". The Tribunal did not do so. The Federal Court, on appeal from the Federal Magistrates Court, held that the Tribunal had committed jurisdictional error by failing to consider whether to use its statutory powers to arrange such an assessment. This was not a matter which had been raised in the Federal Magistrates Court.

3 The Federal Court was in error in inferring that the Tribunal had failed to consider the agent's request or the exercise of its statutory powers to arrange an independent assessment of SZGUR. The appeal should be allowed. Other matters raised on behalf of SZGUR in a notice of contention do not disclose a basis for otherwise supporting the result in the Federal Court.

Procedural and factual background

4 SZGUR, a citizen of Nepal, arrived in Australia lawfully on 18 December 2004[1]. On 21 January 2005, he lodged an application for a protection visa.

5 SZGUR claimed that because of his support for the Maoist Nepali Communist Party he had been at risk of execution in Nepal by the Royal Nepalese Army. He said he had to leave Nepal in order to save his life. If he were to return and the Army were to find him they would kill him. They had already visited his home and interrogated his wife and relatives about his whereabouts.

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1 He arrived on a sub-class 679 visa.

6 SZGUR's application for a protection visa was refused by a delegate of the Minister for Immigration and Citizenship ("the Minister") on 11 February 2005. On 15 March 2005, SZGUR applied to the Tribunal for a review of the delegate's decision. On 30 May 2005, the Tribunal affirmed the decision. That decision of the Tribunal was quashed by the Federal Magistrates Court and remitted to the Tribunal differently constituted. So too, was a further decision of the Tribunal which again affirmed the delegate's decision. Following the second remitter, SZGUR gave oral testimony, on 6 March and 2 April 2008, at hearings before the Tribunal, again constituted differently from its predecessors.

7 On 11 April 2008, the Tribunal wrote to SZGUR inviting him to "comment on or respond to information that the Tribunal considers would, subject to any comments or response you make, be the reason, or a part of the reason, for affirming the decision that is under review". The language of the invitation was taken from s 424A of the Migration Act which requires the Tribunal to give to an applicant "clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review"[2]. In such a case the Tribunal is required to invite the applicant to comment on or respond to the information[3].

8 The "information" upon which the Tribunal invited comment, was the existence of "contradictions and inconsistencies" between what SZGUR had stated orally and in writing to the Tribunal, variously constituted, during the iterations of the review process. The contradictions and inconsistencies, which were elaborated at some length in the letter, related to SZGUR's claimed involvement with the Communist Party of Nepal, whether he and his family had gone into hiding in Nepal, whether he had been helped to leave the country and his claim that two colleagues had been executed by the Nepalese Army.

9 Despite the language of the Tribunal's letter, the existence of "inconsistencies" and "contradictions" in an applicant's testimony and written submissions to the Tribunal is not "information" of the kind to which s 424A is directed. As was explained by the plurality in *SZBYR v Minister for Immigration*

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2 Migration Act, s 424A(1)(a).

3 Migration Act, s 424A(1)(c). The Tribunal is also required to ensure, as so far as is reasonably practicable, that the applicant understands why the information is relevant and the consequences of it being relied on in affirming the decision under review: s 424A(1)(b).

and Citizenship[4], the term "information" in s 424A does not extend to the Tribunal's "subjective appraisals, thought processes or determinations"[5]. Their Honours said:

> "However broadly 'information' be defined its meaning in this context is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence."

The exclusion of this class of information from the obligation imposed by s 424A is consistent with limits on the procedural fairness hearing rule at common law. Procedural fairness requires a decision-maker to identify for the person affected any critical issue not apparent from the nature of the decision or the terms of the statutory power. The decision-maker must also advise of any adverse conclusion which would not obviously be open on the known material. However, a decision-maker is not otherwise required to expose his or her thought processes or provisional views for comment before making the decision[6]. That is not to say that the Tribunal cannot or should not, in the exercise of its discretion, invite an applicant for review to make supplementary submissions in relation to apparent inconsistencies, contradictions or weaknesses in his or her case which have been identified by the Tribunal. Indeed it may be that such an invitation, once issued, amounts to a binding indication by the Tribunal that the review process will not be concluded until the applicant has had an opportunity to respond[7]. But an invitation to comment on perceived inconsistencies and contradictions is not an invitation under s 424A. The Tribunal's letter of 11 April 2008, despite its phrasing, was not sent pursuant to the obligation imposed by that section. Part of

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4 (2007) 81 ALJR 1190 at 1196 [18] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; 235 ALR 609 at 616; [2007] HCA 26.

5 Citing with approval *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 at 477 per Finn and Stone JJ.

6 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592; and see *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 161-162 [29]-[32] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ; [2006] HCA 63; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 219 [22] per Gleeson CJ, Gummow and Heydon JJ; [2003] HCA 56 and *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte MIAH* (2001) 206 CLR 57 at 117-118 [194] per Kirby J; [2001] HCA 22.

7 *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at 11-12 [30]-[34] per McHugh, Gummow, Callinan and Heydon JJ; [2004] HCA 62.

the reasoning in the Federal Court depended upon the incorrect view that it was such an invitation.

10 SZGUR, by successive migration agents, requested and was granted two extensions of time to respond to the Tribunal's letter. In a letter of 20 May 2008 requesting an extension of time, SZGUR's agent said he had been provided with evidence from a psychiatrist that SZGUR was suffering from depression and would be "unable to work until 29 May 2008". The letter enclosed a certificate from a psychiatrist as to SZGUR's depression and five statutory declarations by people testifying to his forgetfulness.

11 On 20 June 2008, SZGUR's agent wrote to the Tribunal in response to its letter of 11 April 2008. He said that SZGUR was "going through depression & disorder of some kind" and attached another two statutory declarations, and a certificate from the psychiatrist which stated that SZGUR was being treated for Bipolar Mood Disorder, was receiving regular medication and was attending consultations with the psychiatrist. The agent said that SZGUR confirmed that he could not remember things that happened a long time ago and that SZGUR accepted that there were inconsistencies in the information he had provided to the Tribunal from time to time. SZGUR could not tell which information was correct and which was not. The agent had attempted to get clarification from SZGUR on various issues which had been raised by the Tribunal, but he had "mixed up the things all the time". The agent said that SZGUR was unable to provide "categorical comments" on the issues raised by the Tribunal. Because his forgetfulness was worsening the information provided in his original application for a protection visa and at the first Tribunal hearing would be more correct than information provided at later hearings. The agent's letter concluded with a request:

> "For the above reasons I would like to request you to assess his application based on his original application and evidences considering his mental health.
>
> To further assess his mental health situation, I would like to request you to arrange independent assessment of his mental health, if required. The applicant confirms that he would pay the cost of the assessment.
>
> Should you require any further information, please don't hesitate to advise."

12 The Tribunal did not accede to the agent's request. On 3 September 2008, the Tribunal again affirmed the delegate's decision. SZGUR made an application

for judicial review of the Tribunal's decision in the Federal Magistrates Court. That application was dismissed on 7 August 2009[8].

13 On 4 March 2010, Rares J allowed SZGUR's appeal against the decision of the Federal Magistrates Court[9]. His Honour set aside the order made by that Court and in lieu thereof ordered the issue of certiorari to quash the decision of the Tribunal and mandamus directing the Tribunal to hear and determine the application for review according to law.

14 On 30 July 2010, Gummow and Kiefel JJ granted an application by the Minister for special leave to appeal against the decision of Rares J. The Minister gave an undertaking that he would not seek to disturb the orders as to costs which had been made in the courts below, and that he would pay SZGUR's costs of the appeal including the costs of the application for special leave.

The Tribunal's decision

15 In its reasons for decision, the Tribunal referred to and summarised the contents of the letters of 20 May 2008 and 20 June 2008 from SZGUR's migration agent and the documents enclosed with them. However, it made no reference to the conditional request in the letter of 20 June 2008 that it arrange a medical assessment of SZGUR.

16 The Tribunal did not find SZGUR to be a credible witness. His inconsistent and contradictory statements indicated that, contrary to his claims, "[he] was not a supporter of and closely associated with the Maoists; did not collect money for the Maoists or provide security information; the army was not looking for him; and he and his family did not go into hiding". The Tribunal took into account the medical certificate, the statutory declarations as to SZGUR's forgetfulness, the stress of separation from his family and the time which had elapsed since he left Nepal, but added:

> "However, the Tribunal was not provided with any further details about the applicant's condition by himself or [the consulting psychiatrist] nor did the medical certificates specifically address the issues raised in the Tribunal's letter of 11 April 2008 or the applicant's forgetfulness."

17 The Tribunal drew a distinction, adverse to SZGUR, between forgetfulness about everyday events, dates and names and his claimed

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8 *SZGUR v Minister for Immigration* [2009] FMCA 750.

9 *SZGUR v Minister for Immigration and Citizenship* (2010) 114 ALD 112.

forgetfulness about specific details central to his need to leave Nepal. The Tribunal said it would expect him to remember when he started to collect donations, where he collected them, who provided assistance to him to leave Nepal, whether the assistance was pre-arranged and whether it was provided by a relative or some other person. Another basis for the adverse credibility finding was the "implausibility of [SZGUR's] central claim about the number of business people in one area that he would have spoken to in up to 13 years of collecting donations for the Maoists".

The statutory framework

18 This appeal focused upon s 427(1)(d) which confers powers on the Tribunal in terms which have remained unchanged since it was introduced as part of Pt 7 of the Migration Act in 1992[10]. It provides:

> "For the purpose of the review of a decision, the Tribunal may:
>
> …
>
> (d) require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination."

At the heart of the decision of the Federal Court under appeal in this case was the proposition that the Tribunal had failed to consider whether it should require the Secretary of the Department of Immigration and Citizenship to arrange for a medical examination of SZGUR. This constituted, so it was said, a failure by the Tribunal to consider whether to exercise the power conferred on it by s 427(1)(d).

19 The power conferred by s 427(1)(d) is to be exercised having regard to the requirement imposed on the Tribunal, in the discharge of its core function of reviewing Tribunal decisions[11], "to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick"[12] and to act "according to substantial justice and the merits of the case"[13]. In so doing it is

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10 The provision was introduced as s 166DD(d) by s 32 of the *Migration Reform Act* 1992 (Cth), but has since been renumbered.

11 Migration Act, s 415(1).

12 Migration Act, s 420(1).

13 Migration Act, s 420(2)(b).

not to be bound by "technicalities, legal forms or rules of evidence"[14]. Section 424 provides that in conducting a review the Tribunal "may get any information that it considers relevant". It is required to have regard to any information so obtained in making the decision on the review[15].

20 Section 427(1)(d) is ancillary to s 424. Those two provisions and s 415, which confers upon the Tribunal all the powers and discretions of the person who made the decision under review, give the Tribunal wide discretionary powers to investigate an applicant's claims. But they do not impose upon the Tribunal a general duty to make such inquiries[16]. Relevantly to the present case, as Gummow and Hayne JJ observed in *Minister for Immigration, Multicultural and Indigenous Affairs v SGLB*[17]:

> "whilst s 427 of the Act confers power on the Tribunal to obtain a medical report, the Act does not impose any duty or obligation to do so." (footnote omitted)

That observation was made in a context in which the Tribunal had considered it highly likely that the applicant for review was suffering from Post Traumatic Stress Disorder. The Court, by majority, held the Tribunal was under no duty to inquire as to the effect of that condition.

21 The reasons for judgment of Rares J and the submissions made on behalf of SZGUR in this appeal assumed the existence, at least in some circumstances, of a duty on the part of the Tribunal to "consider" whether to exercise its power under s 427(1)(d). Rares J referred, in his reasons, to the judgment of the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin*[18]. The Full Court there held that the Migration Review Tribunal was obliged, by s 361(3) of the Migration Act[19], to consider an

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14 Migration Act, s 420(2)(a).

15 Migration Act, s 424(1).

16 *Re Minister for Immigration and Multicultural Affairs; Ex parte Cassim* (2000) 74 ALJR 1404 at 1406 [13] per McHugh J; 175 ALR 209 at 212-213; [2000] HCA 50; *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at 445 [86].

17 (2004) 78 ALJR 992 at 999 [43]; 207 ALR 12 at 21; [2004] HCA 32.

18 (2005) 88 ALD 304.

19 Section 426(3) applies in similar terms to the Tribunal.

applicant's request that it obtain oral evidence from named persons[20]. The reference in his Honour's judgment to *Maltsin* pointed to some analogical argument about a duty to consider a request to the tribunal to exercise its power under s 427(1)(d). The analogy, if that is what it was, was inapposite given the differences between ss 427 and 361. There is an express requirement in the latter section that the tribunal have regard to an applicant's notice requesting the tribunal to obtain oral evidence from named persons. The analogy is not supported by resort to the obligation in s 424 that the Tribunal have regard to information which it obtains under that section. This is not least because the fact of a request is not information of the kind contemplated by s 424. Nor is the analogy supported by s 424A.

22 The question whether s 427(1)(d) imposes a legal duty on the Tribunal to consider whether to exercise its inquisitorial power under that provision was answered in the negative by the Full Court of the Federal Court in *WAGJ v Minister for Immigration and Multicultural and Indigenous Affairs*[21]. The Court held that absent any legal obligation imposed on the Tribunal to make an inquiry under s 427(1)(d) "[b]y a parity of reasoning … there is no legal obligation to consider whether one should exercise that power"[22]. That view is correct. That is not to say that circumstances may not arise in which the Tribunal has a duty to make particular inquiries. That duty does not, when it arises, necessarily require the application of s 427(1)(d).

23 In *Minister for Immigration & Citizenship v SZIAI*[23] the Court considered the implications of its designation, in earlier decisions[24], of Tribunal proceedings as "inquisitorial". As was pointed out in that case, the term "inquisitorial" has been applied to tribunal proceedings to distinguish them from adversarial

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20 *Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin* (2005) 88 ALD 304 at 316 [38].

21 [2002] FCAFC 277.

22 [2002] FCAFC 277 at [25].

23 (2009) 83 ALJR 1123; 259 ALR 429; [2009] HCA 39.

24 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 164 [40]; *Minister for Immigration and Citizenship v SZKTI* (2009) 238 CLR 489 at 499 [27] (fn 40); [2009] HCA 30.

proceedings and to characterise the Tribunal's statutory functions[25]. As the plurality judgment stated[26]:

> "The duty imposed upon the Tribunal by the *Migration Act* is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error." (footnote omitted)

It was not necessary in that case to further explore those questions of principle. Nor in our opinion is it necessary in this case.

24 Before turning to the contentions of the parties, reference should be made to the decisions of the Federal Magistrates Court and of the Federal Court which have led to this appeal.

The decision of the Federal Magistrates Court

25 SZGUR applied for judicial review of the Tribunal's decision in the Federal Magistrates Court on 3 October 2008. An amended application, supported by written submissions prepared by counsel, was filed on 19 March 2009. SZGUR appeared unrepresented at the hearing.

26 On 24 April 2009, SZGUR filed an application to have the matter reopened for further argument. He was represented on 13 May 2009 by counsel, who applied to amend a ground of the application which alleged "serious errors of fact finding" on the part of the Tribunal. Counsel submitted, inter alia, that the Tribunal's decision was vitiated by unreasonableness because it had failed to make inquiries of SZGUR's treating psychiatrist as to the effect that his depression and Bipolar Mood Disorder may have had on his memory. The Federal Magistrates Court dismissed the application to reopen the case and to amend the grounds upon which review was sought. However, it did so on the basis of its rejection of the merits of the proposed amended ground. The point on

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25 *Minister for Immigration and Multicultural Affairs v SZIAI* (2009) 83 ALJR 1123 at 1127 [18]; 259 ALR 429 at 434.

26 *Minister for Immigration and Multicultural Affairs v SZIAI* (2009) 83 ALJR 1123 at 1129 [25]; 259 ALR 429 at 436.

which SZGUR succeeded in the Federal Court, and which is the subject of appeal to this Court, was not taken in the Federal Magistrates Court.

The decision of the Federal Court

27 In his amended notice of appeal to the Federal Court, SZGUR included the following ground:

> "The Court erred in finding that the Tribunal's failure to exercise its discretion pursuant to s 427(1)(d) of the *Migration Act* to obtain an expert opinion as to the appellant's memory (or to consider doing so) entailed a failure to complete the exercise of its jurisdiction pursuant to s 414 of the *Migration Act*."

28 Rares J held that the Tribunal had constructively failed to exercise its jurisdiction and failed to have regard to a relevant consideration namely the migration agent's request that it arrange for a medical examination of SZGUR. On the premise that the Tribunal's letter to SZGUR on 11 April 2008 was written pursuant to s 424A(1) of the Act, his Honour held that the Act required the Tribunal to have regard to the agent's response to that letter. That premise, as noted earlier, was incorrect. His Honour held that there was nothing in the Tribunal's decision record or in the appeal papers to suggest that it understood that the agent had asked it to exercise its power under s 427(1)(d) to obtain a medical examination, or that it had given any, let alone proper, genuine and realistic consideration to the request. His Honour allowed the appeal and set aside the decision of the Federal Magistrates Court. He ordered that certiorari issue to quash the decision of the Tribunal. He also made an order in the nature of mandamus directing the Tribunal to hear and determine the application for review according to law.

Grounds of appeal

29 The grounds of appeal in this Court were:

> "2. His Honour erred in finding that the second respondent failed to consider the first respondent's request that it exercise its power under s 427(1)(d) of the *Migration Act 1958* (Cth) (**Act**).
>
> 3. His Honour erred in finding that, by reason of its failure to consider whether to exercise its power under s 427(1)(d) of the Act, the second respondent constructively failed to exercise its jurisdiction.
>
> 4. His Honour erred in finding that, by reason of its failure to consider the first respondent's request that it exercise its power under

s 427(1)(d) of the Act, the second respondent failed to have regard to a relevant consideration."

The appeal - submissions and disposition

30 The Federal Court's reasoning which led it to allow the appeal from the Federal Magistrates Court involved the following steps:

1. The Tribunal had an obligation to give genuine and realistic consideration to the agent's request[27].

2. A failure to discharge that obligation would constitute jurisdictional error[28].

3. There was nothing in the Tribunal's decisional record or in the appeal papers to indicate it had given any consideration to the agent's request for an independent assessment of SZGUR[29].

4. It was safe to infer, from the preceding, that the Tribunal overlooked the agent's request or that it had no good reason for not considering it[30].

5. The Tribunal constructively failed to exercise its jurisdiction and failed to have regard to a relevant consideration, namely the request put as a response to its letter under s 424A.

31 The premise upon which the Federal Court found jurisdictional error on the part of the Tribunal was that the Tribunal overlooked the agent's request, or did not consider it and had no good reason for not doing so. The premise depended for its correctness upon the content of the Tribunal's obligation under s 430 to give reasons for its decision. Rares J relied upon a passage from the judgment of McHugh, Gummow and Hayne JJ in *Minister for Immigration and*

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27 *SZGUR v Minister for Immigration and Citizenship* (2010) 114 ALD 112 at 122 [36].

28 *SZGUR v Minister for Immigration and Citizenship* (2010) 114 ALD 112 at 120 [31].

29 *SZGUR v Minister for Immigration and Citizenship* (2010) 114 ALD 112 at 120 [31].

30 *SZGUR v Minister for Immigration and Citizenship* (2010) 114 ALD 112 at 121 [34].

Multicultural Affairs v Yusuf[31] in which their Honours said that s 430 "entitles a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material". That, of course, does not mean that a matter not mentioned in the s 430 statement was not considered.

32 Section 430 presupposes a logical structure to the Tribunal's reasoning which involves the following steps:

1. Identification of the relevant evidence or material upon which findings of fact can be based.

2. Making findings of fact based on the relevant evidence or material.

3. Reasoning to the decision by application of the relevant legal principles to findings of fact, both primary and inferential.

Section 430 therefore does not require that the Tribunal make reference, in its reasons, to the disposition of a request from an applicant for a medical examination or for any other investigation. The Tribunal's consideration of whether or not to exercise its power under s 427(1)(d) in aid of its discretion under s 424(1), whether requested or not, to "get any information that it considers relevant", is neither evidence nor material nor a fact upon which the Tribunal could base any findings or its ultimate decision. The nature of the Tribunal's treatment of the agent's letter of 20 June 2008 in its reasons was consistent with that view of what s 430 requires and the logical structure it presupposes.

33 In any event, the Tribunal's reasons were sufficient unto the day for what they disclosed about its approach to the agent's letter. The Tribunal made express reference to the letter and its contents so far as they went to SZGUR's forgetfulness, depression and Bipolar Mood Disorder. It referred to the psychiatrist's report and the statutory declarations which were provided with the letter. The absence of a reference to the agent's request in this context provides no support for an inference that the request was overlooked. The Tribunal having read the letter must have read the agent's request. It is difficult to see by what mental process the Tribunal could be said not to have considered that request. The Tribunal's reasoning about the effect of SZGUR's mental state on his recollection of matters of central importance to his claim suggests that it might well have formed the view that an independent assessment of his mental health would have at most confirmed the claims made about it by the agent without resolving the important contradictions and inconsistencies which were, in the end, fatal to his application. It may be that the Tribunal would be open to

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31 (2001) 206 CLR 323 at 346 [69]; [2001] HCA 30.

criticism for that process of reasoning, but it is a process of reasoning about the evidence and material before the Tribunal which could not disclose jurisdictional error. It should also be noted that there is nothing to suggest that SZGUR could not have obtained from his psychiatrist a more expansive report than the bare certificates which were provided. That report could have addressed the very matters of which the agent asked the Tribunal to arrange an independent assessment.

34 In submissions against the Minister's appeal, SZGUR argued that:

1. If the Tribunal's letter was issued pursuant to s 424A, the Tribunal was required to have regard to the agent's request by reason of s 424A(1)(c).

2. If the Tribunal's letter was not sent pursuant to s 424A, it was properly characterised as a letter issued pursuant to s 424 whereby the Tribunal sought "information" that it considered relevant. In that event, it was required by s 424 to have regard to the information provided in the agent's letter, including the agent's request.

Neither of these submissions can be sustained. The first depends upon the incorrect proposition that the letter was sent under s 424A. The second would treat the agent's request as "information" for the purposes of s 424. The agent's request was a request that the Tribunal obtain information exercising its powers under s 427(1)(d). It was not itself information.

35 In any event, for the reasons already given the factual premise that the Tribunal failed to consider the agent's request was not established. Subject to the issues raised in the notice of contention, the appeal must be allowed.

The notice of contention – submissions and disposition

36 SZGUR filed a notice of contention seeking to support the outcome in the Federal Court on the basis that Rares J should have found a jurisdictional error on the part of the Tribunal on grounds other than on which he decided the case. Eight grounds of contention were arranged under four topics:

- The Tribunal's statutory function with respect to evidence. (Grounds 1-2)

- Breach of procedural fairness. (Grounds 3-5)

- Due administration of the Migration Act. (Grounds 6-7)

- The nature of a s 414(1) review. (Ground 8)

37 Under the first heading, SZGUR submitted that the Tribunal had based its decision on a finding that there was no connection between his medical condition and his memory or the quality of his evidence. He complained in ground 1 of the notice of contention that:

- the Tribunal had no evidentiary basis for that finding;
- the finding was based on the Tribunal's own lay opinion; and
- the Tribunal was not authorised by the Migration Act to act on its lay opinion.

As was pointed out in the submissions for the Minister, Rares J acknowledged that the Tribunal focused upon the insufficiency of the medical evidence provided by SZGUR in response to the Tribunal's letter of 11 April 2008. On the basis of the insufficiency of the evidence, the Tribunal was entitled to come to the conclusion that the contradictions and inconsistencies it had identified were not explained by the brief, uninformative statements in the psychiatrist's certificates, nor by anecdotal lay accounts of forgetfulness set out in the statutory declarations.

38 SZGUR also contended that, having accepted that he suffered from Bipolar Mood Disorder, depression and forgetfulness, the Tribunal failed to make inquiries as to the significance of his medical condition and how it bore upon his application, preferring to act upon its own judgment about what he might have been expected to remember concerning facts bearing on his application. This constituted, he submitted, a failure to review the delegate's decision as required by s 414 (grounds 2(a) and (b)). For the reasons already given, the Tribunal was under no obligation to make further inquiry in relation to the significance of SZGUR's medical condition. It acted upon its view of the limitations of the evidence provided to it. In so doing, it did not fail to discharge its duty under s 414.

39 Then it was said that the Tribunal failed to have "regard … to … the information within its knowledge about [SZGUR's] medical condition". This was characterised as non-compliance by the Tribunal with s 424(1) of the Migration Act (ground 2(c)). There is no substance in the point. The Tribunal had regard to the evidence and found it wanting.

40 The second avenue of attack in the notice of contention was based on procedural fairness (grounds 3-5). Grounds 3 and 4 relied upon the premise that the Tribunal failed to consider the agent's request that it arrange for an independent assessment of SZGUR. For the reasons already given, that premise was not made out.

41 Then it was said that it was not open to the Tribunal to reach the state of satisfaction or non-satisfaction required by s 65 of the Act as to the fulfilment of the criteria for the grant of a protection visa without:

- having regard to and considering the agent's request; and
- taking steps to obtain an independent medical opinion.

Again, SZGUR failed to demonstrate that the Tribunal did not have regard to and consider the agent's request. In any event the Tribunal was under no obligation to obtain an independent medical report. It was under no obligation derived from s 427(1)(d) to consider whether to obtain such a report. It was entitled to decide the case on the material before it and if the material were insufficient to satisfy it that SZGUR was entitled to the grant of a protection visa, it was required to affirm the delegate's decision.

42 Grounds 6 and 7 of the notice of contention under the heading "Due Administration of the *Migration Act* as Federal Law" rested upon the premise that the Tribunal failed to consider the agent's request. For that reason alone they cannot succeed.

43 Ground 8 assumed that the Tribunal did in fact consider the agent's request that it arrange for an independent assessment of SZGUR but then asserted:

> a. such consideration as may have been given to the request by the Tribunal lacked the character of a proper, genuine and realistic consideration of [SZGUR's] case as was necessary to constitute a "review" required by *section* 414(1) of the *Migration Act* to be undertaken; and
>
> b. by reason of its failure to comply with *section* 414(1), the Tribunal constructively failed to exercise its jurisdiction under the Act.

It was submitted for SZGUR in support of this ground that if the Tribunal did consider the agent's request its consideration was deficient because "lacking probative information and evidence to support it, it was not of the quality necessary to meet the requirements of *section* 414(1) and *section* 65 of the *Migration Act*". The Minister made the point in response that the lack of reference to the agent's request in the Tribunal's reasons did not support an inference that the Tribunal had failed to consider the request. That argument having been accepted, there was no basis for any inference as to the degree of intensity with which the request was considered.

44 None of the matters set out in the notice of contention was sufficient to support the outcome in the Federal Court.

Conclusion

45 For the preceding reasons the appeal should be allowed, and paragraphs 1 and 2(a) and (b) of the order of the Federal Court set aside. In lieu thereof there should be an order that the appeal to that Court be dismissed. The appellant, in accordance with his undertaking, should pay the first respondent's costs of the appeal.

46 GUMMOW J. The first respondent is a citizen of Nepal who arrived in Australia on 18 December 2004 and thereafter applied for a protection visa under the *Migration Act* 1958 (Cth) ("the Migration Act"). His application was refused by a delegate of the appellant ("the Minister"). He then applied, pursuant to s 412 of the Migration Act, for review of the delegate's decision by the Refugee Review Tribunal ("the Tribunal"). The Tribunal, as constituted for the third time, affirmed the delegate's refusal. The Tribunal is the second respondent and has filed a submitting appearance.

47 An application to the Federal Magistrates Court (Nicholls FM) for judicial review of the Tribunal's decision was unsuccessful[32]. An appeal by the first respondent to the Federal Court was heard by Rares J. His Honour held that there had been a constructive failure to exercise jurisdiction on the part of the Tribunal[33]. His Honour made an order in the nature of certiorari quashing the Tribunal's decision and an order in the nature of mandamus directing the Tribunal to determine the application for review of the delegate's decision according to law.

48 The constructive failure to exercise jurisdiction was held by Rares J to be the Tribunal's failure to consider a request, made by the first respondent's migration agent on his behalf, that the Tribunal arrange an independent assessment of his mental health. The mental health of the first respondent was said to be relevant to his credibility because it made him forgetful or otherwise caused him memory problems, and this explained certain errors and inconsistencies in evidence provided by him in support of his claim for protection. For the reasons which follow, and contrary to the decision of the Federal Court, there was no such constructive failure to exercise jurisdiction by the Tribunal. The Minister's appeal to this Court should be allowed.

The course of events in the Tribunal

49 The Tribunal decision the subject of the application to Nicholls FM was the third decision of the Tribunal on review of the delegate's refusal to grant a protection visa to the first respondent. Each decision had been made by a differently constituted Tribunal. This circumstance was brought about by the setting aside of the first, and later the second, decision of the Tribunal, by order

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32 *SZGUR v Minister for Immigration and Citizenship* [2009] FMCA 750. The Federal Magistrates Court had the same original jurisdiction as the High Court has under s 75(v) of the Constitution in relation to the Tribunal's decision: s 476(1) of the Migration Act together with the definitions of "migration decision" in s 5(1) and "privative clause decision" in s 474(2).

33 *SZGUR v Minister for Immigration and Citizenship* (2010) 114 ALD 112.

of the Federal Magistrates Court[34]. The reasons for those orders do not affect this appeal.

50 The first respondent attended four hearings conducted before the Tribunal. The first hearing, on 27 May 2005, and the second hearing, on 25 July 2006, were before the first and second Tribunals respectively. The third and fourth hearings, on 6 March 2008 and 2 April 2008, were both conducted by the third Tribunal. The Tribunal, as constituted for the third time, had regard to material that had been before the Tribunal as previously constituted, including evidence given at the first and second hearings. It appears to be the better view, as indicated by the Full Court of the Federal Court in *SZEPZ v Minister for Immigration and Multicultural Affairs*[35], that the Tribunal was entitled to have regard to such material, and no party in this Court argued to the contrary.

51 After the fourth and final hearing, the Tribunal wrote to the first respondent's former (but then current) migration agent by letter dated 11 April 2008. The letter, using the language of s 424A of the Migration Act, invited the first respondent to comment on or respond in writing to "information" that the Tribunal considered would be a reason for affirming the delegate's refusal to grant the protection visa. The letter set out "contradictions and inconsistencies" in what the first respondent had stated in his visa application, in a written submission to the first Tribunal, and at the four Tribunal hearings. The first respondent's written comment or response to the information was required by 28 April 2008. An extension of time was granted until 27 May 2008 upon a request by the first respondent's then migration agent for audio recordings of the first and second Tribunal hearings.

52 On 20 May 2008, the first respondent's new migration agent requested a further extension of time, citing his own impending travel overseas and the first respondent's "depression". Attached to the letter was a certificate from Dr Masood Khan, a psychiatrist, dated 14 May 2008 which stated that the first respondent was suffering from depression and was unfit to work from 15 to 29 May 2008. Also attached were statutory declarations made by several acquaintances of the first respondent which variously referred to their perceptions of his "forgetting habit", "weak memory power", "poor memory especially in remembering names and dates", of him being a "bit forgetful" and "an absent-minded person", and that he "often forgets important dates and events". The

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34 The first by consent order made on 26 April 2006; the second by order made on 28 November 2007: *SZGUR v Minister for Immigration and Citizenship* [2007] FMCA 1946.

35 (2006) 159 FCR 291 at 299 [39]. See also *SZHKA v Minister for Immigration and Citizenship* (2008) 172 FCR 1 at 9 [22], 13-14 [37].

letter also stated that the migration agent had asked the first respondent to obtain a "detailed psychological report". A further extension was granted to the first respondent until 3 July 2008.

53 The response to the Tribunal's invitation, critical to this appeal, was made by the migration agent by letter dated 20 June 2008. The letter stated that the first respondent had difficulty remembering past events and "mixed up" things all the time. It accepted that the first respondent had provided contradictory information to the Tribunal on different occasions. The letter continued:

> "[The first respondent] claims that he has mentioned his habit of forgetting things during the Tribunal hearing as well.
>
> Looking at his ongoing mental problem [and] depression, he is unable to provide categorical comments on the issues you have raised.
>
> He has realized that his problem of forgetting things is getting worse day by day. …
>
> I previously asked him to present [a] detailed psychiatric report. I had given him a letter to hand to his psychiatrist. Now he claims that I never gave him such letter.
>
> For the above reasons I would like to request you to assess his application based on his original application and evidences [sic] considering his mental health.
>
> To further assess his mental health situation, I would like to request you to arrange independent assessment of his mental health, if required. [The first respondent] confirms that he would pay the cost of the assessment."

Attached to the letter was a certificate of Dr Khan dated 16 June 2008 stating that the first respondent was "being treated for Bipolar Mood Disorder" and was "receiving regular medication" and attending consultations with Dr Khan. Two further statutory declarations were attached in which acquaintances stated their opinions that the first respondent was forgetful.

54 The letter did not make reference to s 427(1)(d) of the Migration Act; however, that section provides relevantly as follows:

> "For the purpose of the review of a decision, the Tribunal may:
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> …
>
> (d) require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal

> thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination."

55 In issue on this appeal is whether the Tribunal in fact considered the migration agent's request and, if it did not do so, whether a failure to consider the request amounted to jurisdictional error. It has not been argued at any stage of the litigation that the first respondent lacked capacity or competency to make a visa application or take part in proceedings before the Tribunal[36].

The decision of the Tribunal

56 The Tribunal handed down its decision on 16 September 2008. In reviewing the delegate's decision, the Tribunal was required by s 430(1) of the Migration Act to provide a written statement that set out the reasons for its decision and its findings on any material questions of fact, and that referred to the evidence or any other material on which those findings of fact were based. The first respondent's claim to be owed protection obligations was based on a fear of persecution by the Royal Nepalese Army by reason of his actual or imputed political opinion, namely his support of the Maoists. The Tribunal's reasons reveal that it did not believe the first respondent's assertions that he: (i) was involved with the Maoists in Nepal by collecting donations for them and providing them with security information; (ii) had gone into hiding with his family in Nepal because of fears for their safety; and (iii) required assistance to depart Nepal legally. The Tribunal found the first respondent not to be a credible witness, and found he was untruthful given the several inconsistencies in his evidence and incorrect statements made by him.

57 The reasons of the Tribunal dealt in turn with each of the three matters raised by the first respondent. In addressing each matter, the Tribunal found that the first respondent had not been truthful about that matter. At par 124 of its reasons, the Tribunal summarised its decision by restating its findings that the first respondent was untruthful and the three matters raised by him lacked foundation. In par 125 the Tribunal said:

> "In reaching the above finding the Tribunal has taken into account the statutory declaration[s] provided by [the first respondent's] friends as to his forgetfulness. In reaching the above finding the Tribunal has also taken into [account] the medical certificates of Dr Masood Khan,

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36 See *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 1000 [45]-[46]; 207 ALR 12 at 23; [2004] HCA 32. There does not appear to be an equivalent, in respect of the mentally infirm, to the *Immigration (Guardianship of Children) Act* 1946 (Cth), under which the Minister is the guardian of non-citizen children.

> consulting psychiatrist the first of which stated that he was suffering from depression and the other which stated that [the first respondent] is being treated for Bipolar Mood Disorder and is receiving regular medication and attends consultations with him. The Tribunal has also taken into account that [the first respondent], by being separated from his family, is in a stressful situation. Further, the Tribunal has taken into account the time that has lapsed since [the first respondent] left Nepal and he lodged the application. However, the Tribunal was not provided with any further details about [the first respondent's] condition by himself or Dr Khan nor did the medical certificates specifically address the issues raised in the Tribunal's letter of 11 April 2008 or [the first respondent's] forgetfulness."

The reference in the first sentence of par 125 to "the above finding" is ambiguous. It may be a typographical error. It may refer to the several findings summarised in par 124. This would also be consistent with reading "the above finding" in par 124 as a singular finding by the Tribunal that the first respondent had not made out his claim to be owed protection obligations. That claim was dependent upon the three matters considered, and his truthfulness as to those matters, as the basis upon which his well-founded fear of persecution could be demonstrated.

58 No reference was made in the Tribunal's reasons to s 427(1) of the Migration Act, or to the request made by the migration agent for the Tribunal to arrange an independent assessment of the first respondent's mental health.

The reasoning of the Federal Magistrates Court and the Federal Court

59 Argument before Nicholls FM had focused on whether his Honour should apply the reasoning of Wilcox J in *Prasad v Minister for Immigration and Ethnic Affairs*[37], a case brought under the different regime of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"), and find that the Tribunal had fallen into jurisdictional error by unreasonably failing to make inquiries of Dr Khan as to the effect of the first respondent's mental health on his memory. The decision in *Prasad* was fully considered by this Court in *Minister for Immigration and Citizenship v SZIAI*[38], a judgment delivered after Nicholls FM made his decision in the present case.

60 On the appeal to the Federal Court the focus shifted. The successful ground of appeal was that Nicholls FM had erred in not finding that the

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37 (1985) 6 FCR 155.

38 (2009) 83 ALJR 1123 at 1128-1129 [20]-[25]; 259 ALR 429 at 434-436; [2009] HCA 39.

Tribunal's failure to consider to exercise its power under s 427(1)(d) of the Migration Act was a failure to undertake its statutory duty of review imposed by the words "must review the decision" in s 414 of the Migration Act. The submission advanced by the first respondent, and accepted by Rares J, was that the Tribunal failed to consider the migration agent's request that the Tribunal arrange a mental health examination of the first respondent, and that such a failure gave rise to a constructive failure to exercise jurisdiction.

61 His Honour noted the absence of express reference in the Tribunal's written reasons to the migration agent's request[39]. He referred to s 430(1) of the Migration Act which provides as follows:

> "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."

62 His Honour said that the obligation in s 430(1) "involves the tribunal recording what it did, not what it was asked to do, or supposed to do, or might have done"[40]. He then set out a passage from *Minister for Immigration and Multicultural Affairs v Yusuf*[41]. That case decided that s 430(1) obliged the Tribunal to set out its findings on only those questions of fact which it considered material to its decision. The passage set out by Rares J was from the reasons of McHugh, Gummow and Hayne JJ and included the statement that s 430 "entitles a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material[42]". Rares J continued[43]:

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39 (2010) 114 ALD 112 at 119 [26], 120 [31].

40 (2010) 114 ALD 112 at 121 [33].

41 (2001) 206 CLR 323 at 346 [69]; [2001] HCA 30.

42 *Repatriation Commission v O'Brien* (1985) 155 CLR 422 at 446 per Brennan J; [1985] HCA 10; *Sullivan v Department of Transport* (1978) 20 ALR 323 at 348-349 per Deane J, 353 per Fisher J; cf *Fleming v The Queen* (1998) 197 CLR 250 at 262-263 [28]-[29]; [1998] HCA 68.

43 (2010) 114 ALD 112 at 121 [34].

> "Since the tribunal did not refer to the request *or* the test it applied to exclude the possible effect of depression and or bipolar mood disorder on [the first respondent's] memory, let alone indicate any consideration of *these matters*, it is safe to infer that it either overlooked *them* or had no good reason for not considering *them*". (emphasis added)

63 At the conclusion of that passage his Honour referred to *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme*[44] and *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs*[45]. In *Palme*, Gleeson CJ, Gummow and Heydon JJ said:

> "It was decided by this Court in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*[46], where an order for prohibition under s 75(v) of the Constitution was made, that the 'inadequacy' of the material on which the decision-maker acted may support the inference that the decision-maker had applied the wrong test or was not 'in reality' satisfied of the requisite matters."

In *WAEE*, the Full Court of the Federal Court observed:

> "The inference that the tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected."

64 There is some difficulty with the approach taken by Rares J as indicated in the passages quoted above. The Tribunal's treatment of the evidence adduced respecting the first respondent's mental health, and its relation (if any) to his memory and therefore the credibility and veracity of his claims, was a matter distinct from the treatment by the Tribunal of the migration agent's request for a medical examination of the first respondent. The drawing of an inference that the Tribunal had no good reason for not considering the request necessarily assumes the drawing of an anterior inference that the Tribunal did not consider the request. But that difficulty is merely a symptom of the more fundamental

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44 (2003) 216 CLR 212 at 223-224 [39]; [2003] HCA 56.

45 (2003) 75 ALD 630 at 641 [47] per French, Sackville and Hely JJ.

46 (1953) 88 CLR 100 at 120; [1953] HCA 53.

problem. The approach invites error by conflating consideration of the inferences available in respect of, on the one hand, the Tribunal's findings as to material facts, and, on the other, its treatment of a request to require the Secretary to the Department of Immigration and Citizenship to arrange a medical examination.

65 The remainder of his Honour's reasoning that a failure by the Tribunal to consider the request amounted to jurisdictional error will be considered later in these reasons. It is convenient first to deal with the Minister's submission that the inference made by Rares J should not have been made.

Did the Tribunal fail to consider the request?

66 The Minister submits that clearly the Tribunal read the migration agent's letter of 20 June 2008. In its reasons the Tribunal referred to and summarised the majority of the contents of the letter, but it did not make reference to the request for a further medical examination of the first respondent. The Minister submits that Rares J erred in drawing an inference that the failure by the Tribunal to refer to the request in its written statement meant that the Tribunal had not considered the request. That submission should be accepted.

67 An applicant in the Federal Magistrates Court for judicial review of the Tribunal's decision, as the moving party, bears the onus of establishing jurisdictional error on the part of the Tribunal. Nothing in the Migration Act displaces the usual position that it is for the moving party to make out its case. In *Industrial Equity Ltd v Deputy Commissioner of Taxation*[47], Gaudron J made a similar point with respect to the ADJR Act. We are not concerned here with questions of a presumption of the regularity or validity of administrative action[48]. Rather, the point to be made is that it fell to the first respondent to establish a basis for drawing the inference necessary to make out the alleged jurisdictional error. There was certainly no burden upon the Minister to demonstrate the positive proposition that the Tribunal had indeed considered the request.

68 In the penultimate paragraph of his reasons, Rares J referred to an argument put by the Minister that an inference should be drawn that the Tribunal had considered, and rejected, the request. His Honour said in response[49]:

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47 (1990) 170 CLR 649 at 671-672; [1990] HCA 46.

48 As to which, see the authorities collected in Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 4th ed (2009) at 255 [4.345].

49 (2010) 114 ALD 112 at 122 [37].

> "But, there is no material, including any reference to the request, on which I can be satisfied that it was considered. There was no indication in the tribunal's written statement or the material in the appeal book that the tribunal either identified the making of the request to it or, if it did, that it considered and then rejected it (as it would have been entitled to do)".

If this passage is to be understood as requiring the Minister to demonstrate, by way of evidence or inference, that the Tribunal did consider the request, that would indicate an incorrect approach to a proceeding for judicial review of the Tribunal's decision.

69 The question whether the inference should have been drawn in the present case can only be addressed in the setting provided by the Migration Act, and in particular by reference to the requirement in par (b) of s 430(1) that the Tribunal provide a written statement which sets out the reasons for the decision. Contrary to the reasoning in the Federal Court, par (b) of s 430(1) does not create any requirement that the Tribunal record generally "what it did" in conducting its review, and does not require the Tribunal, in every case, to describe or state the procedural steps taken by it in reviewing the relevant decision. The obligation under s 430(1) focuses upon the thought processes of the Tribunal in reaching its decision on what it considers to be the material questions of fact[50]. The absence of reference in the Tribunal's reasons to its consideration of the request for a medical examination of the first respondent is to be contrasted with an absence of reference to findings of fact or to evidence and material upon which such findings are based. Section 430(1) deals with the latter in pars (c) and (d); it does not deal with the former. The statute does not require the Tribunal to disclose procedural decisions taken in the course of making its "decision on a review". There may be situations where a procedural decision forms part of the Tribunal's "reasons for the decision" under par (b), but that is not so here.

70 An inference that the Tribunal did or omitted to do some act in the course of its review, not being a matter which s 430(1) requires the Tribunal to set out, should not be drawn lightly. Nothing found in the authorities relied upon by Rares J assists in the present case. The statement by McHugh, Gummow and Hayne JJ in *Yusuf*[51], given the surrounding context and the authorities collected in the footnote at its conclusion, demonstrates that the reference there was to "matters of fact" or "findings of fact" and not to matters generally, such as the procedures the Tribunal chose to adopt in fulfilling its duty to review the delegate's decision.

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50 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 331-332 [10], 338 [34], 346 [68]; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 623 [33]; [2010] HCA 16.

51 (2001) 206 CLR 323 at 346 [69].

71 In *WAEE*, the Full Court of the Federal Court was considering the Tribunal's failure to make reference to evidence that the appellant's son was married to a Muslim woman and the contention that this supported his claimed fear of persecution in Iran; a matter going directly to the criterion for the grant of a protection visa[52].

72 Finally, the passage in *Palme*[53] to which Rares J referred, noted that, given the detail in the relevant departmental submission and the statement by the decision-maker that he had considered all relevant matters, no assistance could be gained from the statement by Gibbs CJ in *Public Service Board of NSW v Osmond*[54] (made with reference to *Padfield v Minister of Agriculture, Fisheries and Food*[55]) that "if the decision-maker does not give any reason for his decision, the court may be able to infer that he had no good reason". The inference could not be drawn in *Palme* because the decision-maker had given reasons for his decision, albeit reasons which did not meet the statutory description due to the failure to express the essential ground or grounds for the conclusion reached[56]. In the present case, no assistance can be drawn from the statement by Gibbs CJ in *Osmond*, or the reference to it in *Palme*; the Tribunal fulfilled its duty to give written reasons under par (b) of s 430(1).

73 The Tribunal had clearly read the letter from the migration agent. The Tribunal summarised most of its contents in its written statement. That weighs against the drawing of an inference that the Tribunal did not read or did not turn its mind to the paragraph in which the request was made. The absence of reference in the Tribunal's written statement to the making of the request by the migration agent or to the Tribunal's decision as to the request was the only evidential basis upon which the inference could be made. In light of the other evidence, that was not a sufficient basis to found an inference that the Tribunal failed to consider whether to exercise its power under s 427(1)(d) to require the Secretary to arrange for a medical examination.

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52 *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 at 641 [48]-[49].

53 (2003) 216 CLR 212 at 224 [39].

54 (1986) 159 CLR 656 at 663-664; [1986] HCA 7.

55 [1968] AC 997 at 1053-1054. See also *Wu v The Queen* (1999) 199 CLR 99 at 124 [71]; [1999] HCA 52.

56 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 224 [40].

Jurisdictional error?

74 While, in light of the above conclusion, it is not necessary to decide conclusively whether a failure by the Tribunal to consider the request would have amounted to jurisdictional error, something should be said on that subject. Rares J had referred[57] to the following passage from the plurality judgment in *SZIAI*[58]:

> "Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a 'duty to inquire', that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the *Migration Act* is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction[59]. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case."

75 His Honour appears to have accepted that the Tribunal was not required to exercise its power under s 427(1)(d). The absence of a requirement is made clear by the use of the word "may" in the opening words of the sub-section; a point which was made in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB*[60]. Rather, his Honour framed the issue as whether the Tribunal ought to have *considered* the request for a medical examination[61]. His Honour, in reliance upon the reasoning of the Full Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin*[62] and the circumstance that the

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57 (2010) 114 ALD 112 at 116 [15], 120 [28].

58 (2009) 83 ALJR 1123 at 1129 [25]; 259 ALR 429 at 436.

59 See authorities collected in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 453 [189], fn 214; [2001] HCA 51.

60 (2004) 78 ALJR 992 at 999 [43], 1019-1020 [124]; 207 ALR 12 at 21-22, 49. See also *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at 445 [86].

61 (2010) 114 ALD 112 at 113 [2].

62 (2005) 88 ALD 304 at 316-317 [38].

request was made by the migration agent in his response to an invitation under s 424A, concluded that the Tribunal thereby "constructively failed to exercise its jurisdiction and failed to have regard to a relevant consideration, namely the request"[63].

76 Three points must be made with respect to that conclusion. First, the decision in *Maltsin* concerned the obligation of the Migration Review Tribunal ("the MRT") under s 361(3) of the Migration Act, the analogue of s 426(3) with respect to the Refugee Review Tribunal. Sub-section (3) of s 361 provides that the MRT "must have regard" to any notice given by an applicant, under sub-s (2) or (2A), that the applicant wishes the MRT to obtain oral or written evidence. The reasoning in *Maltsin* respecting consideration of an applicant's wishes is not relevant to the power conferred in discretionary terms by s 427(1). Indeed, the Full Court in *WAGJ v Minister for Immigration and Multicultural and Indigenous Affairs*[64], when specifically addressing s 427(1)(d), concluded that there was no obligation on the Tribunal to consider whether to exercise the power there conferred.

77 Secondly, it appears from the content of the Tribunal's letter of 11 April 2008 that it considered it was providing an invitation to the applicant under s 424A of the Migration Act to comment or respond to information that the Tribunal considered would be a reason for affirming the delegate's decision. No party suggested to the contrary before either Nicholls FM or Rares J. However, the assumption that the invitation was made pursuant to s 424A does not appear to be correct, given that the Tribunal's disbelief of the first respondent's evidence arising from inconsistencies therein could not be characterised as "information" within the meaning of s 424A[65]. The statutory basis for the Tribunal's invitation would appear, on a proper construction of the legislation, to be s 424 of the Migration Act. This empowered the Tribunal in conducting the review to get any information it considered relevant. The Minister advanced several arguments that whether an invitation was made under either s 424A or s 424 did not affect what the Tribunal was required to do with a request that it exercise the power under s 427(1)(d) to require the Secretary to arrange a medical examination. It is not necessary to address these arguments as the issues do not arise in this appeal.

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63 (2010) 114 ALD 112 at 122 [37].

64 [2002] FCAFC 277 at [24]-[25].

65 *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1195-1196 [15]-[21]; 235 ALR 609 at 615-617; [2007] HCA 26.

78 Thirdly, it was accepted by Rares J that the Tribunal was entitled to reject the request made of it[66]. Thus there did not arise the point left open in *SZIAI*, that a failure to *make* an obvious inquiry as to a critical fact may give rise to jurisdictional error. The alleged failure on the part of the Tribunal was a failure to *consider* whether to (require the Secretary to) make an inquiry by arranging a medical examination.

The first respondent's notice of contention

79 While the Minister has made good his first ground of appeal, there remains the notice of contention filed by the first respondent. Grounds 3, 4, 5(a), 6 and 7 of the notice are premised on a failure by the Tribunal to consider the migration agent's request and so must fail.

80 Grounds 1, 2(a) and 2(b) take issue with the way in which the Tribunal proceeded to make its decision in the absence of expert evidence as to the effect of the first respondent's mental condition on his memory. Of relevance in this regard is what the Tribunal said in the balance of par 125 of its written statement[67]:

> "Further, there is a difference between forgetting everyday events, dates and names and forgetting specific details that are central to [the first respondent] having to leave Nepal even if the Tribunal takes into consideration, in combination, the length of time since [the first respondent] left Nepal, [the first respondent's] claimed forgetfulness and depression/Bipolar Mood Disorder. In particular the Tribunal would expect [the first respondent] to remember when he started to collect donations or, at least, with better specificity than a difference of 7 years … and where he collected those donations whether it was in a rural area or where he had operated his business for sometime [sic]. The Tribunal would also expect [the first respondent] to remember who provided assistance to him at the airport so he could leave Nepal and whether he had arranged this assistance the day before or it happened by chance on the day. Further, the Tribunal would expect [the first respondent] to remember if the assistance was provided by a relative or not, irrespective of how long it was since he left Nepal."

81 The first respondent submits that the Tribunal made a finding that there was no connection between his medical conditions and his memory, without any evidentiary foundation, and based upon its own lay opinion and the imposition of

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66 (2010) 114 ALD 112 at 120 [30].

67 The first part of par 125 is set out above at [57].

a standard as to what he could be expected to remember despite his medical conditions.

82 The Tribunal took into account the evidence of Dr Khan that the first respondent was suffering (and presumably continued to suffer) from both depression and bipolar mood disorder. That evidence did not explain when the first respondent began suffering from either of those conditions, except insofar as Dr Khan certified him as unfit to work from 15 to 29 May 2008 by reason of depression. There was a lack of evidence linking the mental health of the first respondent with his claimed memory problems so as to explain, or be capable of explaining, the inaccuracies and inconsistencies in statements made by him to the Tribunal. No evidence was provided as to the likely effect, upon patients generally, of depression or bipolar mood disorder on memory, or as to their capacity to become confused in recalling events. No evidence was provided of the actual or likely effect of those two conditions, disparately or in conjunction, upon the first respondent.

83 In *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*[68], Gummow ACJ, Callinan, Heydon and Crennan JJ observed:

> "This Court has repeatedly said that the proceedings of the Tribunal are administrative in nature, or inquisitorial[69], and that there is an onus upon neither an applicant nor the Minister[70]. It may be that the Minister will sometimes, perhaps often, have a greater capacity to ascertain and speak to conditions existing in another country, but that does not mean that the Minister is to bear a legal onus, just as, in those cases in which an applicant is the better informed, that applicant is not to be so burdened."

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68 (2006) 231 CLR 1 at 17 [40]; [2006] HCA 53.

69 See, eg, *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 985 [98] per McHugh J (citing, among others, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 115 [76] per Gaudron and Gummow JJ; [2000] HCA 57), 1001 [208] per Kirby J, 1008 [246] per Hayne J, 1014 [287] per Callinan J; 190 ALR 601 at 625, 648, 658, 666; [2002] HCA 30.

70 See, eg, *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 573-574 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ; [1997] HCA 22; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 544-545 [83] per Gleeson CJ and McHugh J; [1999] HCA 14; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 673 [195] per Callinan J; [1999] HCA 21.

84 Accordingly, neither the Tribunal itself nor the primary decision-maker acts as a contradictor to a visa applicant's case[71]. But an applicant for a protection visa must put forward the evidence the applicant wishes the Tribunal to consider[72]. Evidence as to a relevant connection between his mental condition and memory difficulty could be expected to have come from the first respondent or his migration agent[73]. Indeed, the migration agent without success had already requested that his client obtain a more thorough medical report.

85 The Tribunal was entitled to proceed on the basis that it understood the first respondent had the relevant medical conditions, but in the absence of evidence was unable to find that those conditions impaired his memory. The Tribunal did not make a finding that the medical conditions did not impair the first respondent's memory. The Tribunal had no evidence on which it could explain away or put aside the errors and inconsistencies it had found in his evidence. What it went on to say about its "lay" expectations was not necessary to support that reasoning.

86 Grounds 2(c) and (d) of the notice of contention essentially complain that the Tribunal, once it was aware of the first respondent's medical conditions, was required by s 424(1) of the Migration Act to have regard to his medical conditions, and the Tribunal was obliged to inquire as to what the medical conditions meant and how they bore upon his visa application. If it were accepted that the Tribunal was seeking, and received, information as to the first respondent's mental health under s 424(1), then it was required to have regard to that information in making the decision on review. It did so. Section 424(1) is not the source of any obligation on the Tribunal to go further and seek more information that might enhance, detract from or otherwise be relevant to information which it has already received.

87 Ground 5(b) of the notice of contention is to the effect that the Tribunal, in order to reach a state of satisfaction about whether the criteria for a protection visa had been met (s 65(1)(a)(ii)), was required to obtain an independent medical report. But for the reasons given above[74], there was no duty on the Tribunal to

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71 *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1127 [18]; 259 ALR 429 at 434.

72 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 164 [40]; [2006] HCA 63.

73 See *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 673 [195] per Callinan J; *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1133 [52] per Heydon J; 259 ALR 429 at 441-442.

74 At [75].

obtain a medical report. Even if the Tribunal had required the Secretary to arrange a medical examination under s 427(1)(d), attendance at the examination would not have been compulsory. A further power of the Minister concerning medical examinations is contained in s 60 of the Migration Act. By virtue of s 415(1), this is a power also enjoyed by the Tribunal. Section 60 provides as follows:

> "(1) If the health or physical or mental condition of an applicant for a visa is relevant to the grant of a visa, the Minister may require the applicant to visit, and be examined by, a specified person, being a person qualified to determine the applicant's health, physical condition or mental condition, at a specified reasonable time and specified reasonable place.
>
> (2) An applicant must make every reasonable effort to be available for, and attend, an examination."

As is apparent from s 60(2), the visa applicant is not required to attend the examination. This may be because in most cases it will be, or at least in the present case it was, in the interests of the applicant to attend such an examination given the adverse consequences for his or her application which might follow on from a failure to so attend.

88 The terms of s 427(1)(d) qualify the Tribunal's power with respect to medical examination by the words "that the Tribunal thinks necessary with respect to the review". There were no circumstances here that made such an examination necessary. The first respondent's migration agent had asked his client to obtain a detailed psychiatric or psychological report. The reason why such a report was not obtained was unknown. In his letter to the Tribunal, the migration agent said he gave the first respondent a letter for Dr Khan (presumably requesting a written report) but the first respondent then claimed never to have been given such a letter. The migration agent had indicated that the first respondent would meet the costs of an examination if arranged by the Tribunal. No reason has been shown as to why it would have been more appropriate, or necessary, for the Tribunal rather than the first respondent or his migration agent to arrange for such an examination. I agree with Rares J[75] that it was open to the Tribunal to reject the request.

89 The premise of ground 8 of the notice of contention is that if the Tribunal did consider the request, then no "proper, genuine and realistic consideration" was given to the request such that the Tribunal failed to review the delegate's decision as it was required to do by s 414(1). It is not possible to infer that the

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75 (2010) 114 ALD 112 at 120 [30].

Tribunal gave a particular degree of consideration to the request. The success of this ground therefore depends upon establishing that if the Tribunal had given proper, genuine and realistic consideration to the request, it would have sought a medical report under s 427(1)(d). That is no more than another way of saying the Tribunal was bound to seek the medical report, which it was not.

Order

90 The grant of special leave to appeal was made upon an undertaking by the Minister not to seek to disturb the orders as to costs made in the courts below, and to pay the costs of the first respondent of this appeal, including the special leave application, regardless of the result of the appeal. It should therefore be ordered that:

1. Appeal allowed.

2. Paragraphs 1 and 2(a) and (b) of the order of the Federal Court made on 4 March 2010, as varied by the order of that Court made on 26 March 2010, be set aside and in place thereof order that the appeal to that Court be dismissed.

3. The Minister pay the costs of the first respondent in this Court.

91 HEYDON J. I agree with the reasons given by French CJ and Kiefel J, and Gummow J.

92 CRENNAN J. For the reasons given by French CJ and Kiefel J, and also by Gummow J, I agree that the appeal should be allowed and that consequential orders should be made. I have nothing to add.