

## Violable Law and Inviolable Law in Migration Cases: Notice of Invitation to Appear

Megumi Ogawa\*

In 2009, the High Court of Australia in the *Minister for Immigration and Citizenship v SZIZO* decided in respect of certain provisions of the *Migration Act 1958* (Cth) that 'Notwithstanding the detailed prescription of the regime' 'and the use of imperative language it was an error to conclude that the provisions' 'are inviolable'. By this judgment, the High Court established two classes of provision under the *Migration Act 1958* (Cth): one violable and the other inviolable. Since then, the search has continued in practice to work out which provisions under the *Migration Act 1958* (Cth) are violable and which are inviolable. In this article, ss 360A(4) and 425A(3) of the *Migration Act 1958* (Cth) concerning the statutory notice period for a hearing in the Migration Review Tribunal and the Refugee Review Tribunal are considered to ascertain whether they are violable or inviolable. The first part of the article deals with natural justice, a key to considering the issue of violability. The author contends that there are two approaches to determining the question of the violability of the statutory provisions arising from the High Court decision. The article then analyses the provisions of the statutory notice period to clarify its scope. Finally, the issue of the violability of the provisions concerning the statutory notice period is examined.

### 1. Introduction

In 2009, the High Court of Australia in *Minister for Immigration and Citizenship v SZIZO*<sup>1</sup> ('SZIZO') decided in respect of certain provisions of the *Migration Act 1958* (Cth) that: 'Notwithstanding the detailed prescription of the regime under [certain Divisions of the *Migration Act 1958* (Cth)] and the use of imperative language it was an error to conclude that the provisions of [certain sections of the *Migration Act 1958* (Cth)] are inviolable...' <sup>2</sup> By this judgment, the High Court of Australia established two classes of provision under the *Migration Act 1958* (Cth): one violable and the other inviolable. Since then, the search continues in practice as to which provision under the *Migration Act 1958* (Cth) is violable and which is not.

In this article, ss 360A(4) and 425A(3) of the *Migration Act 1958* (Cth) that are concerned with the statutory notice period for a hearing in the Migration Review Tribunal ('MRT') and the Refugee Review Tribunal ('RRT') are to be considered as to whether they are violable. The consideration involves the statutory interpretation of these provisions as well as the elucidation of the criteria for a provision being violable in light of *SZIZO* and other High Court cases.

After this introduction, the article examines and differentiates the rules of natural justice in migration review cases before and after *SZIZO*. The MRT and the RRT are required to undertake statutory review of migration decisions in accordance with Part 5 of the *Migration Act 1958* (Cth) for cases other than those concerning protection visa applications, and Part 7 of the Act in the case of protection visa applications. Of these Parts, Division 5 of Part 5 and

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\* BA (Law) (Waseda University), MA (Intl & Bus Law) (Yokohama National University), PhD (Law) (The University of Queensland). The author wishes to thank Dr Clive Turner and an anonymous referee for their useful comments on the earlier version of this article.

<sup>1</sup> *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627.

<sup>2</sup> *Ibid* [36].

Division 4 of Part 7 provide the hearing rule in the MRT and the RRT respectively and the first section of each Division, namely ss 357A and 422B, sets out the '[E]xhaustive statement of natural justice hearing rule'. The interpretation of this statement gave rise to an issue of violability of the provisions of the *Migration Act 1958* (Cth) and this article will critically review the natural justice hearing rule in migration cases.

The article then proceeds to an examination of the statutory notice period for a hearing in the MRT and the RRT in order to determine whether the provision concerning the notice period for a hearing is violable. Two issues are involved. First, a hearing does not always commence at the scheduled time and day. Therefore, consideration must be given to two kinds of hearings: one, a hearing that commenced as scheduled; and the other, a hearing that has been vacated and re-listed for another day. There are differing views as to whether the statutory period applies to the new notice for a re-listed hearing. The author's contention is that the statutory notice period applies to every hearing regardless of the hearing being listed for the first time or re-listed. The second issue is, if the statutory notice period applies to a hearing in the MRT and the RRT, whether the statutory notice period is a violable provision in light of the natural justice hearing rule under the *Migration Act 1958* (Cth). Two possible approaches to this issue will be presented. These arguments will provide an analysis of the natural justice hearing rule which has not been presented to the High Court for determination regarding the future conduct of the MRT and the RRT.

## 2. Natural Justice Hearing Rule

### 2.1 Natural Justice Hearing Rule under the *Migration Act 1958* (Cth)

The MRT was established in 1999 as a result of amendment by the *Migration Legislation Amendment Act (No.1) 1998* (Cth) to the *Migration Act 1958* (Cth) replacing the Migration Internal Review Office and the Immigration Review Tribunal. The RRT was established to replace the Refugee Status Review Committee in 1992 by amendment to the *Migration Act 1958* (Cth) made by the *Migration Reform Act 1992* (Cth).

The MRT and the RRT undertake statutory merits review in accordance with the *Migration Act 1958* (Cth). The *Migration Act 1958* (Cth) requires the MRT and the RRT to review visa-related decisions unless the Minister for Immigration has issued a conclusive certificate which prevents the MRT or the RRT from reviewing the decision (ss 348 and 414).

The MRT and the RRT have essentially the same power and must follow largely the same rules and procedures.<sup>3</sup> The procedure which the MRT and the RRT must follow is set out in Division 5 of Part 5 and Division 4 of Part 7 of the *Migration Act 1958* (Cth) starting with the '[E]xhaustive statement of natural justice hearing rule' in each Division (ss 357A and 422B). Sections 357A and 422B were inserted into the *Migration Act 1958* (Cth) by the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth). The 'exhaustive statement of natural justice hearing rule' appearing under ss 357A and 422B reads:

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

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<sup>3</sup> *Migration Act 1958* (Cth), Part 5 and Part 7.

(3) In applying this Division, the Tribunal must act in a way that is fair and just.’

Division 8A of Part 5 and Division 7A of Part 7 of the *Migration Act 1958* (Cth) are concerned with ‘Giving and receiving review documents etc’. Amongst the provisions under these Divisions, subsections 379G(1)(b) and 441G(1)(b) require the MRT and the RRT to provide any documents to the authorised recipient instead of the applicant if the applicant nominated such a person. Subsections 379G(1) and 441(1) state:

‘If:

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

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

Subsections 357A(2) and 422B(2) provide that these Divisions ‘are taken to be an exhaustive statement of the requirements of the natural justice hearing rule’.

What follows the exhaustive statement of natural justice hearing rule is a provision allowing the applicant and the Secretary of the Department of Immigration to provide documents to the MRT or the RRT for its consideration (ss 358 and 423). The MRT and the RRT are also allowed to seek information from any source (ss 359(1) and 424(1)) or any person (ss 359(2) and 424(2)). When information is sought from a person, an invitation must be given to the person by a specific method (ss 359(3) and 424(3)).

If the MRT or the RRT considers the decision under review to be affirmed, the MRT or the RRT, prior to making its decision, must invite the review applicant to make comments upon the information which would be the reason, or a part of the reason, to affirm the decision under review after such information is provided to the review applicant either in writing delivered by a specified method (ss 359A and 424A) or orally at a hearing (ss 359AA and 424AA).

Sections 360 and 425 of the *Migration Act 1958* (Cth) require the MRT and the RRT to invite their review applicants to appear before them. Subsections 360(1) and 425(1) read as follows:

‘The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.’

There are exceptions to this requirement. Where: the MRT or the RRT reached a favourable decision for the applicant; the applicant consented not to appear; or the applicant did not respond to the previous invitation from the MRT or the RRT to give information or make comments, the MRT or the RRT is not required to invite the applicant to appear before it (ss 360(2) and (3) and ss 425(2) and (3)). Where the MRT or the RRT is required to invite applicants to appear, it must give notice to them of the date, time and place by virtue of s 360A in the case of the MRT and s 425A in the case of the RRT. Subsections 360A(1) and 425A(1) read as follows:

‘If the applicant is invited to appear before the Tribunal, the Tribunal must give the applicant notice of the day on which, and the time and place at which, the applicant is scheduled to appear.’

Sections 360A and 425A provide that notice must be given by a specified method (ss 360A(2) and 425A(2)), at a specified timing (ss 360A(4) and 425A(3)) and with the specified contents (ss 360A(5) and 425A(4)).

The second issue considered by this article arises out of the provision concerning the timing of the notice to be given under ss 360A(4) and 425A(3).

Subsections 360A(4) and 425A(3) read as follows:

‘The period of notice given must be at least the prescribed period or, if no period is prescribed, a reasonable period.’

The period of notice to appear is prescribed in the *Migration Regulations 1994* (Cth). Regulation 4.21 prescribes as the notice period for the MRT two working days in relation to applicants in detention (reg 4.21(a)) and seven working days, or if the applicant agrees in writing, one working day in relation to applicants other than ones in detention (reg 4.21(b)). In relation to the RRT, regulation 4.35D prescribes seven working days in respect of applicants in detention (reg 4.35D(a)) and fourteen working days in respect of applicants other than ones in detention (reg 4.35D(b)).

Division 5 of Part 5 and Division 4 of Part 7 of the *Migration Act 1958* (Cth) also set out the provisions concerning the way to call a witness, the entitlement of the applicant to have access to documents related to the review, the powers of the MRT and the RRT and so on that this article does not deal with. These provisions constitute the natural justice hearing rule that were once regarded as the requirements to satisfy natural justice, the violation of which resulted in the invalidity of decisions of the MRT and the RRT,<sup>4</sup> up to the time of the decision of the High Court in *SZIZO*.

## 2.2 Natural Justice Hearing Rule in *SZIZO*

On 23 September 2009, the High Court of Australia delivered a unanimous judgment (French CJ, Gummow, Hayne, Crennan and Bell JJ) in *SZIZO* allowing the appeal by the Minister in relation to the natural justice hearing rule in the MRT and the RRT.<sup>5</sup> The High Court set aside the Full Court ruling that the exhaustive statement of the natural justice hearing rule under s 422B of the *Migration Act 1958* (Cth) requires ‘strict adherence to each of the procedural steps leading up to the hearing.’<sup>6</sup> The effect of the High Court decision is often

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<sup>4</sup> *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294.

<sup>5</sup> *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627.

<sup>6</sup> *SZIZO v Minister for Immigration and Citizenship* (2008) 172 FCR 152 [87] cited in *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 [22].

regarded as a change of principle of the natural justice hearing rule in the MRT and the RRT.<sup>7</sup>

*SZIZO* was concerned with protection visa applications made by *SZIZO* and his family members including his eldest daughter on 14 November 2005.<sup>8</sup> On 13 January 2006, the delegate of the Minister for Immigration refused to grant protection visas to *SZIZO* and his family members.<sup>9</sup> On 9 February 2006, the RRT filed a review application from *SZIZO*.<sup>10</sup> The review application included a template statement that: ‘Unless an included applicant advises the Tribunal otherwise, the Tribunal will communicate with Applicant 1 or his or her authorised recipient. Applicant 1 must inform each applicant of the contents of any communication from the Tribunal and reply to the Tribunal for them’.<sup>11</sup> *SZIZO* was Applicant 1 in the review application.<sup>12</sup> *SZIZO* was not literate in English.<sup>13</sup> He nominated his eldest daughter, who lived at the same residence as *SZIZO*, as his authorised recipient to receive documents from the RRT.<sup>14</sup> On 28 February 2006, the RRT sent by pre-paid post a notice of invitation to attend a hearing to be held on 23 March 2006 to *SZIZO* instead of his eldest daughter who was the authorised recipient.<sup>15</sup>

On 23 March 2006, *SZIZO* and all his family, including his eldest daughter, attended the hearing, at which time the RRT invited *SZIZO* and his family to make any submissions within ten days if they wished.<sup>16</sup> On 7 April 2006, the RRT filed the submission from *SZIZO*, his wife and his eldest daughter together with documents in support of their submission.<sup>17</sup> On 6 June 2006, the RRT handed down the decision affirming the decision under review.<sup>18</sup>

Thereafter, *SZIZO* and his family applied to the Federal Magistrates Court for judicial review where they were not legally represented. The Federal Magistrates Court dismissed their appeal.<sup>19</sup> *SZIZO* appealed to the Federal Court where counsel for the Minister pointed out that the RRT’s notice of invitation to attend a hearing had not been sent to the authorised recipient.<sup>20</sup> The Federal Court arranged for pro bono counsel who amended the notice of appeal relying solely on the ground that the notice of hearing had not been sent to the authorised recipient.<sup>21</sup> The Full Federal Court (Moore, Marshall and Lander JJ) unanimously upheld appeal.<sup>22</sup> The Minister for Immigration appealed to the High Court.

In *SZIZO*, the High Court accepted the well established principle that a denial of natural justice makes decisions of the MRT and the RRT invalid and did not reconsider the

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<sup>7</sup> For example: *Minister for Immigration and Citizenship v Brar* [2012] FCAFC 30; *SZOFE v Minister for Immigration and Citizenship* (2010) 185 FCR 129; *Minister for Immigration v SZMTR* (2009) 180 FCR 586.

<sup>8</sup> *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 [5].

<sup>9</sup> *Ibid* [6].

<sup>10</sup> *Ibid* [8].

<sup>11</sup> *Ibid* [7].

<sup>12</sup> *Ibid* [8].

<sup>13</sup> *Ibid* [10].

<sup>14</sup> *Ibid* [8].

<sup>15</sup> *SZIZO v Minister for Immigration and Citizenship* (2006) 172 FCR 152 [11].

<sup>16</sup> *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 [11]-[12].

<sup>17</sup> *Ibid* [13].

<sup>18</sup> *Ibid* [14].

<sup>19</sup> *SZIZO v Minister for Immigration and Citizenship* [2007] FMCA 1339.

<sup>20</sup> *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627[15].

<sup>21</sup> *Ibid*.

<sup>22</sup> *SZIZO v Minister for Immigration and Citizenship* (2006) 172 FCR 152.

principle.<sup>23</sup> However, the High Court considered the issue of whether non-compliance with the natural justice hearing rule under Division 4 and Division 7A of Part 7 of the *Migration Act 1958* (Cth) always constitutes a denial of natural justice in light of the *Migration Act 1958* (Cth) which does not provide any consequences for non-compliance with the natural justice hearing rule under these Divisions.<sup>24</sup>

In considering the issue, the High Court first turned to the decision in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*<sup>25</sup> ('SAAP') delivered on 18 May 2005. In *SAAP*, a protection visa applicant SAAP was refused a visa by the delegate of the Minister for Immigration on 19 June 2001 and applied to the RRT for review of the decision of the delegate of the Minister.<sup>26</sup> SAAP, her daughters and her migration agent attended the hearing before the RRT on 5 September 2001.<sup>27</sup> After hearing the evidence of a daughter of SAAP who was not a refugee claimant, the RRT orally raised issues arising out of the evidence given by the daughter of SAAP and asked SAAP for her comments.<sup>28</sup> SAAP made her comments on the spot.<sup>29</sup> Then the RRT adjourned the matter allowing SAAP to make further submissions.<sup>30</sup> SAAP made no submissions and the RRT affirmed the decision under review on 18 October 2001.<sup>31</sup>

At the time of the hearing and the determination by the RRT, s424AA did not exist. Therefore, the RRT, prior to making its decision, was required to invite the review applicant to make comments upon the information which would be the reason, or a part of the reason, to affirm the decision under review after such information was provided to the review applicant either in writing delivered by a specified method (s 424A).

In *SAAP*, the High Court had ruled that the failure of the RRT to comply with the steps of the review prescribed under the *Migration Act 1958* (Cth) made the RRT's decision invalid.<sup>32</sup> The Court cited two similar passages from the judgment in *SAAP*, one of which appears to have best summarised the principle concerning the natural justice hearing rule under the *Migration Act 1958* (Cth).<sup>33</sup> It stated:

'Where the Act prescribes steps that the Tribunal *must* take in conducting its review and those steps are directed to informing the applicant for review (among other things) of the relevance to the review of the information that is conveyed, both the language of

<sup>23</sup> *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 [24].

<sup>24</sup> *Ibid* [24]-[26].

<sup>25</sup> *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294.

<sup>26</sup> *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294[10]; and *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (s204 of 2001, Federal Court) [1].

<sup>27</sup> *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 [10].

<sup>28</sup> *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 [10]; and *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (s204 of 2001, Federal Court)[1].

<sup>29</sup> *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 [10].

<sup>30</sup> *Ibid*.

<sup>31</sup> *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 [10]; and *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (s204 of 2001, Federal Court) [1].

<sup>32</sup> *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 [29]-[30].

<sup>33</sup> *Ibid*.

the Act and its scope and objects point inexorably to the conclusion that want of compliance with s 424A renders the decision invalid.<sup>34</sup>

Then, the Court explained that SAAP was concerned with the *Migration Act 1958* (Cth) prior to the insertion of the 'exhaustive statement of natural justice hearing rule' under s 422B.<sup>35</sup> The Court further explained that Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ in *SZBYR v Minister for Immigration and Citizenship*<sup>36</sup> ('SZBYR'): 'observed that in light of the introduction of s 422B it would be surprising if s 424A were interpreted as having an operation going well beyond the requirements of the hearing rule at common law'.<sup>37</sup>

The Court went on to explain:

'[T]he *manner* of providing timely and effective notice of hearing is not an end in itself. The procedural steps dealing with the manner of giving notice are to be distinguished from other components of the statutory statement of the hearing rule, including the obligation to give particulars of adverse information (s 424A(1)) and to invite the applicant to appear to give evidence and to present arguments relating to the issues arising in the decision under review (s 425).'<sup>38</sup>

The High Court's view was that while the MRT and the RRT would discharge their obligations if they took the steps provided under the *Migration Act 1958* (Cth), the MRT and the RRT could also discharge their obligation even if they failed to take the steps provided under the *Migration Act 1958* (Cth) so long as the departure from the steps was concerned with the manner of providing a notice of hearing and 'the extent and consequences of the departure' from the steps was negligible.<sup>39</sup> The High Court ruled that SZIZO had received an effective and timely notice of hearing resulting in no loss of opportunity to advance his case.<sup>40</sup>

The High Court concluded that:

'Notwithstanding the detailed prescription of the regime under Divs 4 and 7A and the use of imperative language it was an error to conclude that the provisions of ss 441G and 441A are inviolable restraints conditioning the Tribunal's jurisdiction to conduct and decide a review. They are procedural steps that are designed to ensure that an applicant for review is enabled to properly advance his or her case at the hearing; a failure to comply with them will require consideration of whether in the events that occurred the applicant was denied natural justice. There was no denial of natural justice in this case.'<sup>41</sup>

As will be discussed below, the High Court's decision in *SZIZO* could be read in two ways.

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<sup>34</sup> SAAP v *Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 [208] cited in *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 [30].

<sup>35</sup> *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 [32].

<sup>36</sup> *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 [14].

<sup>37</sup> *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 [32].

<sup>38</sup> *Ibid* [34].

<sup>39</sup> *Ibid* [35].

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid* [36].

### 2.3 Natural Justice Hearing Rule in the MRT and the RRT

The High Court in *SZIZO* made it clear that natural justice is required to be afforded to a review applicant in the MRT or the RRT.<sup>42</sup> The High Court in *SZIZO* also made it clear that the requirements for the satisfaction of natural justice in the MRT and the RRT after the insertion of the exhaustive statement of the natural justice hearing rule under the *Migration Act 1958* (Cth) became different from those prior to the insertion of the exhaustive statement of the natural justice hearing rule.<sup>43</sup> However, the High Court did not make clear exactly what the requirements are to satisfy natural justice in the MRT and the RRT.

One approach to understanding what the High Court decided in *SZIZO* might be:

- i) After the insertion of the exhaustive statement of the natural justice hearing rule into the *Migration Act 1958* (Cth), as ‘observed’ by the High Court in *SZBYR*, the requirements to satisfy natural justice in the MRT and the RRT became less than those at common law;
- ii) Therefore, the requirements to satisfy natural justice in the MRT and the RRT as decided by the High Court in *SAAP*, namely, compliance with all the steps provided as the natural justice hearing rule under the *Migration Act 1958* (Cth), the decision of which was made prior to the insertion of the exhaustive statement of natural justice hearing rule under s 422B of the *Migration Act 1958* (Cth), no longer applied;
- iii) The new requirements were determined by comparing common law natural justice and the natural justice hearing rule under the *Migration Act 1958* (Cth) and the lower protection for a review applicant were the new requirements to satisfy natural justice in the MRT and the RRT.
- iv) Accordingly, amongst the provisions of the natural justice hearing rule under the *Migration Act 1958* (Cth), the ones that provide more protection than common law natural justice are violable.

If this approach is taken, *SZIZO* would appear to have established a new broad principle which encompasses all provisions of the natural justice hearing rule under the *Migration Act 1958* (Cth). However, the High Court decision in *SZIZO* could be read in another way.

The alternative approach is:

- i) After the insertion of the exhaustive statement of the natural justice hearing rule into the *Migration Act 1958* (Cth), the requirements to satisfy natural justice in the MRT and the RRT became different from those in *SAAP* which required compliance with all the steps provided as the natural justice hearing rule under the *Migration Act 1958* (Cth) since the decision in *SAAP* was made prior to the insertion of the exhaustive statement of the natural justice hearing rule under s 422B of the *Migration Act 1958* (Cth);

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<sup>42</sup> Ibid [24].

<sup>43</sup> Ibid [32].



- ii) Although natural justice is concerned with providing a review applicant with an opportunity to argue his or her case, there are two different components that enable the review applicant to argue his or her case, namely, providing a notice of hearing which allows a review applicant to present his or her case and providing a notice of adverse information against a review applicant which allows a review applicant to rebut the adverse argument against him or her;
- iii) Corresponding to natural justice, the natural justice hearing rule under the *Migration Act 1958* (Cth) includes the provisions concerning both a notice of hearing which allows a review applicant to present his or her case and a notice of adverse information which allows a review applicant to rebut the information against him or her and the provisions concerning a notice of hearing are further comprised of two components, namely, the ‘manner’ of giving a notice and the substance of giving a notice;
- iv) In some cases, even though the MRT or the RRT used a wrong ‘manner’ to give a notice to a review applicant, a review applicant can receive and understand a notice in the same way as a notice having been provided to the review applicant in a correct ‘manner’ and only in those cases, natural justice is satisfied even though the provision concerning the ‘manner’ of giving notice as part of the natural justice hearing rule under the *Migration Act 1958* (Cth) was not complied with.

In this alternative approach, the scope of the decision is very narrow. It only applies to a provision concerning the ‘manner’ of giving a notice of hearing to a review applicant in the MRT and the RRT in certain limited circumstances. On this approach, *SZIZO* simply established an exception to the principles of natural justice rather than a new principle of natural justice. Hereinafter, for the sake of convenience, we might call the first approach the ‘new principle theory’, and the alternative approach the ‘new exception theory’.

Although there are potentially two distinctive ways of reading *SZIZO*, namely, the new principle theory and the new exception theory, both theories raise a number of questions.

First of all, contrary to what the High Court said, it is most unlikely that the insertion of the exhaustive statement of the natural justice hearing rule into the *Migration Act 1958* (Cth) altered the nature of the natural justice hearing rule under the *Migration Act 1958* (Cth). The speech by the Minister for Immigration on the second reading of the Migration Legislation Amendment (Procedural Fairness) Bill 2002 (Cth) made this plain:

‘This bill amends the Migration Act 1958 to provide a clear legislative statement that the “codes of procedure” in the act are an exhaustive statement of the requirements of the natural justice hearing rule.

The bill also makes it clear that the amendments do not in any way limit the scope or operation of the privative clause, which is contained in part 8 of the act.

The Migration Reform Act 1992 introduced codes of procedure for dealing fairly, efficiently and quickly with the processing of visa applications.

It also introduced other detailed codes of procedure for the cancellation of visas and the revocation of the cancellation of visas.

In 1998, the codes of procedure for the Migration Review Tribunal and the Refugee Review Tribunal were enhanced.

The purpose of each of these codes is to enable decision makers to deal with visa applications and cancellations fairly, efficiently and quickly.

It was also intended that they would replace the uncertain common law requirements of the natural justice “hearing rule”, in particular, which had previously applied to decision makers.

However, last year in the *Miah* case, the High Court found that the code of procedure relating to visa applications had not clearly and explicitly excluded common law natural justice requirements.

This means that, even where a decision maker has followed the code in every single respect, there could still be a breach of the common law requirements of the natural justice hearing rule.

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

The majority of the court emphasised that parliament's intention to exclude natural justice must be made unmistakably clear.

It concluded that this intention was not made apparent in relation to the code of procedure for dealing with visa applications.

Therefore, the purpose of this bill is to make it expressly clear that particular codes in the Migration Act do exhaustively state the requirements of the natural justice or procedural fairness hearing rule.

This will have the effect that common law requirements relating to the natural justice or procedural fairness hearing rule are effectively excluded, as was originally intended.<sup>44</sup>

Counsel for *SZIZO* included this speech by the Minister for Immigration in his submissions to the Court and the High Court in *SZIZO* cited part of this speech in the Respondent's submissions.<sup>45</sup> However, the High Court did not explain why the exhaustive statement of the natural justice hearing rule was not only to exclude common law natural justice but also to allow the MRT and the RRT not to comply with the provisions of the natural justice hearing rule under the *Migration Act 1958* (Cth). As a result, one is left to question why the exhaustive statement of the natural justice hearing rule was required to be understood as having the effect of altering the nature of the natural justice hearing rule under the *Migration Act 1958* (Cth) when the Minister clearly explained that the exhaustive statement of the natural justice hearing rule was to exclude the application of the common law natural justice hearing rule to a hearing in the MRT and the RRT.

The new principle theory raises a further question in this respect. The High Court relied upon a passage in *SZBYR*, namely, ‘it would be surprising if s 424A were interpreted as having an

<sup>44</sup> Commonwealth of Australia, House of Representatives, ‘Second Reading Speech’, *Parliamentary Debates* (Hansard), 13 March 2002, 1106.

<sup>45</sup> *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 [27].

operation going well beyond the requirements of the hearing rule at common law' - to hold that decisions of the RRT made without compliance with the natural justice hearing rule in the *Migration Act 1958* (Cth) could be valid because some of the provisions of the natural justice hearing rule in the *Migration Act 1958* (Cth) go beyond common law natural justice. However, the passage in *SZBYR* did not say that a provision of the natural justice hearing rule in the *Migration Act 1958* (Cth) did not have an operation beyond the requirements of the hearing rule at common law at all. It simply stated that the provisions of the natural justice hearing rule were unlikely to go 'well beyond' common law natural justice. Furthermore, the passage was not a definitive finding. *SZBYR* cannot be used as a reason to hold that a provision of the natural justice hearing rule under the *Migration Act 1958* (Cth) which goes beyond common law natural justice is violable.

Moreover, the new principle theory which provides a blanket principle to cover all the provisions, does not explain the High Court's insistence that: 'The procedural steps dealing with the manner of giving notice are to be distinguished from other components of the statutory statement of the hearing rule'.<sup>46</sup>

Given these problems, the new principle theory is unlikely to be correct.

The new exception theory also starts from the assumption that the insertion of the exhaustive statement of the natural justice hearing rule had altered the operation of the natural justice hearing rule under the *Migration Act 1958* (Cth) and therefore the previous decisions of the High Court in this respect no longer apply, the assumption of which appears to be incorrect. However, consideration given by the High Court to the issue in *SZIZO* is strikingly similar to those judgments in the High Court made prior to the insertion of the exhaustive statement of the natural justice hearing rule.

For example, in *SAAP*, Hayne J wrote:

'This appeal raises three questions. Was the Tribunal bound to give the appellants written notice of the information it obtained from the eldest daughter? If it was, did its failure to do so constitute jurisdictional error or a want of procedural fairness? If those questions are resolved in the appellants' favour, should the discretion to grant relief of the kind the appellants seek be exercised in their favour?'<sup>47</sup>

The criteria to determine the third question is well-established. One of the reasons for the grant of relief to be withheld is futility.<sup>48</sup> Where no different result could possibly be available as a result of the relief sought, the Court would withhold the grant of relief even if the Court found that the MRT or the RRT failed to comply with the natural justice hearing rule under the *Migration Act 1958* (Cth). The High Court in *SZIZO* was, in essence, decided on this point.

The intention of the High Court to avoid considering this question as a discretionary one is unknown since the judgment in *SZIZO* did not disclose much about the law but the facts specific to the case. In any event, notwithstanding that the High Court stated that the law

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<sup>46</sup> Ibid [34].

<sup>47</sup> *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 [179].

<sup>48</sup> *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, para 56; *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 [28]-[29].

under which *SAAP* had been decided was different from that under which *SZIZO* was decided, *SZIZO* virtually followed the same chain of reasoning to reach its conclusion.

Below, the issue of whether the provisions concerning the statutory notice period for a hearing in the MRT and the RRT will be considered to determine whether or not they are violable under the new principle theory and the new exception theory of *SZIZO*.

### 3. Statutory Notice Period for a Hearing in the MRT and the RRT

#### 3.1 Authorities concerning a Rescheduled Hearing

The MRT and the RRT are required to invite a review applicant to appear before them under ss 360(1) and 425(1) of the *Migration Act 1958* (Cth). A notice of hearing must be given to a review applicant under ss 360A in the MRT and 425A in the RRT in compliance with the prescribed notice period under s 360A(4) in the MRT and s 425A(3) in the RRT. Before considering whether the provision prescribing a notice period is violable, the scope of the application of the provision needs to be clarified. A question to be resolved here is, if the MRT or the RRT, by notice to appear, invites a review applicant to appear before the MRT or the RRT but then, for some reason, prior to the date of the hearing, changes the date of the hearing, whether or not s 360A(4) or 425A(3) of the *Migration Act 1958* (Cth), which prescribes a notice period, is applicable to a notice of the new hearing date.

Initially, the Federal Court was divided in its view: Sackville J in *NBBU v Minister for Immigration and Multicultural Affairs* [2004] FCA 767 considered that s 425A(3) of the *Migration Act 1958* (Cth) applied even to a rescheduled hearing;<sup>49</sup> conversely, Conti J in *SZDQO v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1026 considered that s 425A(3) of the *Migration Act 1958* (Cth) did not apply to a rescheduled hearing. In 2006, the Full Federal Court (Spender, French and Cowdroy JJ) in a joint judgment in *Minister for Immigration v SZFML*<sup>50</sup> upheld the latter view. Although their comments on this issue were regarded as obiter,<sup>51</sup> subsequently, later cases, without undertaking their own analysis of the relevant legislation, simply followed the principle which the Full Court in *SZFML* had enunciated.<sup>52</sup>

In *Minister for Immigration and Multicultural and Indigenous Affairs v SZFML*,<sup>53</sup> *SZFML* applied for a protection visa which was refused by the delegate of the Minister for Immigration, from which decision, *SZFML* applied for review to the RRT.<sup>54</sup> On 6 October

<sup>49</sup> In *NBBU*, the Minister for Immigration conceded the jurisdictional error in not complying with the prescribed period of notice and sought together with *NBBU* consent orders to remit the matter to the Tribunal. Sackville J stated that: 'I am satisfied that this error on the part of the RRT is sufficient to justify the consent orders...'. See *NBBU v Minister for Immigration and Multicultural Affairs* [2004] FCA 767 [4].

<sup>50</sup> *Minister for Immigration v SZFML* (2006) 154 FCR 572.

<sup>51</sup> See *SZQCQ v Minister for Immigration and Citizenship* [2011] FMCA 733 [17].

<sup>52</sup> See, for example, *SZJXG v Minister for Immigration and Citizenship* [2007] FCA 1120; *SZNSN v Minister for Immigration and Citizenship* [2009] FMCA 1193; *BZAAA v Minister for Immigration and Citizenship* [2011] FMCA 131; *SZOST v Minister for Immigration and Citizenship* [2011] FMCA 196; *SZOZE v Minister for Immigration and Citizenship* [2011] FMCA 300; *BZAAA v Minister for Immigration and Citizenship* [2011] FCA 447; *SZQBI v Minister for Immigration and Citizenship* [2011] FMCA 650; and *SZQCQ v Minister for Immigration and Citizenship* [2011] FMCA 733; *Hossain v Minister for Immigration and Citizenship* [2009] FMCA 1100.

<sup>53</sup> *Minister for Immigration v SZFML* (2006) 154 FCR 572.

<sup>54</sup> *Ibid* [1].

2004, the RRT sent a letter to SZFML inviting her to appear before it on 9 November 2004.<sup>55</sup> On 20 October 2004, SZFML by her agent replied to the RRT requesting an interpreter for her appearance.<sup>56</sup> On 8 November 2004, the RRT cancelled the hearing of 9 November 2004 owing to the unavailability of an interpreter and, on 9 November 2004, sent a letter to SZFML notifying her to that effect together with information of a new hearing date which was 25 November 2004.<sup>57</sup> On 24 November 2004, the RRT received a form from SZFML by her agent indicating that SZFML did not wish to appear so that the RRT, on 26 November 2004, made an adverse decision against her without her appearance.<sup>58</sup>

SZFML appealed from the RRT's decision to the Federal Magistrates Court on the ground that the RRT had failed to invite SZFML to appear, which appeal the Federal Magistrate allowed.<sup>59</sup> The Federal Magistrate found that SZFML had not given consent to the RRT to proceed to decision without SZFML's appearance since the agent acting for her only had general authority to represent SZFML which authority did not include the authority to give such consent to the Tribunal without her explicit permission and SZFML had not given such permission to the agent.<sup>60</sup> The Federal Magistrate ruled that, since SZFML had not given consent to the RRT to make a decision without her appearance, the notice of a new hearing date was required to be given to SZFML in compliance with the notice period under s 425A(3) of the *Migration Act 1958* (Cth) and reg 4.35D(b) of the *Migration Regulations 1994* (Cth) which the RRT had failed to comply with.<sup>61</sup>

The Minister for Immigration appealed to the Full Federal Court arguing that the general authority which the agent retained allowed the agent to give valid consent to the RRT to make a decision without SZFML's appearance and further, or in the alternative, the statutory notice period was not applied to the re-scheduled hearing.<sup>62</sup> The Full Court dismissed the appeal but for a different reason from that of the Federal Magistrates Court.<sup>63</sup>

The Full Court, first, approved the Federal Magistrate's finding that SZFML had not given consent to the RRT to proceed without her appearance.<sup>64</sup> It then decided that the RRT in the circumstances had failed to discharge its obligation to hold a hearing before making its decision.<sup>65</sup> Consequently, the Full Court concluded that the issue of the notice period did not arise.<sup>66</sup> Nevertheless, Spender, French and Cowdroy JJ in their joint judgment considered the issue 'in case the conclusion in relation to the first issue [namely the consent by the agent] was wrong'.<sup>67</sup>

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<sup>55</sup> Ibid [14].

<sup>56</sup> Ibid [15].

<sup>57</sup> Ibid [17].

<sup>58</sup> Ibid [17]-[18].

<sup>59</sup> Ibid [18].

<sup>60</sup> Ibid [45].

<sup>61</sup> Ibid [46].

<sup>62</sup> Ibid [47].

<sup>63</sup> Ibid [54]-[75].

<sup>64</sup> Ibid [65].

<sup>65</sup> Ibid [74].

<sup>66</sup> Ibid [76].

<sup>67</sup> Ibid.

In relation to the issue of the notice period, the Full Court first defined the word ‘review’ as follows:

‘The review is a larger process than the oral hearing. The hearing is but a component of the review.’<sup>68</sup>

No attempt was made to explain the reason for this meaning of ‘review’.

Then the Full Court said that when the RRT adjourns a hearing because of the non-attendance of an applicant, the power of the RRT exercised is under s 427.

The Court went on to explain that:

‘Significantly, notification of a rescheduled hearing does not involve a fresh invitation for the purposes of s 425(1). But where the hearing is rescheduled, then it is implicit in the obligation imposed on the Tribunal under s 425A(1) that the Tribunal must give the applicant notice of the amended day on which, and time and place at which, the applicant is scheduled to appear.’<sup>69</sup>

There is no explanation of why only s 425A(1), requiring the RRT to give notice to the applicant, implicitly applied to the rescheduled hearing while s 425A(3), which requires the period of notice given to the applicant to be at least the prescribed period, did not implicitly apply to the rescheduled hearing.

Then, the Full Court, presumably for the purpose of justifying its decision, namely, that the prescribed notice period does not apply to the rescheduled hearing, referred to two cases: one is *SZDQO v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 144 FCR 251 where the applicant who did not attend the hearing requested the RRT to reschedule the hearing and the Tribunal did so; and the other is *SZEFM v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 78 where the RRT, after it notified the hearing date to the applicant, rescheduled the hearing owing to a telecommunication failure.<sup>70</sup> In both cases, the court decided that the statutory period of notice did not apply to the rescheduled hearing. The Full Court approved the conclusion in these two cases and dismissed the appeal.<sup>71</sup>

### 3.2 Analysis of *SZFML*

The Full Court judgment in *SZFML* regarding the prescribed notice period of invitation to appear is not an easy one to comprehend. There are three reasons for this.

First, the Full Court gave a construction to a word which has a significant meaning in the *Migration Act 1958* (Cth) without explaining why the word should be construed in that particular way. This was the case with the word ‘review’. The Full Court defined the meaning of ‘review’ as a larger process than the oral hearing but the basis for that

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<sup>68</sup> Ibid [79].

<sup>69</sup> Ibid.

<sup>70</sup> Ibid [80] and [81].

<sup>71</sup> Ibid [83].

interpretation is unclear. There is no explanation by the Full Court of why the review within the meaning of the provision cannot be the oral hearing.

The Full Court may have looked at the *Migration Act 1958* (Cth) and may have considered that since the heading of Division 4 of Part 7 (which is the equivalent to Division 5 of Part 5) is 'Conduct of review', the 'review' means all the process set out in Division 4. However, s 365 which section heading is 'Review to be in public' provides:

- '(1) Subject to this section, any oral evidence that the Tribunal takes while a person is appearing before it must be taken in public.
- (2) Where the Tribunal is satisfied that it is in the public interest to do so, the Tribunal may direct that particular oral evidence, or oral evidence for the purposes of a particular review, is to be taken in private.
- (3) If the Tribunal is satisfied that it is impracticable to take particular oral evidence in public, the Tribunal may direct that the evidence is to be taken in private.
- (4) Where the Tribunal gives a direction under subsection (2) or (3), it may give directions as to the persons who may be present when the oral evidence is given.'

Plainly, the word 'review' appearing in this heading means the oral hearing. Similarly, s 429 has the heading 'Review to be in private' and provides: 'The hearing of an application for review by the Tribunal must be in private.' Again, it is plain that the 'Review' in this section means the oral hearing. Therefore, the use of the word 'Review' in the headings in the Act is unlikely to provide any basis for deciding the meaning of 'review' in the way determined by the Full Court.

Secondly, the Full Court omitted a step in the logical sequence. For example, the Full Court pronounced that a rescheduled hearing does not require a fresh invitation under s 425(1) but made no comment as to whether or not s 425A which is concerned with notice of a hearing applies to a rescheduled hearing.

Since the Full Court explained that s 425A(1) implicitly imposed an obligation on the part of the RRT, it is apparent that the Full Court considered that s 425A(1) does not apply to a rescheduled hearing directly. However, the application of s 425A(1) is a separate question from the application of s 425(1) and the Full Court provided no reason for its decision concerning the (non-)application of s 425A(1).

Given the omission of separate consideration of the issue of the application of s 425A(1), the Full Court is likely to have thought that the RRT's obligation both under s 425(1) and s 425A(1) are discharged when the RRT invites and provides notice to an applicant once. However, s 425A(1) requires the RRT, without qualifying the hearing being initially scheduled or rescheduled, to give notice of the hearing to an invited applicant. It may well be the case that s 425A(1) requires the RRT to give notice of a hearing date, time and place every time it schedules a hearing. So even if the obligation under s 425(1) is discharged, it does not necessarily mean the automatic discharge from the obligation under s 425A(1).

Thirdly, the Full Court pronounced a partial application of a section in the *Migration Act 1958* (Cth) in a certain circumstance without explaining why the section only partially applied to the circumstance. According to the Full Court, the implicit requirement of the *Migration Act 1958* (Cth) encompasses only part of s 425A but not the rest of the section and hence the Full Court decided that s 425A(1) is implicitly applicable to the rescheduled

hearing but not s 425A(2) or s 425A(3). The Full Court did not elaborate reasons for the partial application of s 425A except for citing Conti J's opinion in *SZDQO*:

'In my opinion, in circumstances where the Tribunal decides to reschedule a contemplated hearing at the behest, explicitly or implicitly of an applicant, s 425A does not apply in relation to the notice of a rescheduled hearing, at least insofar as concerns the period of the reviewed notice. ...'<sup>72</sup>

Although the Full Court did not go into the details of *SZDQO*, it is necessary to examine certain details of the case. In reaching the above conclusion in *SZDQO*, Conti J considered three cases, Sackville J in *NBBU*,<sup>73</sup> and Barnes FM in *SZBAZ v Minister for Immigration and Multicultural and Indigenous Affairs*<sup>74</sup> and *SZBNS v Minister for Immigration & Multicultural & Indigenous Affairs*.<sup>75</sup> Conti J disregarded *NBBU* as not being a reasoned judgment<sup>76</sup> and simply relied upon and followed that part of Barnes FM's judgment in *SZBAZ* and *SZBNS* in which Barnes FM explained that notice of a rescheduled hearing at an applicant's request constituted an extension of the original invitation and hence did not require a fresh invitation in compliance with s 425A.<sup>77</sup> The point was the applicant's request for rescheduling of a hearing as is evident from Barnes FM's statement: 'This is not a case where the Tribunal itself re-scheduled a hearing and hence might be said to have issued a fresh invitation to which s.425A(3) should apply.'<sup>78</sup>

Conti J when agreeing with Barnes FM, reiterated that part of Barnes FM's reasoning, namely, '[w]ere it otherwise, any delay, even of minutes or hours, at the request of the applicant, would give rise to a failure to comply with s 425A'.<sup>79</sup> However, Conti J did not make any comment upon the other part of Barnes FM's reasoning, namely, 'Such an interpretation is also consistent with the language of s.425A which is limited to situations where an applicant "is invited to appear before the Tribunal" as distinct from situations where, having been properly invited, the applicant subsequently seeks a rescheduling of his or her appearance before the Tribunal.'<sup>80</sup> In essence, this reasoning was cited by Conti J but did not receive attention, and subsequently, the Full Court ignored it.

It is unclear why Barnes FM and Conti J thought that an applicant could delay a hearing by making a request to the RRT since there is nowhere in the *Migration Act 1958* (Cth) or in the *Migration Regulations 1994* (Cth) a provision which requires the Tribunal to postpone the hearing whenever an applicant makes such a request. In fact, it is very common for the RRT not to postpone the hearing despite a request made by an applicant.<sup>81</sup> Since Conti J's decision in *SZDQO* does not provide a good reason for the partial application of s 425A, the Full Court's reason which only cites Conti J in *SZDQO* makes it difficult to follow.

<sup>72</sup> *SZDQO v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 144 FCR 251 [29] cited in *Minister for Immigration v SZFML* (2006) 154 FCR 572 [80].

<sup>73</sup> *NBBU v Minister for Immigration and Multicultural Affairs* [2004] FCA 767.

<sup>74</sup> *SZBAZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FMCA 790.

<sup>75</sup> *SZBNS v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FMCA 458.

<sup>76</sup> *SZDQO v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 144 FCR 251 [20].

<sup>77</sup> *Ibid* [28]-[29].

<sup>78</sup> *SZBAZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FMCA 790 [28].

<sup>79</sup> *SZDQO v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 144 FCR 251 [29].

<sup>80</sup> *SZBAZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FMCA 790 [29].

<sup>81</sup> See, for example, *SZOES v Minister for Immigration and Citizenship* [2010] FMCA 686 [10].



The Full Court, after referring to *SZDQO*, went on to consider *SZEFM* apparently for the purpose of extending the non-application of part of s 425A, namely s 425A(3) which is concerned with the notice period of the RRT's invitation to the applicant to appear, to a case where a hearing is rescheduled on the RRT's initiative, not at the request of the applicant.

Again, although the Full Court did not look into the details of *SZEFM*, the case needs to be examined in some detail. In *SZEFM*, Bennett J reviewed a decision of Nicholls FM in which Nicholls FM had distinguished the case from Conti J's *SZDQO* in that the applicant in *SZEFM* did not request the RRT to reschedule the hearing, but nonetheless Nicholls FM had accepted that the RRT 'adjourned' the hearing when it rescheduled the hearing and hence *SZDQO* applied to the case.<sup>82</sup> Nicholls FM did not explain the reason why s 425A(3) does not apply to the case where the hearing was rescheduled on the RRT's own motion.<sup>83</sup> Bennett J, agreeing with the Nicholls FM, explained that the rescheduling of a hearing by the RRT on its own motion is an adjournment of a hearing by looking at two dictionary definitions:

“Adjourn” can mean to defer or put off or suspend in respect of something that has already commenced (see Shorter Oxford English Dictionary (fifth edition) and Macquarie Dictionary (revised third edition)). It can also mean to defer or postpone to a future meeting of the same body (Macquarie Dictionary).<sup>84</sup>

It appears that Bennett J tried to explain that an adjournment can occur not only at the request of a review applicant but by the RRT's own motion since 'adjourn' means nothing more than 'defer', 'put off', 'suspend', 'postpone' and so on and when the RRT 'adjourns' the review, the prescribed notice period does not apply since Conti J determined so in *SZDQO*. It may well be the case that the RRT can adjourn the matter by its own motion pursuant to s 427 (or s 363 in the case of the Migration Review Tribunal). However, the problem is that *SZBAZ*, the judgment which Conti J followed in *SZDQO*, decided that only a hearing rescheduled at the request of an applicant is not required to comply with s 425A(3). There is a conflict between Bennett J's decision and the decision which Bennett J relied upon, that is, Conti J's decision which in turn followed the decision of Barnes FM. Bennett J is silent on this problem. So is the Full Court which makes its judgment difficult to understand.

The Full Court's reference to Bennett J's decision makes the Full Court judgment further confusing in that, the Full Court at the outset defined 'review' as a larger process than a hearing. The purpose of referring to Bennett J's decision appears to include the rescheduling of a hearing before the commencement of the hearing in the 'review' over which the RRT has power to 'adjourn' under s 427. However, Bennett J's definition of 'adjourn' could make the definition of 'review' irrelevant since even if a hearing is not started, it can be adjourned since 'adjourn' can mean 'to defer or postpone to a future meeting of the same body (Macquarie Dictionary)'. It is unclear whether the Full Court consciously defined the meaning of 'review' as a result of its consideration of the meaning of 'adjourn' in the way that the Shorter Oxford English Dictionary (fifth edition) and Macquarie Dictionary (revised

<sup>82</sup> *SZEFM v Minister for Immigration and Anor* [2005] FMCA 1351 [13]-[15].

<sup>83</sup> Curiously, Nicholls FM in a later case of *SZOZE v Minister for Immigration and Citizenship* [2011] FMCA 300 listed a request by an applicant for rescheduling a hearing as a factor which makes s 425A(3) inapplicable to the rescheduled hearing.

<sup>84</sup> *SZEFM v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 78 [12].

third edition) defined as opposed to the other meaning by Macquarie Dictionary which Bennett J cited.

After all, there is no explanation by the Full Court of why s 425A(1) is implicitly applied to the rescheduled hearing but not s 425A(3). Common sense would seem to demand that if s 425A(1) is implicitly applicable, s 425A(3) is also applicable implicitly.

In any event, in reaching its conclusion in relation to the issue of the period of notice under s 425A(3), the Full Court refers only to previous cases and did not turn even once to the actual wording of the provisions of the *Migration Act 1958* (Cth) or the *Migration Regulations 1994* (Cth).

### 3.3 Statutory Notice Period for a Rescheduled Hearing

In a statutory jurisdiction, the law is found in the Acts of Parliament. The procedure which is to be followed by the MRT and the RRT can be found in the *Migration Act 1958* (Cth). The *Migration Act 1958* (Cth), under s 360 or s 425, allows the MRT and the RRT to decide whether or not to invite a review applicant to appear before it. If the MRT or the RRT decides to invite the review applicant to appear before it, s 360A or s 425A of the *Migration Act 1958* (Cth) becomes relevant.

Since subsections (1) of s 360A and s 425A state that ‘If the applicant is invited to appear before the Tribunal’ as opposed to ‘When the applicant is invited to appear before the Tribunal’, s 360A(1) and s 425A(1) probably apply to a category of applicants rather than a specific time, that is, when the review applicant is invited under s 360(1) or s 425(1) to appear before the MRT or the RRT. This interpretation is consistent with the rest of the subsection which requires the MRT or the RRT to ‘give the applicant notice of the day on which, and the time and place at which, the applicant is scheduled to appear’ without any qualification of the schedule. Given that the schedule is not qualified as the first time schedule or the initial schedule, it must be the case that the MRT or the RRT is required to give notice to the review applicant whenever the review applicant is scheduled to appear. It follows that the MRT or the RRT must give notice of a rescheduled hearing to the review applicant.

If this interpretation is not adopted and the subsections is understood to mean ‘when the applicant is decided by the Tribunal under s 360(1) or s 425(1) to be invited to appear’ as determined by the Full Court in *SZFML*, there would be, as explained by the Full Court, no provision in the *Migration Act 1958* (Cth) which requires the MRT or the RRT to give notice of an adjourned hearing to the review applicant after the MRT or the RRT sent its notice of the first hearing. In order to agree with this, one would need to believe that it is the intention of Parliament to allow the MRT and the RRT to list a hearing secretly without notifying the schedule of the hearing to the review applicant.

Furthermore, if ss 360A(1) and 425A(1) do not apply to a rescheduled hearing, ss 360A(4) and 425A(3) also would not apply to a rescheduled hearing. Such a construction is not open in light of the operation of subsections (1) and (4) of s 360A and subsections (1) and (4) of s 425A. This will be evident in a case such as where the MRT or the RRT first gave notice to the applicant to appear in two weeks and then brought back the hearing date on the next day to the day when the MRT or the RRT sent a letter of notice.

In such a case, if s 360A(1) or s 425A(1) does not apply to the rescheduled hearing and hence s 360A(4) or s 425A(3) does not apply, the MRT and the RRT can lawfully hold a hearing on the second day from the day on which the MRT or the RRT gave notice. It may well be the case that the period of notice given is regarded as unreasonable and the hearing of the MRT or the RRT should not be compromised by unreasonably short notice in accordance with *SZFML*. However, subsections (1) and (4) of s 360A and subsections (1) and (4) of s 425A operate in a way proscribing the hearing to be scheduled within the prescribed period without involving any consideration by the MRT or the RRT (or a judge on appeal) of the reasonableness of the period of notice. This is another indication of ss 360A(1) and 425A(1) being applicable not only to an initially scheduled hearing but also a rescheduled hearing.

Since ss 360A(1) or 425A(1) apply to a rescheduled hearing, ss 360A(4) or 425A(3) must also apply to a rescheduled hearing. It follows that the prescribed notice period for a hearing in the MRT and the RRT applies not only to an initial schedule of the first hearing but also a rescheduled hearing save for the case where a hearing, after its commencement, was adjourned to a later time.

### 3.4 Violability of the Statutory Notice Period

The last issue to consider in this article is whether or not the provisions which prescribe a notice period, namely, ss 360A(4) and 425A(3) of the *Migration Act 1958* (Cth), are violable in light of *SZIZO* under the new principle theory and the new exception theory.

Applying the new principle theory, the protection afforded by the prescribed notice period for a review applicant in the MRT and the RRT should be compared with the protection under common law natural justice. Therefore, according to the new principle theory, if the prescribed notice period is longer than the period which a judge might consider reasonable, the provision of the prescribed notice period would be violable. If, on the other hand, the prescribed notice period is shorter than the period which a judge might consider reasonable, the provision of the prescribed notice period would not be violable. This means that the provision of the prescribed notice period could be, but might not be, violable.

Under the new exception theory, only the provision concerning the ‘manner’ of notice is violable. The provision concerning the period of notice is therefore inviolable and accordingly must be complied with.

## 4. Conclusion

From the time when the High Court decided that: ‘Notwithstanding the detailed prescription of the regime under Divs 4 and 7A and the use of imperative language it was an error to conclude that the provisions of ss 441G and 441A are inviolable restraints conditioning the Tribunal's jurisdiction to conduct and decide a review’,<sup>85</sup> in *SZIZO* in 2009, uncertainty has prevailed as to which provision of the *Migration Act 1958* (Cth) is violable and which is inviolable. *SZIZO* could be seen to be a kind of declaration of the High Court to override the legislative power of Parliament.

The loosely written judgment in *SZIZO* allows a construction which in this article is called the new principle theory. However, on a closer look, *SZIZO* could be read down in a

<sup>85</sup> *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 [36].

different way. The article has presented an alternative interpretation referred to as the new exception theory. In the new exception theory, the questions that the High Court set out and answered were, in essence, the same as the ones considered by that Court prior to *SZIZO* save for the use of the words, a discretionary ground to withhold the grant of relief.

With those theories in mind, when examining the provision concerning the prescribed notice period of a hearing in the MRT and the RRT, the provision cannot be violable under the new exception theory but might be either violable or inviolable under the new principle theory.